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CAN FELON DISENFRANCHISEMENT SURVIVE UNDER MODERN CONCEPTIONS OF VOTING RIGHTS?: POLITICAL PHILOSOPHY, STATE INTERESTS, AND SCHOLARLY SCORN

*S. Brannon Latimer**

I. INTRODUCTION

DEMOCRATIC principles are critical to America's prosperity, and the right of its citizens to decide for themselves how they will be governed is a value deeply ingrained in its people. Americans celebrate this in various ways. They study the founding documents of the United States even hundreds of years after they were written. They speak, protest, donate, and vote in elections held across the country every year. Nearly everyone agrees that these things are praiseworthy and that the aspirations of self-government are noble.

However, the right to vote is only meaningful in a competitive system; thus, America is a natural incubator for disagreement. This Comment is about voting and disagreement. Specifically, it explores the debate over the revocation of voting rights from convicted felons. There is much to be debated on this issue, and only a small part of it will find its way onto the following pages; however, what is included is an attempt to discuss and defend a state's power to maintain this practice. Thus, this Comment aims to provide a counterpoint to what has become the conventional wisdom of the academy: felon disenfranchisement is both untenable and undesirable.

The first section of this Comment provides an overview of the American franchise and its history. This leads into a discussion of the current debate over felon disenfranchisement and why it has become such an important issue. Part three then describes the constitutional baselines for voting rights and felon disenfranchisement under the law as it now stands. Part four begins by sketching an argument against these disenfranchisement provisions. The arguments articulated by Professor Pamela Karlan are described in detail, and the issues raised by her comments are identi-

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fied and discussed. The section then provides a critique of her major points, concluding that states still have sufficient power and purpose to justify disenfranchising felons, even under modern conceptions of voting rights.

II. CONTEXT AND CONTROVERSY

A. History and Overview of the Franchise in America

At its beginning, the American franchise was limited to white male property owners.[1] This attribute was the result of importing English legal doctrines and traditions, which limited suffrage in similar ways. Laws in Colonial America were loosely enforced, however, and land was cheaply available, so from its beginning, suffrage was more widespread than in England.[2] Nevertheless, "there was no ideological consensus during the eighteenth century in favor of universal white male suffrage."[3]

Embracing this viewpoint and fearful of a heavily centralized political structure, American constitutional framers limited the powers given to the national government, granting states plenary authority to regulate the franchise in both federal and state elections.[4] Thus, voting laws have always varied from state to state. While the wisdom of this system is beyond the scope of this article, there is no question that, for better or worse, states have been "laboratories of experimentation" in voting matters.[5]

After the turn of the century, this narrow conception of the franchise was challenged by a Puritan belief that "for purposes of secular politics, people should be treated as if they were equal and, increasingly, by natural rights theories of political equality."[6] Land-ownership requirements for voting began to lose popularity as universal white suffrage became the ideal.[7] Poll taxes were welcomed as a replacement for property requirements, a "liberalizing device" that *opened* access to the franchise.[8] By the time of the Civil War, universal white male suffrage was the norm.[9] Although black suffrage was unpopular in both the North and the South even after the war, Congress stepped in, passing the Reconstruction Act of 1867, which made enfranchisement of blacks a condition southern states had to satisfy for readmission to the Union.[10] The next year, the Fourteenth Amendment was drawn up and ratified to ensure that there

1. Daniel Hays Lowenstein & Richard L. Hansen, Election Law: Cases and Materials 30 (3d ed. 2004).
2. *Id.*
3. *Id.* at 31. "Before the Revolution, the prevailing political theory was influenced by Aristotle's idea of balanced government, which held that tyranny would result if either the monarchical, the aristocratic, or the democratic principle dominated the others." *Id.*
4. *See* U.S. Const. art. I, § 4, cl. 1; *id.* art. II, § 1.
5. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
6. Lowenstein & Hansen, *supra* note 1, at 31.
7. *Id.*
8. *Id.*
9. *Id.* at 32.
10. *Id.*

was no question as to Congress's power to pass such anti-discriminatory statutes.[11] Although the structure of state and federal power changed dramatically with the adoption of the Fourteenth Amendment, it did not prohibit discrimination in voting outright.[12]

Section Two of the Fourteenth Amendment, however, was written with the purpose of discouraging states from disenfranchising their constituents.[13] It did this by mandating a reduction in a state's congressional representation proportional to the number of twenty-one year-old males who were excluded from the franchise for any reason other than "rebellion, or other crime[.]"[14] Thus, states which excluded otherwise legal voters from the franchise would pay a political price in Washington.

Black suffrage became the law in 1879 with the ratification of the Fifteenth Amendment, providing that the right of citizens to vote "shall not be denied or abridged [on] account of race, color, or previous condition of servitude."[15] But the battle was far from over in the south. Over the next several decades, Southern Democrats erected various barriers to black suffrage.[16] Previously legitimate devices for regulating the franchise, such as secret ballots, poll taxes, and literacy tests, became weapons against black voters.[17] The battle for black suffrage continued slowly and violently, climaxing with the Civil Rights Movement, which led to the enactment of the Voting Rights Act and the Twenty-Fourth Amendment, providing that the right of any citizen to vote in any federal presidential or congressional election "shall not be denied or abridged [by] reason of failure to pay any poll tax or other tax."[18]

In the wake of these changes, the movement for women's suffrage began in the mid-nineteenth century[19] and culminated in 1920 with the rati-

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11. STONE, ET AL., CONSTITUTIONAL LAW 432 (4th ed. 2001). Section One states that
> [n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

12. *See* U.S. CONST. amend. XIV, § 1.

13. Its text reads:
> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2.

14. *See id.*

15. *Id.* amend. XV.

16. LOWENSTEIN & HANSEN, *supra* note 1, at 35.

17. *Id.* at 34-35.

18. *See* U.S. CONST. amend. XXIV.

19. LOWENSTEIN & HANSEN, *supra* note 1, at 33-36.

fication of the Nineteenth Amendment.[20] More than fifty years later, the Constitution was amended once again to expand the franchise with the Twenty-Sixth Amendment, which lowered the voting age to eighteen.[21]

This completes a picture of the development of the American franchise. When our nation began, the franchise was limited to "property-owning, taxpaying white males over the age of twenty-one."[22] Since that time, the history of the franchise in the United States has been one of gradual expansion.[23] Political scientist E.E. Schattschneider stated that "one of the easiest victories of the democratic cause in American history has been the extension of the suffrage . . . . [t]he struggle for the ballot was almost bloodless, almost completely peaceful, and astonishingly easy," and most scholars tend to agree.[24] While the interests driving progress were diverse and often motivated by something other than equality,[25] the result is the nearly universal suffrage we embrace today. "The dominant assumption in the literature today is that 'at least since the voting rights reforms of the 1960s, political rights have been universalized in the United States. With relatively insignificant exceptions, all adult citizens have the full complement of political rights.'"[26]

B. The Felon Disenfranchisement Controversy

Scholars are quick to point out these "exceptions" to universal suffrage, and many vehemently argue that they are anything but "insignificant."[27] While the voting rights battlefield has many fronts, the debate over felon disenfranchisement has taken center stage in recent years, due largely to the potential effects a change in these laws would have on polit-

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20. *See* U.S. Const. amend. XIX.

21. Stone et al., *supra* note 11, at 740-41. Prior to this amendment, the majority of states set the minimum voting age at twenty-one. Lowenstein & Hansen, *supra* note 1, at 40.

22. Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. Cin. L. Rev. 1345, 1345 (2003).

23. Lowenstein & Hansen, *supra* note 1, at 29. Not all scholars wholly accept this view. These authors note that the change "has usually been in the direction of allowing more people to vote in more elections that increasingly have controlled the most important aspects of government policymaking" but that "we should not assume that the direction of change has always been toward extension of the franchise," because resident aliens saw their right to vote revoked during the nineteenth century and Southern states severely impeded African American suffrage during the early twentieth century. *Id. See also* Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 Am. Soc. Rev. 777, 778 (2002) (referring to restrictions on the voting rights of felons as "a rare and potentially significant counterexample to the universalization of the franchise in democratic societies").

24. *Compare* Uggen & Manza, *supra* note 23, at 780 (citing Schattschneider favorably) *with* 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, 765-66 (2000) (citing Schattschneider disapprovingly).

25. Theories explaining the expanding franchise have laid credit at the feet of Puritan beliefs, natural rights theory, political advantage, fear of slave rebellion, and war. *See* Lowenstein & Hansen, *supra* note 1, at 1-32; Karlan, *supra* note 22, at 1345-46.

26. Uggen & Manza, *supra* note 23, at 780 (citation omitted).

27. *See infra* note 40 and sources cited.

ical outcomes.[28] This portion of the article will describe the nature of these laws and why they are the subject of such heated debate.

Contrary to popular lore,[29] Americans did not invent felon disenfranchisement to exclude African-Americans from voting. The practice has Mediterranean origins; ancient Greek society imposed *atimia* on criminal offenders, pronouncing "civil death" upon them and stripping them of many citizenship rights, including the right to vote.[30] Likewise, Romans punished particular offenders with *infamia*, which included loss of voting privileges.[31] These ideas spread to England, and the practice found its place in English common law under the idea of attainder, which revoked rights from anyone convicted of treason or specific felonies.[32] Early American colonies adopted much of English legal doctrine and traditions, and felon disenfranchisement laws gained a foothold in the United States to a somewhat lesser extent than they did in England.[33] Thus, rather than inventing the statutes to decrease minority voters, "states have punished malefactors by restricting the fundamental rights of citizenship, including rights of political participation" since the United States became a nation.[34]

The fight did not begin until the late 1950s, when several public-interest groups took aim at felon disenfranchisement laws across the country.[35] Seeking to transform the focus of the American penal system from retribution and deterrence to rehabilitation and integration, these progressive groups believed that disenfranchisement cut felons off from society and thus increased the likelihood of recidivism. However, rehabilitative theories of punishment fell out of favor in the United States in the face of rapidly escalating crime rates.[36] And although the felons' rights move-

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28. *See infra* notes 63-68 and accompanying text.

29. *See* Roger Clegg, *Perps and Politics: Why Felons Can't Vote*, NAT'L REV. ONLINE, Oct. 18, 2004, *available at* http://www.nationalreview.com/clegg/clegg200410180844.asp (discussing prominent newspapers which erroneously tie felon disenfranchisement to racism).

30. Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSP. ON POL., 491, 491, 492 (2004).

31. *Id.*

32. Demleitner, *supra* note 24, at 765-66.

33. *Id.* Demleitner noted that "the United States rejected some of this common law heritage," adhering

> [to] a lesser form of "civil death" than England did .... The Constitution, for example, abolished forfeiture for treason and corruption of blood. In the second half of the twentieth century, many of the surviving consequences of 'civil death' statutes, such as the inability to enter into contracts or to inherit property, were abolished in American states.

Id.

34. Manza & Uggen, *supra* note 30, at 492.

35. Demleitner, *supra* note 24, at 766. Such groups included the National Conference on Uniform State Laws, the American Law Institute, the National Probation and Parole Association, the National Advisory Commission on Criminal Justice Standards and Goals, and the President's Commission on Law Enforcement and the Administration of Justice.

36. STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 122-23 (2005).

> During the first half of the twentieth century, the incidence of violent crime in the United States was, for the most part, fairly steady. But in the early

ment gained traction abroad,[37] efforts to use the judiciary as a vehicle to attack felon disenfranchisement provisions in the United States came to an abrupt end in *Richardson v. Ramirez*.[38] This case, discussed in fuller detail below, held that Section Two of the Fourteenth Amendment provides an affirmative constitutional sanction for states that seek to adopt felon disenfranchisement laws.[39] As a result of this holding, the issue all but disappeared during the seventies and eighties. But since that time, particularly in the last decade, the movement has regained much of its former momentum, and today there is an avalanche of scholarly condemnation of the current felon disenfranchisement laws.[40]

Today, nearly every state disenfranchises convicted felons, and nearly every article on the subject begins by reciting the scope and impact of these laws, often in hyperbolic language. But many facts are quite clear. Forty-eight states and the District of Columbia only allow people *not* imprisoned for a felony to vote.[41] Thirty-six states withhold restoration of voting privileges until felons have successfully completed their parole.[42] Thirty-one of these states wait until felons complete their probation as well.[43] Only Maine and Vermont impose no voting restrictions on convicted felons.[44] Stated another way, convicted felons automatically regain the right to vote upon completing their sentence, parole and probationary periods in thirty-eight states and the District of Columbia.

1960s, it began to climb. In retrospect, it is clear that one of the major factors pushing this trend was a more lenient justice system.

Id. However, conservative campaigns to restore retributive punishments changed the nature of the laws dramatically. "The evidence linking increased punishment with lower crime rates is very strong. Harsh prison terms have been shown to act as both deterrent . . . and prophylactic . . . . [l]ogical as this may sound, some criminologists have fought the logic." *Id.* He includes a priceless quote: "Apparently, it takes a Ph.D. in criminology to doubt that keeping dangerous criminals incarcerated cuts crime." *Id.* I include these comments here because many critics of disenfranchisement still rely on these arguments and favor rehabilitative criminal theories.

37. Some other nations, such as Germany, have modified their laws under the influence of these ideas. Demleitner, *supra* note 24, at 767.

38. *See* Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (holding that felon disenfranchisement laws did not violate equal protection, because Section Two of the Fourteenth Amendment explicitly exempts such laws from equal protection scrutiny). *See also infra* notes 81-114, and accompanying text.

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

40. *See, e.g.*, John R. Cosgrove, *Four New Arguments Against the Constitutionality of Felony Disenfranchisement*, 26 T. JEFFERSON L. REV. 157, 163-73 (2004); Demleitner, *supra* note 24, at 755-56; Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 738-44 (1998); Afi S. Johnson-Parris, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 VA. L. REV. 109, 133-36, (2003); Manza & Uggen, *supra* note 30, at 492-93; Mark E. Thompson, *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, 168-69, 200-01 (2002).

41. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2005), http://www.sentencingproject.org/pdfs/1046.pdf [hereinafter Sentencing Project].

42. *Id.*

43. *Id.*

44. *Id.*

Nine states automatically restore voting privileges once a preset waiting period passes,[45] and in two others, felons can vote from their prison cells.[46] At this point, we are left with what might appear to be a rather underwhelming controversy. Only three states permanently deny convicted felons the right to vote, and each of these has defined a process which, if completed, restores voting rights.[47] Unfortunately for opponents of these provisions, the restrictions described above are not intuitively outrageous or likely to provoke public outcry.

Currently, felon disenfranchisement laws are in flux. The trend within the United States has not been to eliminate these laws or to increase their severity but instead toward what appears to be equilibrium. On the one hand, several states with existing felon disenfranchisement provisions have relaxed their effects. "'In the past decade, the trend at the state level has been very clear. In the majority of cases, states have made [voting] laws less restrictive' for ex-felons."[48] Delaware amended its constitution in 2000 to end its practice of permanent disenfranchisement of all felons.[49] In 2001, Connecticut passed a law restoring voting rights to felons upon completion of probation.[50] Maryland amended its laws and abandoned its practice of permanently disenfranchising all felons in 2002.[51] In 2003, Alabama passed a statute to allow felons to apply for a certificate of eligibility to vote after completing their sentence.[52] Between 1997 and 2005, similar changes took place in Iowa, Kentucky, Nebraska, Nevada, New Mexico, Pennsylvania, Texas, and Wyoming.[53] So in eight years, twelve states—several among the most *conservative* in the nation—relaxed their restrictions on felon voting. One study found that since 1975, thirteen states have expanded the franchise to felons in some way, while eleven states have passed further restrictions, and three others have moved in both directions.[54]

Several states, however, did exactly the opposite during this period. Two states which have never disenfranchised felons—Utah and Massachusetts—recently enacted provisions doing exactly that.[55] In 1998, Utah voters approved a state amendment prohibiting persons currently incar-

45. *Id.* Delaware and Wyoming require a five-year waiting period, Maryland requires three years, and Nebraska two.

46. *Id.*

47. These stares are Florida, Kentucky, and Virginia. SENTENCING PROJECT, *supra* note 41, at 1.

48. Joyce Howard Price, *Vermont, Maine Allow Felon Votes; Maryland Bill Studies Privilege*, WASH. TIMES, Jan. 29, 2006, at A1, *available at* http://www.washtimes.com/national/20060128-104343-6528r.htm.

49. SENTENCING PROJECT, *supra* note 41, at 2.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Jeff Manza, et al., *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275, 276 (2004), *available at* http://www.soc.umn.edu/~uggen/Manza_Brooks_Uggen_POQ_04.pdf.

55. SENTENCING PROJECT, *supra* note 41, at 2.

cerated from voting.[56] Likewise, in 2000, Massachusetts voters approved a constitutional amendment to the same effect.[57] Kansas took a step in the same direction in 2002, passing a statute which extended the prohibition on voting to felons who are still serving parole.[58]

Thus, states, through democratic—not judicial—processes, constantly modify their felon disenfranchisement policies, but not uniformly. "Since 1975, thirteen states have liberalized their laws, eleven states have passed further limitations on felons, and three states have passed both types of laws."[59] A recent study suggests that a majority of the public favors restoration of voting rights to felons who are out of prison,[60] but felon disenfranchisement is clearly not unpopular among state legislators. Were this the case, one would expect states troubling themselves to amend these statutes would instead repeal them. Instead, several states have repealed portions of their statutes, but all stopped far short of sweeping expansions of suffrage. The trend, if it can be said that one exists, is toward reform rather than a rejection of disenfranchisement statutes.

Perhaps more surprisingly, it appears possible that constituents on both sides of the political aisle approve of felon disenfranchisement. Consider that the two states which most recently adopted felon disenfranchisement provisions for the first time are Utah, in 1998, and Massachusetts, in 2000. There is irony in this juxtaposition. Utah is a state in which President George W. Bush carried 71.1% of the vote in the last presidential election—the strongest pro-Bush state in the union.[61] And, in Massachusetts, 62.1% of the electorate supported John F. Kerry in the 2004 race, making it the strongest pro-Kerry state.[62] Identical action by such politically different states may provide more questions than answers.

In 2002, two leading voting-rights scholars published an article which greatly increased the stakes in this issue. Their conclusion was simple: that "there are reasons to believe that felon disenfranchisement has not had a neutral impact on the American political system."[63] They noted that the Democratic voting base may be significantly eroded by felon disenfranchisement,[64] estimating that 1.8 million felons and ex-felons currently disenfranchised are African-American.[65] Coupled with historical patterns indicating that African-Americans are overwhelmingly Democrats, the difference between excluding and including this segment of the

56. *Id.*
57. *Id.*
58. *Id.*
59. Manza & Uggen, *supra* note 30, at 499.
60. Manza et al., *supra* note 54, at 280.
61. *See* USA Today Election 2004, http://www.usatoday.com/news/politicselections/vote2004/results.htm (follow "President by State" hyperlink) (last visited Sept. 16, 2006).
62. *Id.*
63. Uggen & Manza, *supra* note 23, at 780.
64. *Id.*
65. *Id.*

population is not insignificant.[66] Additionally, the white population of felons and ex-felons is primarily poor or working class, and thus a large portion of these would also vote for Democratic candidates.[67] In the end, the authors concluded that "felon disenfranchisement laws, combined with high rates of criminal punishment, may have altered the outcome of as many as seven recent U.S. Senate elections and at least one presidential election."[68] Assuming their conclusions are correct, the motives for a bitter political and legal battle become immediately clear.

III. VOTING, DISENFRANCHISEMENT, AND CONSTITUTIONAL RIGHTS

A. VOTING AS A FUNDAMENTAL RIGHT

Before describing the current arguments against felon disenfranchisement laws, a discussion of the core legal doctrines is edifying. Up until the 1960s, courts generally yielded to the states' determinations of voting qualifications where there was no express prohibition on the restraint.[69] For example, the Supreme Court unanimously upheld a $1 poll tax in Georgia in 1937[70] and, in 1959, a North Carolina statute requiring that voters be able to "read and write any section of the [state constitution] in the English language."[71]

However, this deference came to an abrupt end during the Warren era. The Court announced in *Reynolds v. Sims* that

> [the] right of suffrage is a fundamental matter in a free and democratic society. Especially since 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.[72]

This marked the birth of "one person, one vote" and chaos in the state legislatures, who were compelled by the opinion to redraw the district lines throughout the nation. Chief Justice Warren would later say that this decision was the most important of his tenure, and its sweeping effects on the American political system cannot be questioned. Further, the declaration of voting as a "fundamental right" altered the legal framework of franchise restrictions[73] and was the genesis of a new series of

66. *Id.*
67. *Id.* at 780-81.
68. *Id.* at 794.
69. STONE ET AL., *supra* note 11, at 741.
70. *Id.* (citing Breedlove v. Scuttles, 302 U.S. 277 (1937))
71. *Id.* (citing Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959)).
72. Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).
73. Under the Equal Protection Clause, courts employ different standards of review depending on the right and classification at issue. Classifications on the basis of race, for example, are considered "suspect" because it is thought that laws containing such provisions are likely to hinder the targeted class. Thus, the court developed what is called "strict scrutiny" to analyze such laws. Under this framework, the state carries the burden to show that the law at issue is narrowly tailored to serve a compelling state interest—a burden that has been historically very difficult to meet. When strict scrutiny is applied, a statute will

legal challenges to the electoral system. The strongest arguments against felon disenfranchisement rest ultimately on this doctrine—the fundamental nature of the right to vote. Within legal circles, the debate over this decision continues,[74] but there is no doubt that *Reynolds* is firmly entrenched in our nation's law and culture.

B. Disenfranchisement and the Supreme Court

This declaration—that voting is a fundamental right—is the touchstone of modern felon disenfranchisement law, but challenges to disenfranchisement for unlawful acts had come before the Court as early as the nineteenth century. Two cases, *Davis v. Beason*[75] and *Murphy v. Ramsey*,[76] often referred to as the "Mormon Cases," challenged state statutes excluding polygamists from the franchise. *Ramsey* concerned a Utah plaintiff who argued that the disenfranchisement provision was essentially a criminal punishment without prosecution.[77] However, the Court disagreed, stating that it is "precisely similar to an inquiry into the fact of nativity, of age, or of any other status made necessary by law as a condition of the elective franchise."[78] It then hinted at its view of the state's power to regulate voting:

> It would be quite competent for the sovereign power to declare that no one but a married person shall be entitled to vote; and in that event the election officers would be authorized to determine for that occasion, in case of question in any instance, upon the fact of marriage as a continuing status.[79]

The *Beason* Court upheld a similar Idaho statute in the face of a First Amendment challenge, holding that the law was simply a prescription of reasonable voter qualifications.[80] Neither of these cases, however, dealt with felon disenfranchisement *per se*—the plaintiffs had not been convicted of polygamy but merely deprived of the right to vote under a state regulatory scheme.

The first and only Supreme Court decision squarely addressing felon disenfranchisement in the modern era is *Richardson v. Ramirez*.[81] In *Ra-*

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almost always fail, and thus lawyers who wish to attack a statute will attempt to show that it targets a "suspect class." Like suspect classifications, "fundamental interests" are also reviewed by the court under strict scrutiny. *See generally* Erwin Chemerinsky, Constitutional Law: Principles and Policies 517-20 (2d ed. 2002).

74. Robert Bork, nominee to the Supreme Court, was not confirmed by the Senate in part because of his writings critical of the "one person, one vote" holding. Likewise, the recent nominations of Chief Justice John Roberts and Justice Samuel Alito did not pass without questioning from senators about the nominees' views on *Reynolds v. Sims*. Bork's critique is still valuable to those who study this debate. *See* Robert H. Bork, The Tempting of America: The Political Seduction of the Law 84-90 (1990).

75. 133 U.S. 333 (1890).

76. 114 U.S. 15 (1885).

77. *Id.* at 40-44.

78. *Id.* at 43.

79. *Id.*

80. *Beason*, 133 U.S. at 346.

81. 418 U.S. 24 (1974).

mirez, three felons who had completed their sentences filed a writ of mandate to the Supreme Court of California, asserting that the state constitutional and statutory provisions denying them voting opportunity violated the Equal Protection Clause of the Fourteenth Amendment.[82] The California constitution, adopted in 1879, contained a provision that "'[laws] shall be made' to exclude from voting persons convicted of bribery, perjury, forgery, malfeasance in office, 'or other high crimes.'"[83] Further, at the time petitioners filed suit, article II of the state constitution additionally provided that

> [n]o alien ineligible to citizenship, no idiot, no insane person, no person convicted of any infamous crime, no person hereafter convicted of the embezzlement or misappropriation of public money, and no person who shall not be able to read the Constitution in the English language and write his or her name, shall ever exercise the privileges of an elector in this State.[84]

The petitioners prevailed in the state court, but the United States Supreme Court reversed and held that felon disenfranchisement provisions did not violate the United States Constitution in a 6-3 decision.[85]

The majority opinion, written by Justice Rehnquist, focused on the explicit text and an original understanding of the Fourteenth Amendment.[86] Specifically, the Court found its answer by looking beyond the commonly-referenced Section One, to Section Two, which pertains to voting in the states:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.[87]

The Court reasoned that this imposes a sanction on any state which deprives otherwise qualified citizens suffrage, unless it does so based on conviction for a felony.[88] As a result, it seems that felon disenfranchisement *could not* violate Section One of the Amendment, because the

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82. *Id.* at 31.
83. *Id.* at 27 (citing CAL. CONST. art. XX, § 11).
84. *Id.* at 27-28 (citing CAL. CONST. art. II, § 1 (repealed 1972)).
85. *Id.* at 56.
86. *Id.* at 42-52.
87. U. S. CONST. amend. XIV, § 2 (*quoted in Ramirez*, 418 U.S. at 42-43) (emphasis added by Court).
88. *Ramirez*, 418 U.S. at 43.

Framers, in their next breath, approved of such practice.[89] The Court found that this argument would be persuasive enough to carry the day "unless it can be shown that the language of [Section Two (italicized above)] was intended to have a different meaning than would appear from its face."[90]

Moving on to an Originalism analysis, the Court noted that "legislative history bearing on the meaning of the relevant language of Section Two is scant indeed" since the framers were more concerned with the reduced representation of the states rather than the exempted forms of disenfranchisement.[91] However, what legislative history could be found surely indicates that the language was intended by Congress to "mean what it says."[92]

The language at issue was introduced by Senator Williams of Oregon at Joint Committee; the committee approved it overwhelmingly, and the draft Amendment was sent to the House floor without change.[93] During the entire course of the floor debates in both congressional houses, the language "except for participation in rebellion, or other crime" was not once modified.[94] Several representatives noted the evident result of the clause at issue—that states may disenfranchise criminals without sacrificing representation—while debating other aspects of the amendment.[95] Other convincing evidence was also discussed. At the time of the ratification of the Fourteenth Amendment, twenty-nine of thirty-seven states had constitutional provisions allowing or requiring that individuals convicted of felonies or "infamous crimes" be excluded from the franchise.[96] Moreover, Congress, at the time of the Amendment's ratification, required that Southern states seeking readmission to the union allow delegates of "whatever race, color, or previous condition . . . *except such as may be disenfranchised for participation in the rebellion or for felony at common law.*"[97] The Court showed such an exception to be common to the voter qualification clauses at the time.[98] Finally, the Court noted that, although this was its first holding related to felon disenfranchisement, two cases decided in the late nineteenth century approved of excluding bigamists from the franchise.[99] *Lassiter v. Northampton County Board of Elections*[100] approved of excluding felons from voting in dicta, and the Court summarily affirmed two district court decisions rejecting constitu-

89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 44.
94. *Id.* at 45.
95. *Id.* at 45-48.
96. *Id.* at 48.
97. *Id.* at 48-49.
98. *Id.* at 49-50.
99. *Id.* at 53
100. 360 U.S. 45, 51 (1959).

tional challenges to state felon disenfranchisement laws.[101] In sum, the Court held there is no reason to believe that the ratification Congress believed passage of the Fourteenth Amendment would affect existing felon disenfranchisement laws *at all*.

Finally, the Court directly addressed the respondents, who submitted that the Court's recent interpretation of the Equal Protection Clause required that felon disenfranchisement laws be subject to strict scrutiny.[102] But unlike Section One, Section Two of the amendment includes an *affirmative sanction* of felon disenfranchisement "which was not present in the case of the other restrictions on the franchise which were invalidated in the cases on which respondents rely."[103] Rather, the original understanding of the Framers and ratifiers of the Fourteenth Amendment is controlling, and the Court

> rest[s] on the demonstrably sound proposition that Section One, in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which Section Two imposed for other forms of disenfranchisement.[104]

The Court, 6-3, gave merely a nod of acknowledgement to the *amici curiae* who contend that felon disenfranchisement is "outmoded" and should be replaced with a more modern view of rehabilitation.[105] Justice Rehnquist, in response, pointed to judicial restraint, noting that he

> [W]ould by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them against those advanced in support of California's present constitutional provisions. But it is not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.[106]

The dissent's argument, now over thirty years old, resembles the main thrust of most recent scholarship on this issue. Justice Marshall argued that Section Two was designed as an "out" for Southern states, which sought to discriminate against African-Americans, and that the provision in Section Two could not act as a limitation on the other sections of the Amendment.[107] Finally, he reasoned that that the statute failed strict

101. *Ramirez*, 418 U.S. at 53 (citing Fincher v. Scott, 352 F. Supp. 117 (M.D.N.C. 1972), *aff'd*, 411 U.S. 961 (1973); Beacham v. Braterman, 300 F. Supp. 182 (S.D. Fla. 1969), *aff'd* 396 U.S. 12 (1969)).

102. *Id.* at 54.

103. *Id.*

104. *Id.* at 55.

105. *Id.*

106. *Id.*

107. *Id.* at 73-74 (Marshall, J., dissenting).

scrutiny.[108] Although preventing election fraud is a compelling state interest, the disenfranchisement provision in question was hopelessly over- and under-inclusive to this goal—some voting crimes were not felonies, and there was no rational relationship between the crimes most felons commit and voter fraud.[109] Moreover, felons have a legitimate interest in the democratic process and cannot be excluded based on the manner in which they might cast a vote.[110]

Ramirez, however, should not be read to be a rubber stamp exempting all felon disenfranchisement statutes from Equal Protection scrutiny. In 1985, the Court heard a challenge to Alabama laws disenfranchising felons on the basis that they were passed with a discriminatory motive—disenfranchisement of African-Americans.[111] The *Hunter v. Underwood* plaintiffs were convicted for presenting worthless checks—a crime of "moral turpitude" that, under Alabama statute, meant disenfranchisement.[112] The Court, examining the state constitutional provision in question, found that it was indeed drafted and passed by the Alabama convention for the express purpose of disenfranchising blacks.[113] It found damning evidence in the legislative history, noting that the president of the convention stated in his opening address: "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."[114] With such stark evidence of discriminatory intent, the Supreme Court reasoned that Section Two would not act as a shield for racially discriminatory laws.[115] Thus purely discriminatory disenfranchisement statutes, though they fall within the Section Two exception, will nevertheless be violative of the Equal Protection Clause if they are adopted for discriminatory purposes.

IV. CHALLENGES TO FELON DISENFRANCHISEMENT

With the historical and legal background in place, the next section will describe and critique several challenges to felon disenfranchisement provisions. Various scholars have developed legal and philosophical arguments attacking the practice, but very little has been written in its defense. The following critique addresses the feasibility of felon disenfranchisement statutes in light of our modern view of voting rights and considers whether they remain philosophically tenable or serve any legitimate nonpenal purpose. Much of the following discussion is based on the often-cited work of Professor Pamela S. Karlan.[116] The following subsec-

108. *Id.* at 78-85.
109. *Id.* at 79.
110. *Id.* at 78.
111. Hunter v. Underwood, 471 U.S. 222 (1985).
112. *Id.* at 223-24.
113. *Id.* at 233.
114. *Id.* at 229 (citing 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21, 1901 TO SEPTEMBER 3, 1901 8 (1940)).
115. *Id.* at 233.
116. *See* Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1149-50 (2004).

tion will describe Karlan's, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*,[117] in which she argues that disenfranchisement is punishment, not regulation, and as such it cannot withstand scrutiny under our current conception of voting rights. The final subsection will analyze and critique the components of her argument. Additionally, a few other issues closely related to her position will be addressed as well.

A. Professor Karlan's 'Disenfranchisement as Punishment' Argument

A primary issue in felon disenfranchisement is whether such provisions are punitive or regulatory in nature.[118] This is crucial because constitutional limits on punishment are more restrictive than limits on regulations, so if it can be proved that felon disenfranchisement laws are punitive, they will be scrutinized under a more demanding set of legal standards.[119] Currently, disenfranchisement statutes are regulatory, but Professor Karlan argued that this notion is founded on a "long-since-repudiated conception of the right to vote."[120] Furthermore, the "current conception so undercuts originally regulatory justifications for disenfranchising offenders that only penal justifications remain."[121]

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117. *Id.*
118. *Id.*
119. *Id.* at 1150.
120. *Id.*
121. *Id.*

This conclusion is important because if disenfranchisement can only be justified as a punitive measure it might violate the Eighth Amendment's prohibition on cruel and unusual punishment. Karlan maintained that the Court's decision in *Ewing v. California*, 538 U.S. 11 (2003), may support a finding of unconstitutionality under this theory. *Ewing* recognized that the Constitution "does not mandate adoption of any one penological theory" and upheld California's "three strikes law" primarily based on the necessity of incapacitation when deterrence fails. *Ewing*, 538 U.S. at 25-26. In Karlan's view, the defendant's recidivism—not the retributive penalty for a rather silly offense—was the linchpin of this holding. Karlan, *supra* note 116, at 1165. The only suitable justification for the harsh punishment was that "he had shown that he was 'simply incapable of conforming to the norms of society as established by its criminal law.'" *Id.* at 1166. However, disenfranchisement is only justifiable as a retributive measure, because "[n]either rehabilitation nor deterrence plays any plausible role at all in justifying the disenfranchisement of former offenders." *Id.* Moreover,

> [i]t seems unlikely that an individual who is not deterred by the prospect of imprisonment or fines or other restrictions on his liberty will be dissuaded by the threat of losing his right to vote, even if he were aware that permanent disenfranchisement is a collateral consequence of a criminal conviction.

Id. at 1165-66.

Dismissing incapacitation as well, Karlan noted that only retribution is left standing. When a punishment is justified on this basis, proportionality analysis becomes determinative to its constitutionality. *Id.* at 1167. The gravity of the defendant's conduct will be weighed against the harshness of the penalty imposed under today's prevailing standards of justice. *Id.* at 1167-68. Treating all felons the same under disenfranchisement statutes yields unconscionable results—all felonies are treated as equally serious though some carry a maximum sentence and others the death penalty. *Id.* Furthermore, "[t]he disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box . . . disinherited[, he] must sit idly by while others elect his civil leaders and while others choose the fiscal and governmental policies which

The current conception of disenfranchisement statutes originates in the Warren Court's pronouncement in *Trop v. Dulles*, which explained:

> [A] statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. . . . The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.[122]

Professor Karlan believed this case was decided on faulty reasoning: Chief Justice Warren never articulated a non-penal purpose which was served by disenfranchising offenders,[123] and he relied on the Mormon Cases,[124] which permitted the disenfranchisement of polygamists as an ordinary regulation.[125] The conception of voting rights underlying the Mormon Cases—that states have plenary authority to regulate the franchise[126]—has since been rejected by the Supreme Court.[127]

The pivotal case to the modern understanding of voting rights is *Reynolds v. Sims*,[128] in which the Warren Court declared that "the right to vote freely [is] the essence of a democratic society" and "any restrictions on that right strike at the heart of representative government."[129] The Supreme Court went on to hold that voting is a "fundamental right."[130] Thus, laws restricting the right to vote must be narrowly tailored to promote a compelling state interest.[131] Furthermore, the *Romer* Court stated in 1996 that it was "doubtful" that the laws upheld in the Mormon Cases denying citizens the right to vote "because of their status" could meet this threshold.[132]

According to Professor Karlan, this has several important implications

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will govern him and his family." *Id.* at 1168. In short, if disenfranchisement can be classified as a penal rather than regulatory measure, Karlan suspected that it cannot withstand scrutiny under the Eighth Amendment. *Id.* at 1167-69.

122. Trop v. Dulles, 356 U.S. 86, 96-97 (1958).

123. "He never explained why eligibility to vote should turn on one's not having robbed a bank." Karlan, *supra* note 116, at 1150.

124. Davis v. Beason, 133 U.S. 333, 346-47 (1890); Murphy v. Ramsey, 114 U.S. 15, 43 (1885). *See supra* notes 75-80 and accompanying text.

125. Karlan, *supra* note 116, at 1151.

126. The *Murphy* Court stated that "it would be quite competent for the sovereign power to declare that no one but a married person shall be entitled to vote." *Murphy*, 114 U.S. at 43.

127. Karlan, *supra* note 116, at 1151.

128. 377 U.S. 533 (1964).

129. Karlan, *supra* note 116, at 1151 (citing *Reynolds*, 377 U.S. at 555).

130. *Id.* at 1152 (citing *Reynolds*, 377 U.S. at 562; Dunn v. Blumstein, 405 U.S. 330, 336 (1972)).

131. Karlan, *supra* note 116, at 1152. *See supra* note 73 and accompanying text.

132. Kaplan, *supra* note 116, at 1152 (citation omitted).

when considered alongside other important changes in voting law.[133] States can no longer rely on the traditional justifications for disenfranchisement. To the extent that the state's purported justification "fences out" a group—that is, excludes them from the franchise based on the way they might vote—it is unconstitutional viewpoint discrimination under *Carrington v. Rash*.[134] Karlan thus concludes that "[t]he repudiation of *Davis* means that denying individuals the right to vote either because they endorse criminal behavior or because they would vote to change existing criminal laws is constitutionally impermissible."[135]

Additionally, other traditional non-penal justifications for felon disenfranchisement, such as those reasoning that they "lack the qualities of mind or character voters ought to possess," also fail.[136] Although the Court's holding in *Lassiter*[137]—that literacy tests are acceptable because they "promote intelligent use of the ballot"—has never been overruled, that decision would be decided differently today because we now know that voting is a fundamental right.[138] Since *Reynolds*, the Court has consistently rejected the notion that restrictions on the franchise are an acceptable way of promoting reasonable voting.[139] Further, even if the Court decided that promoting intelligent and responsible voting is a compelling state interest, it cannot be achieved by disenfranchising an individual simply because he or she is less intelligent or responsible than others.[140] Title 42, § 1973aa of the United States Code makes it illegal to deny the right to vote based on any test of literacy, education, intelligence, or good character.[141] Professor Karlan thus reasoned: "If neither good character nor intelligent use of the ballot nor support for existing criminal laws are generally permissible prerequisites for voting, then it would be perverse to rely on criminal convictions as evidence that individuals lack qualities that voters are not required to have."[142]

B. Critical Analysis

The next section examines a few key issues regarding Karlan's arguments and provides a critical response. An initial matter that deserves attention is the precedential hurdle posed by *Richardson v. Ramirez*. Next, this Comment addresses Karlan's initial point that, if voting is a fundamental right, franchise restrictions must be reconceptualized as pu-

133. *Id.*
134. *Id.*; Carrington v. Rash, 380 U.S. 89, 94 (1965); *see also Dunn*, 405 U.S. at 354-56 (rejecting arguments for durational residency requirements based on the state's interest in ensuring that voters understood and shared community values and noting that such justifications had been used in the past to exclude particular political groups).
135. Karlan, *supra* note 116, at 1152.
136. *Id.*
137. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959).
138. Karlan, *supra* note 116, at 1153.
139. *Id.*
140. *Id.* at 1153 n.29 (citing *Dunn*, 405 U.S. at 356; Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 632 (1969)).
141. 42 U.S.C.A. § 1973aa (West 2006); Karlan, *supra* note 116, at 1155 n.31.
142. Karlan, *supra* note 116, at 1155.

nitive measures rather than regulations.[143] This raises two specific issues. First, if the states' plenary authority over voting rights is no longer valid, is there any philosophical justification for felon disenfranchisement? Second, assuming disenfranchisement can be justified as a regulatory measure, can a state carry its burden to show a legitimate non-penal purpose for disenfranchisement that does not "fence out" individuals because of the way they might vote? Karlan answers both of these questions in the negative and argues that both states and courts have failed to articulate satisfying responses to these questions.[144]

This Comment, however, concludes that there are legitimate responses to Karlan's initial challenges to felon disenfranchisement statutes. It provides several potential justifying purposes that would buttress a state's power to disenfranchise felons under a regulatory scheme. And although the question of whether we *should* disenfranchise is left unaddressed, it appears unlikely the practice will cease due to a lack of philosophical consistency or legitimate, non-penal interests, even under the modern construction of voting rights.

1. Precedent and Stare Decisis

As an initial matter, any challenge to existing felon disenfranchisement provisions must address the Supreme Court's decision in *Richardson v. Ramirez*.[145] Although Professor Karlan did not attack its holding directly, the precedential value of this case poses a critical roadblock to her arguments. *Ramirez* is clearly established law that has been repeatedly affirmed and followed.[146] The most important recent Supreme Court decision pertaining to election law, *Romer v. Evans*, supports the *Ramirez* holding.[147] While striking down a Colorado constitutional provision that nullified protections based on sexual orientation, the majority took a startling step by explicitly affirming the legitimacy of felon disenfranchisement.[148] The Court stated that, to the extent the *Davis v. Beason* holding stood for the principle that a convicted felon may be denied the right to vote, it is "unexceptionable."[149] The Court cited *Ramirez* as support for this proposition.[150] The forcefulness of this statement would be difficult for a reviewing court to ignore, and its importance is accentuated by the names of the Justices who signed it: Kennedy, Stevens, O'Connor, Souter, Ginsburg, and Breyer[151]—the Justices whose judicial philosophy would seem to make them most receptive to reconsidering *Ramirez*.

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143. *Id.* at 1150.
144. *Id.* at 1155.
145. *See supra* note 81 and accompanying text.
146. *See* Romer v. Evans, 517 U.S. 620, 634 (1996) (stating that to the extent *Davis* held that a convicted felon may be denied the right to vote it is "unexceptionable"); Hunter v. Underwood, 471 U.S. 222, 233 (1985); Lewis v. United States, 445 U.S. 55, 66 (1980).
147. *Romer*, 517 U.S. at 634.
148. *Id.*
149. *Id.*
150. *Id.*
151. *See id.* at 623.

Further, the doctrine of stare decisis suggests that the Court should not, under its own framework for reviewing cases, reconsider the holding of *Ramirez*. Stare decisis, a Latin term meaning "to stand by that which is decided," dictates that precedential decisions are given great weight.[152] The Court explained the framework for stare decisis analysis in *Planned Parenthood v. Casey* describing four factors which, if present, provide a basis for reconsidering a prior holding.[153] First, the Court examines whether the central rule of the case has proven unworkable, or whether "the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed [by the rule in question]."[154] Furthermore, the Court looks to see whether the doctrine has been abandoned by society and, finally, whether the factual premises supporting the holding have fundamentally changed such that the central holding of the precedent is unjustifiable or irrelevant.[155]

These Stare decisis factors fail to expose a need to reconsider *Ramirez*. Forty-eight states and the District of Columbia enforce felon disenfranchisement laws,[156] so it would be far-fetched to argue that the *Ramirez* doctrine is unworkable, abandoned, or can be abrogated without undermining the reliance states have placed on its validity. *Ramirez* is probably most vulnerable to the final factor. The dissent in that case argued Justice Rehnquist's opinion was analytically flawed, and scholars often agree;[157] this apparent flaw could perhaps be exploited before the Court. The Court may be open to arguments that facts underlying the application, purpose, or effect of these statutes have changed since *Ramirez* was decided.[158] However, such challenges have a poor record thus far in appellate courts, and the Supreme Court has repeatedly denied certiorari to several such cases.[159] It is far more likely that the Court would balance this controversial argument against strong evidence supporting the continued validity of the holding. Nearly every state has adopted a felon disenfranchisement provision of some kind, many in recent years.[160] More importantly, many more states have scaled down the severity of their statutes, and very few permanently disenfranchise felons today.[161] It appears that the legislatures are effectively responding to shifting societal standards, so there is a strong argument that the Court should not

152. BLACK'S LAW DICTIONARY 1443 (8th ed. 2004).
153. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).
154. *Id.* at 854-55.
155. *Id.*
156. *See supra* notes 41-58 and accompanying text.
157. *See, e.g.*, John Hart Ely, *Interclausal Immunity*, 87 VA. L. REV. 1185, 1185-87 (2001).
158. *See supra* notes 152-55 and accompanying text.
159. *See, e.g.*, Muntaqim v. Coombe, 366 F.3d 102, 130 (2d Cir. 2004), *cert denied*, 543 U.S. 978 (2004); Ortiz v. Phila. Office of the City Comm'rs, 28 F.3d 306, 318 (3d Cir. 1994); Irby v. Va. State Bd. of Elections, 889 F.2d 1352, 1360 (4th Cir. 1989), *cert. denied*, 496 U.S. 906 (1990).
160. *See supra* notes 41-58 and accompanying text.
161. *Id.*

interfere; to do so would be unnecessary and violate principles of federalism.

2. *The Regulatory Nature of Disenfranchisement*

Professor Karlan mounted a compelling case that, in view of the Court's declaration that voting is a fundamental right, restrictions on the franchise should be re-rationalized.[162] Traditional notions that states have plenary authority over voting rights are invalidated, she argued, so a new philosophical framework must be erected, and the burden falls on states to show that they have a legitimate non-penal purpose that does not "fence out" individuals because of the way they might vote.[163] Since both states and courts have failed to articulate such a purpose, Karlan concluded that disenfranchisement must be penal rather than regulatory, thereby exposing the statutes to fatal scrutiny.[164]

Because we know voting is a fundamental right, an important question is whether fundamental rights can be revoked or suspended by a mere regulation. The answer is clearly yes. While the *Reynolds* Court elevated the importance of voting, its holding did not require states to repeal their various franchise regulations. Organizing and controlling elections is a complicated task, and every state must regulate the intricacies of the process, including voter registration dates, the cutoff date, distribution of absentee ballots, voting-by-mail, early voting options, and the frequency of voting roll "purges."[165] States regulate *who* is eligible to vote and routinely exclude aliens, children, and the mentally incompetent, as well as felons.[166] States also implement durational residency requirements for voting.[167] The regulatory nature of these provisions is unassailable—states do not *punish* aliens or new residents by revoking their voting rights. Thus, on a practical level, the fact that voting rights are fundamental does not place them beyond the reach of state regulation.

a. Philosophical Justifications

i. Social Contract Theory

Another important inquiry is whether there is a philosophical theory which can justify felon disenfranchisement as something other than speech restrictions. Modern case law looks to Locke's social contract theory for justification.[168] Under this rationale, the right to vote is revoked from felons not because of the way they might vote, but because their

162. Karlan, *supra* note 116, at 1150.
163. *Id.* at 1149-51.
164. *Id.*
165. *See* LOWENSTEIN & HANSEN, *supra* note 1, at 65-67.
166. *See id.* at 40-46. *See generally* NATIONAL DISABILITY RIGHTS NETWORK, STATE LAWS AFFECTING THE VOTING RIGHTS OF PEOPLE WITH DISABILITIES (2004), *available at* http://ndrn.org/issues/voting/resourses/state_voting_rights_MD_laws%5B062304%5D.pdf (2004).
167. *See* LOWENSTEIN & HANSEN, *supra* note 1, at 41.
168. *See, e.g.*, Wesley v. Collins, 791 F.2d 1255, 1261 (6th Cir. 1986).

citizenship status is demoted or destroyed as a consequence of their criminal behavior. In the words of the Sixth Circuit, "[a] man who breaks the laws he has authorized his agent (the legislature) to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact."[169] Judge Friendly of the Second Circuit articulated this idea more thoroughly, explaining:

> The early exclusion of felons from the franchise by many states could well have rested on Locke's concept, so influential at the time, that by entering into society every man "authorizes the society, or which is all one, the legislature thereof, to make laws for him as the public good of the society shall require, to the execution whereof his own assistance (as to his own decrees) is due." 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.[170]

Several scholars, however, have attacked social contract theory justifications.[171] They argue that, taken to their logical conclusion, these justifications cannot be reconciled with the current conception of citizenship.[172] Modern liberal theory holds that certain fundamental rights cannot be forfeited or "bargained away" in a contract.[173] Further, the formulation of social contract theory cited by Judge Friendly is unduly narrow, focusing only on the suppression of undesirable behavior and failing to account for the parallel goal of promoting freedom and development.[174] Even under this narrow theory, however, they argue that disenfranchisement is unconscionable, because Locke's theory essentially requires that a consequence be rational and proportional to the severity of the action.[175] Disenfranchisement, especially the permanent sort, is perceived to be an unduly harsh penalty.

Without addressing the merits of these criticisms, however, one can conclude that they are likely insufficient to influence the legal status quo. It is enough to note that Locke's theory is readily susceptible to diverse interpretations.[176] Critics citing the arguments above contrast "broad" and "narrow" versions of social contract theory as if they have meaning in the absolute sense. But the "current" conception of social contract theory is always changing, and courts are unlikely to find that a particular iteration has a great deal of persuasive value.

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169. *Id.*

170. Green v. Bd. of Elections, 380 F.2d 445, 451 (2d Cir. 1967).

171. *See, e.g.*, Johnson-Parris, *supra* note 40; *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"*, 102 HARV. L. REV. 1300, 1304-07 (1989).

172. *See The Disenfranchisement of Ex-Felons*, *supra* note 171, at 1306.

173. *See id.*

174. *See id.*

175. *Id.* at 1306-07.

176. *See, e.g.*, Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1108-09 (2002); Johnson-Parris, *supra* note 40, at 117-38.

More importantly, it is not obvious that a court would reject current legal doctrine based on these arguments, even if it decided that a particular social contract theory was "right" and incompatible with disenfranchisement. No particular iteration has ever been incorporated into our legal framework—it is significant that Friendly observed that states "could have" rested their statutes on Locke's theory.[177]

Scholars at times behave like physicists in search of a "Grand Unifying Theorem." However, the law is neither absolute nor static, while physical forces favor both attributes. The Constitution did not adopt any single political or legal theory, and the courts have never required one. The nature of our representative democracy is that legislation will be passed at different times based on different philosophical justifications, and internal consistency is not required. In criminal law, competing theories of punishment are accepted in different situations.[178] A state may adopt both retributive and rehabilitative penalties in its criminal code with the blessing of the Supreme Court,[179] and such inconsistency is virtually *guaranteed* in our political system. Likewise, free speech jurisprudence under the First Amendment is composed of patchwork of various theories—"advancing knowledge and 'truth' in the 'marketplace of ideas,' facilitating representative democracy and self-government; and promoting individual autonomy, self-expression, and self-fulfillment."[180] Thus, attacking the philosophical underpinnings of felon disenfranchisement is unlikely to change the law. Although our conception of citizenship has evolved and it cannot any longer be revoked as a criminal penalty, it does not follow that states must abandon all tangentially related practices. As Justice Scalia noted: "One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion."[181]

ii. Altman's Collective Rights Alternative

Accepting, however, that felon disenfranchisement must mesh with a broader theory of citizenship to remain viable does not necessitate abandonment of the practice. While most academics conclude that the two are irreconcilable, liberal philosopher Andrew Altman argued otherwise in his recent treatment of the issue.[182] "[T]he current literature," he wrote, "fails to take adequate account of a certain nontraditional argument in favor of felon disenfranchisement."[183] His argument holds that democracies are free to adopt, within limits, various standards for deter-

177. Green v. Bd. of Elections, 380 F.2d 445, 451 (2d Cir. 1967).
178. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 2.04 at 19-22 (3d ed. 2001).
179. *See* Ewing v. California, 538 U.S. 11, 29 (2003).
180. KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 4 (2d ed. 2003).
181. Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting).
182. Andrew Altman, *Democratic Self-Determination and the Disenfranchisement of Felons*, 22 J. APPLIED PHIL. 263, 264-67 (2005).
183. *Id.* at 263.

mining who is granted and denied the right to vote.[184] This is part of the collective right of citizens to "define the distinctive political identity of their community;" policies regarding disenfranchisement are a legitimate part of this identity.[185] The citizens of a democratic state are under no obligation to select morally optimal policies.[186] Within the boundaries of fair representation and protection of basic rights, a community's decisions legitimately reflect its unique political identity.[187]

Altman directly addressed Professor Karlan's objections, conceding that she is correct insofar as she states that a state's power to regulate the franchise is no longer plenary.[188] However, "it is perfectly consistent with her point to hold that citizens have a collective democratic right to determine, within limits, who is eligible to vote in their state."[189] Specifically, he took issue with Professor Karlan's conclusion that once voting is understood to be a fundamental right rather than a state-created privilege, its punitive nature is "undeniable."[190] He stated:

> Karlan's reasoning is faulty. The punitive nature of disenfranchisement does not follow from the denial that it is a state-created privilege. One can deny that the right to vote is a privilege rather than a right, while still holding that taking the right away from the felons is a legitimate exercise of democratic self-determination. The right to vote is not a privilege because all mentally competent, adult citizens of a state have a strong presumptive claim to the franchise. Yet, acknowledging the validity of such a claim does not bar one from arguing that a democratic state has the right to decide whether individuals who commit serious felonies, having already had their right to vote presumptively recognized, are now to have that right suspended. *The suspension need not be so much a matter of meting out punishment as making a statement about the standards to which the state will hold each citizen if she is to retain her claim to be a full and equal member of the political community.*[191]

While Altman favored limiting disenfranchisement to the period of incarceration, he recognized that such distinctions are exercises in line-drawing that do not have well-defined limits or solutions.[192] Thus, current felon disenfranchisement provisions can in fact be reconciled with a modern conception of voting as a fundamental right.

b. Legitimate Non-penal Purposes of Disenfranchisement

Even assuming that a philosophical justification for disenfranchisement can be found, Professor Karlan asserted that if felon disenfranchisement

184. *Id.* at 267.
185. *Id.* at 263.
186. *Id.* at 264.
187. *Id.*
188. *Id.* at 265.
189. *Id.*
190. Karlan, *supra* note 116, at 1149.
191. Altman, *supra* note 182, at 265 (emphasis added).
192. *Id.*

provisions are to stand as regulations, they must serve a "legitimate, non-penal purpose."[193] She also launched a preemptive strike at potential counterarguments, positing that any defense addressing the manner in which a felon may vote would be "fencing out," a form of unconstitutional viewpoint discrimination.[194] Likewise, restricting voters based on their quality of mind is untenable in view of statutory bans on literacy or morality tests.[195]

i. State Administrative Interests

Contrary to Karlan's assertions, however, it is possible for states to articulate a legitimate, non-penal purpose for disenfranchising felons without violating speech rights. One possible justification relates to administrative and practical issues surrounding the election process. Consider the latter portion of Judge Friendly's observations noted above, explaining:

> On a less theoretical plane, it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. This is especially so when account is taken of the heavy incidence of recidivism and the prevalence of organized crime.[196]

Although many reject this position, Friendly's justification is intuitively appealing and likely to withstand scrutiny. While most who consider the merits and effects of disenfranchisement immediately focus on implications for national elections, the picture looks quite different at the local level. States have more immediate and intimate interests in felon disenfranchisement regulations, as local events and outcomes are more sensitive to changes in policy. States hold local elections for *lawmakers* such as the city council and school boards. They elect law *enforcement* officials such as sheriffs and district attorneys. Most states also elect state court judges as well—the individuals who *interpret* the law and who personally sentence felons in criminal cases.

Problems arise if felons are permitted to vote in this context. Elected officials executing their duties may become the targets of felons' personal and organized attacks. While the opponents of disenfranchisement think it absurd that prisoners or ex-prisoners could organize a voting bloc,[197] their skepticism appears misplaced when the personal element of community crime is present, especially if voting booths are brought to prisons themselves. Given the right to vote from the jail cell, would not candi-

193. Karlan, *supra* note 116, at 1150-51.
194. *Id.* at 1152.
195. *Id.* at 1153.
196. Green v. Bd. of Elections, 380 F.2d 445, 451 (1967).
197. *See, e.g.*, Angela Behrens, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN. L. REV. 231, 243-44 (2004).

dates campaign there? Admittedly, it is unlikely that a candidate for public office would run on a "pro-crime" platform in a broad sense.

However, through a narrow, gradual process, the *effects* of such a platform could be attained. A "pro-drug" or "anti-incapacitation" political position is certainly feasible, and it is not unreasonable to suspect that felons would favor such a promise in greater numbers than the general public. Particularly in a local election where turnout and voting totals are low, there is the potential for such a bloc to corrupt the outcome of an election, not because the way an *individual* might cast his vote, but the way candidates might target and influence incarcerated *groups*. Such an event would likely have an immediate and damaging effect on local elections, tainting their outcomes with anti-social influences. This rationale may avoid the "fencing out" limitation because it is not focused on the preferences of a voter but an illegitimate manipulation of the voting process.

Furthermore, this scenario gives rise to a different but related reason states may disenfranchise criminals. As Judge Kozinski stated, "[i]f states can't exclude felons formerly incarcerated from the franchise, then they surely can't exclude felons currently behind bars."[198] If felon disenfranchisement becomes unconstitutional, states would likely be required to bring voting booths to prisoners, or at least provide an absentee voting system for incarcerated felons. This would complicate election administration, impose heavy costs on state election commissions, and create a new set of security issues for state governments to solve. Thus, states have a legitimate interest in felon disenfranchisement given the administrative difficulties and expenses of providing voting booths to those in prison. At the very least, the decision of forty-eight states to avoid the difficulties of running polls in prisons should be respected.

ii. Lawbreakers are Not Trustworthy Lawmakers

States may also have a legitimate interest in disenfranchisement because "[i]t is not too much to demand that those who would make the laws for others—who would participate in self-government—be willing to follow those laws themselves."[199] Critics such as Professor Karlan reject the notion that felons are less qualified to vote than other citizens because this simply "fences out" those with whom we do not agree, violating the First Amendment.[200] And on a broader level, critics often take exception to using "felon status" as a meaningful proxy for anything. Karlan asserted this herself by questioning *why* one's right to vote should turn on not being a felon.[201]

Addressing these issues, Roger Clegg noted that felons are not the only

198. Farrakhan v. Washington, 359 F.3d 1116, 1125 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc).
199. Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 172 (2001).
200. *See* Karlan, *supra* note 116, at 1152.
201. *Id.* at 1150.

group currently excluded from voting.[202] States are also constitutionally permitted to disenfranchise the mentally incompetent, the young, and foreigners.[203] If these regulations do not "fence out" the viewpoints of these groups, then on what basis are these exclusions acceptable? Clegg argued that "we currently require only two characteristics of voters: trustworthiness and loyalty."[204] People have a right to determine who governs them to the extent they can be trusted to exercise that right in good faith, sharing "a common commitment to our nation, our government, and our laws."[205] Thus we do not allow Germans who reside in Germany to vote—their loyalties are not to our nation, but their own.[206] For different reasons, children, aliens, and felons do not possess the prerequisite qualities of trustworthiness and loyalty.[207] "While serving a sentence discharges a felon's 'debt to society' in the sense that his basic right to live in society is restored, serving a sentence does not require society to forget what he has done or bar society from making judgments regarding his trustworthiness."[208]

To support this assertion, Clegg pointed out that states routinely impose collateral consequences on felons other than disenfranchisement.[209] Depending on the state, felons may lose the right to various entitlements, including welfare benefits, public housing, food stamps, and the right to possess firearms and ammunition.[210] Describing a more extreme example, he noted that "most would agree that a public school ought to be able to refuse to hire a convicted child molester, even after he has been released from prison."[211] According to Clegg, each of these consequences is based on a nexus theory linking one's status as a felon with some broader lack of trustworthiness, evidence that our society perceives a relationship between trustworthiness and criminal history.

When viewed alongside Altman's philosophical justifications, Clegg's conclusions have traction. Deeming felons unfit to vote is not without rational foundation, nor is it inconsistent with forbidding their participation in other civic functions. Rather, it is consistent with the right of citizens to decide collaboratively what actions result in restrictions on the right to vote. This approach does not exclude the felon from the franchise because of the way he will vote, but because his actions show him to be untrustworthy and therefore unfit to participate in the creation and enforcement of our laws. Thus, it passes Karlan's "fencing out" test

202. Clegg, *supra* note 199, at 161-62.
203. *Id.*
204. *Id.* at 174.
205. *Id.* at 162.
206. *Id.*
207. *Id.* at 174.
208. *Id.*
209. *Id.*
210. *See* Marc Mauer, *Beyond the Sentence: Post-Incarceration Legal, Social, and Economic Consequences of Criminal Convictions: Introduction: The Collateral Consequences of Imprisonment*, 30 FORDHAM URB. L.J. 1491, 1494 (2003).
211. Clegg, *supra* note 199, at 174.

and provides states with a foothold for maintaining their felon disenfranchisement statutes.

V. CONCLUSION

Admittedly, this Comment barely scratches the surface of the felon disenfranchisement debate—without addressing whether states *should* disenfranchise felons, it merely provides reasons that they *could*. Contrary to recent scholarly claims, existing felon disenfranchisement statutes are not without justification, even under our modern conception of voting rights. The wisdom of the practice will be ultimately decided by lawmakers and voters, and its fate is not a foregone conclusion.