# EVALUATING FELONY DISENFRANCHISEMENT RATIONALES UNDER THE RATIONAL BASIS TEST

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## INTRODUCTION

As of 2022, 48 states banned at least some individuals with felony convictions from voting, amounting to roughly 4.6 million disenfranchised Americans, or 2% of the voting-age population.[1] Three quarters of all disenfranchised people have either finished their sentence or are on probation or parole.[2] Disenfranchisement laws disproportionately affect black individuals[3] and states historically targeted these laws at disenfranchising black voters.[4] In three states, more than 8% of the adult population

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[1] CHRISTOPHER UGGEN ET AL., LOCKED OUT 2022: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 2 (2022).

[2] *Id.*

[3] Daniel S. Goldman, Note, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN L. REV. 611, 633-34 (2004).

[4] *See generally* Hunter v. Underwood, 471 U.S. 222 (1985). Felony disenfranchisement became explicitly racialized after the Civil War and the end of slavery. State governments used concepts of infamy and moral turpitude and singled out certain crimes to disenfranchise African Americans disproportionately. During Reconstruction, almost every southern state disenfranchised those convicted of petty theft or larceny, thought to be crimes more frequently committed by Black people. PIPPA HOLLOWAY, LIVING IN INFAMY: FELON DISFRANCHISEMENT AND THE HISTORY OF AMERICAN CITIZENSHIP 55 (Oxford University Press, 2013) [hereinafter HOLLOWAY, LIVING IN INFAMY]. For example, South Carolina disenfranchised people convicted of adultery, wife-beating, thievery, arson, housebreaking, attempted rape, bigamy, breach of trust with fraudulent intent, fornication, sodomy, larceny, receiving stolen goods, miscegenation, assault with intent to ravish—crimes presumed to be committed more by Black people—and any election law violations, all while excluding murder and fighting, which white people committed frequently. KATHERINE IRENE PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA, SECOND EDITION HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES (SUNY Press, 2013). In Mississippi, the state constitution amended in 1890 explicitly disenfranchised individuals convicted of low-level offenses, while not applying disenfranchisement to rape and murder. JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2006). In the late 1800s, most states in the South revised their laws to disenfranchise all incarcerated individuals with felony convictions. Yet some states continued to permanently disenfranchise "furtive" crimes thought to be committed more by African Americans, but not "robust" crimes that whites committed, as infamy (now more often imposed upon Black people) continued meriting disenfranchisement. HOLLOWAY, LIVING IN INFAMY, *supra*, at 101. By the time the Civil War ended, Black people were incarcerated at a higher rate than whites across most states and especially in the South, a disparity that worsened over subsequent decades. ERIN KELLEY, RACISM & FELONY DISENFRANCHISEMENT: AN INTERTWINED HISTORY (Brennan Center for Justice, 2017). In 1850, 99% of Alabama's prison population was

is disenfranchised due to felony conviction.[5] 5.3% of African Americans of voting age are disenfranchised, a rate 3.5 times higher than non-African Americans.[6] In eight states — each state makes its own laws about felony disenfranchisement and which crimes count as felonies — over 10% of African American adults are disenfranchised.[7] States employ varied

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white. By 1880, 85% of imprisoned people were Black. Black History in Two Minutes or so, *Convict Leasing | Black History in Two Minutes or So*, YOUTUBE, https://www.youtube.com/watch?v=fATymSYfSWA. In Mississippi, the prison population quadrupled between 1874 and 1877, and in Georgia, it tripled between 1875 and 1877. Christopher R. Adamson, *Punishment after Slavery: Southern State Penal Systems, 1865-1890*, 30 SOCIAL PROBLEMS 555, 562 (1983). By 1890, 95% of the South's prison population was Black. RUTH DELANEY ET AL., AMERICAN HISTORY, RACE, AND PRISON (Vera Institute of Justice), https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison. After the passage of the Fifteenth Amendment five years after the Thirteenth and Fourteenth amendments, lawmakers implemented criminal disenfranchisement provisions to diminish African American voting power. Disenfranchisement was explicitly motivated by race in this era, and its supporters often used racial differences in criminality as evidence that Black people were underserving of citizenship rights. MANZA & UGGEN, *supra*. Because the criminal punishment system was designed to incarcerate and exploit Black people at extremely disproportionate rates, this argument was highly circular and hypocritical. Despite the Fourteenth Amendment's guarantee of formal equal citizenship, "free blacks" were extremely vulnerable to extralegal racial terror, and notions of civil death were used to disenfranchise them, as Black people essentially had the legal status of "outlaws." PETTUS, *supra*, at 34. Early moral turpitude and exclusionary felony disenfranchisement laws explicitly used "infamy," "black codes," and other explicitly racialized crimes and language to disenfranchise Black people. In the 19th century, like other states in the South, Florida enacted Black Code laws with clear racial undertones, as they carried harsh penalties for very minor crimes such as petty larceny and vagrancy. Lawmakers did not bother to conceal their racial motivations. *See generally* Janai Nelson, *Felon Disenfranchisement Is Anti-Democratic*, N.Y. TIMES (Apr. 22, 2016) https://www.nytimes.com/roomfordebate/2016/04/22/should-felons-ever-be-allowed-to-vote/felon-disenfranchisement-is-anti-democratic; MANZA & UGGEN, *supra*; Ratliff v. Beale, 74 Miss. 247, 266-67 (1896); Andrew Shapiro, *Challenging Criminal Disenfranchisement under the Voting Rights Act* 103 YALE L.J. 541 (1993); Alec Ewald, *'Civil Death': The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1066 (2002); ANDREW DILTS, PUNISHMENT AND INCLUSION: RACE, MEMBERSHIP, AND THE LIMITS OF AMERICAN LIBERALISM 142 (Fordham University Press, 2014); HOLLOWAY, LIVING IN INFAMY, *supra*, at 86; Pippa Holloway *'A Chicken-Stealer Shall Lose His Vote': Disfranchisement for Larceny in the South, 1874-1890*, 75 Journal of Southern History 931 (2009).

[5] UGGEN ET AL., *supra* note 1, at 2. These states are Alabama, Mississippi, and Tennessee.

[6] *Id.*

[7] *Id.* These states are Alabama, Arizona, Florida, Kentucky, Mississippi, South Dakota, Tennessee, and Virginia.

disenfranchisement provisions: some allow those in prison to vote,[8] others disenfranchise individuals only while they are in prison (the largest group of states),[9] a few disenfranchise people while they are in prison and on parole and probation, and other states disenfranchise people convicted of felonies indefinitely — even after one has completed all terms of their sentence.

The U.S. Supreme Court declared that Section Two of the Fourteenth Amendment affirmatively sanctions felony disenfranchisement[10] because it explicitly provides that disenfranchising for crime does not affect the apportionment of representatives.[11] However, in finding no constitutional violation, the Court "eschewed traditional equal protection analysis" by neither characterizing the right at issue — the vote — nor identifying "any particular level of scrutiny" it applied to the law.[12] However, that case, *Richardson v. Ramirez*, does not say that felony disenfranchisement provisions "can never violate the Constitution … to read [it] for the proposition that the disenfranchisement of felons is invariably constitutional is to misread *Ramirez*."[13] *Richardson* "did not in fact mandate that courts reject all equal protection challenges … Rather, *Richardson* should be read to require courts to ask whether the challenged voting statute is rationally related to a legitimate governmental purpose and to reject the claim only if they can answer in the affirmative."[14] Multiple courts noted that equal protection claims are still applicable to felony disenfranchisement, even after *Richardson*, which still allows for lower-level scrutiny.[15] Disenfranchisement scholar Alec Ewald agrees that in *Ramirez,* the Court's textual decision obscures what would normally be an inquiry into Constitutional principles;[16] Section Two's seeming allowance of felony disenfranchisement does not foreclose constitutional challenge because equal protection requires that all laws pass rational basis scrutiny at minimum. The Equal

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[8] *Id.* at 3. These states are Maine and Vermont.

[9] *Id.*

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

[11] U.S. CONST. amend. XIV, § 2 (providing for a reduction in state representation if voting rights are denied to adult male citizens, "except for participation in rebellion, or other crime").

[12] Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85, 95 (2005).

[13] *Id.* at 95.

[14] Elena Saxonhouse, *Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1623 (2004) (citing Owen, 711 F.2d at 27, McLaughlin, 947 F. Supp. at 974).

[15] *Id.* at 1625.

[16] Ewald, *supra* note 4, at 1066 (*Richardson* "frustrates attempts to understand the ideological principles behind American criminal disenfranchisement, because the Court made a quintessentially 'textual' decision in eschewing serious attention to political theory, broad Constitutional principles, or social norms.")

Protection Clause[17] requires "only that regulations (as a matter of due process) and classifications (as a matter of equal protection) be rationally related to a legitimate governmental interest … [this test is] reserved for those equal protection and substantive due process cases least likely to implicate important issues of equal protection and substantive due process."[18] The Court applies this standard — at minimum — to all government regulations.

Rational basis review applies to felony disenfranchisement provisions because the laws classify along non-suspect lines[19] — by felony convictions — and they regulate the right to vote, which is not formally classified as a fundamental constitutional right. Although courts often consider the right to vote to be fundamental,[20] they do not consistently treat it as such, declining to apply strict scrutiny to every restriction on the right to vote.[21] Because the Court does not consider people convicted of felonies to be members of a discrete and insular minority, the Court also declined to apply strict scrutiny to restrictions treating individuals with felony convictions differently than other citizens.[22] Rather, courts repeatedly applied the rational basis test (or no constitutional test at all) when faced with

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[17] U.S. CONST. amend. XIV, § 1. ("no State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); Raphael Holoszyc-Pimentel, *Reconciling Rational Basis Review: When Does Rational Basis "Bite"?,* 90 N.Y.U. L. REV. 2070, 2074 (2015) (quoting City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam) ("A statutory classification comports with the Equal Protection Clause if it is 'rationally related to a legitimate state interest.'").

[18] Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1629 (2016).

[19] Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class,* 94 CAL. L. REV. 1191, 1191 (2006) ("Equal protection doctrine fails to protect ex-offenders largely because they are not considered a suspect class for equal protection purposes and therefore do not receive heightened judicial attention when subject to government discrimination.").

[20] *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); Reynolds v. Sims, 377 U.S. 533, 562 (1964); Mobile v. Bolden, 446 U.S. 55, 141 (1980); Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

[21] Demian A. Ordway*, Disenfranchisement and the Constitution: Finding a Standard That Works, 82* N.Y.U. L. REV. 1174, 1175 (2007) ("Considering the history of the 'right to vote' in American jurisprudence, today's confusion is hardly surprising. While the right to vote appears central to our political system, the Supreme Court has never held that the Constitution guarantees this freedom per se. Instead, in Harper v. Virginia Board of Elections, the Court held only that the Equal Protection Clause requires courts to strictly scrutinize laws that grant the right to vote to some citizens but not to others.").

[22] These issues have been explored by many scholars who have made arguments for the Court to change course.

challenges to these laws,[23] consistently upholding felony disenfranchisement provisions with little inquiry into their merits.[24]

Because all laws are subject to the rational basis test,[25] a law's constitutionality may change over time.[26] As law professor Laurence Tribe puts

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[23] In Owens v. Barnes, the court cited Williams v. Taylor, 677 F.2d 510, 514 (5th Cir. 1982) and Shepherd v. Trevino, 575 F.2d 1110, 1114-15 (5th Cir. 1978), espousing that the "standard of equal protection scrutiny to be applied when the state makes classifications relating to disenfranchisement of felons is the traditional rational basis standard."

[24] *See* Owens v. Barnes, 711 F.2d 25 (3d Cir. 1983) (where the court held that that state may rationally decide to disenfranchise those incarcerated for felonies, and that the right to vote is not fundamental) and Shepherd v. Trevino, 575 F.2d 1110 (5th Cir. 1979) (where the court upheld that state felony disenfranchisement law as rationally related to the state's interest in limiting the franchise to responsible voters). Unless there is explicit racial discrimination, as in *Hunter v. Underwood*, courts will not apply strict scrutiny to felony disenfranchisement provisions. *See* Geneva Brown, *White Man's Justice, Black Man's Grief: Voting Disenfranchisement and the Failure of the Social Contract*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 287 (2008). "Taken on their own, the Court's rulings on disenfranchisement, voting, and citizenship do not raise significant questions. But taken together, the jurisprudence seems incoherent: The Court's rulings, as a whole, present a flawed syllogism. Roughly speaking, voting is equivalent to citizenship; citizenship, in turn, is inalienable; but, for some reason, voting is not inalienable. A equals B equals C, but C does not equal A. This is the paradox of disenfranchisement." Jesse Furman, *Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice*, 106 YALE L.J. 1197 (1997).

[25] Laws that do not "infringe [upon a] fundamental constitutional right[]…[therefore, it] must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993); *see also* Williamson v. Lee Optical, 348 U.S. 483, 487 ("[T]he legislature *might have concluded* that one was needed often enough to require one in every case. Or the legislature *may have concluded* that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert. … If the advertisement of lenses is to be abolished or controlled, the advertising of frames must come under the same restraints; *or so the legislature might think.*" (emphasis added)). *See also* Golan v. Holder, 132 S. Ct. 873, 889 (2012) ("Congress rationally could have concluded that adherence to Berne 'promotes the diffusion of knowledge.'" (citation omitted)).

[26] United States v. Carolene Products Co., 304 U.S. 144, 153 ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."). *See also* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 669 (1966) (observing that "[in determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to

it, "the reach of the equal protection clause ... is not bound to the political theories of a particular era but draws much of its substance from changing social norms and evolving conceptions of equality."[27] Although the Court has previously upheld felony disenfranchisement laws, a renewed challenge to them would allow courts to reconsider their constitutionality under the rational basis test more carefully than in previous cases, where courts often hand-waved at the rational basis for the law without reasoning through why the law had both a legitimate state interest and rationally related means.

This Article examines rationales for felony disenfranchisement through the lens of the rational basis test, evaluating the constitutional strength of arguments supporting disenfranchisement provisions. First, it traces the Court's rational basis and rational basis "with a bite" doctrine. Then it evaluates the strength of reasons for why courts might examine the constitutionality of felony disenfranchisement laws using the more "searching" form of the rational basis test, rather than the minimal form. Then, it translates arguments advocating colloquially for felony disenfranchisement into their rational-basis-state-interest formulations. Using the Court's own rational basis language and tests, it evaluates the strength of these arguments for disenfranchisement under the Court's existing doctrine. Though these arguments are unlikely to be litigated successfully any time soon, it is always the right time to shine light on a constitutional problem, and that is the aim of this Article. Given the current Court, we should be focusing on these constitutional issues (in addition to any legislative efforts) related to felony disenfranchisement because the current Court is unlikely to provide voting fundamental right status, nor is it likely to consider people with felony convictions a discrete and insular minority. Therefore, if challenged, the current Court will almost certainly not treat felony disenfranchisement provisions with scrutiny more severe than some form of the rational basis test.

## I. THE RATIONAL BASIS TEST

The rational basis test is the lowest form of constitutional inspection, and all laws are subject to it at minimum;[28] it applies when no fundamental rights or suspect classifications are at issue. Because voting is not formally considered a fundamental right, nor are people convicted of felonies considered members of a suspect class, the rational basis test typically applies to felony disenfranchisement.

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be the limits of fundamental rights"); Shelby County v. Holder 133 S. Ct. 2612, 2623-31 (2013).

[27] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1094 (2d ed. 1988).

[28] FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).

Scholars traditionally categorize the Supreme Court's rational basis review as falling into two forms of a test.[29] The most basic form involves the court first deciding whether the legislature creating the law could have had a legitimate interest in imposing the law. Under this version of the test, plaintiffs need to prove there is no legitimate reason to impose the law — in other words, that the law serves no legitimate purpose. The more rigorous (or "searching") form of the rational basis test (rational basis "with a bite" or rational basis "plus") requires the government to demonstrate the law's rational basis instead of the court simply hypothesizing that legislators might have had a legitimate state interest.[30] Like intermediate and strict scrutiny, a court using the rigorous form presumes unconstitutionality (unlike in the regular, more lenient form). Rational basis with bite involves "the Justices gaug[ing] the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing."[31] After this initial step of who supplies the reasons, which differs depending on what version of the test a court uses, the inquiry of whether the law rationally furthers that legitimate state interest is the same across the two forms. The Court used this heightened form of the rational basis test in cases concerning sexual orientation,[32] mental disabilities,[33] school funding for undocumented immigrant children,[34] food stamps,[35] and taxes.[36] But it never admitted to using two different rational basis standards, nor has it articulated a rationale for what triggers applying rational basis with bite.[37]

Justice Thurgood Marshall, as well as other scholars, argued that the distinction between minimum rational basis review and the more

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[29] Holoszyc-Pimentel, *supra* note 17, at 2070-72.; Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1318-19 (2018).

[30] Holoszyc-Pimentel, *supra* note 17, at 2070-72; Eyer, *supra* note 29*,* at 1318-19; Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 760 (2011) (noting that stricter applications of the rational basis test "depart from the usual deference associated with rational basis review. For this reason, commentators have correctly discerned a new rational basis with bite standard in such cases," namely, rational basis with bite).

[31] Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972).

[32] *See* Romer v. Evans, 517 U.S. 620 (1996); *see also* U.S. v. Windsor, 570 U.S. 744, 768 (2013).

[33] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985).

[34] *See* Plyler v. Doe, 457 U.S. 202 (1982).

[35] *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

[36] *See* Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County, W. Va., 488 U.S. 336 (1989).

[37] See Miranda Oshige McGowan, *Lifting the Veil on Rigorous Rational Basis Scrutiny*, 96 MARQ. L. REV. 377 (2012).

searching form may be too simple.[38] Justice Marshall advocated for a sliding scale of review, rather than siloed tiers of scrutiny. He noted that sometimes cases defy "easy characterization" as to whether the Court should apply the rational basis or strict scrutiny test.

> [E]qual protection analysis…is not appreciably advanced by the a priori definition of a 'right,' fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification…'we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.'[39]

Scholars such as Katie Eyer similarly argued that the Court's application of rational basis review is more of a sliding scale than the typical teaching of the doctrine portrays it to be. She explained that "meaningful applications of rational basis review have been construed as fundamentally distinct from 'true' or 'traditional' rational basis review; a deviation from the canonical account, rather than a component of it."[40] Professor Eyer argued that by "positioning successful minimum-tier cases as outside of the core canonical accounts of rational basis review — as 'animus' or 'rational basis with bite' cases, rather than simply 'rational basis' cases"[41] the traditional rational basis cannon purports that its doctrine is more deferential than it is. For example, there are many cases in which the Court applied the heightened form of the rational basis test to strike down economic regulations, which are usually the least suspect.[42] This dichotomous narrative of the rational basis test is often advanced by those who want laws to pass the test or want the court to reserve the harshest rational basis doctrine to apply only in very extreme and rare cases. Those articulating this view may do so "by oversimplifying and thus narrowly cabining any

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[38] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98, 109 (1973) (Marshall, J., dissenting); Richardson v. Belcher, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting).

[39] Dandridge v. Williams, 397 U.S. 471, 520–21 (1970) (Marshall, J., dissenting) (citations omitted).

[40] Eyer, *supra* note 29, at 1319.

[41] *Id.* at 1364.

[42] *See* Zobel v. Williams, 457 U.S. 55 (1982); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985); Williams v. Vermont, 472 U.S. 14 (1985); Allegheny Pittsburgh Coal v. County Com'n of Webster County, W. Va., 488 U.S. 336 (1989); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

acknowledgment of more meaningful forms of rational basis review."[43] For example, scholars (or justices in the dissent) often describe the Court as "purporting" to apply rational basis review in cases in which the more searching form is used, rather than accepting the rational basis test is not an exactly standardized test applied identically in every case. While this may be true in fact — that courts, scholars, and law professors oversimplify the doctrine — to take the rational basis test seriously is to evaluate felony disenfranchisement through the version of the doctrine commonly taught in law schools and applied by courts, which portrays rational basis with bite as a fundamentally different test than the minimal form. This section will briefly trace the most pertinent rational basis cases.

### *A. Rational Basis Cases*

In the following cases, the Court struck down laws under the rational basis test for three main reasons: the law in question used a political process to disadvantage a minority group over the preference of a state or locality that wanted to protect their rights; the provision entrenched into law an already-existing bias against a group; or the Court was particularly concerned about animus against especially marginalized and vulnerable groups.

#### 1. Political Process Harms: Modifying Rules to Disadvantage a Group

In *Romer v. Evans*, the Court held that a state interest is illegitimate if the government is acting out of animus, and the Court found this animus present because Colorado engaged in what one scholar described as "electoral-procedural discrimination."[44] Colorado's Amendment 2 was a referendum that repealed all local ordinances prohibiting discrimination against LGBTQ+ individuals and prevented the future imposition of these protections. The majority took issue with the fact that Amendment 2 "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect … homosexual persons or gays and lesbians…from the injuries caused by discrimination, and it [forbid] reinstatement of these laws and policies."[45] The Court found this evidenced animus[46] because Colorado was creating a state rule that extinguished local LGBTQ+ protections, singling out homosexuals as the only group who needed "to resort to state political processes to seek the same kinds of

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[43] Eyer, *supra* note 29, at 1321.

[44] Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 169 (2005).

[45] Romer v. Evans, 517 U.S. 620, 624, 627 (1996).

[46] *Id.* at 632 ("Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.").

protections" afforded to other groups. [47] Therefore, the animus the court found came from the state overriding local majorities — who were willing to protect this marginalized group — without a legitimate reason for doing so.[48]

In the latter case *Windsor*, the Court struck down Section 3 of the Defense of Marriage Act (DOMA), which prohibited federal recognition of legal same-sex marriages — a political process harm like in *Romer*, but in this case involved the federal government targeting a minority group that had state protection rather than a state targeting a minority group that had local protection.

> For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status…DOMA seeks to injure the very class New York seeks to protect.…. DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class.[49]

The Court here credited the fact that that social movements were changing the public's understanding of marriage and thus what was once a purely moral judgement about homosexuality is now understood to be animus. Therefore, the Court basically used evolving standards of decency to "dislodge[e] an outdated consensus"[50] because it found that this political process harm evidenced animus undergirding Section 3 of DOMA.

2. Entrenching Bias into Law Against Already-Marginalized Groups

The Court struck down an ordinance requiring a special permit for a group home for mentally disabled residents using the rational basis test in *City of Cleburne v. Cleburne Living Center, Inc.* The Court found animus underlying the government's requirement for extra zoning procedures affecting only a marginalized group of mentally disabled individuals.[51]

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[47] Schragger, *supra* note 44, at 169.

[48] David Barron has also fleshed out this view that motivating the Court was a concern about using the political process to harm a marginalized group. Barron articulated that in *Romer* the Court "enforced public constitutional values by striking down state attempts to control the political discretion of towns and cities." David J. Barron, *Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 493 (1999).

[49] U.S. v. Windsor, 570 U.S. 744, 769-70 (2013).

[50] Heather Gerken, *Windsor's Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587, 610 (2015).

[51] *See* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432 (1985).

> [M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like…requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded.[52]

The Court saw through seemingly legitimate rationales for the special permit and recognized that the city was trying to enact extra barriers against a group commonly discriminated against.

In *Reed v. Reed,*[53] the Court invalidated a provision that preferred men over women in estate administrator appointments using the rational basis test. The purported state interest was to easily resolve issues that would otherwise require conducting hearings; the Court found that "the objective of reducing the workload on probate courts by eliminating one class of contests [was] not without some legitimacy" but that mere sex preferences to accomplish this goal were unconstitutional under equal protection.[54] The Court invalidated the law despite that, at the time, men had, on average, more years of formal education than women did. Thus, despite a legitimate state interest, the Court understood the law to entrench bias into rules that make it harder for women to achieve parity when they are otherwise equally as qualified as men to be estate administrators.[55]

3. Special Concern About Animus Against Vulnerable Minority Groups

In *Moreno*, the Court struck down a federal law excluding households with unrelated members from a food stamp program because discrimination was not a legitimate state interest; the law was based on animus rather than a specific government goal. The government claimed its goal was to reduce fraud, and the law itself cited goals of increasing food consumption and raising nutrition levels. These arguments are plainly legitimate in the abstract, but the Court rejected them, finding that the government's assumptions undergirding the disparate treatment the law imposed were "unsubstantiated" and that the legal history evidenced animus against "hippies" and their participation in the program.[56] Because food stamp fraud and abuse was still possible after the law's exclusions, the "imprecise" classification was "wholly without rational basis" because it was based on a desire to harm an unpopular group.[57] The Court was concerned

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[52] *Id.* at 448, 450.

[53] Reed v. Reed, 404 U.S. 71 (1971).

[54] *Id.* at 76.

[55] *See id.*

[56] U. S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534-35 (1973).

[57] Some scholars think that the Court in *Moreno* applied the heightened form of the rational basis test because it understood privacy in the home to be a

not only about animus against "hippies" undergirding the statutory classification, but additionally had special concern for potentially even more vulnerable people like single mothers, who may be unable to troubleshoot their exclusion from government benefits. It explained that many "unrelated" persons living together "will alter their living arrangements in order to remain eligible for food stamps. However, the AFDC [(Aid to Families with Dependent Children)] mothers who try to raise their standard of living by sharing housing will be affected."[58]

In *Plyler v. Doe*,[59] the Court struck down a law authorizing public school districts to deny undocumented children enrollment. It applied the heightened form of the rational basis test to do so, citing the group's political powerlessness and inability to alter the characteristic that made them subject to the law,[60] the importance of free education (close to a fundamental right),[61] and the complete (rather than partial) denial of free education.[62] In doing so, the Court was especially concerned about this "special" minority group's vulnerability. The Court explained that undocumented people often must work for low wages without the protections and benefits that citizens and lawful residents have. The statute harmed children, the Court noted, who had little to no control of their parents' conduct or their legal status in this country.

> It is thus difficult to conceive of a rational justification for penalizing these children … [the law] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives…. the innocent children who are [the law's] victims…. [presents] special constitutional sensitivity.[63]

By repeatedly emphasizing how the law would impose a lifetime disability on "innocent children," the Court went out of its way to underscore that the provision created a group of "victims."[64] This class of cases in which the Court struck down laws under the rational basis and expressed a special concern about animus against vulnerable minority groups demonstrates that when particularly vulnerable groups are subject to laws that may be motivated by animus against them, the Court applies the heightened form of the rational basis test to protect the group.

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fundamental right. *See* Thomas B. Nachbar, *Rational Basis "Plus"*, 32 CONST. COMMENT. 449 (2017).

[58] *Moreno*, 413 U.S. at 537.

[59] Plyler v. Doe, 457 U.S. 202 (1982).

[60] *Id.* at 219-20.

[61] *Id.* at 221-23.

[62] *Id.* at 226.

[63] *Id.* at 220-24.

[64] *Id.*

More broadly, examining these rational basis cases shows that the Court is most motivated to apply the heightened form of the rational basis test when laws create political process harms by modifying the rules to harm a minority group that a state or locality wants to protect; entrench bias against already-marginalized groups; or when the Court is especially concerned about impacts on vulnerable minority groups. But this theme of protecting against political process harms and entrenched bias in the law, as well as safeguarding especially vulnerable groups, does not seem to be replicated when courts analyze felony disenfranchisement cases under the rational basis test.

### *B. Felony Disenfranchisement Rational Basis Cases*

Federal courts, as well as the Supreme Court, have repeatedly upheld state felony disenfranchisement provisions. Initially, the Supreme Court articulated felony disenfranchisement as a regulation, or a "nonpenal exercise of the power to regulate the franchise" — a way to "designate a reasonable ground of eligibility for voting."[65] In *Richardson v. Ramirez*, the Supreme Court held that § 2 of the Fourteenth Amendment permits states to disenfranchise those convicted of felonies, including those who have served all of their sentence and parole, because it explicitly provides that disenfranchising people convicted of felonies does not affect the apportionment of representatives.[66] The Court took this as an affirmative sanction on the practice and declined to apply even the rational basis test, although Justices Marshall and Brennan dissented, urging the application of strict scrutiny.[67] Following *Richardson*, courts generally upheld felony disenfranchisement provisions except for when they are enacted with clear discriminatory intent.[68] Most often, the courts do not engage in a thorough and full rational basis analysis and simply hand-wave that the provision must pass the test. The following cases illustrate how courts applying the rational basis test often assume that a state interest is legitimate without explaining why that state interest is legitimate or how the law rationally furthers that state goal.

In *Owens v. Barnes*, the plaintiff challenged the state's practice of denying people who were incarcerated for felonies absentee ballots, claiming it violated equal protection. The Third Circuit Court of Appeals held that states can disenfranchise all those convicted of felonies if it wants, and it can "distinguish among them provided that such distinction

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[65] Trop v. Dulles, 356 U.S. 86, 97 (1958).

[66] U.S. CONST. amend. XIV, § 2.

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

[68] In *Hunter v. Underwood*, the Supreme Court found that discriminatory intent to disenfranchise Black voters motivated Alabama's moral turpitude felony disenfranchisement provision disenfranchising for some crimes but not others; a provision that would otherwise be constitutional according to *Richardson v. Ramirez*, 471 U.S. 222 (1985).

is rationally related to a legitimate state interest."[69] Because it applied the minimal form of the rational basis test, the court was "not bound by the state's inexplicable failure to provide in its brief any rationale for such distinction" and reasoned that the distinction between incarcerated and non-incarcerated persons convicted of felonies was "apparent on its face."[70] Reasoning that incarceration begets the "necessary withdrawal or limitation of many privileges and rights," the court concluded that the state could simply include the deprivation of the right to vote among those losses.[71] It also concluded, though, that the state could "rationally determine that those convicted felons who had served their debt to society and had been released from prison or whose crimes were not serious enough to warrant incarceration in the first instance stand on a different footing from those felons who required incarceration, and should therefore be entitled to participate in the voting process."[72] Notably, the court here — despite explicitly indicating that it was applying the rational basis test — did not identify a state interest served by this felony disenfranchisement provision. Although the court reasoned that a state may consider committing certain crimes or being incarcerated to make those convicted of felonies differently situated, it does not explain what the state's goal in differentiation is.

In *Wesley v. Collins*, the Sixth Circuit considered a challenge to Tennessee's law prohibiting all people convicted of felonies from voting. The court found that the state had the "undisputed authority" to do so and a "legitimate and compelling rationale for enacting the statute," namely the social contract theory.[73] In adopting the social contract theory rationale for felony disenfranchisement, the court found that it was reasonable "for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases."[74] The court, with little rationale or articulation for doing so, simply quoted a non-controlling court's rationale for felony disenfranchisement without any application to the facts of the case.[75] The court, however, failed to explain why the social contract theory was a legitimate state interest.

In *Johnson v. Governor of Florida*,[76] the Eleventh Circuit considered Florida's law that barred all people convicted of felonies from voting or holding office unless their rights were restored. Although the court

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[69] Owens v. Barnes, 711 F.2d 25, 27 (3d Cir. 1983).

[70] *Id.* at 28.

[71] *Id.*

[72] *Id.*

[73] Wesley v. Collins*,* 791 F.2d 1255, 1261 (6th Cir. 1986).

[74] *Id.* at 1262.

[75] *Id.*

[76] 405 F.3d 1214 (11th Cir. 2005).

rejected the plaintiffs' claims that the law was motivated by racial discrimination, the court merely hand-waved at the underlying constitutionality of the law. It reasoned that "Florida has a legitimate reason for denying the vote to felons," based only on the fact that several other courts have "recognized the propriety of excluding felons from the franchise"[77] without even undergoing a rational basis analysis.

The Ninth Circuit in *Harvey v. Brewer* upheld an Arizona law that restored voting rights only to people convicted of felonies who completed their sentences and paid fines and restitution. The court had "little trouble concluding that Arizona ha[d] a rational basis" for the law, reasoning that states can "reasonably conclude that perpetrators of serious crimes should not take part in electing government officials [and] rationally conclude that only those who have satisfied their debts to society through fulfilling the terms of a criminal sentence are entitled to restoration of their voting rights."[78] But the court failed to explain what goal a state's disenfranchisement provision that differentiates between those who have completed their sentences or not actually serves.

*Shepherd v. Trevino* may be the only case in which a court considering a felony disenfranchisement provision actually reasoned through the state interest and ability of the law to rationally serve that purpose.[79] In this case, the Fifth Circuit upheld a Texas mechanism to restore voting rights only to those convicted of felonies in state court and not federal court. The court considered the law rationally related to the state's interest in limiting the franchise to "responsible voters" and noted that "[w]hile such a theoretical state interest might not rise to the level of a compelling state interest, it is forceful enough to constitute a legitimate state interest."[80] The state's goal of ensuring responsible voters, the court reasoned, was served by differentiating between those convicted in state and federal court because the state was much more familiar with the rehabilitation of those convicted in its system rather than in the federal system. Although Texas could have implemented a system to review those convicted of federal felonies, the state system "(1) tried and convicted the defendant, (2) placed him on probation, (3) supervised him during the period of probation, and (4) discharged him from further supervision upon completion of the probationary period."[81] This familiarity could not be obtained by reviewing applicants of those convicted of federal crimes because "the state could not compel the federal courts or federal probation officials to turn over information about federal probationers."[82] Thus, the state system was "a peculiarly advantageous position to gauge the progress and rehabilitation

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[77] *Id.* at 1225.

[78] Harvey v. Brewer, 605 F.3d 1067, 1079 (9th Cir. 2010).

[79] 575 F.2d 1110 (5th Cir. 1978).

[80] *Id.* at 1115.

[81] *Id.*

[82] *Id.*

of a convicted felon", and the court found that Texas's different classifications rationally furthered its interest in "limiting the franchise to responsible voters."[83]

*Shepherd v. Trevino* deviates from the typical way courts consider felony disenfranchisement under the rational basis test, where instead of examining all the possible rationales or articulating how and why the law passes the test, courts often just assume the law withstands rational basis analysis—barely even applying the minimum form. If courts today examined felony disenfranchisement provisions, which form of the rational basis test might they apply?

## II. MIGHT COURTS EVALUATE FELONY DISENFRANCHISEMENT PROVISIONS WITH RATIONAL BASIS "WITH BITE"?

The Court applied the heightened form of the rational basis test when it sees political process harms, bias entrenched into law, or when laws affect especially vulnerable minority groups. In terms of applying the doctrine, courts consider state interests (which must be legitimate) first and then examine the relation of the challenged law to the state interest (which must be rational).

Proper state interests under the rational basis test could be anything that a court considers legitimate, but they cannot be arbitrary or discriminatory, or pretextual.[84] The Court has repeatedly emphasized that animus, or a "bare desire to harm a politically unpopular group" is an illegitimate state interest.[85] Discrimination for the purposes of reinforcing discriminatory attitudes is illegitimate,[86] as is the goal of restricting the exercise of fundamental rights.[87] Even if a state purports to espouse a legitimate state interest under rational basis with bite, a court can look past that interest if it thinks the real driving force supporting the law was animus.[88] The Court has "never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons,"[89] although "the

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[83] *Id.*

[84] Nachbar, *supra* note 18, at 1654. "If the doctrine on what constitutes a rational basis is murky, the doctrine on what constitutes a legitimate end is almost nonexistent. … In the modern era of rational basis review, the Court has neither enumerated a list of legitimate governmental interests nor provided a rule for evaluating whether a purported end is legitimate for the purposes of rationality review." Instead, the Court considers state interest on a case-by-case basis. "In Mugler v. Kansas, the Court identified the ends of the police power as 'the protection of the public morals, the public health, or the public safety;' in Carolene Products, it cited protection of "the public health, morals or welfare.'"

[85] Romer v. Evans*,* 517 U.S. 620, 652 (1996).

[86] Loving v. Virginia*,* 388 U.S. 1 (1967).

[87] Nachbar, *supra* note 18.

[88] Hunter v. Underwood*,* 471 U.S. 222 (1985).

[89] Lawrence v. Texas, 539 U.S. 558, 582 (2003).

Court has similarly never disapproved of the use of morality as a legitimate governmental interest."[90] Although states either need to articulate a legitimate reason for their law or the court must be able to hypothesize a legitimate one, state provisions for their own sake — those serving no state interest at all — are not legitimate.[91]

In terms of a law's relation to a state interest, the rational basis test allows laws that are both underinclusive and overinclusive. Underinclusive laws fail to regulate all those similarly situated, which could heighten concerns that the government is targeting a certain group,[92] but the Court held that under-inclusiveness alone is not enough to strike down a law under the rational basis test because governments "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[93] Similarly, the Court permits over-inclusiveness, which is when laws regulate individuals who are not similarly situated in addition to those that are.[94] Allowing this, the Court held that "rational distinctions may be made with substantially less than mathematical exactitude."[95] While permitting laws that are over- or under-inclusive, the rational basis test does allow the court to find unconstitutional laws because of this "fit" feature if the lack of fit points to animus. Thus, laws that have

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[90] Nachbar, *supra* note 18, at 1672 n.223 ("It came close in United States v. Windsor, 133 S. Ct. 2675, 2693-95 (2013) (rejecting the "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws" as an illegitimate attempt to "demean those persons who are in a lawful same-sex marriage" (first internal quotation marks and citation omitted)), but Justice Kennedy is far from clear on exactly what the nature of the harm is, and his primary focus is on the harm to individuals and their (state-law-solemnized) relationships rather than the moral basis of the Congress's contrary intuition. Similarly, the Lawrence majority disclaimed morality as an adequate justification for a criminal ban on behavior, see *Lawrence*, 539 U.S. at 578, but if identifying the right at issue as fundamental, the Court would have required far more than a legitimate governmental interest to support the ban.").

[91] Merrifield v. Lockyer, 547 F.3d 978, 991 n.15 (9th Cir. 2008) ("[E]conomic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review [because] . . . economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest.").

[92] Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 414 (2016).

[93] Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483, 489 (1955).

[94] Chemerinsky, *supra* note 92.

[95] City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). For example, in *NY Transit Authority v. Beazer*, the court upheld a law excluding all methadone addicts under the legitimate state interest of not hiring drug users, even though methadone is a treatment for heroin addiction and can help keep people from using illicit drugs. So, excluding all users of methadone is overinclusive, but the Court upheld the law because less-inclusive laws would be hard to impose and more costly. 440 U.S. 568 (1979).

means so attenuated from legitimate ends — laws that are very imprecise — are unconstitutional if that attenuation reveals animus.[96] Animus is not necessary to find a law fails rational basis with bite, though; lack of fit is enough for a classification to fail to be rationally related to the purpose it is supposed to serve.

A court aiming to uphold the status quo is likely to apply the minimum form of the rational basis test when evaluating an equal protection challenge to a felony disenfranchisement law that does not classify by any suspect categories. However, courts might also reasonably choose to apply the more searching form of the rational basis test to felony disenfranchisement provisions either because the laws target people with felony convictions, or because they take away the right to vote. Because these are technically distinct rationales for doing so, I separate them below. However, the strongest reason why a court may use rational basis with bite may come from combining the below rationales.[97] Comparing the two rationales to each other, the importance of the vote seems far more likely to encourage a court to apply the heightened form of the rational basis test than special concerns for those convicted of felonies might.

### *A. Because Felony Disenfranchisement Laws Target Individuals with Felony Convictions*

Many scholars argued for applying intermediate or strict scrutiny to laws that classify by felony status because those convicted of felonies are politically marginalized (even more so if they are incarcerated), historically oppressed, and once convicted, the status is arguably immutable.[98]

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[96] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 447 (1985)*;* Romer v. Evans, 517 U.S. 620 (1996).

[97] In a study of cases in which the court applied the more searching form of the rational basis test, the author found that factors such as a history of discrimination, political powerlessness, capacity to contribute to society, immutability, burdening a significant right, animus, federalism concerns, discrimination of an unusual character, and inhibiting personal relationships were often present. The two most common ones, and thus most likely to trigger rational basis with bite, are immutability and burdening a significant right, with burdening a significant right being the most common trigger. An immutable characteristic is one that someone tends to be unable to control and those that are very difficult to change. "Burdening a significant right," on the other hand, refers to laws that burden an interest so important it is "quasi-fundamental," such as the right to vote. For example, in *Frontiero*, the court explained that imposing disabilities based on immutable characteristics "'would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" Holoszyc-Pimentel, *supra* note 17, at 2085 (citing *Frontiero v. Richardson,* 411 U.S. 677 (1973) (second internal quotation marks omitted)). But these factors are not required, as section 2 demonstrates.

[98] *See, e.g.*, Geiger, *supra* note 19, at 1191. Many rely on theorists like JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (Harv. Univ. Press, 1980) (arguing that ex-offenders are an immutable class and

This Article does not suggest that courts should or will go that far, although those arguments may be persuasive to some. Instead, this section contends that courts might choose to meet felony disenfranchisement provisions with more meaningful review via rational basis with bite because the laws target people with felony convictions. This comports with the Court's application of the more rigorous form of the rational basis test to protect groups that are particularly vulnerable, lack political power, and face animus "based on beliefs about [the] group's lesser moral worth."[99] This principle derives in part from the Court's famous footnote in *Carolene Products* advising that a "more searching judicial inquiry" is appropriate where there is discrimination or "prejudice against discrete and insular minorities."[100]

Even though laws targeting individuals with felony convictions have not always been analyzed under tests more rigorous than minimum rationality review, the Supreme Court has been adamant that time can change the Court's understanding of what constitutional protection groups are afforded. The Court explained that "the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights."[101] The Court acknowledged that the possibility that time could affect the rationality of a law,[102] and articulated that

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immutability need not be an accident of birth; ex-offenders "should not be held responsible *ad infinitum* for their offenses" because individual responsibility for crimes is assessed through the legal system rather than legislatures and ex-offenders vary tremendously in their individual moral blameworthiness; those convicted of felonies have a history of class-based discrimination; are politically powerless; ex-offenders as a class are "discrete" and "insular"); Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 139 (2011) (("[E]ven if courts agreed on which factors to consider and the meaning of each factor, they do not emphasize each factor uniformly. For example, it is unclear what factors or elements are necessary to a finding of suspectness, what are sufficient, or whether all elements must be satisfied."); *id.* at 139 n.23 ("For example, the Supreme Court has expressed the factors in the disjunctive, suggesting that meeting *any of them* is sufficient to find a class is suspect.") (citing Supreme Court cases using "or" in between the factors of political powerlessness, history of unequal treatment, and political powerlessness; citing relevancy to the legislation; if the group's distinguishing characteristics bear relation to their ability to perform and function in society).

[99] Miranda Oshige McGowan, *Lifting the Veil on Rigorous Rational Basis Scrutiny*, 96 MARQ. L. REV. 377, 387-88 (2012).

[100] U.S. v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938).

[101] *Harper*, 383 U.S. at 669.

[102] *Carolene Prod. Co.*, 304 U.S. at 153 ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.").

a statute's rationality could change depending if time and circumstances changed.[103]

Many older cases using rationality review to uphold felony disenfranchisement were based on premises courts could reject without question today. For example, in 1959 the Court held that states can impose voter qualifications related to criminal history.[104] However, in that case, it also upheld literacy tests, which Congress rejected in 1965.[105] Since then, courts and society both changed how they conceptualize and treat people convicted of felonies. If courts today heard equal protection challenges to felony disenfranchisement provisions, they may very well increase judicial scrutiny to these laws so that rational basis analysis reflects the evolving standards of decency reflected by modern American society and law.

This rationale comports with the Court's second and third motivation for applying the heightened form of the rational basis test from section two: how vulnerable people convicted of felonies are as a group. They are subject to animus and are particularly vulnerable because they are politically unpopular and already have their rights and liberties restricted. A court may see the denial of people convicted of felonies' voting rights as furthering their politically marginalized and vulnerable status insofar as it comes to the protection of their rights. However, courts may be hesitant to extend to those convicted of felonies the same sympathy, for example, the Court extended to undocumented children (who it called victims) in *Plyler* or single mothers in *Moreno.*[106] After all, felony status is not some accident of birth like being an undocumented child can be, and people disenfranchised due to convictions are grown adults, not children. So, while a court should consider marginalization of people convicted of felonies in its decision whether to apply rational basis with bite to disenfranchisement provisions, it is not a guarantee that a court will apply the heightened form of the test on this basis.

### *B. Because Felony Disenfranchisement Laws Abridge the Right to Vote*

When it comes to determining eligibility to vote, the Court repeatedly held that restrictions and denials of the vote are deserving of more than minimum rational basis review, if not strict scrutiny. Because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[107]

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[103] Shelby County, Ala. v. Holder, 570 U.S. 529, 546 (2013). The Court has not just articulated this theory, but has applied it in cases like *U.S. v. Windsor*, 570 U.S. 744 (2013) and *Romer v. Evans*, 517 U.S. 620 (1996).

[104] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959).

[105] Voting Rights Act of 1965, 52 U.S.C. § 10101 (1965).

[106] Plyler v. Doe, 457 U.S. 202, 223-24 (1982); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 537 (1973).

[107] Reynolds v. Sims, 377 U.S. 533, 562 (1964).

Under the Equal Protection Clause, classifications that "might invade or restrain" fundamental rights and liberties "must be closely scrutinized and carefully confined."[108] The Court's theory of protections for the right to vote is one that evolves over time: "the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality."[109]

The Court explicitly called for strict scrutiny in cases where the vote is denied: "if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are *necessary* to promote a *compelling state interest*."[110] When state statutes deny the right to vote, the usual deference and "general presumption of constitutionality" courts give to legislators does not apply; "the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable" because the presumption of constitutionality is "based on an assumption that the institutions of state government are structured so as to represent fairly all the people."[111] In vote denial or restriction cases, that premise is missing. When legislation restricts the right to vote, the Court itself said those laws should be "subjected to more exacting judicial scrutiny."[112]

Additionally, the Court created a doctrine that provides for more scrutinizing analysis to restrictions on the right to vote, which supports the idea that a court may apply more meaningful scrutiny to felony disenfranchisement provisions. Although formally separate from rational basis doctrine, courts applied the *Burdick* balancing test to election regulations and infringements on the right to vote. This balancing test requires a court to weigh the burdens of election regulations against the state's purported benefits, and is most often applied in voter ID and other election administration cases.[113] The doctrine is not clear[114] as to whether the balancing

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[108] *Harper*, 383 U.S. at 670.

[109] *Id.* at 669.

[110] Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969) (emphasis added) (In this case, the Court compared severe restrictions, such as total denial of the franchise, to minor, reasonable, and nondiscriminatory restrictions on the vote, to which courts should apply strict scrutiny).

[111] *Id.* at 627-28 (quoting *Harper*, 383 U.S. at 670 (1966)).

[112] U.S. v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938).

[113] Ordway, *supra* note 21, at 1177 ("As a matter of authority, the fact that Burdick concerned the freedom to cast a write-in ballot-as opposed to the right to cast a vote at all-throws doubt on the claim that the Supreme Court ever intended lower courts to apply the standard to disenfranchisement claims generally.").

[114] Erika Stern, *The Only Thing We Have to Fear Is Fear Itself: The Constitutional Infirmities with Felon Disenfranchisement and Citing Fear as the Rationale for Depriving Felons of Their Right to Vote*, 48 LOY. L.A. L. REV. 703, 722 (2015). Discusses *Burdick v. Takushi*, but only in relation to the free speech issues. 504 U.S. 428 (1992).

test is meant to be a flexible spectrum that balances burdens against the state interest or a framework for deciding whether to apply strict scrutiny or the rational basis test to the law. Nonetheless, the framework may suggest that courts will take seriously infringements and denials on the right to vote.

In *Burdick v. Takushi*,[115] the Court considered Hawaii's prohibition of write-in voting and articulated a flexible standard of weighing the alleged burden on the First and Fourteenth Amendments to associate and have candidates of one's choice on ballot against the state's interest or justification for this burden. The Court considered the extent to which the state's interests require the burdening of the plaintiff's rights and balanced how significant the burden on the plaintiff's rights were against the state's interest in the law. If the burden is high, the Court will more rigorously scrutinize the law and require states to draw the regulation more narrowly to advance a compelling state interest. If the restriction is reasonable, nondiscriminatory, or mildly burdensome, the state interest just needs to be important or reasonable. The Court upheld Hawaii's law as a reasonable regulation in the state's effort to winnow down the field of candidates in an election because the candidate had the opportunity to run in the "open primary," which gave the candidate an opportunity to get on the general ballot.

If a state election law imposes only light or reasonable burdens on a voter's First and Fourteenth Amendment rights, the state's law will be presumptively valid. The *Burdick* balancing test is as follows: when a case challenges a state election law,

> a more flexible standard applies. A court…must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments…against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'[116]

Justice Stevens characterized *Burdick* as a "flexible"[117] balancing test that the Court should apply to voting regulations that do not categorically deny the franchise to a class of citizens based on "invidious" discrimination. The *Burdick* balancing test — a sliding scale of judicial review — is the Court's new workable approach to equal protection voting rights claims and departs from its traditionally rigid "tiers" of equal protection analysis. Depending on whether the challenged regulation imposes a slight or severe burden on voting rights, courts utilizing the *Burdick* approach apply strict scrutiny or rational basis review, or simply balance the

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[115] 504 U.S. 428 (1992).

[116] Burdick v. Takushi, 504 U.S. 428, 434 (1992) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

[117] Crawford v. Marion County, 553 U.S. 181 (2008).

purported state interest with whether the means impose a necessary burden to achieving that goal. "This analysis [is] the accepted judicial approach to voting rights claims under the Fourteenth Amendment."[118] Although the *Burdick* balancing test has mainly been applied to burdens or infringements on one's vote rather than total denials of the right to vote, this line of cases may show that when it comes to burdens on the right to vote, courts sometimes choose to *weigh* burdens and benefits rather than apply the formal rational basis test. This "important doctrinal shift, moving the Court's focus from structural concerns to the severity of the burden imposed on the voter,"[119] may provide current courts considering felony disenfranchisement provisions another reason for applying heightened rational basis review to felony disenfranchisement because it may suggest that outright denials of the vote should receive an even more stringent constitutional analysis.

Felony disenfranchisement is a political process harm because it modifies the rules — who can vote — to disadvantage a group. This seems to be a further harm than simply entrenching bias into a law because those convicted of felonies are unpopular, which is certainly something the Court has shown it is willing to intervene in generally, because the political process harm takes away their ability to participate in lawmaking in the future and defend themselves from other animus-motivated disadvantages. This kind of concern and the sanctity of the right to vote seem most likely to persuade a court to apply rational basis with bite.

## III. EVALUATING ARGUMENTS FOR FELONY DISENFRANCHISEMENT UNDER THE RATIONAL BASIS FRAMEWORK

Often in cases challenging felony disenfranchisement, states and courts articulate no state interest at all served by felony disenfranchisement provisions.[120] However, this section articulates — in their strongest form possible — arguments for felony disenfranchisement and rebuttals to those arguments in the language most easily understood by courts applying the rational basis test. The following justifications for felony

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[118] Thomas G. Varnum, *Let's Not Jump to Conclusions: Approaching Felon Disenfranchisement Challenges Under the Voting Rights Act*, 14 MICH. J. RACE & L. 109, 115 (2008).

[119] Ordway, *supra* note 21, at 1190-92.

[120] The Harvard Law Review Association, Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box*," 102 HARV. L. REV. 1300, 1302 (1989) ("Courts have been hard pressed to define the state interest served by laws disenfranchising persons convicted of crimes. . . Search for modern reasons to sustain old governmental disenfranchisement prerogative has usually ended with a general pronouncement that a state has an interest in preventing persons who have been convicted of serious crimes from participating in the electoral process or a quasi- metaphysical invocation that the interest is preservation of the 'purity of the ballot box.'" Dillenburg v. Kramer, 469 F.2d 1222, 1224 (9th Cir. 1972) (citations omitted)).

disenfranchisement come from court cases on the subject, as well as philosophical and democratic theory, legislative debates, political commentary, and general justifications for punishment. The strength of these rationales for felony disenfranchisement are then analyzed under the Court's existing rational basis doctrine. Some of the justifications for felony disenfranchisement do not seem to pass muster under the rational basis test, but a few justifications are sufficient for courts to uphold the provisions under the rational basis test. The justifications for felony disenfranchisement are ordered from weakest to strongest in this section.

### *A. Voting Behavior*

Perhaps the weakest argument supporting felony disenfranchisement concerns the fact that felony disenfranchisement could change election outcomes in the future[121] and impacts whole communities by lowering political participation, especially of minority voters.[122] An argument about whom someone convicted of a felony might be more likely to vote for,[123] or how that vote impacts whole elections, is not a logically or legally compelling reason for disenfranchisement because the Supreme Court held this is unconstitutional. "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible," as restrictions on the right to vote "because of a fear of the political views of a particular group" are prohibited.[124] Likewise, "differences of opinion" is an illegitimate reason to deprive one of the right to vote, so restrictions aimed at ensuring voters have a certain interest is impermissible.[125] Thus, the voting behavior justification for felony disenfranchisement is an illegitimate state interest under the Court's precedent.

### *B. Historical Practice*

Some supporters of felony disenfranchisement invoke historical arguments, contending that because felony disenfranchisement has origins in

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[121] MANZA & UGGEN, *supra* note 4, at 173, 178-179, 195-196, 201. Manza and Uggen found that "disenfranchised felons would likely have made a decisive difference in a small number of national elections," having a cumulative effect of Democrats controlling the senate during the 1990s. In Florida, there were over 800,000 disenfranchised on election day in 2000, and Manza and Uggen contend that if only 1% of those individuals voted (extremely low turnout), Al Gore would have been President.

[122] ERIN KELLEY, BRENNAN CENTER FOR JUSTICE, RACISM & FELONY DISENFRANCHISEMENT: AN INTERTWINED HISTORY 3 (2017). In states with permanent felony disenfranchisement, "eligible and registered black voters were nearly 12 percent less likely to cast ballots…while white voters' probability of voting decreased by only 1 percent in such states."

[123] Many say that abolishing felony disenfranchisement would favor Democrats. *See generally* MANZA & UGGEN, *supra* note 4.

[124] Carrington v. Rash, 380 U.S. 89, 94 (1965).

[125] Dunn v. Blumstein*,* 405 U.S. 330, 355 (1972).

ancient Greece and Rome and has existed for centuries in America,[126] it is a legitimate penalty today. After all, disenfranchisement and civil death were originally meant to be punishment for crime.[127] However, just because laws had an original purpose does not preclude the fact that their once-thought-of-as-legitimate usage does not survive a rational basis test today.[128] The most rigorous form of this argument formulates "because we've always done it" into consistency over time as the purported state interest. Not many courts have addressed this issue, but a court considering consistency generally would likely consider it a legitimate state interest. For example, a federal district court did recognize consistency across current laws as a legitimate interest and agreed that an Ohio appellate review system was rationally related to the legitimate state interest of "ensuring consistency in the application of the death penalty."[129]

However, there are three reasons that despite consistency potentially being a legitimate state interest, felony disenfranchisement would still fail the rational basis test. The first is that the "means" of felony disenfranchisement do not fit that broad interest of consistency well at all — which can make the provision fail the rational basis test on its own, or it could evidence animus which would also make a law fail the test. Second, in comparison to *Smith v. Mitchell*[130], which aimed to ensure modern-day consistency in the application of a criminal penalty, a state interest of consistency here seems to be lacking some meaning or goal: consistency *in what, exactly, does felony disenfranchisement serve, other than rights deprivation?* Consistency may be too vague to articulate an actual state interest. Third, consistency and uniformity with other laws (federal, state, local) is different than consistency with old or previous laws (*Smith v.*

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[126] Angela Behrens, Note, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN. L. REV. 231, 236 (2004).

[127] ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 62-63 (2000). Roger Clegg, a prominent proponent of felony disenfranchisement, argues exactly this, citing the Sentencing Project and Human Rights Watch organizations' descriptions of disenfranchisement as a legacy from ancient Greece and Rome as evidence it must be permissible. Roger Clegg, George T. Conway III & Kenneth K. Lee, *The Bullet and the Ballot? The Case for Felon Disenfranchisement Statutes*, 14 AM. U. J. GENDER SOC. POL'Y & L, 1, 5 (2006) ("Alexander Keyssar…has acknowledged that such laws have 'a long history in English, European, and even Roman law.'").

[128] *See* Justice Blackmun's dissent in Bowers v. Hardwick, 478 U.S. 186, 199 (1986), where he quotes Oliver Wendell Holmes: "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

[129] Smith v. Mitchell, No. C-1-99-832, 2003 U.S. Dist. LEXIS 27476, at *1 (S.D. Ohio Sep. 30, 2003)

[130] *Id.* at *1.

*Mitchell* concerned other existing statutory schemes). While one could make a reliance argument in that old felony disenfranchisement laws affect people's expectations (such as candidates for office and districting plans), the laws may still lack a reasonable fit because redistricting, voting, and election regulations are frequently changed. Further, reliance interests are different when increasing access to the vote rather than those changes to restrict the franchise. Thus, historical practice does not seem to satisfy the rational basis test and therefore is a weak argument for proponents of felony disenfranchisement to make.

### *C. Deterrence*

Supporters of felony disenfranchisement occasionally contend the practice deters crime because, if one cares about voting, disenfranchisement is an unwanted punishment that would dissuade one from committing a crime.[131] Reducing crime is certainly a legitimate (and compelling) state interest. However, evidence suggests that deterrence via disenfranchisement does not work in practice. [132]

This proposition is supported by empirical research. One study analyzed whether variation among states' disenfranchisement policies accounted for the variation in recidivism across those states and found that "individuals who are released in states that permanently disenfranchise are roughly nineteen percent more likely to be rearrested than those released in states that restore the franchise post-release."[133] Rather than reducing recidivism, disenfranchisement may actually result in increased recidivism.[134] Additionally, disenfranchisement scholars Christopher Uggen and Jeff Manza conducted a study using longitudinal survey data on voting and criminal behavior. They found that voters had statistically significant

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[131] Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 407, 410 (2012). "Given that disenfranchisement's effects were often quite pervasive as applied to criminal offenders, and all societies have an interest in general crime control, it makes sense to view disenfranchisement as a deterrent to criminal activity."

[132] The American Bar Association supports this point, agreeing that disenfranchisement cannot deter crime: "[i]ndividuals who are not already deterred from crime by the threat of incarceration are unlikely to be swayed by the prospect of losing their right to vote." Marc Mauer, *Felon Disenfranchisement: A Policy Whose Time Has Passed?*, AMERICAN BAR ASSOCIATION (Jan. 1, 2004) https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol31_2004/winter2004/irr_hr_winter04_felon/.

[133] Hamilton-Smith & Vogel, *supra* note 131, at 426.

[134] When controlling for (unobserved) variables that may increase or decrease incarceration, the study found still significant results: "[i]ndividuals released in states that permanently disenfranchise are roughly ten percent more likely to reoffend than those released in states that restore the franchise post-release." Hamilton-Smith & Vogel, *supra* note 131, at 427.

lower arrest and incarceration rates than non-voters, and voting is statistically significantly correlated with lower arrest and re-arrest rates, as well as statistically significant rates of self-reported crimes, both property and violent.[135] A multivariate analysis controlling for criminal history, race, class, and gender "suggests that the political participation effect is not entirely attributable to preexisting differences between voters and non-voters."[136] Rather, voting is a prosocial behavior, and voting itself may lead to reduced crime.

While, in theory, the loss of the right to vote may be a salient deterrent to crime, the opposite effect seems to be true. The deterrence argument for disenfranchisement thus fails the rational basis test because there is no rational or reasonable relationship between the means and the ends.

### *D. Incapacitation*

Incapacitation theorizes that the penalty of disenfranchisement obstructs the convicted individual from committing voter fraud or other voting-related criminal acts. This theory is based on the idea that "[a] State may also legitimately be concerned that persons convicted of certain types of crimes may have a greater tendency to commit election offenses."[137] Many scholars and politicians contend that even if all people convicted of non-election-related felonies are not disenfranchised, surely those convicted of a crime aimed at subverting the electoral process should be.[138] In this case, they argue, the punishment really does "fit the crime." This contention contains a state interest — the prevention of election crimes and maintain election security—that is legitimate, and perhaps even compelling too.

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[135] Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 208 (2004).

[136] *Id.* at 213.

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

[138] In Kentucky in 2019, Governor Beshear restored the right to vote for more than 140,000 Kentuckians who had completed their sentences for nonviolent felonies (other than treason or election bribery related convictions). In Tennessee, those convicted of murder, rape, treason, or *voter fraud* are permanently disenfranchised, absent a pardon. Connecticut disenfranchises parolees and felony probationers convicted of election-related offenses. THE SENTENCING PROJECT, LOCKED OUT 2022: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION (Oct. 2022) https://www.sentencingproject.org/app/uploads/2022/10/Locked-Out-2022-Estimates-of-People-Denied-Voting.pdf ; *Felony Disenfranchisement Laws (Map)*, ACLU, https://www.aclu.org/issues/voting-rights/felony-disenfranchisement-laws-map?redirect=issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map (last visited Sept. 14, 2023).

However, voter fraud is exceedingly rare[139] and there is "little to no evidence that former felons are more likely to commit electoral fraud than any other element of the American citizenry."[140] The disenfranchisement literature[141] contains studies finding that there is "no empirical basis for assuming that all offenders are more likely to engage in election fraud than the rest of the population."[142] Further, there is no evidence that disallowing one to vote would prove effective against voter fraud because people retaining the right to vote and those deprived of the right to vote can both commit voter fraud. Even disenfranchising someone convicted of election fraud does not seem to make them unable or less likely to commit election fraud again. For example, non-Americans (Russians) interfered in U.S. elections despite having no right to vote.[143]

There are two main reasons why an incapacitation justification for felony disenfranchisement does not survive rational basis scrutiny under the Court's current doctrine. First, because preventing voter fraud is much better secured by other election security measures (electoral supervision and anticorruption legislation, for example), the lack of fit could be evidence of animus. The Supreme Court recognized that voter registration systems help protect against election crimes, and states already have penalties for election crimes.[144] "[V]oting fraud is itself criminalized, and measures are in place to prevent and punish it."[145] Laurence Tribe writes that felony disenfranchisement "is not needed to prevent voter fraud since registration provisions and criminal sanctions constitute less oppressive means of realizing that end even if convicted criminals are unusually prone to indulge in such fraud."[146] States increased voter fraud prevention through "election reform and technological advances in the elective process," both of which have dramatically decreased the possibility of voter

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[139] *See* The Myth of Voter Fraud, THE BRENNAN CENTER FOR JUSTICE, https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression/myth-voter-fraud.

[140] MANZA & UGGEN, *supra* note 4, at 22–24.

[141] Katherine Pettus, Felony Disenfranchisement in America (2d ed. 2013).

[142] *Id.* at 140 and Ewald, *supra* note 4, at 1112, both cite this quotation from Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753, 773 (2000).

[143] FBI, RUSSIAN INTERFERENCE IN 2016 U.S. ELECTIONS. https://www.fbi.gov/wanted/cyber/russian-interference-in-2016-u-s-elections.

[144] The Harvard Law Review Association, Note, The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box," 102 HARV. L. REV. 1300, 1302 (1989) and Dunn v. Blumstein, 405 U.S. at 355.

[145] Ewald, *supra* note 4, at 1112.

[146] LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, §13-16, 1094 (Foundation Press 2d ed. 1988).

fraud.[147] Additionally, the Brennan Center contends that there are "only a handful of known cases in which people rendered ineligible by convictions cast ballots despite knowing that they were not permitted to do so."[148] So, maintaining election security through felony disenfranchisement may fail the rational basis test because of the loose means-ends test, as there is no reasonable logic supporting the link between this punishment and the prevention of election crimes.

Second, felony disenfranchisement is extremely over- and under-inclusive in this regard, which may evidence animus. It is overinclusive because very few people convicted of felonies are convicted of election crimes.[149] It is underinclusive because anyone can commit election crimes — not just those with votes. And in some states, election crimes are misdemeanors.[150] Extreme over- and under-inclusivity can be enough to fail

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[147] Mark E. Thompson, Comment, *Don't Do the Crime if You Ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment*, 33 SETON HALL L. REV. 167, 190-91 (2002).

[148] Justin Levitt, *The Truth About Voter Fraud*, Brennan Center for Justice, at 16, 26, 27, 31. Rather, more commonly individuals mistakenly register to vote without realizing they are ineligible — which does not constitute fraud because fraud requires the element of intent — or election officials erroneously take away one's voting rights such as when one has been pardoned, committed a crime as a juvenile and never lost their voting rights, or was supposed to have their right to vote restored. The Brennan Center's report highlights a few facts demonstrating the above points: in Missouri in the 2000 general election, there were six substantiated cases of votes cast by four ineligible voters — a fraud rate of 0.0003%. In New Jersey in the 2004 general election, there were eight substantiated cases of voter fraud amongst eight individuals voting twice, amounting to a fraud rate of 0.0004%. In Wisconsin in 2004, there were seven substantiated cases of voter fraud, all by persons with felony convictions — a fraud rate of 0.0002%. There is little to no evidence that felony disenfranchisement will solve the problem of voter fraud — individuals intentionally voting despite knowing they are ineligible to do so. Thus, felony disenfranchisement is not related to the of incapacitation of voter fraud, or the use of this justification may evidence animus because much more voter fraud occurs due to absentee ballots rather than people felony convictions voting.

[149] Statista, *Number of Committed Crimes in the United States in 2021, by Type of Crime*, (June 2, 2023), https://www.statista.com/statistics/202714/number-of-committed-crimes-in-the-us-by-type-of-crime/; Federal Bureau of Prisons, *Offenses (*July 2, 2023), https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp; Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, Prison Policy Initiative, https://www.prisonpolicy.org/reports/pie2023.html.

[150] Kira Lerner, *Election Officials Risk Criminal Charges Under 31 New GOP-Imposed Penalties*, KAN. REFLECTOR (July 17, 2022), https://kansasreflector.com/2022/07/17/election-officials-risk-criminal-charges-under-31-new-gop-imposed-penalties/; Brennan Center for Justice, *Voting Laws Roundup: October 2022* (Oct. 6, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2022.

the rational basis test, especially when that lack of fit points to animus, as it could here. This is like in *Moreno*, where the Court said that because fraud and abuse was still possible after the food stamp program's exclusions, there must have been animus.[151] Thus, felony disenfranchisement provisions seem too attenuated from the goal of incapacitating election fraud to pass the rational basis test under the current doctrine.

Felony disenfranchisement provisions therefore do not rationally serve that legitimate state end of incapacitation and may instead be motivated by animus.[152] Justice Thurgood Marshall's dissent in *Ramirez*, illustrates how a court may apply the rational basis test to incapacitation:

> Although the State has a legitimate and, in fact, compelling interest in preventing election fraud…the disenfranchisement provisions are patently both overinclusive and underinclusive. The provision is not limited to those who have demonstrated a marked propensity for abusing the ballot by violating election laws. Rather, it encompasses all former felons and there has been no showing that ex-felons generally are any more likely to abuse the ballot than the remainder of the population. In contrast, many of those convicted of violating election laws are treated as misdemeanants and are not barred from voting at all. It seems clear that the classification here is not tailored to achieve its articulated goal, since it crudely excludes large numbers of otherwise qualified voters. Moreover, there are means available for the State to prevent voting fraud which are far less burdensome on the constitutionally protected right to vote…'[A] variety of criminal laws [are] more than adequate to detect and deter whatever fraud may be feared.'…penal sanctions for election fraud surely demonstrates that there are adequate alternatives to disenfranchisement.[153]

Scholars of disenfranchisement have similarly noted that modern voting procedures and equipment make unrealistic the idea that disenfranchisement prevents voter and election fraud — and they suggested that the prevention of voter fraud is a pretextual justification for the practice, given that many states do not disenfranchise those convicted of election fraud but disenfranchise those conviction of non-election-related felonies.[154] For states that treat election crimes as misdemeanors, incapacitation as a state

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[151] U. S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

[152] Afi S. Johnson-Parris, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 VA. L. REV. 109, 109-38 (2003); 418 U.S. at 79-81 (Marshall, J., dissenting).

[153] Richardson v. Ramirez, 418 U.S. 24, 79-80 (1974).

[154] Thompson, *supra* note 147, at 191; *see also* Wilkins, *supra* note 12, at 115 n.195.

interest supporting felony disenfranchisement is an especially weak argument under the rational basis test because it would seem to evidence animus.

### *E. Retribution*

Retribution, one of the four classic aims of punishment, is a penalty "inflicted on someone as vengeance for a wrong or criminal act,"[155] and often underlies arguments supporting felony disenfranchisement. During debates in Maine regarding a bill that would have instituted felony disenfranchisement for incarcerated individuals, "[f]amilies of murder victims argued that the killers had denied their loved ones the right to vote and therefore should suffer the same fate."[156] In 2019, Kentucky's governor restored voting rights to some people with felony convictions, but not those convicted of violent or sexual crimes, or of bribery or treason, explaining that "some crimes are so awful and the damage that is done to families and communities is so terrible that I don't believe that those rights should be restored."[157] Such retaliatory arguments often contend that someone who caused harm should simply be harmed back.

However, some authors distinguish between retribution as revenge — the desire to punish people who have committed crimes in retaliation for their wrongdoing by making them suffer — and retribution as just deserts — restoring justice through proportional compensation from the offender.[158] Others understand this characterization differently, with revenge begetting two definitions: retribution, or deterrence.[159] One study found that that victims of harm (not necessarily crimes) want to punish the wrongdoer, sometimes even more than they were harmed to begin with, and that the notion of revenge as retribution is empirically strong.[160] However, the idea that humans use revenge to deter harm is a common theory in evolutionary psychology — either to deter harm and encourage cooperation by someone who actually committed a harm (direct deterrence) or to deter third parties who observe revenge against someone who causes

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[155] *Retribution*, OXFORD DICTIONARY OF ENGLISH (3d ed. 2010).

[156] Brent Staples, Editorial, *The Racist Origins of Felon Disenfranchisement*, N.Y. TIMES, Nov. 18, 2014.

[157] Jonathan Bullington & Chris Kenning*, Felon Right to Vote: Kentucky Gives Voting Rights to More than 140,000*, COURIER J., Dec. 13, 2019.

[158] Monica M. Gerber & Jonathan Jackson, *Retribution as Revenge and Retribution as Just Deserts*, 26 SOC. JUST. RSCH. 61 (2013).

[159] Jeffrey M. Osgood, *Is revenge about retributive justice, deterring harm, or both?*, 11 SOC. PERS. PSYCH. COMPASS 1 (2017) ("Revenge is defined as an action in response to some perceived wrongdoing by another party that is intended to inflict damage, injury, discomfort, or punishment on the party judged responsible.").

[160] *Id.*

harm.[161] The two are not mutually exclusive, but "evidence leans in favor of retributive justice over deterrence as the primary goal in revenge."[162]

This section takes each characterization of retribution in turn — retribution as revenge or vengeance, retribution as deterrence, and retribution as just deserts — and analyzes the strength of each justification for penal disenfranchisement. First, under the Court's doctrine, the pure vengeance version of retribution is an unconstitutional basis for felony disenfranchisement provisions[163] because it espouses no state interest: punishment for punishment's sake is not legitimate under the rational basis test.[164] Similarly, retribution is an illegitimate state interest because laws based on the public's vengeful distain for those who commit serious crimes is simply animus: "[r]etaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society."[165] Thus, retribution as vengeance or revenge fails to justify felony disenfranchisement because even the minimal form of the rational basis test requires the law to be more objective than relying on animus. This version

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[161] *Id.*

[162] *Id.* at 11.

[163] The Court has taken seriously retribution in Eighth Amendment claims/context, as it has been accepted by the Court as a legitimate rationale for punishment. In fact, Justice Scalia wrote repeatedly that it is the only legitimate rationale for punishment. *See* Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U.L. REV. 67 (1992) ("Under Justice Scalia's system …This use of capital punishment as a collective moral palliative moves beyond traditional arguments based on moral retribution into the realm of amoral vengeance"); Antonin Scalia, *Justice Scalia's Letter to the Editor*, NAT'L CATH. REG. (Mar. 24-30, 2002) (Scalia believes that, to eliminate retribution as a legitimate purpose of capital punishment is to depart from "the (infallible) universal teaching of the past 2,000 years"); Transcript of Oral Argument at 19, Graham v. Florida, 560 U.S. 48 (2010) (No. 08-7412) ("One of the purposes [of punishment] is retribution, punishment for just perfectly horrible actions."); Ian P. Farrell, *Gilbert & Sullivan and Scalia: Philosophy, Proportionality, and the Eighth Amendment*, 55 VILL. L. REV. 321, 324 (2010) (Scalia argues that proportionality is inherently tied to the goal of retribution).

We must wonder the extent that the Court would consider retribution a legitimate state interest in a rational basis context, despite the fact that equal protection analysis is separate from Eighth Amendment analysis and the doctrinal tests are formally distinct. Because felony disenfranchisement does not implicate the Eighth Amendment, and this paper analyses equal protection claims, it seems unlikely (but not impossible) a court would just borrow Scalia's rationale from death penalty and other Eighth Amendment cases, given that the rational basis doctrine seems to clearly cut against retribution being a legitimate state interest. This discrepancy may be the Court being incoherent, or it may underscore that these are distinct areas of the law.

[164] *See* Merrifield v. Lockyer*,* 547 F.3d 978 (holding economic protectionism for the sake of economic protectionism is an illegitimate state interest).

[165] Furman v. Georgia, 408 U.S. 238, 343 (1972) (Marshall, J., concurring).

of retribution is a weak justification for disenfranchisement under the rational basis test.

Second, as for retribution as just deserts, or providing compensation to victims, this is a legitimate state interest under the rational basis doctrine. However, felony disenfranchisement does not rationally serve the purpose of just deserts. "[E]ven if there is agreement on the end of retribution, difficulty in specifying its demands makes it hard to assess the degree of fit between a particular punishment and a particular retributive end."[166] Rights deprivation to further victim compensation may evidence animus[167] because it is unclear how a person convicted of a felony losing their right to vote makes a victim whole. Someone who committed a crime not voting does not provide any compensation to account for or make better the harm that they caused, which makes retribution not rationally related to compensation (especially for all crimes that are not voting crimes). After all, the person convicted of a felony might have voted for the same candidate or political party as the victim, who may be worse off if the individual is disenfranchised rather than not. The state interest of compensating victims also does little to guide courts or policymakers in the way of *how much* disenfranchisement makes a victim whole; it is unclear for which crimes or what length of time disenfranchisement serves any purpose in this respect. Even for voting crimes, taking away the vote does not somehow make whole the election system or remedy the breach of voting law.[168] Thus, the retribution-as-compensation justification for felony disenfranchisement will fail the rational basis test under the Court's doctrine because the means of disenfranchisement are not rationally related to the state interest of retribution as just deserts.

Lastly, for brevity, see the Deterrence section of this paper for a rational basis response to retribution as deterrence.

### *F. Political Capacity*

Just as some argue that individuals convicted of crimes are *undeserving* of the right to vote, others argue that anyone who commits a crime is *incapable* of voting or that, as with children, those who have offended lack the political capacity necessary to participate in elections.[169] One federal court permitted felony disenfranchisement because people convicted of felonies, "like insane persons, have raised questions about their ability to vote responsibly."[170] This argument aligns disenfranchisement with the regulation of elections, such as how one must be eighteen or older, or mentally competent, to vote. The state interest here would be ensuring a

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[166] Nachbar, *supra* note 18, at 1676.

[167] See section on civil death.

[168] See section on incapacitation.

[169] GRIFFITHS ET AL., SUBJECTIVITY, CITIZENSHIP AND BELONGING IN LAW (2018).

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

reasonably competent electorate or an electorate that votes freely, and both of these goals are legitimate.

However, because there is no evidence or substantive reason to assume people who have committed crimes are incapable of voting, felony disenfranchisement is not rationally related to the goal of ensuring a competent, free-voting electorate. To support the state interest of a competent electorate, one would need evidence that committing a crime demonstrates one is incompetent to vote — a proposition for which no evidence exists. Adults with convictions are categorically not akin to kids, nor to mentally disabled individuals, who are disenfranchised for cognitive incapacity or worries about others influencing their vote. Disenfranchising children is consistent with their other diminished legal rights and duties in comparison to adults.[171] Disenfranchising people convicted of felonies is not consistent with their legal rights and duties because these individuals are fully legally culpable for their crimes and can sometimes even pro se represent themselves in court. Both facts demonstrate their cognitive capacity. As law professor Gideon Yaffee explains, adults convicted of felonies were competent to stand trial, and "adult citizens…must meet a far higher standard of incompetence to be denied the vote. In most states, anyone sufficiently in touch with reality to know what he or she is doing cannot be prevented from voting."[172]

Additionally, states have alternatives to increase civic engagement and understanding, and ensure a competent electorate that way. These run the gamut. First, states might preclude from voting everyone who did not graduate high school, or impose literacy tests or other examination, all of which would more reasonably ensure a competent electorate than felony disenfranchisement, but these would certainly not be constitutional. On the other hand, states could increase civics course requirements and funding for social studies and political science courses in public schools. States could also allow public fund-matching for campaign contributions or hold more town halls and debates. These are constitutional and rationally would increase the competency of the electorate. The availability of more

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[171] In addition to their inability to vote, children lack many of the rights and privileges that adults do. They cannot drive until they are close in age to adulthood, cannot drink alcohol, run for office, sue or be sued, consent to medical treatments, or own property.

[172] Gideon Yaffee, Opinion, *Give Felons and Prisoners the Right to Vote*, WASH. POST, July 26, 2016. This argument holds regardless of whether one believes children ought to be able to vote. If one does think children should be able to vote and contends that all 12-year-olds have the cognitive capacity to vote, then surely an adult who is legally responsible for their crimes and can represent themself in court is equally capable of exercising this right. On the other hand, if one contends children should not vote because they lack the ability to reason for themselves by virtue of their incomplete development, this rationale does not apply to adults convicted of crimes, who must be capable of that for the law to hold them responsible for their actions.

effective, constitutional methods of increasing the competency of the electorate seem much more rationally related to that goal than felony disenfranchisement does.

There is thus no reasonable argument for felony disenfranchisement that rests on notions of political capacity. The means of disenfranchisement serve virtually no purpose in furthering the ends, and it is extremely overinclusive such that the assumptions about the capacity of those convicted of crimes may even reflect animus. Therefore, felony disenfranchisement provisions purporting to serve this state interest are unconstitutional under the rational basis test.

### *G. Purity of the Ballot Box (Civic Republicanism[173])*

A popular argument for disenfranchisement contends that allowing people convicted of crimes to vote threatens the purity of the electorate by tainting the decisions elections render.[174] Such an argument highlights the fear that allowing individuals convicted of felonies to vote will create "anti-law enforcement" voting blocs that will "victimize[e] the vast majority of law-abiding minority citizens who live in high-crime urban areas."[175] These proponents of felony disenfranchisement contend that the ballot box needs protecting against "the tainted votes of those who have not abided by social norms."[176] Senator Mitch McConnell invoked these arguments to support disenfranchisement: "We are talking about rapists, murderers, robbers, and even terrorists and spies. Do we want to see convicted terrorists who seek to destroy this country voting in elections? Do we want to see 'jailhouse blocs' banding together to oust sheriffs and

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[173] Wilkins, *supra* note 12, at 113 (The idea that "only virtuous citizens should be trusted with the franchise.").

[174] Washington v. State, 75 Ala. 582, 585 (1884) ("It is quite common also to deny the right of suffrage, in the various American States, to such as have been convicted of infamous crimes. The manifest purpose is to preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption, just as much as against that of ignorance, incapacity, or tyranny. The evil infection of the one is not more fatal than that of the other. The presumption is, that one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship. It is proper, therefore, that this class should be denied a right, the exercise of which might sometimes hazard the welfare of communities, if not that of the State itself, at least in close political contests. The exclusion imposed for protection, and not for punishment.").

[175] Roger Clegg et al., *supra* note 127, at 24.

[176] Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 112 (2019).

government officials who are tough on crime?"[177] A delegate to the 1890 Kentucky constitutional convention opposed letting those convicted of crimes vote, arguing, "The spectacle of a squad of prisoners, escorted by a jailer or Sheriff, from behind the bars, or from the rock-pile, to the polls [would] degrade rather than elevate the right of suffrage, in the sight of the worthy."[178] California's highest court thought that the fear that an offender "might defile 'the purity of the ballot box' by selling or bartering his vote or otherwise engaging in election fraud" was a "tenable ground" for disenfranchisement.[179] Other courts[180] legitimated this concern as well, understanding felony disenfranchisement as serving the state interest of "preserv[ing] the purity of the ballot box."[181]

The Second Circuit proclaimed, "[a] contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be."[182] The Fifth Circuit contended that states have a legitimate interest in "excluding from the franchise persons who have manifested a fundamental antipathy to the criminal laws of the state or of the nation by violating those laws sufficiently important to be classed as felonies… [such persons] have raised questions about their ability to vote responsibly."[183] A federal court in Georgia similarly proclaimed that a state has a legitimate interest "interest in preserving the integrity of her electoral process by removing from the process those persons with proven anti-social behavior whose behavior can be said to be destructive of society's aims."[184] It concluded that states can prohibit those convicted of crimes from voting and may "also legitimately be concerned that persons

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[177] 107 CONG. REC. S802 (daily ed. Feb. 14, 2002) (statement of Sen. Mitch McConnell during debate on Equal Protection of Voting Rights Act of 2001).

[178] *See* HOLLOWAY, LIVING IN INFAMY, *supra* note 4, at 103.

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

[180] Kronlund v. Honstein, 327 F. Supp. 71, 73 (N.D. Ga. 1971) ("A State has an interest in preserving the integrity of her electoral process by removing from the process those persons with proven anti-social behavior whose behavior can be said to be destructive of society's aims.").

[181] Washington v. State, 75 Ala. 582, 585 (1884) ("t]he ballot box…needs protection against the invasion of corruption, just as much as against that of ignorance, incapacity, or tyranny…one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship").

[182] Green v. Bd. of Elections of City of New York, 380 F.2d 445, 451-52 (2d Cir. 1967).

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

[184] *Kronlund*, 327 F. Supp. at 73.

convicted of certain types of crimes may have a greater tendency to commit election offenses[.]"[185]

Although these precedents and rationales may be colloquially compelling, they are not sufficient to survive rational basis scrutiny for two reasons. First, the right to vote or assemble is not contingent on the prediction of how one might exercise that right in the future, so fears about how individuals convicted of felonies might vote cannot be legitimate state interests.[186] "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible," as the Court prohibits restrictions on the right to vote "because of fear of the political views of a particular group."[187] Voting restrictions aimed at ensuring voters have a certain interest is impermissible because "differences of opinion" is an illegitimate reason to deprive one of the right to vote.[188] Second, felony disenfranchisement is both overbroad and underinclusive to the purported state interest of maintaining a pure ballot box because the provisions lack anything close to a tight means-ends fit; this may evidence animus. The argument that people convicted of crimes must have undesirable qualities and therefore should not vote[189] is underinclusive because many people who have never been convicted of a crime are untrustworthy and irresponsible; it is overinclusive because a prior conviction is not evidence of moral qualities. Thus, a court considering this rationale may infer animus, which constitutes a failure of the rational basis test.[190]

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[185] *Id.*

[186] It is important to note that not everyone, most, or even significant proportions of individuals convicted of felonies are "anti-law enforcement" or would vote in some similar way. People convicted of crimes do not have homogenous political views, even about crime policy, nor is there evidence that they are more likely to be single-issue voters on such policy. The idea that there is a "pro-crime" candidate or ticket to vote on is fictitious to begin with, and even if the hypothetical were to be true, it would be the result of the democratic process by which any candidate runs for election, not of corruption or subversive voting. *See generally* MANZA & UGGEN, *supra* note 4.

[187] Carrington v. Rash, 380 U.S. 89, 94 (1965); *see also* Cipriano v. Houma, 395 U.S. 701, 705 (1969) (holding preclusion of non-landowners from voting unconstitutional because their interests and thus voting behavior was different than landowners'.).

[188] Dunn v. Blumstein, 405 U.S. 330, 355 (1972).

[189] Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and 'The Purity of the Ballot Box*,' 102 HARV. L. REV. 1300, 1307 (1989) (citing Washington v. State, 75 Ala. 582, 585 (1884)).

[190] Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1152-53 (2004) ("And the same federal statute that permanently bans the use of literacy tests nationwide-based on Congress's conclusion that such tests served no compelling interest and perpetuated the exclusion of minority citizens—also barred

The above arguments for felony disenfranchisement are the weakest under the current doctrine. the following arguments for felony disenfranchisement are much stronger under a rational basis analysis and represent substantial hurdles to constitutional challenges.

### *H. Proportionality*

Proportionality is sometimes used in arguments supporting felony disenfranchisement.[191] Supporters of disenfranchisement contend it is natural to deprive those convicted of crimes of the vote, which they consider to be "in bounds" of proportional punishment since, the argument goes, all (or some) lesser punishments are proportional for crimes if someone has a more severe punishment. In other words, disenfranchisement must be allowed as penalty for crime because other, worse things are allowed, like prison time; in other words, the greater includes the lesser. Of course, it does not seem legitimate to impose every possible punishment that is lesser than the one for the crime, but this theory contends that it is obviously rational to impose some lesser punishments, although the limit to this is not obviously clear.

This proposition is not without weaknesses, however. First, and most important, is that proportionality is not itself a justification for disenfranchisement, or for punishment at all. Proportionality asks, "how much of this punishment is okay?" not "why is the state imposing this punishment?" Proportionality establishes a limit for punishment but not a rationale for it, and thus may *authorize* felony disenfranchisement, but under the rational basis test, these provisions still require *justification*.[192]

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denying the right to vote to citizens who could not establish that they 'possess good moral character.'" (citing 42 U.S.C. § 1973aa)).

[191] *See generally,* Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME AND JUST. 55 (1992); Thomas A. Balmer, *Some Thoughts on Proportionality*, 87 OR. L. REV. 783 (2008) (explaining that proportionality was at the heart of the Court's 2008 decision in Kennedy v. Louisiana, where it held that the imposition of the death penalty for child rape is unconstitutional). *See also* Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835, 1835, 1840 (2012) (explaining that in Graham v. Florida, 560 U.S. 48, 59 (2010), the Court said that proportionality is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense"). One form of proportionality the Court employs, Lee explains, is "relative culpability," a limit on punishment that "is essentially comparative. The questions are not whether, say, robbery is a serious crime, but whether it is as serious as other crimes, and not whether a mentally retarded killer is culpable, but whether he is as culpable as an adult of normal intelligence who kills on purpose." This comparison, though—of crime A that is more serious than crime B, for example—implicitly authorizes at least punishment B for crime A. But it does not explain *why* we might punish crime A at all, or what end imposing such a punishment serves.

[192] Under the court's precedent, proportionality review seems like it needs a separate theory of punishment to review a punishment: retribution, deterrence,

Thus, the greater does not *justify* the lesser—which the rational basis test requires, because a state interest must be legitimate.

Second, proportionality conceptualizes disenfranchisement as under the umbrella of the worst punishment someone gets, instead of it being additive; it disregards the severity of the loss of the right to vote for someone who has another punishment in the legal system (*e.g.*, is already incarcerated). Crime is already punished by sentences in the legal system by combinations of years of incarceration, probation, parole, restitution, and other penalties.[193] This makes felony disenfranchisement an additive punishment coming not from a judge, jury, or sentencing guidelines, but from the legislature. For example, by extension, this proportionality argument would imply that it is permissible to deny someone on death row the right to exercise because, surely, death is worse than losing the ability to move one's body. As one can see, this thinking leads to unconstrained and additive unnecessary penalties for crime. The "greater includes the lesser" argument is too simplistic because it does not tell courts what punishments are greater or lesser in comparison to each other. Is cutting off a finger more or less severe than a sentence of forty years in prison? In other words, what limits proportionality? Alec Ewald contends that necessity generally guides this theory of punishment. "Society punishes prisoners by depriving them of various rights and privileges: to assemble, enjoy privacy, and read whatever they wish, among others. But for the most part, such restrictions are necessary to incarceration, and disenfranchising them is not."[194] Disenfranchisement is certainly unnecessary after incarceration, and likely during as well. These concerns are important because if a court deemed them severe, they could evidence animus due to an extreme lack of fit between the state interest of proportionality and the means of disenfranchisement.

Third, disenfranchisement is a one-size-fits-all punishment, and is thereby not proportional, even for the "worst of the worst" crimes. States employing some types of permanent disenfranchisement do so for convictions of very different crimes, and states vary widely in when one's vote may be restored, if at all. Therefore, there is no consensus as to what crime disenfranchisement is proportional to, or for how long disenfranchisement is proportional to a felony conviction. Ewald explains, "[i]t is not logically clear why the loss of voting rights is a proportional penalty for a first-time drug offender sentenced to probation, for example, as well as a murderer incarcerated for life, while the sanction is rarely imposed at all on those who…endanger the public by driving intoxicated."[195] Actual sentences for

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incapacitation, and rehabilitation. John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishment Clause*, 97 VA. L. REV. 899 (2011).

[193] Since felony disenfranchisement is technically a regulatory collateral consequence, it is not part of sentencing.

[194] Ewald, *supra* note 4, at 1107.

[195] *Id.* at 1103 & n.236 (noting that (at the time of publication) "[n]o 'state classifies a first offense for driving while intoxicated as a felony. In most states,

crimes, such as prison terms, monetary fines, community service hours, and terms of parole and probation, all are (or are supposed to be) quantitatively calibrated to fit the crime. Felony disenfranchisement cannot be adjusted for proportionality since the vote is absolute. However, this reason alone is insufficient for disenfranchisement to fail the rational basis test. States are permitted wide latitude to advance legitimate goals, and they may draw categorizations without exactitude. The fact that two states may advance their goals of proportionality differently is not strong enough of a reason to find that one state's disenfranchisement provision is irrational unless it was so severe as to be a complete outlier when compared to all other states.

### *I. Democratic Legitimacy*

Another argument for felony disenfranchisement concerns democratic legitimacy, wherein "the people" retain the right to pass laws about punishment.[196] Under this logic, any felony disenfranchisement laws passed directly by the people,[197] or by directly elected state legislators, are democratic because they reflect the public's consensus about laws and punishments. After all, the public knows how best to protect itself against threats and determine its own system of laws. Perhaps even part of the punishment for crime is vulnerability to the public's determination of how to treat lawbreakers. In line with this hypothesis, one may endorse disenfranchisement as a reflection of the values of the public.[198] Some contend that "citizens have a collective democratic right to determine, within limits, who is to be eligible to vote in their state."[199]

In response, however, many scholars such as Pamela Karlan counter that felony disenfranchisement is not democratic because it "operate[s] as a kind of collective sanction" because it penalizes the communities from which the disenfranchised individuals come.[200] Additionally, the Eleventh

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a person must be convicted of driving under the influence three or more times in order to be charged with a felony").

[196] Andrew Altman, *Democratic Self-Determination and the Disenfranchisement of Felons*, 22 J. APPLIED PHIL. 263, 264, 267 (2005) (arguing that political community's self-determination means that it can disenfranchise who it wants).

[197] Such as Florida's Amendment 4, a 2018 referendum on restoring voting rights after a felony conviction to those who have completed all terms of their sentence, except for individuals convicted of murder or sexual assault. FLA. CONST. art. VI, § 4.

[198] This hypothetical would be like when the public validates or invalidates the use of the death penalty in their state either by direct vote or by electing representatives who propose policy change in this area.

[199] Altman, *supra* note 196, at 265.

[200] Altman, *supra* note 196, at 270 (quoting Karlan).

Circuit expressed skepticism as to whether any "non-racially discriminatory public policy rationales for disenfranchising felons" exist."[201]

There are reasonably strong arguments for and against this justification under the rational basis test. A court might understand the democratic legitimacy argument in favor of felony disenfranchisement as a political process harm like in *Romer* and *Windsor*; or it may understand imposing disenfranchisement at the will of the people as evidence of merely public condemnation, or animus, which is unconstitutional.[202] Recall that in *Cleburne*, the Court was adamant that "the electorate as a whole, whether by referendum or otherwise, [cannot] order city action violative of the Equal Protection Clause, and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic. 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[203] A court that does not sense animus might characterize the state interest as listening to the people via majority outcomes in elections. After all, an interest in democratic legitimacy requires a state to hold elections and take seriously the will of the people. But a legitimate state interest of listening to the democratic majority may not survive the rational basis test if a court determines that the means of disenfranchisement are so attenuated from the goal of doing whatever the people want—which may be simply irrational.

However, a court could just as easily reject these arguments. This democratic legitimacy justification does not contain the same federalism concerns that *Romer* and *Windsor* did because there is no higher level of government trumping state or local law. Additionally, a court may not be concerned about animus and public condemnation because there is not necessarily evidence that a democratically passed law was motivated by bias. Lastly, a court may permit the ill-fitting nature of felony disenfranchisement towards the goal of democratic legitimacy because the rational basis test permits laws that are both under- and over-inclusive. Therefore, this democratic legitimacy argument represents a difficult one to overcome for challengers to felony disenfranchisement provisions.

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[201] Johnson v. Governor of Florida, 353 F.3d 1287, 1302 n.16 (11th Cir. 2003).

[202] The "bare…desire to harm a politically unpopular group" is an illegitimate state interest. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973). The Court has "never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." Lawrence v. Texas, 539 U.S. 558, 578 (2003) (O'Connor, J., concurring). Romer v. Evans, 517 U.S. 620, 632 (1996) (when a law demonstrates no purpose besides animus, it lacks a rational basis).

[203] City of Cleburne. v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) (citations omitted).

### *J. Social Contract Theory*

Contemporary arguments in favor of felony disenfranchisement often explicitly invoke the seventeenth-century English philosopher John Locke's social contract theory,[204] or unwittingly use it to rationalize their arguments. Locke's theory contends that members of society give the government power to create rules and punish in exchange for the government protecting their rights. Under his theory, government is consented to by the people, who retain majority rule that acts as a check on the government. Similarly, Hobbes envisioned pre-government civil society as a state of war— "solitary, poor, nasty, brutish, and short"[205]—with a collective desire for protection motiving rule by a sovereign body. Rousseau imagined a social contract granting legitimacy to a government that the citizens both submit to and set limits on the authority of to gain benefits and rights like equality and protection for all.[206] Rousseau wrote that

> the evil-doer who attacks the fabric of social right becomes, by reason of his crime, a rebel and a traitor to his country. By violating its laws he ceases to be a member of it…he has broken the terms of the social treaty, and that, consequently, he is no longer a member of the State...he must be separated from the body politic either by exile, as one who has infringed the compact, or by death as a public enemy.[207]

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[204] JOHN LOCKE, TWO TREATISES OF GOVERNMENT: AND A LETTER CONCERNING TOLERATION 6 (Oxford Univ. Press 2016) (1690) ("the offender declares himself to live by another rule than that of reason and common equity… a trespass against the whole species…every man upon this score, by the right he hath to preserve mankind in general, may restrain, or where it is necessary, destroy things noxious to them, and so may bring such evil on any one, who hath transgressed that law…Every man hath a right to punish the offender, and be executioner of the law of nature."). The social contract theory understands democratic government as deriving its legitimacy through a contract. "Felon disenfranchisement doctrine argues that those who break the law have broken the social contract and abandoned the right to participate in it." Johnson-Parris, *supra* note 152, at 112.

[205] Thomas Hobbes, Leviathan §1.13 (1651).

[206] *The Social Contract in Rousseau*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/social-contract/The-social-contract-in-Rousseau (last visited July 6, 2023).

[207] Jean-Jacques Rousseau, *The Social Contract or Principles of Political Right*, in SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME AND ROUSSEAU 282-84 (1958). *See also* JEAN-JACQUES ROUSSEAU, BASIC POLITICAL WRITINGS 159 (Donald A. Cress ed. & trans., Hackett Publ'g. 1987) (1762) (the person who commits a crime is a "rebel and a traitor to the homeland; in violating its laws, he ceases to be a member, and he even wages war with it…he has broken the social treaty, and consequently…he is no longer a member of the state.").

These assertions[208] contend that once someone has broken the law or committed an especially heinous crime, they should not have a say in determining the laws governing the rest of society.[209]

The first Chief Justice of the Supreme Court, John Jay, noted in 1793 that "[h]e is not a good citizen who violates his contract with society."[210] Judge Henry Friendly on the Second Circuit wrote, "[a] man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact."[211] Later in 2000, the Pennsylvania Commonwealth Court held that "a state has a valid interest in ensuring that the rules of its society are made by those who have not shown an unwillingness to abide by those rules."[212] These arguments contend that because someone committed a crime, they should not "get" to vote; a violation of the law (and therefore the social contract) ought to result in a loss of participation in the political sphere: "those who cannot follow the law should not participate in the passing of laws that govern law-abiding citizens."[213]

The social contract justification for disenfranchisement may be articulating a state interest in a contractual system in which if one breaks the agreement, that person cannot continue to make agreements (vote) — in other words, having everyone "do their part."

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[208] Michel Foucault espoused a similar theory in DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 90 (Alan Sheridan trans. 1977). "In effect the offense opposes an individual to the entire social body; in order to punish him, society has the right to oppose him in its entirety. It is an unequal struggle: on one side are all the forces, all the power, and all the rights…. [the criminal is subject to penalty] without bounds" because he is bound by the social contract—thus, he wills his own punishment.

[209] Johnson-Parris, *supra* note 152, at 111-112 ("Theoretical justifications for disenfranchisement posit that the felon has broken the social contract through his actions, and that he does not have the moral competence to participate in governing a society.") (citing Note*, The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box,"* 102 HARV. L. REV. 1300, 1304 (1989)).

[210] Ewald, *supra* note 4, at 1076 (citing Chief Justice John Jay in Henfield's Case, 11 F. Cas. 1099, 1105 (C.C.D. Pa. 1793)).

[211] Green v. Board of Elections, 380 F.2d 445, 451 (2d Cir. 1967).

[212] Mixon v. Com., 759 A.2d 442, 449 (Pa. Commw. Ct. 2000), *aff'd*, 566 Pa. 616, 783 A.2d 763 (2001).

[213] Roger Clegg, George T. Conway III & Kenneth K. Lee, *The Case Against Felon Voting*, 2 U. ST. THOMAS J.L. & PUB. POL'Y 1, 2 (2008). *See also* Roger Clegg, *If You Can't Follow Laws, You Shouldn't Help Make Them*, N.Y. Times (Apr. 22, 2016), https://www.nytimes.com/roomfordebate/2016/04/22/should-felons-ever-be-allowed-to-vote/if-you-cant-follow-laws-you-shouldnt-help-make-them.

1. Legitimate State Interest?

Under the rational basis test, the social contract theory might supply a legitimate state interest for felony disenfranchisement in having everyone do their part. Under the traditional theory of the social contract, a breaking of the law is a breaking of the contract, which authorizes the loss of the right to participate in voting and governing. This state interest is legitimate because it is the traditional understanding of the social contract theory.

An alternative reading of the state interest that a court may take is the view that a violation of the law is not necessarily a breaking of the social contract or "agreement" to be governed by laws. It may be more accurate to imagine that when someone complies with their punishment (goes to prison or shows up for a hearing, for example), they are still in compliance with the contract. Under this view, the social contract contains provisions mandating that each time a person violates the law, they must follow court orders—effectively leaving those who violate the law under the rule of law. After all, under all theorists' versions of the social contract, it exists only because there is consent by the governed — and when people break laws and are punished, government does not cease to exist. In support of this alternative view of the social contract theory is the fact that unincarcerated people convicted of felonies still share the obligations and burdens of the social contract but do not share the benefit of voting — what one author called "an unconscionable term of the social contract."[214] Because committing a crime does not render one without any rights or protection from the government, they may still be a party to the social contract under this understanding. For example, incarcerated people retain many of the same rights, and many are "activated" when one begins interacting with the legal system. "[F]elony offenses are not tantamount to withdrawing consent from the social contract, because law-breaking does not imply a denial of the law's authority."[215] Thus, the traditional view of the social contract justification relies on the "erroneous assumption that breaking the law is tantamount to denying the authority of the law."[216] Therefore, a "violation of the social contract does not nullify the contract itself; the state retains obligations toward its errant subject."[217] For example, those convicted of felonies also continue receiving most all of the benefits that government and law confer, such as protection and rights. Individuals still have most of their constitutional rights and participate in forming the laws of society through civil suits, free speech, protests, and petitioning the government for redress of grievance.

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[214] Johnson-Parris, *supra* note 152, at 113.

[215] Matt Whitt, *Felon Disenfranchisement and Democratic Legitimacy,* 43 SOCIAL THEORY AND PRACTICE 283, 287 (2017).

[216] Jeffrey Reiman, Liberal and republican arguments against the disenfranchisement of felons, 24 CRIM. JUST. ETHICS 3, 10 (2005).

[217] Wilkins, *supra* note 12, at 112.

The problem with this alternative view, however, is that its viability as a reasonable way to understand the social contract theory is not enough for felony disenfranchisement to fail the rational basis test. First, courts are unlikely to adopt this novel view of the social contract theory over the traditional, well-known version. Second, even if some courts were to credit this view as better or more accurate, that is not necessarily enough to fail the rational basis test because the traditional view of the state interest in the social contract theory is still a tenable and legitimate state interest.

### 2. Rationally Related Fit?

When Americans talk about ordinary people (not elected officials) "making laws" or shaping laws, we generally are talking about the right to vote. Thus, the means of felony disenfranchisement do rationally further the ends of upholding the social contract and having everyone party to the contract continue to follow the laws it authorizes.

Felony disenfranchisement's rational relationship to the goal of upholding the social contract is not without counterarguments, however. The social contract does not articulate any reason why voting is different than other mechanisms to shape government and continue the project of the social contract, such as free speech, protesting, or assembling. The social contract theory, when taken to its extreme, extends to revoking an offender's citizenship, which is unconstitutional — so why stop at voting?[218] Under this logic, a court might find that singling out the vote might be arbitrary, or evidence animus, or both. However, the rational basis test permits over- and under-inclusivity, and since voting is the paradigmatic example of how citizens participate in government, this is not problematic enough for disenfranchisement to fail the rational basis test on this basis.

Additionally, felony disenfranchisement may fail the rational basis test under the social contract theory because the state interest is far broader than the means purported to achieve it, and the laws suffer from a gross lack of fit between the ends and the purported means. In some states that disenfranchise only those people of a select few felony crimes as opposed to everyone who breaks the agreement, the law is very underinclusive. However, under the rational basis test, states may make their own decisions about how bad a breach of the social contract warrants disenfranchisement, so this under-inclusivity is not necessarily evidence of animus. Similarly, one could argue that the implicit agreement always present in

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[218] Furman, *supra* note 24, at 1220 (1997) ("Taken on their own, the Court's rulings on disenfranchisement, voting, and citizenship do not raise significant questions. But taken together, the jurisprudence seems incoherent: The Court's rulings, as a whole, present a flawed syllogism. Roughly speaking, voting is equivalent to citizenship; citizenship, in turn, is inalienable; but, for some reason, voting is not inalienable. A equals B equals C, but C does not equal A. This is the paradox of disenfranchisement.").

the social contract contains a promise that if somebody breaches the contract, they will make amends for it. Therefore, if someone who had committed a crime — breaching the social contract — has served their entire sentence, they have made amends for their breach and corrected their error, while still remaining a party to the social contract. Under this view, felony disenfranchisement is over-inclusive because it affects people who have upheld the contract by remedying their breach. However, the rational basis test permits over-inclusivity, and states have the prerogative to view committing a felony as a breach that is not fully remedied by completing the terms of a sentence. For all the above reasons, social contract justifications may be the most difficult to challenge under the rational basis test.

### *K. Related Theories/Rationales*

Lastly, two theories are worth mentioning for sake of thoroughness because they are related to felony disenfranchisement: civil death historically included felony disenfranchisement, and rehabilitation is a typical rationale for punishment but is not typically offered to justify felony disenfranchisement. Including them among arguments for disenfranchisement would be making straw-man arguments, so they are briefly discussed here for sake of thoroughness because, under the rational basis test, courts could consider any (even hypothetical) state interests.

#### 1. Civil Death

When North American colonies and early states first implemented disenfranchisement laws,[219] consequences for crime often included "civil death,"[220] — the termination of an offender's legal status and all political, civil, and legal rights — or execution.[221] The Third Circuit once explicitly relied on the civil death justification for felony disenfranchisement when it reasoned that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by

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[219] Ewald, *supra* note 4, at 1062-63. ("After achieving independence from Great Britain, the American states rejected some of their English common-law heritage. Some states did adopt 'civil death' statutes for criminal offenders, but the Constitution prohibited bills of attainder, forfeiture for treason, and 'Corruption of Blood.'").

[220] *Id*. at 1061-64. *See also* Gabriel Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Incarceration*, 160 U. PA. L. REV. 1789, 1790 (2012) ("Borrowing from its English forebears, the United States once had a form of punishment called civil death. Civil death extinguished most civil rights of a person convicted of a crime and largely put that person outside the law's protection.").

[221] DILTS, *supra* note 4, at 142. Moral turpitude or exclusionary disenfranchisement laws historically resulted in infamy and civil death since lawmakers in the 1800s disenfranchised people for crimes that were understood to reflect one's unfitness for citizenship. These punishments were more for the moral turpitude of the offender than for the crime itself.

the considerations underlining our penal system,"[222] and it said the state could rationally decide "that one of the losses [could be] participation in the democratic process which governs those who are at liberty."[223] But the court in that case failed to articulate any state interest or goal that could possibly have been served by disenfranchisement. Under the Court's precedent, enunciating any legitimate state goal inherent in a civil death justification for disenfranchisement seems unsuccessful because the practice of civil death does not seem to contain an interest other than rights deprivation — the practice usually includes disenfranchisement, but does not justify it. And disenfranchisement for the goal of rights deprivation is illegitimate.[224]

### 2. Rehabilitation

Rehabilitation is one of the primary justifications for punishment in general,[225] and if applied to felony disenfranchisement, the theory would contend that the deprivation of the right to vote will make someone more law-abiding or facilitate integration back into society. This would surely be a legitimate state interest, if not a compelling one. However, this argument for disenfranchisement is unpersuasive even under the minimal form of the rational basis test because penal disenfranchisement more likely undermines any notion that a person is ready to reenter the community in a law-abiding way rather than it furthers rehabilitation. Thus, rehabilitation as a *justification* for felony disenfranchisement is so easily defeated that advocates of felony disenfranchisement do not seem to offer it as a rationale for the practice.[226] The American Bar Association is emphatic that

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[222] Owens v. Barnes, 711 F.2d 25, 27-28 (3d Cir. 1983) (citing Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 869, 74 L. Ed. 2d 675 (1983) (quoting Price v. Johnston, 334 U.S. 266, 285, 92 L. Ed. 1356, 68 S. Ct. 1049 (1948))). The court in Mixon v. Commonwealth, 759 A.2d 442, 449 (Pa. Commw. Ct. 2000), *aff'd*, 566 Pa. 616, 783 A.2d 763 (2001), also quoted this same line from Price v. Johnston, 334 U.S. 266, 68 S. Ct. 1049, 92 L. Ed. 1356 (1948).

[223] *Owens*, 711 F.2d at 28.

[224] "The Court has done only slightly better identifying illegitimate ends. Neither 'a bare congressional desire to harm a politically unpopular group' nor the purpose of restricting the exercise of fundamental rights are legitimate ends, *nor is discrimination for the purposes of reinforcing discriminatory attitudes*. . ." (emphasis added). Nachbar, *supra* note 18, at 1655 (citing Loving v. Virginia, 388 U.S. 1,11 (1967)). *See also* Merrifield v. Lockyer 547 F.3d 978, 991 n.15 (9th Cir. 2008) (holding economic protectionism for the sake of economic protectionism is an illegitimate state interest).

[225] Andrea Steinacker, *The Prisoner's Campaign: Felony Disenfranchisement Laws and the Right to Hold Public Office*, 2003 BYU L. REV. 801, 818 (2003). "The four generally recognized purposes of punishment are deterrence, rehabilitation, retribution, and incapacitation."

[226] Hamilton-Smith & Vogel, *supra* note 131, at 413, 416-17. "Underlying the many collateral consequences of a conviction, especially that of

disenfranchisement is counter to rehabilitation: "the restoration of voting rights can be seen as being in harmony with the rehabilitative goal of sentencing. If an objective of sentencing is to encourage offenders to become less antisocial, then it is in society's interest to engage offenders in productive relationships with the community. Voting is clearly one means of doing so."[227] Felony disenfranchisement likely prohibits full rehabilitation by alienating people convicted of felonies and barring them from civic participation.[228]

Under the rational basis test, courts consider data and evidence that makes a law's relation to some legitimate end more or less rational. In this case, studies show that restoring voting rights, rather than taking them away, fosters law-abiding behavior and trust in government. Therefore, disenfranchisement does not rationally serve rehabilitative goals. For example, Manza and Uggen demonstrate empirically that there is a strong correlation between voting and abstaining from crime, which at minimum suggests that "the act of voting manifests the desire to participate as a law-abiding stakeholder in a larger society."[229] Data from the Department of Justice showed that in states where ex-felons are permanently disenfranchised, the rate of repeat offenses within three years of release from prison is significantly higher than in states that do not have permanent disenfranchisement laws.[230] A 2015 study found that approximately sixteen percent of nonvoting former felons were subsequently arrested, compared with five percent of former felons who voted.[231] Although this is not causal and could be due to educational differences between voting and nonvoting citizens, voting in and of itself is associated with lower rates of recidivism. Additionally, experiments on citizens with felony convictions who are eligible to vote or to have their voting rights restored treated the groups with information about the restoration of their voting rights and/or

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disenfranchisement, is the implicit assumption communicated to the offender that the collateral consequences are permissible because total rehabilitation is impossible." In *Richardson v. Ramirez*, the Court also addressed the relationship between disenfranchisement and rehabilitation. "While the Court recognized that disenfranchisement may impede the rehabilitation and return of ex-felons to society, it reasoned that that was an issue that fell outside the Court's duties and obligations."

[227] Mauer, *supra* note 132.

[228] Manza and Uggen find that "those who vote are less likely to be arrested and incarcerated, and less likely to report committing a range of property and violent offenses…this relationship cannot be solely attributed to criminal history; voting is negatively related to subsequent crime among those with and without a prior criminal history." *Supra* note 4, at 133.

[229] Uggen & Manza, *supra* note 135, at 213.

[230] Hadar Aviram, Allyson Bragg & Chelsea Lewis, *Felon Disenfranchisement*, 13 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 295, 304 (2017) (discussing Hamilton-Smith & Vogel, *supra* note 131). Further research is needed to determine whether this relationship is correlational or causal.

[231] *Id.* at 304.

encouragements and assistance with voting in an upcoming election, leveraging the fact that many people with felony convictions are unsure whether their right to vote has been restored. The experiment isolated the effect of having one's right to vote restored, which caused an increase in trust in government, perception that government is fair and representative, trust in the police and criminal justice system, and enhanced willingness to cooperate with law enforcement.[232] "[P]ro-social and pro-democratic attitudes are common predictors of an individual's ability to successfully re-enter society after being released from prison . . . restoring voting rights causes newly- enfranchised individuals to increase the very types of attitudes and behaviors that make a return to crime less likely."[233] While rehabilitation is certainly a legitimate state goal, the means of felony disenfranchisement contradict it, and therefore these provisions would fail the rational basis test.

## CONCLUSION

Three justifications for felony disenfranchisement — proportionality, democratic legitimacy, and social contract theory — may be the toughest to overcome. Because these rationales may withstand the rational basis test, they present a substantial issue for advocates of abolishing penal disenfranchisement by raising a rational basis claim. Additionally, convincing a court to apply rational basis with bite to felony disenfranchisement, rather than the minimal form of the rational basis test, is likely a difficult task. If a court applied the heightened form, it would likely do so because felony disenfranchisement affects the right to vote, rather than because it classifies by felony status. However, which version of the test a court applies ultimately does not matter because proponents of disenfranchisement have multiple strong-enough justifications under rational basis doctrine that would likely survive rational basis with bite, if the state simply offers them up to a reviewing court. So, policy changes at the state level may be an easier path for felony disenfranchisement abolition. Felony disenfranchisement equal protection claims have a low likelihood of success under the rational basis doctrine. However, examining rationales for disenfranchisement by this standard demonstrates that many common justifications for the practice would not pass even the lowest level of constitutional inspection.

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[232] Victoria Shineman, Restoring Rights, Restoring Trust: Evidence that Reversing Felony Disenfranchisement Penalties Increases Both Trust and Cooperation with Government, SSRN (Oct. 25, 2018), https://ssrn.com/abstract=3272694.

[233] *Id.*