# FELONIOUS ASSOCIATION

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* J.D., University of Virginia School of Law 2020; B.A., University of North Carolina 2015. Thank you to Professor Michael Gilbert for advising and encouraging me throughout this research and writing process. Many thanks as well to Nicole Agama and Meghan Wingert, along with the staff of the Virginia Journal of Social Policy and the Law for their editing expertise. Thank you to Peadar Noone, Eithne Burke, and Kareem Ramadan for continuous support for my work inside and outside of the law.

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*Felony disenfranchisement, the practice of taking the right to vote from people convicted of certain felonies, was expanded in the United States in the Reconstruction Era to prevent African Americans from exercising their newly-gained voting rights. Its legacy in the United States has left a shocking 2.2 million African Americans unable to exercise their political voice at the ballot box.*

*Many scholars and activists have sought different legal solutions to the country's felony disenfranchisement problem. This article argues that voting is political association, and therefore protected by the First Amendment to the U.S. Constitution. While others have made similar arguments, this article takes the completely novel approach of arguing that the association between the voter and the candidate, rather than the association between various groups of voters, is constitutionally protected. This means that the right applies to every citizen who would otherwise be allowed to vote.*

*Part I of this Article describes American felony disenfranchisement, demonstrating its racist origins and racial impact. After describing historical challenges to disenfranchisement, Part II explains the relevant foundations of election law: political party ballot access and campaign finance. Part III then uses this foundation to argue that an individual's vote for their candidate of choice is constitutionally protected association. Part IV applies this constitutional right to felony disenfranchisement laws, concluding that most, though not necessarily all, state laws disenfranchising felons violate the federal Constitution.*

## INTRODUCTION

*There is no right more basic in our democracy than the right to participate in electing our political leaders.*[1]

IN 2016, an estimated 6.1 million American citizens were unable to vote due to state felony disenfranchisement laws.[2] This was an election that included the President of the United States, 435 members of the House of Representatives, 34 members of the Senate, and countless state and local

[1] McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 191 (2014).

[2] CHRISTOPHER UGGEN ET AL., 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016 3 (2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/.

offices. No standard format exists for state laws governing disenfranchisement; they range from no disenfranchisement at all, to disenfranchisement for the duration of the sentence, to the duration of parole and probation, to permanent disenfranchisement.[3]

Felony disenfranchisement laws have been challenged numerous times, both on constitutional and statutory grounds.[4] Generally, these claims have been unsuccessful in striking down the laws.[5] Challenges are most commonly brought under the Equal Protection Clause of the 14th Amendment.[6] In a controversial case decided in 1974, however, the Supreme Court held that there is no Equal Protection claim available to disenfranchised felons.[7] Eleven years later in *Hunter v. Underwood*, the Court clarified that an Equal Protection claim could survive if the plaintiff could prove that the primary purpose behind the law was intentional racial discrimination.[8] It is clear that disenfranchisement laws disproportionately affect African Americans. Four times more African Americans than non-African Americans are barred from voting.[9] In other words, while 1.8% of the non-African American population is unable to vote, 7.4% of African American citizens are disenfranchised.[10] Even so, the Court's standard is a high bar to meet; generally disparate effects of the law, even stark effects, are insufficient to support a finding of discriminatory intent.[11] While legislative reforms have been more successful in ending disenfranchisement laws, the progress has been slow.[12]

This article argues that an unexplored method to challenge felony disenfranchisement laws rests in the First Amendment freedom of

3 *Id.* at 4.

4 *Infra* Part II.A.

5 *Id.*

6 *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).

7 Richardson v. Ramirez, 418 U.S. 24, 54 (1974).

8 Hunter v. Underwood, 417 U.S. 222, 232–233 (1985).

9 UGGEN ET AL., *supra* note 2, at 3.

10 *Id.*

11 Washington v. Davis, 426 U.S. 229, 242 (1976).

12 In 2018, Florida passed a referendum to enfranchise felons who had completed their prison sentence, probation, and parole (excluding those convicted of murder or sexual felonies). *Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. FOR JUST. (May 31, 2019), https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida. Prior to that, Florida had one of the harshest disenfranchisement laws, and was one of only four states that permanently disenfranchised felons. *Id.* Implementation of the amendment has been bogged down in the political process, demonstrating the potential weakness of legislative approaches to solving this problem. Letitia Stein, *Politics cloud felon voting rights restoration in Florida*, REUTERS (Dec. 15, 2018, 6:08AM), https://www.reuters.com/article/us-usa-florida-felons/politics-cloud-felon-voting-rights-restoration-in-florida-idUSKBN1OE0C2.

association. Part I will give a brief history of felony disenfranchisement laws, tracing their origins from Greek and Roman society, through medieval Europe, to colonial and now modern America. It will argue that felony disenfranchisement in the United States has been shaped by racist ideology and the desire to keep African Americans from the polls. These efforts came into sharp focus after the Civil War and the passage of the Fifteenth Amendment prohibiting voting discrimination on the basis of race. It will also describe the modern effects of felony disenfranchisement, including the racial disparities in state disenfranchisement laws and the wide disparities in state laws across the country.

Part II will describe the various challenges to felony disenfranchisement laws, including both constitutional and statutory challenges. The constitutional discussion has primarily focused on the Fourteenth Amendment Equal Protection Clause[13] and the Eighth Amendment prohibition on cruel and unusual punishment.[14] The statutory challenges, which are relatively recent, have focused on Section 2 of the Voting Rights Act.[15] This Part will also describe legislative reforms which have attempted to address the problem of felony disenfranchisement at the state legislature level.[16]

Part III will propose that an individual right to vote rests in the First Amendment freedom of association. This proposal is primarily premised on two lines of political association jurisprudence: the right of political parties to associate with voters of their choice through the primary ballot,[17] and the right of individuals to associate with political candidates through financial contributions.[18] Other scholars have previously argued that there is an associational right to vote, but have hinged that right on either the

[13] Richardson, 418 U.S. at 25.

[14] Trop v. Dulles, 356 U.S. 86, 124 (1985) (Frankfurter, J., dissenting).

[15] *See generally* Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 (1993).

[16] *See* Lynn Eisenberg, *States as Laboratories for Federal Reform: Case Studies in Felon Disenfranchisement Law*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 539, 540–41 (2012).

[17] *See, e.g.*, Cal. Democratic Party v. Jones, 530 U.S. 567 (2000) (holding that a blanket primary violated a political party's First Amendment right of association); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 359 (1997) ("The New Party's claim that it has a right to select its own candidate is uncontroversial."); Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) (holding that a law prohibiting independent candidates from voting in party primaries violated the First Amendment right to association).

[18] *See, e.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (holding that contribution limits must be closely drawn to match a sufficiently important government interest due to their effect on the freedom of association); Buckley v. Valeo, 424 U.S. 1, 22 (1976) (finding that limitations on political contributions and expenditures impinge on the freedom of association).

associational strength of the political party,[19] or on racial groups.[20] This scholarship makes compelling arguments that the right to vote should not be grounded purely in the Equal Protection Clause because voting represents a fundamental form of political expression and association. This article builds on both the foundation laid by these scholars and by Supreme Court decisions on political association to argue that citizens have a fundamental right to associate with candidates of their choice and that restricting the right to vote can unconstitutionally burden that association. This right does not depend on larger associations like the political party or racial groups, but relies on the direct association between the voter and the candidate. Part III will further discuss the appropriate level of scrutiny to apply and will argue that the *Anderson-Burdick* test, applied in cases involving election administration, is the appropriate standard of review.

Finally, Part IV will apply the proposed test to felony disenfranchisement laws, arguing that states' interests in barring felons from voting often will not justify the burden on association. This article does not propose that every felony disenfranchisement law is facially invalid, but rather that the laws must survive a heightened constitutional scrutiny, rendering many current laws disenfranchising felons, regardless of the nature of their crime, unconstitutional.

## I. FELONY DISENFRANCHISEMENT: HISTORICAL ROOTS AND MODERN EFFECTS

The United States has the most restrictive felony disenfranchising laws in the modern world,[21] yet these laws do not exist in a vacuum. They developed from historical precedents dating back to Greek and Roman civilization.

While the United States has followed a historical legacy of disenfranchising those convicted of certain crimes, its laws are uniquely informed and shaped by racist ideology. The United States adopted the practice from England. Following emancipation and the passage of the Fifteenth Amendment forbidding states from discriminating at the ballot box based on race, states adopted a number of tactics to prevent African Americans from being able to vote. One of these tactics was the

19 Daniel P. Tokaji, *Voting is Association*, 43 FLA. ST. U. L. REV. 763, 764 (2016) (arguing that "the First Amendment provides a vehicle for voting claims" using intermediary organizations such a political parties).

20 Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CALIF. L. REV. 1209, 1215 (2003) (arguing that "voters of color have a First Amendment interest in associating politically when their racial identity overlaps with their political identity").

21 Jamie Fellner et al., *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, HUM. RTS. WATCH (1998), https://www.hrw.org/legacy/reports98/vote/index.html#TopOfPage.

disenfranchisement of felons. The history of racist ideology that helped establish these laws has seen great (or terrible) success.

### *A. A Brief History of Felony Disenfranchisement*

The root of American felony disenfranchisement in ancient societies lacked an overtly racial purpose. The deprivation of the right to vote has its origins in ancient Greek and Roman politics, where people convicted of crimes lost various civil rights, including the right to vote in political assemblies.[22] Medieval European societies adopted this tradition, going so far as to argue that those who broke the law stripped themselves of any protection of the laws, and thus could be killed or banished from society.[23] This banishment was referred to as "civil death," because it did more than just disenfranchise the criminal. It destroyed all of their legal capacity.[24] The punishment of barring criminals from voting, what we now call disenfranchisement, was meted out on a case-by-case basis, and generally limited to those who had been convicted of more serious crimes.[25] Specifically, these serious crimes often related to voting or inappropriately influencing an election official.[26]

Colonial America imported its common law from England and its early disenfranchisement laws retained the same flavor as those of their English predecessors.[27] Colonial law allowed the judiciary to strip criminals of their right to vote, but again, this was frequently limited to crimes related to voting.[28] This punishment had a public quality to it; like its roots in civil death, this was part of removing a criminal from society.[29]

Following the Civil War, these laws took on a very different tone. Facially, the Thirteenth Amendment freed American slaves,[30] the Fourteenth Amendment established equal protection of the laws,[31] and the Fifteenth Amendment banned states from denying suffrage on the basis of race.[32] These fundamental shifts also precipitated a change in the goal of disenfranchisement laws, and they took on a clearly racist edge. As early as the late 1800s, state felony disenfranchisement laws gained popularity

22 Susan E. Marquardt, *Deprivation of a Felon's Right to Vote: Constitutional Concerns, Policy Issues, and Suggested Reform for Felony Disenfranchisement Law*, 82 U. DETROIT MERCY L. REV. 279, 280 (2005).

23 *Id.*

24 Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1060 (2002).

25 Marquardt, *supra* note 22, at 280.

26 *Id.*

27 Ewald, *supra* note 24, at 1061.

28 *Id.* at 1062.

29 *Id.*

30 U.S. CONST. amend. XIII, § 1.

31 U.S. CONST. amend. XIV.

32 U.S. CONST. amend. XV.

as a method to prevent newly-enfranchised African Americans from voting.[33]

Unlike disenfranchisement laws of the past, which were utilized on a case-by-case basis and generally justified with the argument that the crime in question was related to elections, the new brand of disenfranchisement laws stripped thousands of their right to vote without any individual inquiry into the criminal or the crime.[34] The purpose of these laws was to strip African Americans of their right to vote without running afoul of the Fifteenth Amendment. States also enacted a number of more overt measures to prevent former slaves from voting, such as poll taxes and literacy tests.[35] At the same time that these taxes and tests were openly preventing African American citizens from voting, state legislatures were crafting disenfranchisement laws that specifically targeted crimes for which African Americans were more likely to be convicted.[36]

While these laws were merely some of the many tools employed by southern states after the Civil War to prevent African Americans from voting, they have also been the most stubbornly persistent. Poll taxes were struck down by the Supreme Court in 1966[37] and the Voting Rights Act outlawed literacy tests nationwide.[38] Disenfranchisement laws, on the other hand, persist throughout much of the country to this day.

[33] *See* Marquardt, *supra* note 22, at 281 ("Disenfranchisement laws gained new popularity in the United States in the late 1800s when white citizens in southern states utilized these laws as a means to prevent African Americans from voting."); Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85, 92 (2005) (citing Hunter v. Underwood, 471 U.S. 222, 233 (1985) (finding that the disenfranchisement provision in the Alabama Constitution violated the Equal Protection Clause, where, despite being facially neutral, it was originally motivated by a desire to discriminate against blacks and continued to have a racially discriminatory impact since its adoption)).

[34] Marquardt, *supra* note 22, at 280, 296.

[35] Bailey Figler, *A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement*, 61 N.Y.U. ANN. SURV. AM. L. 723, 738 (2006).

[36] Shapiro, *supra* note 15, at 540–41 (citing an example in which the Mississippi Supreme Court noted that crimes more often committed by African Americans (burglary, theft, arson, and obtaining money under false pretenses) were included in its constitutional felony disenfranchisement provision, while violent crimes (murder, robbery) were not included).

[37] Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) ("Wealth or paying fee has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be subordinated or conditioned.").

[38] Richard A. Williamson, *The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bailout Provisions*, 62 WASH. U. L. REV. 1, 5–6 (1984).

### *B. Summary of Existing Disenfranchisement Laws*

In our system, states are in charge of running elections, including elections for federal office.[39] States have significant leeway to regulate elections, and the courts intervene only to the extent that state laws violate federal constitutional provisions.[40] Accordingly, states have widely varying laws governing disenfranchisement. In practice, this means that a felon's right to vote is dependent on the state in which they live. This is not the case for age, gender, or any other characteristic traditionally used to limit the franchise. While voting is regulated by the state, it is both a state and a national right. Losing the right to vote restricts the ability to participate in government at all levels, making the wide disparity among states' practices extremely troubling.

These varying state practices range from permissive to extremely restrictive. For example, in Maine and Vermont, there is no restriction on voting for any felons.[41] Fourteen states and the District of Columbia restrict felons from voting for the duration of their time in prison, and four states disenfranchise during parole as well as prison time.[42] Eighteen states, including Louisiana, which has the highest prison population of any state in America, disenfranchise felons for the entire duration of their prison sentence, plus parole and probation.[43] Finally, eleven states disenfranchise felons even after the completion of the sentence, probation, and parole.[44] Even within these categories, state laws differ. For example,

[39] U.S. CONST. art. I, §4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

[40] *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 643 (1993) (holding that "the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling government interest"); Harper, 383 U.S. at 667 (holding that poll taxes violate the Equal Protection Clause of the Fourteenth Amendment); Reynolds v. Sims, 377 U.S. 533, 557–68 (1964) (holding that the Fourteenth Amendment requires states to give each citizen an equal vote).

[41] Jean Chung, *Felony Disenfranchisement: A Primer*, THE SENT'G PROJECT (Dec. 2019), http://www.sentencingproject.org/wp-content/uploads/2015/08/Felony-Disenfranchisement-Primer.pdf.

[42] *Id.*

[43] *Id.*

[44] *Id.* The data cited here include Florida, which would bring the total number of states who disenfranchise post-conviction up to twelve. While Florida passed a referendum in 2018 to end post-sentence disenfranchisement of felons, the legislature has introduced a bill that would "require former felons to pay fees and fines before having their voting rights restored." Karen Zraik, *Florida Republicans Push to Make Ex-Felons Pay Fees Before They Can Vote*, N.Y. TIMES (Mar. 20, 2019), https://www.nytimes.com/2019/03/20/us/florida-felon-voting-rights.html. Given the inevitable challenges to this law, and uncertainty more generally about the future of the implementation of the Florida referendum, for the purposes of this article I have included Florida in the

some have complicated restoration processes involving waiting periods that may differ based on the specific crime and some permanently disenfranchise felons only for certain offenses or for numerous offenses.[45] These complicated processes would make it difficult for a person released from prison to understand their rights, and how to go about reclaiming them.

Perhaps even more concerning than differences between the states is the fact that some states have seen dramatic policy shifts between and within administrations. In 2005, Iowa Governor Tom Vilsack restored the voting rights of those with previous felony convictions, but six years later Governor Terry Branstad reversed the executive order, effectively re-disenfranchising the state's entire population of felons.[46] Similarly, in 2016, Virginia Governor Terry McAuliffe restored the voting rights of 200,000 Virginians who had completed their sentences but the action was challenged in the state Supreme Court, which ruled that such decisions could only be made on a case-by-case basis.[47] Governor McAuliffe proceeded to re-enfranchise 173,000 Virginians with felony convictions in this manner, leaving 27,000 voters stripped again of their rights.[48] This flippant treatment of a fundamental constitutional right is inherently disrespectful to the people that it affects, who are forced to sit in uncertainty about their own status as citizens able to fully participate in our democracy.

There is disparity in these laws among states, but even more startling are the disparate effects felt by people of color.

### *C. The Modern Effects of Disenfranchisement Laws*

As explained, felony disenfranchisement laws originated without racist undertones. Before the Civil War, even American laws reflected this more neutral tone. Following the Civil War, however, American states began touting overtly racist ideologies when creating their

number of states who impose post-sentencing disenfranchisement. However, this is subject to change.

[45] Chung, *supra* note 41, at 1. For example, in Arizona, a person convicted of one felony conviction automatically has their rights restored at the end of their prison sentence. A.R.S. § 13-907 ("On final discharge, any person who has not previously been convicted of a felony offense shall automatically be restored any civil rights that were lost or suspended as a result of the conviction if the person pays any victim restitution imposed."). For those convicted of multiple offenses, however, the person wishing to vote again must petition the court that sentenced them. A.R.S. §§ 13-908. To complicate matters further, if the person convicted of two felonies was sentenced to parole, they can immediately petition the court, while a person who received a prison sentence must wait for two years after their release. *Id.*

[46] Chung, *supra* note 41 at 2.

[47] Howell v. McAuliffe, 292 Va. 320 (2016).

[48] Chung, *supra* note 41 at 1.

disenfranchisement laws.[49] This legacy has persisted and has resulted in disenfranchisement laws with wildly disproportionate impacts for African American populations, despite the lack of facial racial animus.[50] The racial disparity has persisted for a number of reasons, including the war on drugs, sentencing laws, and discretionary prosecution.[51] While we no longer see Jim Crow laws, mass incarceration and facially race-neutral disenfranchisement laws have maintained the divide between the number of African Americans who are able to vote and the number of non-African Americans who are.[52] This has significant effects on African American communities in the United States, depriving huge percentages of these communities of the right to vote, stripping them of the most fundamental means by which to have their political voice heard, and damaging the ability of former felons to transition back into their communities.

In 2016, one out of every thirteen African American adults could not vote nationwide.[53] Compare this to the population of non-African American voters, where only one in every fifty-six adults was unable to vote.[54] In states with the harshest laws, this disparity is even more striking. One in every five African American adults was unable to vote in 2016 in Florida, Kentucky, Tennessee, and Virginia.[55] This shakes out to as many as 20% in some states.[56] Altogether, roughly 2.2 million African American adults are banned from voting.[57] Considered another way, African American adults are *four times more likely* to lose their right to vote than non-African American adults.[58]

To contextualize the scope of these laws, consider the narrow margin by which most elections are decided. One study concluded that since 1978, seven out of thirty-five Senate elections would have had different outcomes but for these laws.[59] Thus, these laws deprive enough people of the right to vote to change election outcomes.

[49] Ewald, *supra* note 24, at 1090 (quoting John B. Knox, the president of the Alabama constitutional convention of 1901: "[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").

[50] Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111, 151 (2013).

[51] THE SENT'G PROJECT, ANNUAL REPORT 2017 8 (2017), https://www.sentencingproject.org/wp-content/uploads/2015/10/Annual-Report-2017.pdf.

[52] Nelson, *supra* note 50, at 155.

[53] Chung, *supra* note 41, at 6.

[54] *Id.*

[55] *Id.*

[56] Eisenberg, *supra* note 16, at 542.

[57] Chung, *supra* note 41, at 2.

[58] *Id.*

[59] *Id.* at 4. This study looked at the impact of felony disenfranchisement on the composition of the U.S. Senate.

Additionally, disenfranchisement laws impact individuals and communities. Following a prison sentence, the transition into community life is often difficult. Civic isolation compounds this difficulty.[60] It has also been linked to higher recidivism rates among former felons.[61] Some scholars believe that these effects are so strong that stripping felons of their right to vote actually conflicts with the government's goal of rehabilitating former felons.[62] African American communities disproportionately feel the impact of these laws in the United States and these laws affect recidivism rates and depress rehabilitation. These impacts on the individual and the community have led to a number of challenges, outlined below, with varying levels of success.

## II. ELECTION LAW: FELONY DISENFRANCHISEMENT AND THE FIRST AMENDMENT

As discussed in Part I, felony disenfranchisement remains a significant force keeping African American adults from the polls. It affects a huge number of people nationwide, and so it is unsurprising that there have been a number of challenges to its constitutionality. Where constitutional challenges have failed, opponents have attempted to get the laws struck down on statutory grounds. Many opponents have also turned to state legislative processes to try and change the laws state-by-state. Subsection A will describe the history of these challenges, and their relative success and failure.

Though there have been many challenges to these laws, none have been grounded in the First Amendment. This is surprising, given the prevalence of First Amendment law in election law jurisprudence. Subsection B will survey the use of the First Amendment in election law in order to give background to this article's primary claim, expanded upon in Part III, that the First Amendment grants a right to vote through the right to associate, and that felony disenfranchisement laws impermissibly burden this right.

### *A. Challenges to Felony Disenfranchisement Laws*

#### 1. Equal Protection Under the Law

The Equal Protection Clause of the Fourteenth Amendment provides that no state will "deny to any person within its jurisdiction equal

60 *Id.*

61 *Id.* The cited study notes that 27% of non-voting former felons were rearrested, while only 12% of voting former felons were rearrested. There are limited data on this question, so it is impossible to infer causation, but researchers concluded that "voting appears to be part of a package of pro-social behavior that is linked to desistance from crime." *Id.* (quoting Jeff Manza & Christopher Uggen, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 196 (2003)).

62 Marquardt, *supra* note 22, at 293.

protection of the laws."[63] This applies to laws governing suffrage, and the Equal Protection Clause has been used in a number of contexts to strike down provisions depriving groups of the right to vote.[64] Opponents of felony disenfranchisement viewed this as a clear path to challenge the laws because it had been used in the past to successfully challenge and eliminate vote denial through poll taxes,[65] other direct restrictions,[66] and malapportionment claims.[67]

This clear path was complicated when the Supreme Court decided in *Richardson v. Ramirez* that the Equal Protection Clause does not grant relief to those denied the right to vote on the basis of their felony status.[68] To do this, the Court relied on a convoluted reading of the Equal Protection Clause in conjunction with Section 2 of the Fourteenth Amendment.[69] Section 2 reads in relevant part that "when the right to vote at any election … is denied to any male inhabitants … or in any way abridged, *except for participation in rebellion, or other crime,* the basis of representation therein shall be reduced …"[70] This language was added to give southern states a choice: give African American men the right to vote or reduce your representation in Congress.[71] In other words, the Section was added to ensure that African American men received the right to

[63] U.S. CONST. amend. XIV, § 1.

[64] *See, e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666–67 (1966) (invalidating a poll tax under the Equal Protection Clause of the Fourteenth Amendment); Reynolds v. Sims, 377 U.S. 533, 567–68 (1964) (holding that the Fourteenth Amendment requires states to give each citizen an equal vote); Shaw v. Reno, 509 U.S. 630, 643 (1993) (holding that the Equal Protection Clause protects against laws that distinguish among citizens based on race unless the law can survive strict scrutiny).

[65] Harper, 383 U.S. at 667.

[66] *See* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 622 (1969) (striking down a New York law decreeing that only people with a child in the school district could vote for school board).

[67] Reynolds, 377 U.S. at 567–68.

[68] Richardson v. Ramirez, 418 U.S. 24, 54 (1974).

[69] *Id.* at 72–73 (Marshall, J., dissenting). The majority opinion engages in a review of the legislative history of the amendment and quotes Congressman Bingham of Ohio, one of the authors of the amendment, as saying: "The second section of the amendment simply provides for the equalization of representation among all the States of the Union, North, South, East, and West. It makes no discrimination. New York has a colored population of fifty thousand. By this section, if that great State discriminates against her colored population as to the elective franchise, (except in cases of crime,) she loses to that extent her representative power in Congress. So also will it be with every other State." *Id.* at 45 (majority opinion) (citing Cong.Globe, 39th Cong., 1st Sess., 2543 (1866)).

[70] U.S. CONST., amend XIV, § 2 (emphasis added).

[71] Richardson, 418 U.S. at 74 (Marshall, J., dissenting).

vote.[72] What is less clear is the purpose behind the phrase "or other crimes," which has very little legislative history explaining it.[73] Far from intending that the phrase serve as a tool for disenfranchising African Americans, the phrase was likely added to allow states to disenfranchise former Confederate soldiers.[74] The *Ramirez* Court took that clause, however, to abrogate the clear language in Section 1 of the Amendment granting equal protection of the laws. The Court held that the inclusion of "or other crimes" in Section 2 granted the states full license to strip the vote on the basis of felony status.[75] This decision, based on three words in the second section of the Fourteenth Amendment, has sanctioned the continued disenfranchisement of millions of Americans.

Just over a decade later, the Court walked back this outright ban of Fourteenth Amendment claims against disenfranchisement laws. In *Hunter v. Underwood*, the Court held that a felon disenfranchisement law can violate the Fourteenth Amendment if its "enactment was motivated by desire to discriminate against blacks on account of race" and it "had had racially discriminatory impact since its adoption."[76] The facts in *Hunter* were stark. In 1901, the Alabama Constitution's provision on disenfranchisement was amended to include all crimes involving "moral turpitude."[77] This language was racially neutral on its face, but the misdemeanors included in the umbrella of "moral turpitude" were ones that African Americans were more likely to be convicted of.[78] In fact, the plaintiffs' expert in the case estimated that by January 1903, just two years after the new provision was added, the law "had disenfranchised approximately ten times as many blacks as whites," and that "disparate effect" persisted into the 1970s when the case was brought.[79]

Although these statistics clearly demonstrated a disparity, this alone was not enough. The *Hunter* Court applied the *Arlington Heights* standard,

[72] At the time of ratification, there was a concern about how much representation the southern states would have in Congress. *Id.* at 73. Rather than reduce outright their representation, Section 2 was added as a compromise to ensure that southern states would retain the same level of representation, but to do so they would have to grant African Americans the right to vote. This was motivated at least in part by politics; African American voters were more likely to be sympathetic to Republican causes. *Id.*

[73] *Id.* at 72–73.

[74] Linda R. Monk, *Due Process Clause, Equal Protection Clause, and Disenfranchising Felons*, PBS, https://www.pbs.org/tpt/constitution-usa-peter-sagal/equality/due-process-equal-protection-and-disenfranchisement/ (last visited Nov. 28, 2019).

[75] Richardson, 418 U.S. at 54.

[76] Hunter v. Underwood, 471 U.S. 222, 222–23 (1984) ("And the implicit authorization in § 2 of the Fourteenth Amendment to deny the vote to citizens 'for participating in rebellion, or other crime,' does not except [the state law] from the operation of the Equal Protection Clause.").

[77] *Id.* at 226.

[78] *Id.* at 227.

[79] *Id.*

which requires the plaintiff to prove by a preponderance of the evidence that racial discrimination was a substantial or motivating factor in the adoption of the law.[80] This is an exceptionally high standard to meet for a facially neutral law. Disproportionate impact alone is insufficient to prove that race was a motivating factor.[81] However, in *Hunter*, "[t]he delegates to the all-white [Alabama] convention were not secretive about their purpose."[82] In invalidating the law, the Court looked to numerous delegate statements from the ratification of the law that made very clear that their purpose was to, as the President of the Alabama Constitutional Convention put it, "establish white supremacy in [Alabama]."[83]

Without blatant language demonstrating that the *purpose* of the law was to reduce the number of African Americans in Alabama who could vote, the Supreme Court would not have struck down the law. The plaintiffs demonstrated a ten-to-one ratio of disenfranchised African Americans to non-African Americans, and yet the demanding standard set by *Arlington Heights* and *Washington v. Davis* nearly precluded a finding of unconstitutionality. This is deeply concerning as most lawmakers are more subtle, and the legislative histories for most disenfranchising laws do not contain the same sort of smoking gun language that the Court found from the Alabama Constitutional Convention. The Fourteenth Amendment, designed to ensure equal protection based on race, became a shield for the disenfranchisement of African Americans.

### 2. Cruel and Unusual Punishment

Another constitutional avenue that seems promising on its face is to argue that disenfranchisement is cruel and unusual punishment.[84] Disenfranchisement is triggered by a state conviction for certain enumerated crimes, almost like part of the sentence, and thus as part of the "punishment." This door seems to be closed for those fighting disenfranchisement laws, however. In 1958, the Court decided *Trop v. Dulles*, which held that it is unconstitutional to revoke citizenship as punishment for a crime.[85] In dicta of this case, the Court explained that laws taking away the right to vote upon conviction are not penal in nature; instead, they "designate a reasonable ground of eligibility for voting."[86]

[80] *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977).

[81] Washington v. Davis, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.").

[82] Hunter, 471 U.S. at 229.

[83] *Id.* (quoting John B. Knox, president of the Alabama Constitutional Convention of 1901).

[84] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted").

[85] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[86] *Id.* at 96–97.

There are no other references to disenfranchisement in the opinion. This simple sentence, which could be almost an afterthought, has largely prevented challenges to state disenfranchisement laws on Eighth Amendment grounds.[87]

### 3. The Voting Rights Act

Having failed to sustain constitutional challenges against disenfranchisement, opponents have begun pursuing a new potentially promising avenue under Section 2 of the Voting Rights Act. The Voting Rights Act was passed in 1965, and is lauded as one of the seminal pieces of legislation to arise out of the Civil Rights Movement of the 1960s. Section 2 of the Act prohibits voting practices that discriminate on the basis of race,[88] and has been used primarily as a vehicle to challenge at-large elections, which generally tend to favor white voters.[89] Recently, however, activists have begun using Section 2 to challenge election procedures more broadly.

In *Veasey v. Abbott*, the Fifth Circuit sustained a Section 2 claim against Texas's voter ID law.[90] In doing so, it widened the scope of Section 2's application and crafted a two-part test. First, the court asks whether the practice in question imposes a discriminatory burden.[91] Second, the court asks whether the burden imposed by the practice is caused by or linked to social and historical conditions that have or currently produce racist outcomes.[92]

Most significantly for the purposes of disenfranchisement claims, there is no requirement to prove discriminatory *intent* behind the challenged law.[93] This makes Section 2 a much lower standard for claims of discrimination. There has not yet been a prominent challenge to disenfranchisement laws brought under the Voting Rights Act, but there has been scholarship discussing the possibility of applying this more

87 For a discussion on how felony disenfranchisement is penal in nature, *see* Ewald, *supra* note 24, at 1058. For further discussion on the line between punishment and collateral consequences of sentencing, *see* Margaret Colgate Love, *Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87 (2011).

88 Voting Rights Act of 1965, 52 U.S.C. § 10301 (2018).

89 *See Section 2 of the Voting Rights Act*, DEP'T OF JUST., https://www.justice.gov/crt/section-2-voting-rights-act (last visited July 6, 2019).

90 Veasey v. Abbott, 830 F.3d 216, 265 (5th Cir. 2016).

91 *Id.* at 244–45.

92 *Id.*

93 Shapiro, *supra* note 15, at 550. In fact, in 1980 the Supreme Court held that a claim under Section 2 did need to prove discriminatory intent. Recognizing the unattainably high standard this would impose on plaintiffs, Congress amended Section 2 to clarify that there is no such intent requirement. *Id.* The only thing that the plaintiff needs to demonstrate is that there is a discriminatory effect on minority voters.

accessible standard to the state laws that have, for decades, disproportionately kept African Americans from voting.[94] As this article has already described, plaintiffs should have no difficulty proving the disparate impact of these laws.[95]

The future of this claim is not clear. This is a statutory route, rather than a constitutional one, and the legislature could always change the law. The Court could limit the scope of the law. Indeed, the Supreme Court has already acted to limit the Voting Rights Act's application; in 2013 it struck down one of the most prominent portions of the Voting Rights Act, the Section 5 preclearance formula.[96] The Supreme Court has not ruled on this question, and so it is not certain whether this test will hold. But given the outcome of *Veasey*, it seems that this could indeed be a promising challenge to disenfranchisement laws. Given the uncertainty of this claim's future success, however, there is much to be said for seeking out a viable and more stable constitutional challenge to disenfranchisement.

### 4. Reforms Outside of the Courts

Opponents of these laws have also looked outside of the courts to find redress. Two of the primary non-legal methods are seeking to put the decision to disenfranchise into the sentencing procedure, and legislative reforms.

One of the unique dangers of felony disenfranchisement laws is that they take place outside the criminal sentencing realm.[97] Giving individual judges the discretion to strip people of the vote carries its own risks.[98] Taking the decision out of their hands entirely, on the other hand, creates a system where every person convicted of a certain crime, without regard to the relative severity of their offense, loses their right to vote. As a

[94] *See generally* Shapiro, *supra* note 15; Lauren Handelsman, *Giving the Barking Dog a Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965*, 73 FORDHAM L. REV. 1875 (2005) (discussing the different approaches that circuit courts have taken to felony disenfranchisement. While the Second Circuit appears to have closed the door to VRA challenges, the Eleventh and Ninth Circuits have both allowed these challenges to proceed).

[95] *See supra* Part I.C.

[96] Shelby County v. Holder, 570 U.S. 529 (2013) (holding that the formula used to determine which jurisdictions would fall into the preclearance regime of Section 5 of the Voting Rights Act was no longer constitutional). This formula determined which jurisdictions would require DOJ preclearance before changing any aspect of their election procedures.

[97] Marquardt, *supra* note 22, at 279.

[98] Jerold H. Israel, *Sentencing, the Dilemma of Discretion*, *in* JUDICIAL DISCRETION 13, 14–15 (J. Eric Smithburn ed., 1980) (discussing the factors that judges weigh in sentencing discretion, and specifically noting the fact that the weight given to these factors, and indeed sometimes the factors themselves, can vary at times).

consequence of this, "there is little or no consideration as to whether the elimination of voting rights is an appropriate punishment."[99]

At least one scholar has suggested changing this current system and instead inserting the decision to disenfranchise a felon into the sentencing process. Susan Marquardt argues that historically, disenfranchisement was viewed as a component of the punishment, and as such it should be decided by the judge.[100] But Marquardt does not address what could be the fatal flaw in her argument: the dicta from *Trop v. Dulles* suggesting that the Court believes disenfranchisement is purely regulatory, and not penal, in nature.[101] Further, it would take enormous action at the state and collective level to undo existing state disenfranchisement laws and develop uniform federal guidelines.[102]

Alternatively, some opponents have taken to state legislatures petitioning for the reform or abolishment of disenfranchisement laws. Between 2005 and 2006, for instance, Rhode Island, Iowa, and Nebraska all successfully enacted legislative reforms to their disenfranchisement laws.[103] In Rhode Island, this meant going from one of the most severe laws in the country, one that banned former felons from voting even after they completed parole and probation, to one that allows all former felons to vote upon release.[104] This demonstrates that these reforms can be extremely successful by cementing the changes on the state level as securely as a favorable constitutional ruling would at the federal level.[105]

A problem, however, is that legislative reforms take an enormous amount of work and organization. They can require grassroots advocacy, political capital, money, and lots of time.[106] While there are different

[99] Marquardt, *supra* note 22, at 279. There are other countries that do leave this decision up to the sentencing judge. In Germany, for example, the sentencing judge can assess the severity of the crimes and can deprive the defendant of their voting rights for a limited amount of time. *Id.* at 285.

[100] *Id.* at 297.

[101] Trop v. Dulles, 356 U.S. 86, 96–97 (1958). This doesn't necessarily foreclose her argument entirely, she is not suggesting using the Eighth Amendment's Cruel and Unusual Punishment Clause, which *Trop* focused on. Also, she is not suggesting using the courts to make this change, but rather developing guidelines similar to those that exist today. Marquardt, *supra* note 22, at 289–99.

[102] Gilles R. Bissonnette, *"Consulting" the Federal Sentencing Guidelines After* Booker, 53 UCLA L. REV. 1497, 1503–04 (2006) (describing the rise of the sentencing reform movement over several decades).

[103] Eisenberg, *supra* note 16, at 555.

[104] *Id.* at 556–57.

[105] *Id.* at 556 (Rhode Island changed its constitution through a two-step process of legislative enactment followed by a popular vote).

[106] *Id.* at 558–59. In the case of Iowa, it also involved a certain amount of luck. The Iowa battle began in the legislature, though ultimately reform was achieved through an executive order from the governor. *Id.* at 565. While it was moving through the state's General Assembly, a high school civics class tracked

avenues that activists seeking legislative reform can take, they all need massive buy-in from the population and legislature of the state. Florida's recent constitutional amendment to restore the vote to former felons enfranchised an astounding 1.4 million people, but it required years of determined advocacy within both the judicial and the legislative branches.[107] Despite that dedication and success, following Florida's constitutional referendum the legislature has worked hard to water down the amendment's effectiveness.[108]

Despite a number of legislative successes in many states, the significant amounts of funding and organization required are not politically viable in every state. For all of these reasons, the most sustainable long-term solution to the nation's disenfranchisement problem, and its blatant racial disparity, is a solution rooted in the federal Constitution. While the Fourteenth and Eighth Amendments are not currently realistic possibilities to tackle disenfranchisement, this article argues that there is a solution lying hidden in the First Amendment. The next Subpart will detail the history of the First Amendment right to associate in election law, generally.

### *B. A History of Association in Voting Rights*

Historically, the First Amendment has been silent on the question of a fundamental right to vote, but that is not to say that it has been silent in all of election law. References to the First Amendment in voting cases go back as far as 1966, when the Supreme Court alluded to the Amendment in a decision striking down poll taxes.[109] The Court relied expressly on the First Amendment right to association in its line of cases determining the ability of political parties to gain access to the ballot, and its line of cases on campaign finance.[110]

the progress of the bill and undertook an effort to lobby the state legislatures on the issue. *Id.*

[107] *Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. FOR JUST. (May 31, 2019), https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida.

[108] Arian Campo-Flores, *Florida Gov. DeSantis Signs Bill That Adds Restrictions to Felon Voting*, WSJ (June 28, 2019), https://www.wsj.com/articles/florida-gov-desantis-signs-felon-voting-bill-11561762090.

[109] Harper, 383 U.S. at 665 ("It is argued that the right to vote in state elections is implicit, particularly by reason of the First Amendment and that it may not constitutionally be conditioned upon the payment of a tax or fee.") (citation omitted).

[110] The word "association" does not appear in the First Amendment. The Court first recognized that the First Amendment included under its umbrella a right to associate in 1958, when it held that the state of Alabama could not force the NAACP to disclose its membership, because the resulting fear of reprisal would prevent people from associating together through the NAACP. NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449 (1958). For a detailed history of the right to

### 1. Ballot Access

As noted above, state law governs election procedure. Accordingly, state law controls which political parties and candidates can appear on ballots for state and federal elections, which controls which candidates voters can vote for. It also governs which parties voters are allowed to vote for in primaries. Using this power, states have attempted to limit access to the ballot in different ways and based on different criteria. Political parties responded by launching First Amendment challenges against these laws, arguing that they inhibited their constitutional right to associate with voters of their choice.

When addressing these challenges, the Court differentiates between the rights of *major* parties to associate with voters through their primary, which gets a higher scrutiny level due to the more severe associational burden, and the rights of *minor* and *third* parties to appear on the ballot, which the Court has determined represents a lower associational burden on the parties and their voters. This distinction developed over time. Soon after national political parties became the primary way that candidates engaged with voters, the Supreme Court determined that interference with primaries constituted a burden on associational rights.[111] State laws, however, continued to limit who was allowed to vote in which party's primary, implicating the associational rights of major parties. The Court struck down many of these laws using strict scrutiny as well. For example, in *Tashjian v. Republican Party of Connecticut*, the court invalidated a state law that prohibited the Republican Party from allowing independent voters in their primary.[112] The associational right that the Court identified in this instance was the party's right to determine which people could participate in selecting their candidate.[113]

associate, *see* Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964).

111 Democratic Party of U.S. v. Wis. *ex rel.* La Follette, 450 U.S. 107, 124–26 (1981) (holding that while the state has an interest in the integrity of the electoral process, that interest does not allow the state to interfere in a national party's process to select primary delegates).

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

113 *Id.* at 213. The court specifically held that the state's asserted interests, which included the costs of administering the primary system, preventing voter confusion, and the integrity of the existing two-party system, were "insubstantial," and thus that the law could not survive strict constitutional scrutiny. *Id.* at 229. The key question that triggers strict scrutiny is whether the voters are helping to select a major party's nominee. Where the primary does not select the nominee, the associational burden on the political party is not as high, and thus the law will not be subject to strict scrutiny. This makes sense; the burden on the party's right to associate with voters is highest when those voters are selecting the person the party is supporting for the office in question. *Compare* Cal. Democratic Party v. Jones, 530 U.S. 567 (2000) (striking down a law that created a partisan blanket primary because it limited the parties' ability

More significant for purposes of this article is the Supreme Court's treatment of laws limiting ballot access for independent candidates and third-parties. There, the Court explicitly recognized the constitutional rights of the *voter* to associate with candidates of their choice.

The Court first addressed this in *Williams v. Rhodes* when it struck down a series of Ohio laws that severely restricted ballot access for new political parties.[114] The majority opinion relied heavily on the right to associate, and described the right as twofold.[115] First, the Court described the right of people to associate "for the advancement of political beliefs."[116] Second, it described the right of "qualified voters … to cast their vote effectively."[117] In his concurrence, Justice Douglas asserted that the Supreme Court's then-existing caselaw demonstrated that the rights to vote and to associate are both fundamental constitutional rights.[118] The caselaw since *Williams* has remained largely confined to ballot access, but the holding of the case could be read much broader.

Over the next few decades, the Court developed a two-part test to deal with associational claims by independent candidates and third parties against state election procedures. In 1983, the Court struck down an Ohio filing deadline that unduly imposed upon the plaintiffs' associational rights.[119] In doing so, Justice Stevens first considered the "character and magnitude" of the imposition on associational rights, and then evaluated the state's asserted interest in the law.[120] To determine whether the law passed constitutional muster, he weighed the two competing claims, asking whether the state's interests justified the burden on the fundamental right to associate.[121] The Court reaffirmed this test three years later in *Munro v. Socialist Workers Party*, though it ultimately upheld the law in question in that case.[122]

to determine who voted in the primary to select their candidate), *with* Wash. St. Grange v. Wash. St. Republican Party, 552 U.S. 442 (2008) (upholding a law that created a nonpartisan blanket primary because it did not select party nominees).

114 Williams v. Rhodes, 393 U.S. 23 (1986). The Ohio law required, among other things, new parties to get a petition signed by a number of people equal to 15% of the ballots cast in the preceding gubernatorial election. *Id.* at 24–25. The Court later made clear in *Jenness v. Fortson* that states can require a reasonable showing of support to get onto the ballot, but has always maintained that overly restrictive ballot access laws inhibit the First Amendment. 403 U.S. 431 (1971).

115 Williams, 393 U.S. at 30.

116 *Id.*

117 *Id.*

118 *Id.* at 38–39 (1986) (Douglas, J., concurring).

119 Anderson v. Celebrezze, 460 U.S. 780 (1983).

120 *Id.* at 789.

121 *Id.*

122 Munro v. Socialist Workers Party, 479 U.S. 189 (1986). The Washington law at issue in Munro required candidates to either receive 1% of vote in the state's blanket primary or hold a convention with 100 people to get onto the general ballot. *Id.* at 190–91. Though the court acknowledged that this burdened

The Supreme Court clarified the test further in 1992, giving us, roughly, the one we use today. In *Burdick v. Takushi*, the Court made clear that this test imposes a lower standard than strict scrutiny, making it easier for the state's laws to survive a challenge under the First Amendment than under the Equal Protection Clause.[123] Rather than always requiring that a law be narrowly tailored to fit a compelling government interest, under the so-called *Anderson-Burdick* test, the Court would require such a high standard only when the burden on the fundamental rights in question is particularly severe.[124] When the burden is less severe, it follows that the state's interests need not be as compelling, and the law need not be as narrowly tailored to match those interests.[125]

Therefore, the two-part test that we use today first evaluates the character and nature of the burden. It asks whether the burden is inherently invidious (basically, discriminatory), or valid (basically, non-discriminatory).[126] Second, the Court applies the appropriate scrutiny level. Severe burdens undergo a higher scrutiny, close to strict scrutiny.[127] Valid, non-discriminatory burdens undergo a lesser scrutiny, where the interest is weighed against the burden to determine whether the state's interests justify it.[128]

The development of this test, which governs many challenges against election procedure laws, is significant. Equally significant is the Court's language throughout these decisions affirming the centrality of the right to vote in the political process and its links to the constitutional right to associate. This concept was picked up by the Court when it was asked to examine the constitutionality of campaign finance laws, though it did so under a different standard.

### 2. Campaign Finance

The associational right that the Court recognized in its ballot access cases is significant for this article's argument; the Court recognized that

candidates' ability to access the general ballot, they held that ultimately the state's interest in preventing voter confusion, and the fact that the candidates were able to access the primary ballot, justified that burden. *Id.* at 194–99.

123 Burdick v. Takushi, 504 U.S. 428, 433–34 (1992).

124 *Id.* at 428 ("Under this standard, a regulation must be narrowly drawn to advance a state interest of compelling importance only when it subjects the voters' rights to 'severe' restrictions. If it imposes only 'reasonable, nondiscriminatory restrictions' upon those rights, the State's important regulatory interests are generally sufficient to justify the restrictions.") (quoting Norman v. Reed, 502 U.S. 279, 289 (1992); Anderson, 460 U.S. at 788).

125 *Id.*

126 See Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997). Unfortunately, there is no clear-cut way to draw the line between invidious (severe) and valid burdens. *Id.* at 359 (citing Storer v. Brown, 415 U.S. 724, 729 (1974)).

127 *Id.*

128 *Id.*

voters have a constitutional right to associate with their political party of choice. This article, however, seeks to argue that the political party is not crucial for the right to associate politically, and that is where the Court's campaign finance cases come in. Rather than recognizing the association between voters and the party, campaign finance cases see the Court stressing the importance of the association directly between the voter and the candidates.

Though the many intricacies of campaign finance are not within the scope of this article, some background information provides useful context. It is important to know that in the seminal campaign finance case, *Buckley v. Valeo*, the Court distinguished between campaign contributions, which are donations given directly to a candidate, and expenditures, which is money spent to influence an election without giving it directly to a candidate's campaign.[129] Generally speaking, the Court held that contributions to candidates are a protected form of First Amendment association, because the act of contributing itself "serves to affiliate a person with a candidate."[130] Expenditures are a protected form of First Amendment speech because they are a form of political communication.[131] Thus, the key difference is that the act of contributing does more than voice a political view; it acts like a thread tying the contributor to their candidate of choice and publicly associating the contributor with that candidate. That association, the Court said, does not depend on the amount of money contributed, but rather it is the symbolic act of contributing that creates the affiliation.[132]

After determining which aspect of the First Amendment provided protection to contributions, the Court went on to determine what level of

[129] Buckley v. Valeo, 424 U.S. 1, 3 (1976).

[130] *Id.* at 22.

[131] *Id.* at 18–19. The Court reasoned that virtually every form of meaningful political communication required the speaker to spend some form of money. This article will not explore the many implications of the widening understanding of political speech. For more on this topic, *see* Frederick Schauer & Richard Pildes, *Electoral Exceptionalism*, 77 TEX. L. REV. 1803 (1999) (arguing that political speech may warrant extra First Amendment protection); Abner S. Greene, *Is There a First Amendment Defense for Bush v. Gore?*, 80 NOTRE DAME L. REV. 1643 (2005).

[132] Buckley, 424 U.S. at 21. The Court revisited this issue in *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014). The Court began its discussion of associational rights by saying that they applied with equal force to the "lone pamphleteer" and the person spending "substantial amounts of money." *Id.* at 203 (citing Fed. Election Comm'n. v. Nat'l Conservative Pol. Action Comm., 470 U.S. 480 (1985)). It did, however, suggest that the amount that a contributor chooses to donate to their candidate is significant, and that forcing a person to contribute less (to comply with the FEC's aggregate contribution limits) puts a burden on the contributor's associational rights. *Id.* at 204–05. Most significant for this article's argument is the Court's recognition that, while the contribution amount can be significant, the act of association through contribution is what the First Amendment fundamentally protects.

scrutiny was appropriate.[133] As in cases dealing with ballot access for third and independent parties, the Court held that contribution limits do not draw strict scrutiny. Instead, the Court determined that the limits called for "closest scrutiny," which meant that they had to be justified by a "sufficiently important" government interest and be "closely drawn" to avoid overly burdening the rights in question.[134] In making this determination, the Court cited its ballot access cases, apparently relying on similar reasoning.[135]

The Court relied on this one-on-one connection between the contributor and the voter, but it also went one step further. In addition to allowing individuals to affiliate with their chosen candidate, contributing money to their candidate of choice allowed "like-minded persons to pool their resources in furtherance of common political goals."[136] In other words, while the constitutional link is between the candidate and the individual, the importance of that association draws heavily on the fact that associating with a candidate in that way allows individuals to come together and select one representative to advance their views.[137] If the act of contributing money to a candidate is a constitutionally protected means of associating with like-minded individuals and selecting a candidate of choice to advance political views, how can it be that the act of voting is not similarly constitutionally protected? The next section will demonstrate that it should be.

## III. THE FIRST AMENDMENT RIGHT TO VOTE

The right to vote is the cornerstone of American democracy, a right for which people have fought and died. And yet, despite the crucial role that the vote plays in the American psyche and democracy, the right was not always absolute. First the 15th Amendment prohibited denying the vote on the basis of race,[138] the 19th Amendment prohibited denying the

[133] Buckley, 424 U.S. at 25.

[134] *Id.*

[135] The Court cites *Cousins v. Wigoda*, which dealt with state control over national parties. 419 U.S. 477 (1975).

[136] Buckley, 424 U.S. at 22.

[137] This link has been tested by the courts before, as well as by the legislature. In an interesting case arising out of a Texas state court, a woman was convicted of bribery, and as part of her sentence the judge forbade her from making any political contributions. The appellate court reversed the conviction on other grounds without reaching the First Amendment questions, but stated that the case raised serious First Amendment issues, making clear that limitations on an individual's association rights pose significant constitutional problems. Cary v. State, 507 S.W.3d 750, 760 n.11 (Tex. Crim. App. 2016). The parties did not brief the First Amendment issues. Brief of The Pillar Inst. as Amicus Curiae in Support of Appellant at 7–9, Cary v. State, 507 S.W.3d 750 (Tex. Crim. App. 2016).

[138] U.S. CONST. amend. XV, § 1.

vote on the basis of sex,[139] and finally, the 26th Amendment prohibited denying the vote on the basis of age over eighteen years old.[140] Even with these added protections, felons cut across these demographics and remain barred from the polls by state laws.

The right to vote is nestled in the First Amendment's freedom of association.[141] Other scholars have previously sought to anchor the right to vote in the freedom of association using groups of voters. Guy-Uriel Charles, for instance, made a compelling argument that the First Amendment protects the rights of groups of people of color to vote.[142] Unlike this piece, he argues that the association in question is between groups of voters seeking to advance their political views.[143] Daniel Tokaji wrote a brilliant article arguing that political parties are the central associational hook guaranteeing a right to vote through the First Amendment.[144] Tokaji argues that restrictions on voting prevent a form of expressive political association, infringing on the voters' constitutional rights.[145]

This article takes these arguments further and asserts that the critical association is not between groups of voters, but rather between individual voters and candidates. This broad interpretation of association, relying primarily on the Court's conception of campaign finance law, has not been made by scholars previously. Further, while Janai Nelson applies a proposed constitutional challenge to felony disenfranchisement laws that relies on the freedom of speech,[146] this is the first article to apply an association challenge to such laws.

### *A. The Importance of Political Association*

The Court first recognized a constitutional right to associate in *NAACP v. Alabama* when it struck down a law that would have forced the Alabama chapter of the NAACP to turn over a list of its membership.[147] In its decision, the Court reasoned that "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."[148] In this first decision, the Court stated that the type of association (be it political, religious, or cultural) was immaterial to the right at hand.[149] Since then, however, the Court has

139 U.S. CONST. amend. XIX.

140 U.S. CONST. amend. XXVI, § 1.

141 Though this article does not purport to argue that the amendment grants those under eighteen the right to vote. *See id.*

142 Charles, *supra* note 20.

143 *Id.* at 1279.

144 Tokaji, *supra* note 19.

145 *Id.* at 764.

146 Nelson, *supra* note 50.

147 NAACP v. Alabama, 357 U.S. 449 (1958).

148 *Id.* at 460.

149 *Id.*

switched gears, consistently making clear that political association is particularly sacrosanct.

Less than a decade after the Court decided *NAACP v. Alabama*, it affirmed that the exercise of America's "basic freedoms" has been accomplished "through the media of political associations."[150] In *Buckley v. Valeo*, the Court went even further, stating that its decisions showed that the freedom to associate guaranteed in the First Amendment is for the "common advancement of *political* beliefs and ideas."[151] The Court continues to recognize non-political association. In *Boy Scouts of America v. Dale*, the Court held that a nondiscrimination law that required the Boy Scouts to admit homosexual members violated their right to associate (and not associate) with whomever they wanted.[152] However, the doctrine developed primarily in the context of political association, and the Court continually stresses its unique nature.[153]

### *B. The Individual's Right to Vote*

The right to associate is often discussed in the context of large organizations. In *NAACP v. Alabama* the Court based its decision on the right of NAACP members to associate as a group and thereby enhance their ability to advocate for their own points of view.[154] Were the right limited to such forms of group association, there could be little argument

[150] NAACP v. Button, 371 U.S. 415, 431 (1963). The facts and holding of this case are not of significance to this article's argument. The Court stated in part that, while the NAACP was not a traditional political party, it was an important political association and thus its activities and membership warranted protection under the First Amendment. *Id.* Unlike *NAACP v. Alabama* just five years before, the Court in *Button* did seem to single out political association as particularly important under the First Amendment.

[151] Buckley v. Valeo, 424 U.S. 1, 15 (1976) (emphasis added).

[152] Boy Scouts of America v. Dale, 530 U.S. 640, 661 (2000).

[153] *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 208 (1986) ("The fact that the State has the power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote or, as here, the freedom of political association"); Democratic Party of U.S. v. Wis. *ex rel.* La Follette, 450 U.S. 107, 107 (1981) ("The National Party and its adherents enjoy a constitutionally protected right of political association under the First Amendment"); Elrod v. Burns, 427 U.S. 347, 347 (1976) ("Patronage dismissals severely restrict political belief and association, which constitute the core of those activities protected by the First Amendment, and government may not, without seriously inhibiting First Amendment rights, force a public employee to relinquish his right to political association as the price of holding a public job"); Cousins v. Wigoda, 419 U.S. 477, 487 (1975) ("The National Democratic Party and its adherents enjoy a constitutionally protected right of political association"); Kusper v. Pontikes, 414 U.S. 51, 61 (1973) ("We conclude, therefore, that § 7–43(d) of the Illinois Election Code unconstitutionally infringes upon the right of free political association protected by the First and Fourteenth Amendments").

[154] NAACP v. Alabama, 357 U.S. 449, 460 (1958).

that it protects the direct association between a voter and their candidate.[155]

As explained above, political association is different. The Court's cases affirming the rights of independent parties to appear on the ballot demonstrate that a voter's right to associate with their candidate of choice is protected.[156] In its campaign finance jurisprudence, the Court confirms that the scope of the association is not the deciding constitutional factor. In addition to protecting the rights of groups of voters to associate with their candidate, as it previously had, the Court affirmed that the individual has a constitutional right to associate with their candidate of choice through the use of campaign donations.[157]

In *Buckley*, the Court held that a person's ability to donate money to a candidate is protected association.[158] Because it hinged this portion of its seminal decision on the right to associate, it established that the association between two people—one voter and one candidate—implicates the First Amendment. To make this point even clearer, the opinion discusses the contribution limit in terms of its burden on *individual* financial contributions.[159] If a large group were necessary to vindicate an individual's rights to connect with their candidate of choice, then the act of individually contributing money to a single candidate simply would not implicate the freedom of association. This is true even though the plaintiffs in *Buckley* were candidates and political parties, rather than contributors; the Court references the rights of individual contributors, and cases after *Buckley* were successfully brought by individual donors.[160] So, it is evident that the right to associate can manifest in a one-on-one connection between the individual and the candidate. The next crucial step is to protect that connection in its most vital form: voting.

*Buckley* states that contribution is association for two reasons. It "serves to affiliate a person with a candidate," and it "enables like-minded

155 That is not to say that there could be no argument that the First Amendment protects the right to vote. *Supra* Part III.

156 *Supra* Part II.B.1.

157 Buckley v. Valeo, 424 U.S. 1, 22 (1976). The Court describes the right in question and states that the act of contributing, inherently an act between a donor and a candidate, is a protected act. While the Court upheld the contribution limits, it made clear that the limits did place a burden on the contributors' associational rights; they merely held that the burden survived the relevant constitutional scrutiny. *Id.* Specifically, the Court held that "under the [Court's] rigorous standard of review," the "contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens…" *Id.* at 29. If individual citizens did not hold the associational right, then it would not have been necessary to subject the law to constitutional review.

158 *Id.* at 24–29.

159 *Id.* at 24–27.

160 *See, e.g.*, McCutcheon v. Fed. Election Comm'n, 572 U.S. 185 (2014).

persons to pool their resources in furtherance of common political goals."[161] Under this two-part definition, voting is association.

First, voting is as clear an affiliation as donating money.[162] Voting is possibly the most fundamental expression of support available in our democracy.[163] When seeking to affiliate with a candidate, what could be stronger than giving them your only vote to put them in office? It is true that the comparison between money and votes is not absolutely perfect; one could argue that, given the secret ballot, voting is not association because it is not public (unlike contributions, which are all publicly reported). But aside from the fact that voters are free to share who they voted for, there is no reason that an association must be public to be constitutionally cognizable. Far from it, the NAACP's associational rights guaranteed their right *not* to publicize their membership.[164]

Second, at least as much as contributions, voting allows people to pool their resources—namely, their collective votes—to put people in office, thereby furthering their common goals.[165] While money is undoubtedly necessary to win elections, nothing is more necessary than getting more votes than your opponents. Unlike donations, it is available regardless of income and influence, and serves as a great equalizer. Every person's vote weighs the same.[166] As a vital form of affiliating with a candidate and expressing that affiliation, the vote should fall squarely under the same constitutional protection as contributions.

To say otherwise would be incongruous in the extreme. To illustrate this, it may be useful to consider the following example. Under the current regime, a felon has a constitutional right, rooted in the importance of political association and meaningful channels of association, to affiliate with a candidate by donating to them.[167] They have this right in part because of their own individual association with the candidate, and in part because they are pooling their money with likeminded individuals to further their candidate's campaign. They do not, however, have a

161 Buckley, 424 U.S. at 22.

162 *Id.* (holding that donations affiliate people with their candidates).

163 Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) ("[V]oting is of the most fundamental significance under our constitutional structure.").

164 NAACP v. Alabama, 357 U.S. 449 (1958).

165 *Id.*

166 There is some contention over whether the electoral college does, in fact violate the ideal of "one person, one vote." Lawrence Lessig, *The Constitution Lets the Electoral College Choose the Winner, They Should Choose Clinton*, WASH. POST (Nov. 24, 2016), https://www.washingtonpost.com/opinions/the-constitution-lets-the-electoral-college-choose-the-winner-they-should-choose-clinton/2016/11/24/0f431828-b0f7-11e6-8616-52b15787add0_story.html. This is a complicated argument that falls outside the scope of this article. For the purposes of this article, it matters that the Court in *Reynolds v. Sims* held that the Constitution protects the one person, one vote standard. 377 U.S. 533 (1964).

167 *See infra* notes 184–87 and accompanying text.

constitutional right to affiliate with the candidate by voting for them, or pooling their vote with likeminded voters. This disparity ignores the fact that voting has been recognized as the fundamental method of participating in the political process, and that voting is available to all regardless of income. There is no indication in *Buckley*, or any other case dealing with political contributions, that there is something constitutionally unique about donating money, as compared with other forms of affiliation. It is the act of associating, not of spending money, that implicates the Constitution.

While voting should be found to enjoy the same constitutional protection as donating money, the cases would not necessarily look exactly like those concerning their contribution counterparts. The Court in campaign finance cases applied exacting scrutiny, but it is not obvious that this same test would apply to disenfranchisement laws.

### *C. The Anderson-Burdick Test*

If the right to vote is a constitutionally protected form of political association, then any laws that burden this right are subject to review by the Court.[168] Laws that are subject to strict scrutiny, such as laws that discriminate on the basis of race, will almost certainly be struck down. However, the Court routinely applies lower levels of scrutiny to laws that implicate different constitutional rights. For the right to vote, this article argues that there is more than one possible level of scrutiny that the Court could apply, but the most likely is the flexible *Anderson-Burdick* standard, which governs election procedures and administration, and calls on the courts to weigh the law's burdens with states' interests.

The Court has not uniformly applied this test across association cases. In *NAACP v. Alabama*, the Court introduced the right to associate and held that burdens on the right would be subject to "closest scrutiny."[169] This standard was picked up in the Court's campaign finance cases and recast as "exacting scrutiny."[170] This is a relatively simple form of scrutiny, similar to strict scrutiny or rational basis in its rote application. To survive exacting scrutiny, the Court must find that the law in question uses the least restrictive means possible to further a compelling government interest.[171] Given the logical similarity between the right to donate and the right to vote, as discussed above, exacting scrutiny seems like a possible candidate for the Court to apply. The Court regularly applies the more flexible *Anderson-Burdick* standard to laws governing election administration, however, making it the more appropriate test. The right is the same, but the manner in which the state can permissibly burden it is different because of the state's constitutional duty to govern election administration, including voting.

168 NAACP, 357 U.S. at 461.

169 *Id.*

170 Buckley v. Valeo, 424 U.S. 1, 64 (1976).

171 McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 197 (2014).

The *Anderson-Burdick* test, described at length above, was developed to deal with states' election procedures.[172] The test gives states flexibility, which is necessary because they serve as the primary authority over election administration. A court applying this test must determine, on a sliding scale, what level of scrutiny is appropriate given the gravity of the burden imposed by the law on constitutional rights.[173] The reason for this is simple: unlike other rights, the right to participate in the electoral process is cabined by the need for states to regulate elections, ensuring that they are fair and equally open to all.[174] Voter qualifications fall under the wide umbrella of election administration, as the Supreme Court has made clear.[175]

Under the *Anderson-Burdick* test, or any other test that the Court applies, it will consider the state's interests in the law and the burdens that it imposes on voters. The difference between the scrutiny levels is how compelling the interests must be. The next Part will walk through a hypothetical application of the *Anderson-Burdick* test to a felony disenfranchisement law. While the mechanics of the tests may differ, the Court will always consider burdens and interests, and thus the following discussion remains relevant no matter which test the Court applies.

## IV. APPLICATION TO FELONY DISENFRANCHISEMENT

Under the *Anderson-Burdick* test, the Court first examines the gravity of the law to determine how strong and tailored the state's justifications must be.[176] Higher burdens demand stronger justifications. In the context of felony disenfranchisement, the burdens are clear: the loss of the right to vote is the loss of the primary form of participation in the electoral process and in the political process more generally. In *Munro v. Socialist*

172 *See* discussion *supra* Part II.B.1.

173 Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358–59 (1997).

174 Burdick v. Takushi, 504 U.S. 428, 433 (1992) (citing Storer v. Brown, 415 U.S. 724, 730 (1974)).

175 *Id.* at 433 ("Each provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.' Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently." (citing Anderson v. Celebrezze, 460 U.S. 780, 788 (1983))). Some may disagree that this is the appropriate standard. Should the Court ever visit this question, they will determine the appropriate level. The crucial argument for this article is that the Court should find that laws burdening the right to vote implicate the First Amendment right to association, and turn to the level of scrutiny.

176 Unlike the high burden imposed by *Hunter v. Underwood*, the Court need not determine that a law has a discriminatory purpose or effect to apply this test.

*Workers Party*, the Court held that this kind of burden on voters is sufficient to warrant constitutional scrutiny.[177] Furthermore, we can look to campaign finance cases to evaluate this burden.[178] The Court considered the burden on the right to associate through donations to be constitutionally significant.[179] This would point to a higher level of scrutiny on the so-called "sliding scale" of *Anderson-Burdick*, and the Court would require that the state present more compelling interests and more narrowly tailored laws, though not necessarily at the same level as strict scrutiny.

In addition to the loss of the actual vote, the loss of this civic right can have negative impacts on the felon's adjustment back into society, and indeed on the entire community.[180] These harms are not strictly associational, however, and so it is not clear whether, or to what extent, the Court would take them into account.

While the Court would almost certainly find a burden on the right to associate, it has stopped short of saying that individuals must, under the Constitution, be allowed to affiliate with candidates in every single manner. In *Buckley*, the Court acknowledged that while the contribution limits burdened the right to associate through contributions, the individual was able to support and affiliate with their candidate in other ways.[181] In other words, while an individual may not be able to vote for their candidate, the Court has deemed it significant that other forms of association remain open. Additionally, in *Timmons v. Twin Cities Area New Party*, the Court upheld a law banning "fusion candidates" (candidates selected as the nominee for more than one political party at the same time).[182] In doing so, it spent some time discussing other ways in which the party and its members could associate with the candidate, pointing out that while the law in question burdened one specific form of association between the party, its members, and the candidate, it did not

[177] Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986) (citing Williams v. Rhodes, 393 U.S. 23, 30 (1968)) ("In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms."). *Munro* predates *Anderson-Burdick*, and so the court was not applying the exact test that this article proposes, but it was engaging in a similar analysis of the burden on constitutional rights, and so remains relevant under the newly-defined test.

[178] While these cases were evaluated under "exacting scrutiny," and so are not on all fours with the *Anderson-Burdick* test, the discussion of the burden and the importance of association can be carried from one area to another; all that changes would be the level of scrutiny that the Court applies.

[179] Buckley v. Valeo, 424 U.S. 1 (1976).

[180] Chung, *supra* note 41, at 4.

[181] Buckley, 424 U.S. at 21.

[182] Timmons v. Twin Cities Area New Party, 521 U.S. 351 (1997).

prevent all forms of association and participation in the electoral process.[183]

One could argue that the same set of facts exists here. While felons are prevented from associating with their candidates through the ballot box, they can canvass, donate, make phone calls, and support their candidate in a myriad of other ways. If that were the case, it would likely suggest a significantly lower level of *Anderson-Burdick* scrutiny, demanding less compelling state interests. However, those manners of association fall short of the symbolic and actual importance of voting, but the Court offered another response centered on feasibility in *McCutcheon v. Federal Election Commission*.

In *McCutcheon*, the Court struck down aggregate contribution limits in the face of a similar argument.[184] The Court acknowledged that while a person could volunteer in lieu of supporting *one* candidate financially, it simply is not a viable alternative for "those who wish to support a wide variety of candidates or causes."[185] This argument holds equal or greater weight for voting. If every election gave the chance for voters to support just one candidate, then volunteering for that candidate may be a realistic form of association. But the typical election day presents the opportunity to affiliate with multiple candidates at every level of government. If someone who wishes to affiliate with those candidates with their wallet cannot turn to volunteering to vindicate their right to associate, then someone who wishes to affiliate via the ballot box cannot be expected to either.[186] Campaign contributions are also not a viable alternative. For many voters, it is not even an option to contribute financially to one candidate, much less multiple candidates. Voting is not entirely resource-free; not everyone is able to take time off of work and make it to the polls. Compared to the resources required to donate money, or to spend time and money making phone calls or canvassing houses, however, it is accessible. The Court considers it to be especially burdensome to restrict the

[183] *Id.* at 361.

[184] McCutcheon v. Fed. Election Comm'n, 572 U.S. 185 (2014).

[185] *Id.* at 205.

[186] Consider the 2016 general election ballot in Broward County, Florida, a state where felons were barred from voting. There was a total of thirteen political offices on the ballot, ranging from President to South Broward Drainage District, Zone 6. Broward County Supervisor of Elections (@BrowardVotes), TWITTER (Sept. 22, 2016, 11:34 AM), https://twitter.com/browardvotes/status/779026046918197248. Given that the Court digs into the realistic possibility of associating with candidates through other channels, it is easy to conclude that a person cannot meaningfully vindicate their right to associate with all thirteen of their preferred candidates through other channels.

associational rights of those with limited options, such as felons reintegrating back into society.[187]

We turn, then, to the state's justifications for their disenfranchisement laws. Hypothesizing on the state's justifications is not as simple as discussing the burdens. Because the Court held in *Richardson* that the plaintiff felons did not have a Fourteenth Amendment claim to make, they did not move on to consider the state's interests or the law's tailoring.[188] The state did not have to articulate its justifications for disenfranchising felons. In *Hunter v. Underwood*, the State made the rather circular argument that its interests were in "denying the franchise to those convicted of crimes involving moral turpitude."[189] The Court did not dig into the interests any further; upon finding that the law was motivated by discrimination, they struck it down.[190] This is all to say that no state has ever had to make a compelling argument for its justifications and interests in these laws in federal court. There have, however, been a number of theoretical and philosophical justifications put forward, historically, for the disenfranchisement of felons. While the Supreme Court has not dealt with these justifications, a number of lower courts have. These justifications can largely be grouped into three buckets: purity of the ballot box, subversive voting, and the social contract theory.[191]

First, "the manifest purpose [of felon disenfranchisement laws] is to preserve the purity of the ballot box . . . which needs protection against the invasion of corruption . . ."[192] The idea is that anyone convicted of a felony is simply unfit to vote or hold office.[193] The argument is clear: the felon cannot be trusted to make decisions about the political community.[194] In an 1884 case, the Alabama Supreme Court agreed with this opinion and decided that the harms of allowing unfit people to vote and threaten the sanctity of the ballot box justified the potential "hazard" to the "welfare of communities."[195] Other courts have picked up this thread. A California appellate court reasoned that criminals may be morally corrupt, and so more likely to engage in corrupt voting practices.[196] The Fifth Circuit held in 1978 that a felony conviction calls

187 McCutcheon, 572 U.S. at 205 ("The First Amendment burden is especially great for individuals who do not have ready access to alternative avenues for supporting their preferred politicians and policies.").

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

189 Hunter v. Underwood, 471 U.S. 222, 232 (1985). The state made this argument to avoid a finding of discrimination, rather than to justify the burdens imposed by the law. *See id.* at 230.

190 *Id.* at 233.

191 Nelson, *supra* note 50, at 129, 138.

192 Washington v. State, 75 Ala. 582, 585 (1884).

193 *Id.*

194 Nelson, *supra* note 50, at 133.

195 Washington v. State, 75 Ala. 582, 585 (1884).

196 Otsuka v. Hite, 414 P.2d 412, 417 (Cal. 1966), abrogated by Ramirez v. Brown, 507 P.2d 1345 (1973).

into serious question the ability of a person to vote "responsibly."[197] This is not an idea that has faded entirely from the academic world. In 2001, Roger Clegg published a paper asserting that "[c]riminals are, in the aggregate, less likely to be trustworthy, good citizens."[198]

For many people, this idea is anachronistic. How a 21st century court would consider these arguments is not entirely clear. However much weight the court gives the theoretical argument, though, a clear response is that the laws do not target those felons who have been convicted of crimes related to election fraud, or even fraud more generally.[199] If the government was truly worried about the potential for fraudulent or immoral voting, they have chosen a wildly over- and under-inclusive tool to accomplish this goal. Consider, for example, that someone in North Carolina convicted for felony drug possession will be prohibited from voting, while Mark Harris, a North Carolinian politician whose 2018 reelection campaign became embroiled in a scandal over the mis-marking of absentee ballots, will have full access to the ballot box.[200] While the matter of whether Mark Harris should be kept from voting, or whether he is personally guilty of illegal campaign tactics, is outside the scope of this article, this example serves to illustrate the poor tailoring of felony disenfranchisement laws to the goal of ballot box purity.

The next potential justification for disenfranchisement laws is subversive voting—the fear that felons will band together as a voting bloc to wipe out criminal penalties.[201] This is a theoretically compelling interest. The Court is unlikely to accept it at face value, however, without any supporting evidence. States will be hard-pressed to provide such evidence, given the lack of empirical data on this question. While the question of when the Court requires evidence, and how much evidence is necessary, could fill another several pages and falls largely outside the

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

198 Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 172 (2001).

199 *See* Anthony Gray, *Securing Felons' Voting Rights in America*, 16 BERKELEY J. AFR.-AM. L. & POL'Y 3, 26 (2014).

200 Miles Parks, *New Election Called in North Carolina House Race*, NPR (Feb. 21, 2019), https://www.npr.org/2019/02/21/696561080/email-shows-n-c-gop-candidate-sought-out-operative-accused-of-illegal-ballot-sch. Notably, this is not true in every state. In Missouri, felons who have completed their sentence and parole have their right to vote automatically restored *unless* they were convicted of an election offense. *Vote: Frequently Asked Questions*, MO. SEC'Y OF STATE, https://www.sos.mo.gov/elections/goVoteMissouri/votingrights#3_2 (last visited Nov. 23, 2019). This is particularly notable because the mayor of a Missouri town was convicted of submitting fraudulent absentee voter applications. It seems likely, given the Missouri law, that he will be permanently banned from voting. Jim Salter, *Mayor of St. Louis suburb charged in election fraud case*, ABC NEWS (Nov. 21, 2019), https://abcnews.go.com/Politics/wireStory/mayor-st-louis-suburb-charged-felony-voter-fraud-67205824.

201 Ewald, *supra* note 24, at 1053.

scope of this article, it is worth briefly addressing. It is true that the Court sometimes accepts arguments unsupported by evidence,[202] especially where there is an immediate danger posed to the electoral system.[203] The Court has made clear, however, that restrictions imposed without evidence must be "reasonable" and refrain from "significantly imping[ing] on constitutionally protected rights."[204] Where a law has significantly impinged on a constitutional right, courts generally require more evidence.[205] Further, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."[206] Suffice it to say, the Court "has never accepted mere conjecture as adequate to carry a First Amendment burden"[207] and here, where the burden is so high, a speculative interest with no evidence whatsoever will likely have a hard time withstanding the judicial balancing test.

Finally, some scholars have posited that the social contract theory justifies the exclusion of felons from the ballot box.[208] Essentially, the argument is that criminals have forfeited their political rights because their violation of the law violated their social contract.[209] This is a highly philosophical argument, and while it has historically been given as a scholarly justification for felony disenfranchisement, the Court is unlikely to consider a justification with such little grounding in legal precedent. The Court has, however, discussed a similar idea that could shed light on how it would decide in a felony disenfranchisement case. In *Kramer v. Union Free School District No. 5*, the Court rejected an argument that limited the franchise to those "primarily interested" community members (in Hobbesian terms, members of the polis).[210] While the opinion left open the possibility that such a justification could stand in a future case, it reasoned that the voters being excluded by the law in question were not actually substantially less interested than the voters that were not

202 Munro v. Socialist Workers Party, 479 U.S. 189, 195 (1986) (accepting that the state's interest in preventing voter confusion is acceptable even without evidence proving actual confusion, and discussing a number of times that the Court has upheld a state's justifications in the absence of evidence).

203 *Id.* ("Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively…").

204 *Id.* at 196.

205 *See* Veasey v. Abbott, 830 F.3d 216, 263 (5th Cir. 2016) (requiring evidence to support the legislature's assertions that, absent photo identification, noncitizens and undocumented immigrants would vote).

206 Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 378 (2000).

207 *Id.* at 379.

208 *See* Nelson, *supra* note 50, at 138–41.

209 For more on this philosophical argument, *see* Ewald, *supra* note 24, at 1073.

210 Kramer v. Union Free Sch. Dist. No. 5, 395 U.S. 621, 632–33 (1969).

excluded.[211] This boils down to a tailoring problem: the law in question cut out relevant members of the political community. The same argument certainly would hold for a disenfranchisement law. Maybe some felons who have committed the most grievous crimes, or crimes related to elections, have sacrificed their right to participate in the proverbial polis, but the wide reach of modern felony disenfranchisement laws cuts deeply into segments of the population that remain primarily interested in political outcomes.

Thus, the exact justifications that a state may offer to support their felony disenfranchisement laws are not obvious, because no state has ever had to clearly articulate them. But this article attempts to liken historical and theoretical justifications for the laws to modern legal justifications, and show how they are likely to fail even under the lower *Anderson-Burdick* level of scrutiny. What few justifications have been given are not grounded in empirical evidence and are wildly over- and under-inclusive. The flip side of this argument is clear: there could be a law that does appropriately advance the state's justifications, perhaps a law that singles out election-related crimes, or one that applies only to those actually serving out their sentence in prison.[212] As it currently stands, however, the scope of many states' disenfranchisement laws are likely too wide to withstand constitutional scrutiny because the interests in maintaining the law simply do not justify the severe burdens on individuals.

## CONCLUSION

So much of our Constitution and so many of our Supreme Court's decisions assert that the right to vote is of the utmost constitutional importance. Yet, the practice of disenfranchising felons, sometimes for the rest of their lives, persists into the 21st century. This practice keeps hundreds of thousands of people from voting and disproportionately affects African American communities. This article is far from the first to attempt to tackle the problem of felony disenfranchisement, explain its historical roots and the modern effects of the laws, and find a legal challenge in the First Amendment. It is the first, however, to argue that the right in question applies with equal force to all individuals who want to associate with their candidate of choice.

While advocates fight these laws using the Voting Rights Act and state legislative processes, this article outlines a new method of attack that would call almost every felony disenfranchisement law in the country into question. It would force state legislatures to craft their laws with much greater care, targeting crimes that interfere with elections and justifying

[211] *Id.* at 632.

[212] Given the lack of any precedent, attempting to predict what laws could be appropriately tailored is fruitless. For the purposes of this article, what matters is that while current felony disenfranchisement laws are likely unconstitutional under the proposed test, it stands to reason that a more appropriately tailored law could be held constitutional.

their laws with evidence that show the law is neither under- nor over-inclusive. The impact that this change could have on individual felons and their communities could be extremely significant. The constitutionality of felony disenfranchisement laws is not set in stone, and with determination, lawyers and advocates can make headway in addressing outdated laws that continue to disproportionately keep African Americans from the polls and unconstitutionally bar felons from exercising their rights.

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