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## Carceral Socialization as Voter Suppression

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## CARCERAL SOCIALIZATION AS VOTER SUPPRESSION

Danieli Evans\*

### ABSTRACT

*In an era of mass incarceration, many people are socialized through interactions with the carceral state. These interactions are powerful learning experiences, and by design, they are contrary to democratic citizenship. Citizenship is about belonging to a community of equals, being entitled to mutual respect and concern. Criminal punishment deliberately harms, subordinates, and stigmatizes. Encounters with the carceral system are powerful experiences of anti-democratic socialization, and they impact peoples' sense of citizenship and trust in government. Accordingly, a large body of social science research shows that eligible voters who have carceral contact are significantly less likely to vote or to participate in politics. Hence, the carceral system's impact on political participation goes well beyond those who are formally disenfranchised due to convictions. It also suppresses participation among the millions of legally eligible voters who have not been formally disenfranchised—people who have had more fleeting encounters with law enforcement or vicarious interactions with the carceral system.*

*This Article considers the implications of these findings from the perspective of voting rights law and the constitutional values underlying it. In a moment when voting rights are under siege, voting rights advocates are in a heated discussion about how our federal and state constitutions protect ideals of democratic citizenship and political equality. This discussion has largely (and for good reason) focused on how the law should address what I call “de jure” suppression: tangible election laws and policies that impose legal barriers to voting, or dilute voting power. Eliminating*

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*these formal barriers to voting is vital. But, I argue, fully realizing the constitutional values underlying voting rights will also require also addressing what I call “de facto” suppression, or suppression through socialization. This occurs not through formal legal restrictions on voting, but when state institutions like the carceral system systematically socialize citizens in a manner that is incompatible with democratic citizenship.*

*I show how de facto suppression threatens the constitutional interests protected by the right to vote just like de jure suppression does. In short, by systematically socializing people in a manner that is fundamentally incompatible with democratic citizenship, the state can effectively strip a citizen of much of the instrumental and intrinsic value conferred by the right to vote. Those who are concerned about advancing and protecting voting rights should understand the carceral system’s anti-democratic socialization as a form of political suppression—one that should warrant constitutional scrutiny for the same reasons that de jure suppression should warrant scrutiny.*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	42
II.	SOCIALIZATION AND DEMOCRATIC CITIZENSHIP .....	50
	A. <i>The Meaning of Democratic Citizenship</i> .....	50
	B. <i>How the Government Socializes Citizens</i> .....	53
	C. <i>Carceral Socialization</i> .....	55
III.	CARCERAL SOCIALIZATION AND VOTING RIGHTS .....	62
	A. <i>The Values Animating Voting Rights Law</i> .....	63
	B. <i>Carceral Socialization as Suppression</i> .....	73
	C. <i>Responding to Objections</i> .....	79
	1. Formal rules vs. intangible sociological forces.....	80
	2. Purpose for the policy .....	84
IV.	IMPLICATIONS FOR COURTS AND POLICYMAKERS.....	86
	A. <i>Courts</i> .....	87
	1. Fourth Amendment reasonableness .....	90
	2. Eighth Amendment proportionality .....	94
	B. <i>State Courts</i> .....	97
	C. <i>Legislatures</i> .....	100
	D. <i>Executive Officials</i> .....	103
V.	CONCLUSION .....	107

“I feel like if I contact a senator or governor, they’ll probably want to put me in jail and leave me as a troublemaker. I’m serious . . . . [T]hey have the money and power. Who the hell am I? I am just a small peon at the bottom of the totem pole.”<sup>1</sup>

“[T]his case tells everyone, white and black, guilty and innocent, . . . that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.”<sup>2</sup>

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1. AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL* 210 (2014) (quoting an interviewee who has experienced the criminal legal system).

2. *Utah v. Strieff*, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting).

“The problem of mass incarceration is really a problem of citizenship. This is because citizenship isn’t just about whether or not someone has a set of legal rights . . . It is made through everyday exchanges and between people at every level, because citizenship is about belonging.”<sup>3</sup>

## I. INTRODUCTION

Approximately one third of the adults in the United States has an arrest record. This is about the same number of people who have college degrees.<sup>4</sup> It is estimated that about one half of Black males and 40% of white males will be arrested by the age of 23.<sup>5</sup> Young people—who are particularly impressionable in terms of developing a civic identity—are frequently subject to coercive and forceful interactions with police, especially in socially and economically marginalized communities.<sup>6</sup> One study of students in highly policed neighborhoods found that most people with police contact were stopped for the first time before they were fourteen years old, and over 50% of those stopped reported having been stopped more than seven times.<sup>7</sup> Approximately 70% of high schools—fundamentally socializing institutions—have on-site armed police officers who participate in maintaining discipline, order, and control.<sup>8</sup> The presence of an officer significantly increases the likelihood that students will be arrested for trivial transgressions, such as disrupting the classroom environment.<sup>9</sup>

Throughout this Article, I use the terms carceral state and carceral system to describe a society with statistics like these; a society marked by widespread, commonplace policing and criminalization, where officials have broad discretion to use harmful, physically coercive crime-control

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3. REUBEN JONATHAN MILLER, *HALFWAY HOME: RACE, PUNISHMENT, AND THE AFTERLIFE OF MASS INCARCERATION* 245 (2021).

4. Matthew Friedman, *Just Facts: As Many Americans Have Arrest Records as College Degrees*, The Brennan Center for Justice (Nov. 15, 2017), <https://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas>.

5. *Id.*

6. Vesla Weaver & Amy Geller, *De-Policing America's Youth*, 685 *ANNALS AM. ACAD. POL. & SOC. SCI.* 190, 200 (2019).

7. *Id.* at 201.

8. *Percentage of Public Schools with Security Staff Present At Least Once A Week, and Percentage with Security Staff Routinely Carrying a Firearm, by Selected School Characteristics: 2005-06 through 2019-20*, NAT'L CTR. FOR EDUC. STAT. tbl.233.70, [https://nces.ed.gov/programs/digest/d21/tables/dt21\\_233.70.asp](https://nces.ed.gov/programs/digest/d21/tables/dt21_233.70.asp).

9. Weaver & Geller, *supra* note 6, at 207.

tactics without a compelling justification, or perhaps no justification at all.<sup>10</sup>

In the carceral state, encounters with the criminal system are routine and formative. “It used to be said that school is where society gets into your bones. Today, jail, not school, might better express that maxim’s deep truth.”<sup>11</sup> The prevalence of the carceral system has fundamentally changed the nature of democracy and governance in the United States. Interactions with the criminal law are a predominate means of civic education for many people.<sup>12</sup> Carceral experiences shape many people’s sense of citizenship and their relationship to government. This has important consequences for their wellbeing, their political behavior, and power.

Experiences with carceral control are profoundly anti-democratic. Democratic citizenship is at its core about political equality—being treated as a member of the community who is entitled to equal respect and concern. Policing and criminal punishment are the opposite: largely by

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10. While the term “carceral state” has become common in the literature, there appears to be no agreed upon, universal definition. I do not attempt to create one. By using the term, I mean to refer to the same phenomenon as others who use it: a society that governs largely through criminalization and policing, where coercive police contact, arrest, and incarceration are routine in the lives of many communities, and where the harms of policing and criminal punishment are imposed with little-to-no justification, and very little oversight or limit. For writing discussing the distinct U.S. phenomenon of unrestrained law enforcement discretion to use coercive force, unjustifiably harsh punishment, mass incarceration, and the carceral state, *see generally* LERMAN & WEAVER, *supra* note 1; MILLER, *supra* note 3; JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2009); ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* (2018); ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016); PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2018); MARY GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2016); FRANKLIN E. ZIMRING, *THE INSIDIOUS MOMENTUM OF AMERICAN MASS INCARCERATION* (2020); RACHEL E. BARKOW, *PRISONERS OF POLITICS* (2019); JOHN PFAFF, *LOCKED IN* (2017); MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); HEATHER SCHOENFELD, *BUILDING THE PRISON STATE* (2018); VICTOR RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* (2011); DEVON CARBADO, *UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT* (2022); BARRY FRIEDMAN, *UNWARRANTED: POLICING WITHOUT PERMISSION* (2017).

11. Eric Cadora, *Civics Lessons: How Certain Schemes to End Mass Incarceration Can Fail*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 277, 277 (2014).

12. *See* LERMAN & WEAVER, *supra* note 1; Benjamin Justice & Tracey Meares, *How the Criminal Justice System Educates Citizens*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 159 (2014).

design, they are harmful, subordinating, and stigmatizing.<sup>13</sup> Justice and Meares posit that experiences with the carceral state teach lessons in “an-ticitizenry”: communities targeted for carceral control are “bombarded with messages that they are not citizens belonging to the group . . . in charge of governing, but are a class of problem people to be excluded, monitored, and surveilled, treated harshly and punished arbitrarily.”<sup>14</sup>

Amy Lerman and Vesla Weaver use the term “custodial citizens” to describe how those who have had carceral contact come to perceive themselves as outsiders to the political community, and to see government as being about control and domination.<sup>15</sup> A growing body of empirical research by Lerman and Weaver, Traci Burch, and others shows that these socializing experiences have a real impact on political behavior: people who have contact with the criminal system are significantly less likely to vote and to participate in politics—even if they are legally eligible to vote (i.e., not disenfranchised by law).<sup>16</sup> This disproportionately impacts race-class subjugated communities, who are more frequently targets of policing and criminalization.<sup>17</sup>

Voter suppression is a widely recognized and much maligned problem in our democracy.<sup>18</sup> Typically, conversations about suppression focus on election regulations that impose tangible restrictions or burdens on

13. See *infra* notes 62–65 and accompanying discussion; see also MILLER, *supra* note 3, at 177, 254 (discussing how people with criminal convictions are stigmatized and excluded from social opportunities such that their relationships begin from a position of need, and this makes them vulnerable to exploitation); Gabriel J. Chin, *Collateral Consequences*, in ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM 371 (Erik Luna ed., 2017).

14. Justice & Meares, *supra* note 12, at 167.

15. LERMAN & WEAVER, *supra* note 1, at 30–31.

16. See *infra* Part II.C.

17. I draw the term “race-class subjugated” from Joe Soss & Vesla Weaver, *Police Are Our Government: Politics, Political Science, and the Policing of Race-Class Subjugated Communities*, 20 ANN. REV. POL. SCI. 565 (2017).

18. See generally GILDA DANIELS, UNCOUNTED: THE CRISIS OF VOTER SUPPRESSION IN AMERICA (2020); CAROL ANDERSON, ONE PERSON, NO VOTE (2018); ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA (2016); LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 7–9 (1994); RICHARD HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN (2013); TOVA ANDREA WANG, THE POLITICS OF VOTER SUPPRESSION: DEFENDING AND EXPANDING AMERICANS’ RIGHT TO VOTE (2012); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000); Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 8 SUP. CT. REV. 213 (2018). For one recent discussion about voting rights reform, see Race and Regulation Podcast, *Creating an Inclusive National Politics* (June 8, 2022) (conversation with Guy-Uriel E. Charles), <https://pennreg.org/episode-4/>.

voting, or that dilute the voting power of an identifiable group.<sup>19</sup> This is, of course, a major concern for political equality and participation. But socialization also plays a major role in shaping political behavior by driving civic withdrawal and sustaining political inequality.<sup>20</sup> Thus, I argue, inso-

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19. While voting scholarship oftentimes uses the term “suppression,” *see, e.g.*, sources cited *supra* note 18, it appears there is no universally accepted legal definition of the term. According to Lisa Marshall Manheim and Elizabeth Porter, the Supreme Court has only once used the term “voter suppression” in a majority opinion, and that was to quote the dissent’s use of the term and dismiss it as irrelevant to the issue at hand. Manheim & Porter, *supra* note 18, at 216 (2018) (citing *Husted v. A. Philip Randolph Institute*, 138 S.Ct. 1833 (2018)). For an overview of types of policies that are usually considered to pose a threat to voting rights, and the constitutional values underlying them, *see* SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY*; JAMES A. GARDNER & GUY-URIEL E. CHARLES, *ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM* (2d ed. 2017); DANIEL LOWENSTEIN ET AL., *ELECTION LAW CASES AND MATERIALS* (7th ed. 2022). Voting rights scholars oftentimes classify voting rights issues as “first generation” and “second generation” claims. First generation claims involve laws or policies that deny or abridge access to the polls, while second generation claims involve the rules for aggregating votes—i.e., vote dilution and gerrymandering. For a discussion of these different types of claims, *see generally* GUINIER, *supra* note 18, at 7–9; Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236 (2018) (discussing how the court’s decision not to intervene in political gerrymandering may lead to other voting rights controversies related to limitations on voting); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S. CAL. L. REV. 689 (2006) (suggesting that new-wave restrictions on voting, like voter I.D. laws, are closer to first generation claims than second generation aggregation claims); Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L. J. 1289 (2011) (describing voter I.D. laws and other “new vote denial” laws as being comparable to first generation claims); Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601 (2007) (addressing partisan gerrymandering); Franita Tolson, *The Law of Democracy at a Crossroads: Reflecting on Fifty Years of Voting Rights and the Judicial Regulation of the Political Thicket*, 43 FLA. ST. U. L. REV. 345, 346–47 (2016) (discussing main issues in voting rights law); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1671 (2001) (discussing vote dilution claims). Scholars have also considered a “third-generation” of claims, related to the rules governing decision-making within elected bodies, which have been manipulated so as to prevent elected representatives from having any meaningful influence. *See, e.g.*, GUINIER, *supra* note 18, at 7–9; Pamela S. Karlan, *The Impact of the Voting Rights Act on African Americans: Second- and Third-Generation Issues*, in *VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES* 121 (Mark E. Rush ed., 1998); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1708 (1993) (discussing three different values at stake in voting-rights claims: participation, aggregation, and governance).

20. *See infra* Parts II.B & II.C. I do not mean to suggest that voting rights scholars are unaware of the importance of socialization and political psychology in voting behavior. Likely most are aware, but the conventional understanding of voting rights law is concerned with the legal regulation of elections, and not sociological and psychological dynamics outside of election regulations. *See infra* Part III.C. One notable exception to this is Bertrall Ross II and Daniel Spencer’s argument that the law should do more to address the “passive voter suppression” that occurs when political campaigns neglect lower-



far as the law aspires to create conditions for universal citizenship and political equality, it should be concerned with the extent that the carceral system's anti-democratic socialization operates as a mechanism of de facto voter suppression.

To start, I will lay out a few definitions to clarify the scope of my argument and how it fits within existing scholarship. For the purpose of this Article, I distinguish between three categories of policies or practices that impede political participation: I use the term disenfranchisement to refer to policies and practices that outright bar a class of people from voting, e.g., felony-based disenfranchisement. These laws flatly deem a class of people outside the political community. Disenfranchisement is plainly incompatible with democratic citizenship and the fundamental right to vote. The carceral state's most obvious form of political suppression is laws disenfranchising people who have been convicted of certain crimes. Michelle Alexander, Gilda Daniels, Jeff Manza, and Christopher Uggen, among others, make eloquent and powerful arguments against these laws, and show how they perpetuate a long history of racial subordination and discrimination in voting.<sup>21</sup> I strongly agree with their arguments, and my argument is entirely consistent with them. But because the case against formal disenfranchisement has already been argued so thoroughly, it is not my focus here.

I use the term de jure suppression to refer to laws and policies that regulate voting, but do not outright deny anyone class of citizens the right to vote. Rather, these electoral policies make voting more difficult or dilute votes. Examples include voter I.D. laws, restrictions on early voting, closing polling places, and gerrymandering. Much has been writ-

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income voters in their mobilization drives, resulting in significantly lower participation among lower-income voters. They conclude that “the most significant voter suppression tactics of the twenty-first century are therefore not what legislatures are doing, but what campaigns are not doing.” Bertrall L. Ross II & Daniel Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disenfranchisement of the Poor*, 114 NW. U. L. REV. 663 (2019). They point out that the tangible legal barriers to voting have a relatively small effect compared to sociological and psychological factors. *Id.* at 668-69 (“As with rational choice theories . . . , the tangible costs of voting that are central to voting rights claims are a relatively unimportant voting determinant under the sociological theories of voting.”). Other scholars have discussed voter intimidation, confusion, and deception as forces of suppression. See, e.g., DANIELS, *supra* note 18; Emily Rong Zheng, *New Tricks for an Old Dog: Felon Disenfranchisement and Voter Confusion*, 85 MO. L. REV. 1037 (2019); WANG, *supra* note 18, at 86-88. These issues are closer to the type of suppression that I am concerned with here, as they involve practices that influence voters' decisions about whether to vote. But they are not about systemic anti-democratic socialization through state institutions like the carceral system.

21. DANIELS, *supra* note 18, at 146-72; ALEXANDER, *supra* note 10, at 158-61; ANDERSON, *supra* note 18, at 134-36; JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006).

ten about this sort of de jure suppression as well, as an important contemporary threat to voting rights.<sup>22</sup>

My focus is on a different type of suppression, which I call de facto suppression. By de facto suppression, I mean suppression through the legally intangible mechanism of socialization, as opposed to suppression through formal rules and policies governing elections and voting. De jure suppression threatens political equality by imposing tangible legal barriers to participation, whereas de facto suppression threatens political equality by imposing sociological or social-psychological barriers to participation. While there is a large body of social science research documenting the causes and consequences of de facto suppression, little has been written about the *constitutional* implications of de facto suppression, particularly from the perspective of the right to vote and the constitutional values underlying it.<sup>23</sup> To my knowledge, this is the first Article to argue that de facto suppression should be a constitutional concern because it threatens the right to vote and the constitutional values underpinning it.

There is, of course, a robust body of scholarship criticizing courts for their highly deferential review of policing and criminal punishment. Many have argued that courts should apply more stringent standards when reviewing policing and criminal punishment under the Fourth and Eighth Amendments.<sup>24</sup> I support these arguments. In advancing a voting-rights based argument for more scrutiny of policing and punishment, I hope to offer an additional, distinct line of constitutional argument in favor of stricter review and oversight of carceral policies.

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22. See sources cited *supra* notes 18 and 19.

23. One exception is Ross II & Spencer, *supra* note 20.

24. See generally CARBADO, *supra* note 10; BUTLER, *supra* note 10; FRIEDMAN, *supra* note 10; DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF CRIMINAL LAW (2008); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 196-215 (2011); Ariel L. Bendor & Hadar Dancig-Rosenberg, *Unconstitutional Criminalization*, 19 NEW CRIM. L. REV. 171 (2016); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571 (2005); Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L. J. 263 (2005); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677 (2005); Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049 (2004); Rachel A. Van Cleave, "Death Is Different," *Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217, 272-78 (2003); Louis D. Bilionis, *Process, the Constitution and Substantive Criminal Law*, 96 MICH. L. REV. 1269 (1998); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1 (1996); Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different From All Other Rights?*, 69 N.Y.U. L. REV. 781 (1994); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401 (1958). For further discussion of these sources and how they tie into my argument, see *infra* Part IV.A.

Other scholars have also argued forcefully that crime control policies should trigger scrutiny under the Equal Protection Clause because they systemically discriminate based on race,<sup>25</sup> and the status of having a criminal conviction.<sup>26</sup> I wholeheartedly agree with these arguments, and do not intend to supplant them. I am providing an additional, distinct voting rights-based argument for scrutinizing policing and punishment practices, in addition to these class-based harms. My argument does not rely on showing that carceral policies are designed or applied in a way that discriminates based on a protected characteristic. Rather, the idea is that the criminal law's subordinating treatment threatens the *individual* right to vote. Because the right to vote is an individual right, a burden on a single voter is arguably constitutionally problematic, regardless of any class-based discrimination.<sup>27</sup>

I should also say a word about the intended audience for this Article: the part of this Article addressed to courts lays out an ambitious vision of judicial review, where judges would be significantly more concerned about and sensitive to the dynamics of political inequality, and the sociological and psychological factors that shape political behavior. I recognize this vision may not resonate with many members of the current judiciary.<sup>28</sup> I also expect it may draw skepticism from scholars who have questioned whether it is appropriate to trust judges to safeguard democratic values.<sup>29</sup> In Part IV.A, I say more about which judges I hope to reach with this argument, and how I hope it may add value. In short, I hope to at least inspire federal and state judges who *are* concerned about voting rights and democracy, but who may not recognize the extent that the routine operations of the criminal system threaten these values. I at least hope to inspire more dissents like Justice Sotomayor's dissent in *Utah v. Strieff* (quoted at the outset), which powerfully conveys how carceral control degrades citizenship.<sup>30</sup> Such opinions, even if only in dissent,

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25. See, e.g., Darren Lenard Hutchinson, "With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection, 110 CAL. L. REV. 297 (2022); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019).

26. See Chin, *supra* note 13, at 375-80 (discussing these arguments).

27. See discussion *infra* Part III.B. The harm is of course worse (and the burden on voting rights more severe) when it is targeted at a particular class of voters defined by race or another social identity, and this is an important consideration underlying the arguments I make here.

28. See *infra* Part III.A.

29. See, e.g., Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160 (2021); Luis Fuentes-Rohwer, *Back to the Beginning: An Essay on the Court, the Law of Democracy, and Trust*, 43 WAKE FOREST L. REV. 1045 (2008).

30. For example, though Justices Breyer, Kagan, and Ginsburg had written in favor of stronger protection for voting rights, none of them joined Justice Sotomayor's dissenting opinion in *Utah v. Strieff*, which powerfully conveyed how the routine activities of the

convey concern for and amplify the interests of people harmed by carceral system. This in and of itself may do something to counter-act the anti-democratic messages of the carceral state.

My argument proceeds as follows: in Part II, I begin with background on the sociological and psychological aspects of democratic citizenship. I describe how citizenship is more than a legal status; it is a product of how a person is treated and socialized in all interactions with government. I review recent sociology and political science research documenting how interactions with the carceral state shape peoples' civic identities and influence their political participation.

In Part III, I turn to the constitutional implications of this research. I argue that de facto suppression through carceral socialization is comparable to de jure suppression through formal election regulations, and both threaten the constitutional values underlying voting rights law. The law should therefore be concerned with de facto suppression for the same reason it should be concerned with de jure suppression. I address some possible grounds for skepticism: I explain why I think it should not matter that de facto suppression occurs through informal sociological mechanisms, as opposed to formal election regulations; and why I think intent to distort politics should not be dispositive in terms of defining constitutionally cognizable voter suppression.

In Part IV, I elaborate on the policy implications of my argument for federal and state courts, legislatures, and executive officials. I argue that understanding carceral socialization as voter suppression should lead courts to be more skeptical of policing and criminal punishment policies. Federal courts, evaluating challenges to policing and punishment under the Fourth and Eighth Amendments, respectively, should be less deferential to the state's asserted interests. Because of the fundamental citizenship interests at stake—and because these policies tend to suppress participation among people who are most harmed by them and have the strongest interest in changing them—courts should require the state to supply a stronger justification for inflicting the harms of policing and punishment. Treating the person as a democratic citizen (a full member of the community entitled to equal respect and concern) would require the state to justify such coercive carceral control by showing that it is necessary to serve an interest sufficiently weighty to outweigh the harm—including the harm to citizenship interests.

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criminal system threaten democratic citizenship. *Strieff*, 579 U.S. 232, at 254 (2019) (Sotomayor, J., dissenting). I discuss this point further in Part IV.D. For a portrait of the judge I hope to reach, see Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631 (2021).

State courts should apply a similar line of reasoning to scrutinize carceral interventions under state constitutions, many of which have significantly more robust protections for democratic citizenship. Finally, legislatures and the executive branch are also responsible for elaborating and enforcing the constitutional value of full and equal citizenship. In order to fulfill this responsibility, they should take measures to eliminate carceral socialization, and instead foster a sense of belonging and citizenship.

## II. SOCIALIZATION AND DEMOCRATIC CITIZENSHIP

This Part explores the sociological and psychological dimensions of democratic citizenship: what it takes, in addition to legal rights, for people to understand themselves as democratic citizens, to participate in politics, and thereby realize the values of living in a democracy. I begin with a brief definition of democracy and democratic citizenship. Then I discuss how democratic citizenship depends on political socialization—how the government treats people and what people learn from encounters with government authorities. To illustrate this, I discuss research on how the criminal system socializes people in a way that suppresses participation.

### A. *The Meaning of Democratic Citizenship*

Volumes have been written about the meaning of democratic citizenship. I will not delve into the intricacies of the debates among democratic theorists, but only summarize the core ideas.<sup>31</sup> Democracy is perhaps best defined in contrast to what it is not. Liberal democracies, like the United States purports to be, have been normatively appealing because they stand in contrast to aristocratic or totalitarian regimes, where most people are subordinate to the command of a single ruler or ruling class.<sup>32</sup> In contrast to other governing systems, “what has historically distinguished democracy as a unique form of government is its pursuit of political equality.”<sup>33</sup> The “democratic process should respect all people as free and equal persons,” and “therefore should provide equal opportuni-

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31. Cf. LERMAN & WEAVER, *supra* note 1, at 59 (“[I]n reviewing the literature, we find it safe to say that the basic principles of liberal democratic theory are fairly uncontroversial.”). For a fuller discussion of the ideals of democracy as I understand it here, see Bowie, *supra* note 29 and Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103 (2002).

32. Bowie, *supra* note 29, at 165-67.

33. *Id.* at 167.

ties to have their votes counted equally.”<sup>34</sup> Political equality is what makes democratic government legitimate as an act of self-rule as opposed to authoritarian domination.<sup>35</sup>

Political equality means that one is a member of a community where each person “accepts the obligation to justify their actions by principles acceptable to the other, and in which they take mutual consultation, reciprocity, and recognition for granted.”<sup>36</sup> Democratic citizenship—being recognized and treated as a political equal—is a signifier of belonging; a “status bestowed on those who are full members of a community.”<sup>37</sup> A sense of belonging is in and of itself an important social val-

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34. WANG, *supra* note 18, at 11-13 (quotation omitted). Political equality is integral to other central features of democracy, which include representation, responsiveness, majority rule (though not tyranny), and pluralism. See generally Charles, *supra* note 31 (discussing different values of democratic governance, including responsiveness, representation, substantive equality, majority rule, and pluralism or interest representation); LERMAN & WEAVER, *supra* note 1, at 60 (“Other democratic virtues . . . are either fostered by or foster equal political voice.”) (quotations omitted). It is important to note that political equality is not synonymous with majority rule. For a discussion of how majority rule can be anti-democratic, see GUINIER, *supra* note 18, at 3-13. Rather than straightforward majority rule, a fair system would ensure that groups who are consistently in the minority have a fair opportunity to elect representatives to elected bodies. *Id.*; see also Charles, *Democracy and Distortion*, *supra* note 19, at 109-10 (explaining how democratic responsiveness requires open, fair, and contested elections, which provide voters with meaningful opportunities to elect representatives of their choice).

35. See, e.g., GUINIER, *supra* note 18, at 9-10 (“When the minority experiences the alienation of complete and consistent defeat, they lack incentive to respect laws passed by the majority over their opposition.”). For more on the constitutional ideal of self-determination, see Seth Davis, *The Thirteenth Amendment and Self-Determination*, 104 CORNELL L. REV. ONLINE 88 (2019). It is important to note that political equality is not synonymous with majority rule. For a discussion of how majority rule can be anti-democratic, see GUINIER, *supra* note 18, at 3-13. Rather than straightforward majority rule, a fair system would ensure that groups who are consistently in the minority have a fair opportunity to elect representatives to elected bodies. *Id.*; see also Charles, *Democracy and Distortion*, *supra* note 19, at 109-10 (explaining how democratic responsiveness requires open, fair, and contested elections, which provide voters with meaningful opportunities to elect representatives of their choice).

36. Bowie, *supra* note 29, at 167 (quoting Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 313 (1999)).

37. MANZA & UGGEN, *supra* note 21, at 125 (quotation omitted). This discussion raises important questions about how the political community is defined, and who the law considers to be a citizen. These vital questions are beyond the scope of this Paper. Because of the psychological, sociological, political, and welfare values of citizenship, I support the view that every person who is present in a given community should be considered a full citizen, with the right to vote and to be treated as an equal member of the polity. For more discussion along these lines, see MING HSU CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA (2020).

ue, as it is a fundamental social need.<sup>38</sup> People who are excluded and ostracized may experience significant psychological and emotional harm as a result.<sup>39</sup> Democratic citizenship therefore serves intrinsic social values, apart from the instrumental interest in influencing government decisions.<sup>40</sup>

This point is important because it means that citizenship is, at core, about social experience—i.e., being treated in a way that establishes your status as a valued member of the community—as much as it is about legal rights. People become citizens by being included and engaged in decisions, having others listen to their concerns, and express interest in their wellbeing and welfare.<sup>41</sup> When people participate, they develop a sense of connection to other members of the community, an “explicit identification with the polity and its norms and values.”<sup>42</sup> The experience of being included and participating creates a sense of citizenship and political efficacy.<sup>43</sup> In short, people become citizens by actually being *treated* as equals during interactions with government officials, not merely by being declared equal under the law.<sup>44</sup> Hence, citizenship is as much about socialization as it is about legal rights.

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38. Social psychologists have long identified belonging as the core social motive, a basic drive that is evolutionarily programmed in all people. Belonging is closely connected to other core needs, including control, meaningful existence, and self-esteem. For more discussion, see SUSAN FISKE, SOCIAL BEINGS: CORE MOTIVES IN SOCIAL PSYCHOLOGY; Kipling D. Williams, *Ostracism*, 58 ANN. REV. PSYCH. 425 (2007); Danieli Evans, *Against Ostracism* (working paper on file with author) (discussing the fundamentality of the need to belong and the drastic harms of ostracism).

39. Because exclusion or ostracism (being ignored, excluded, or rejected) threatens the core social need to belong, it is one of the most aversive human experiences, associated with emotional and physical pain, a sense of loss of control and meaningful existence, depression, anxiety, hopelessness. See Williams, *supra* note 38, at 425–29. This may be part of the mechanism by which the carceral state’s anti-democratic treatment reduces political participation. Brandon Rudolph Davis, *Feeling Politics: Carceral Contact, Well-Being, and Participation*, 49 POL’Y STUD. J. 591 (2021) (finding that carceral contact reduces well-being, which in turn reduces political participation).

40. For example, observers noted that people who protested the potential failure to count their ballots in the 2000 presidential election, expressed concerns beyond fear that the miscount would alter the election outcome. They “seemed to feel that a refusal to count their votes would amount to a declaration that they did not count as citizens.” WANG, *supra* note 18, at 12–13 (quotations omitted).

41. MANZA & UGGEN, *supra* note 21, at 128 (“[I]ndividuals become citizens in part through the ‘educative’ or ‘constitutive’ impact of political participation.”).

42. *Id.*

43. *Id.* at 125–35 (discussing evidence that political participation produces citizens who have a sense of political efficacy, and who believe they have a stake in the political system, and this fosters further political participation).

44. A large literature on procedural justice finds that that peoples’ judgements about the legitimacy of government, and their respect for social norms and rules, are closely

B. *How the Government Socializes Citizens*

Many scholars have observed that the government plays an important role in shaping peoples' perceptions of citizenship and their political behavior. It does this when it interacts with citizens in domains outside of elections and voting, such as the criminal system, education, and other social welfare or regulatory domains. In all these interactions, the government educates people about their own standing as citizens. It determines whether they experience democratic citizenship, and whether they participate as democratic citizens would.<sup>45</sup>

A large body of research on political socialization explores how interactions with government influence peoples' sense of citizenship and their political behavior. Political science literature uses the term "policy feedback" to describe how policies and their implementation "are not just political objects; they are political forces that reconfigure the underlying terms of power, reposition actors in political relations, and reshape political actors' identities, understandings, interests, and preferences."<sup>46</sup> The government can impact civic engagement by treating voters in ways that are more- or- less- consistent with democratic citizenship. When the government treats people with respect and consideration, it conveys that it cares about citizens' interests, and this fosters a sense of belonging and entitlement to respect, which is associated with active political participation. When the government treats people in a subordinating and exclusionary manner, it signals that it is not concerned about their interests and

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linked to whether the government treats them in a way that affirms their belonging and equal standing. More specifically, the four qualities that impact peoples' perceptions of legitimacy are all qualities associated with democratic citizenship (or being recognized as a political equal): voice and participation; fairness and neutrality; respect and dignity; and authorities' trustworthiness (honesty, transparency, public motives). See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006). See Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 *YALE L. J. F.* 525, 527 (2014), [https://www.yalelawjournal.org/pdf/8.TylerMeares\\_FINAL\\_Updated\\_5.20.14\\_iugaebgj.pdf](https://www.yalelawjournal.org/pdf/8.TylerMeares_FINAL_Updated_5.20.14_iugaebgj.pdf) ("[P]eople understand the way in which they are treated by legal authorities to provide them with information about how that authority views them and the group or groups to which they belong. In other words, the way people interpret the fairness of procedures has a substantial relational component."); see also Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 115 (1992); WANG, *supra* note 18, at 12-13 (discussing how voting has a positive impact on perceptions of trust, legitimacy, and government's responsiveness).

45. LERMAN & WEAVER, *supra* note 1, at 60 ("Democracy entails what the government does—its responsiveness to citizen preferences and its regard for them as political equals—as well as what citizens must possess—that is, the franchise and the right to free speech and association.")

46. Donald P. Moynihan & Joe Soss, *Policy Feedback and the Politics of Administration*, 74 *PUB. ADMIN. REV.* 320 (2014).



does not regard them as being worthy of respect and consideration. This has the opposite effect on behavior—it fosters a sense of alienation and estrangement associated with withdrawal and disengagement from politics.<sup>47</sup>

Because political socialization impacts political participation, how government treats citizens during routine interactions can reinforce inequities in political power. Government programs and officers typically treat powerful social groups with more respect and deference.<sup>48</sup> Members of high-status groups who receive this treatment “learn to expect, and to feel they deserve, government responsiveness.”<sup>49</sup> In contrast, government programs and officers typically treat members of marginalized groups in a domineering, stigmatizing, and exclusionary manner.<sup>50</sup> People subject to this treatment tend to “learn to retreat from government and view one another with suspicion.”<sup>51</sup> This withdrawal tends to undermine political engagement and collective action.<sup>52</sup> Political scientists have described this as a “degenerative policy system” where “group-based political inequalities and divisive policy designs reinforce each other in ways that threaten democracy.”<sup>53</sup>

Because of these policy feedback loops, encounters with government agents may determine both political behavior and policy outcomes, and reinforce cycles of political inequality and marginalization: authorities

47. *E.g.*, LERMAN & WEAVER, *supra* note 1, at 13 (“[T]he character of the regime will affect the character of the citizens” because “interactions with government . . . are the most direct source of information about how government works.”). For example, Joe Soss finds that federal social security insurance program treats people with more respect, in a manner consistent with political equality, while state-administered means-tested welfare programs are subordinating and stigmatizing. This differential treatment impacts the ways recipients think about themselves, their client group, and their government. Joe Soss, *Making Clients and Citizens: Welfare Policy as a Source of Status, Belief, and Action in DESERVING AND ENTITLED* 291, 321 (Anne Schneider & Helen M. Ingram, eds., 2005).

48. Soss, *supra* note 47, at 293–95.

49. *Id.* at 294 (“The positive messages embedded in these policies also encourage group members to identify with one another, recognize their mutual interests, and perceive their particular wants as commensurate with the common good.”).

50. *Id.* (“In many cases, policies for disadvantaged groups will isolate or stigmatize their targets, setting them apart from the majority as an object of pity or scorn.”).

51. *Id.*

52. *Id.* at 321 (describing how clients of state-administered programs, who are treated in a stigmatizing, demeaning manner, “learn to hold their tongues at the agency and develop a sense that government, as a whole, is unlikely to be responsive” and this treatment “diminishes the potential for group solidarity or collective political action” and concluding that “policy designs in the U.S. welfare system do much to reinforce (and only a little to diminish) the kinds of political inequalities that can threaten an inclusive and vibrant democracy.”).

53. *Id.* at 293 (quotations omitted).

subject members of powerless groups to subordinating and stigmatizing treatment. This socializes people to withdraw from politics, which sustains political powerlessness, which begets further subordinating and stigmatizing treatment, and so on. This cycle of political marginalization undermines civic engagement, democratic legitimacy, and ultimately respect for and trust in law. Thus, “street level bureaucrats implicitly mediate aspects of the constitutional relationship of citizens to the state.”<sup>54</sup>

In the next Section, I discuss the research showing how the carceral system is a powerful degenerative policy system where marginalized groups are subject to anti-democratic socialization, which suppresses political participation and thereby deepens political inequality.

### C. Carceral Socialization

Many state institutions influence peoples’ sense of belonging, status, political participation, and sense of citizenship.<sup>55</sup> However, among these, the criminal law is arguably unique in the extent to which it undermines democratic citizenship. This is because criminal punishment (including law enforcement actions that share the fundamental attributes of criminal punishment<sup>56</sup>) are inherently and largely by design in tension with the core tenets of democratic citizenship.

Democratic citizenship is about being a member of a community of equals who treat one another with mutual respect and concern. With criminal punishment, the government deliberately causes significant physical, emotional, material, and social harm to a person.<sup>57</sup> And being branded as a criminal suspect or convict has a specific, intentional, stigmatizing meaning—a criminal record is an official “negative credential” that publicly labels a person as inferior, legitimates their exclusion, and degrades their status in most social interactions.<sup>58</sup> As one court put it, “[v]irtually all individuals who are convicted of serious crimes suffer humiliation and shame, and many may be ostracized by their communities. Indeed, the

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54. LERMAN & WEAVER, *supra* note 1, at 10 (quotations omitted).

55. This includes schools, welfare and other bureaucratic agencies. See, e.g., Soss *supra* note 47 (discussing welfare programs); *infra* notes 157–58 (discussing schools).

56. See *infra* note 203 and accompanying text (discussing how arrest is effectively a criminal punishment).

57. See *infra* notes 200–201 and accompanying text.

58. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937, 942 (2003) (“The ‘negative credential’ associated with a criminal record represents a unique mechanism of stratification, in that it is the state that certifies particular individuals in ways that qualify them for discrimination or social exclusion.”). This is by design as the purpose of punishment.

mere fact of conviction . . . is stigmatic.”<sup>59</sup> And “the societal consequences that flow from a criminal conviction are virtually unlimited.”<sup>60</sup>

While other institutions play a vital role in political socialization—schools, in particular, but also workplaces and welfare agencies—carceral punishment stands out in that it is in many ways a form of “social death;” it is totalizing and isolating, and it disconnects a person from society, their family members, friends, and communities.<sup>61</sup>

A growing body of research investigates how such carceral interactions impact people’s sense of civic standing and their political behavior. In many communities across the United States, the carceral system plays such a pervasive role in schools and in day-to-day life that law enforcement officers are peoples’ primary experiences with government.<sup>62</sup> These interactions teach people powerful lessons about their own standing as citizens and the nature of government more generally. In their comprehensive study on how carceral contact shapes political behavior, Lerman and Weaver observe that “custodial citizens”—people who have had contact with the criminal system—are “constituted not as participatory members of the democratic polity, but as disciplined subjects of the carceral state” who are “outside the bounds of political consideration.”<sup>63</sup> When asked to describe government, participants frequently used words like “control,” “hard,” and alluded to harm or fear.<sup>64</sup> As these citizens see

59. *United States v. Gementera*, 379 F.3d 596, 605–06 (9th Cir. 2004) (citing *United States v. Koon*, 34 F.3d 1416, 1454 (9th Cir. 1994)).

60. *Id.* The Third Circuit, evaluating the scope of Second Amendment protection for people who have been convicted of crimes, wrote an opinion stating that someone with a criminal conviction is “beyond the ambit of ‘the people’ protected by the Second Amendment.” *Range v. Att’y Gen. United States*, 53 F.4th 262 (3d Cir. 2022).

61. See, e.g., JOSHUA PRICE, *PRISON AND SOCIAL DEATH* (2015); MILLER, *supra* note 3 (discussing these aspects of carceral citizenship). To say that criminal punishment is in tension with democratic citizenship, and therefore problematic from the perspective of voting rights, is not to say that it is per se invalid or can never be justified. It simply means that such harmful and anti-democratic treatment should be subject to a higher standard of justification, as I describe in Parts IV.A and IV.B.

62. See generally LERMAN & WEAVER, *supra* note 1; Justice & Meares, *supra* note 12; Friedman, *supra* note 4; NATAPOFF, *supra* note 10 (documenting the massive scale of the misdemeanor system).

63. LERMAN & WEAVER, *supra* note 1, at 111 (“[R]ather than communicating that they are worthy and valued citizens, their interactions with the [criminal legal system] teach them that they have little voice and mark them outside consideration.”).

64. *Id.* at 139–40. In the words of one interviewee: “government is capable of pretty much anything . . . government can pretty much do as it please. You know, whether it’s good or bad.” In the words of another: “when I think of government, I think of control . . . me not able to make the decisions I want to make because . . . my decisions may not fit what the government wants . . . Usually the outcome is the government takes over and I’m just stuck in a rut.” *Id.* at 143.

it, government officials do not understand their needs or care about their interests.<sup>65</sup> These citizens do not see government as operating at their consent or as being accountable to them. Instead, they see government as an authority that controls them by means of force and coercion, and they have no meaningful say in what it does or how it operates.

Lerman and Weaver find that people who have had contact with the criminal system tend to perceive political participation as futile and even risky. For example, one interviewee stated that voting is “completely worthless” because “none of them are really gonna do nothing [sic] to help out” and “they’re going to do what they want anyhow.”<sup>66</sup> Others reported avoiding political participation out of fear that interacting with a government institution will result in unpredictable repercussions.<sup>67</sup> “[P]ressing one’s claims results only in further difficulties, such as loss of benefits, or worse, harassment and retribution. The only option is to stay low, out of sight, and beyond reach.”<sup>68</sup> This has been described as a “politics of invisibility,” where the “best survival strategy is to . . . disengage[] from all forms of politics and try[] to remain invisible to officials who possibly could provide assistance but [a]re more likely to impose greater surveillance and regulations . . . .”<sup>69</sup> In a related vein, Sarah Brayne finds that people who have had contact with the criminal law are likelier to practice “system avoidance”—i.e., avoid any form of “surveilling institution” (ones that keep official records), including banks and hospitals as well as government institutions.<sup>70</sup>

Lerman and Weaver also performed quantitative analyses which show that experiences with the criminal system not only alter attitudes about government, they also significantly influence voting behavior. Using data from two nationally representative surveys of youth, Lerman and

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65. *Id.* at 139–40 (“[M]ost perceived those in power to have little understanding of their situations and circumstances. Elected officials and government agents were distant entities who exerted control over them without truly understanding them.”); *id.* at 144 (One interviewee: “They don’t know what it’s like to suffer. . . . They couldn’t handle being poor. And they know nothing about being poor. They don’t know. They don’t care.”); *id.* (Another interviewee: “I don’t believe they actually had to experience what people like us or other people go through [starvation, struggle, living on the street]. . . . They don’t take it as serious as we do.” *Id.* at 145. “They really don’t get the grip of what really goes on in places like this, I don’t think so.”).

66. *Id.* at 204–05.

67. *Id.* at 208–09 (quotations omitted).

68. *Id.* at 202, 210–14.

69. *Id.* at 208–09 (quotations omitted).

70. Sarah Brayne, *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, 79 AM. SOCIO. REV. 367 (2014); See also Kathryn Young & Joan PETERSILIA, *Book Review: Keeping Track: Surveillance, Control, and the Expansion of the Carceral State*, 129 HARV. L. REV. 1318 (2014).

Weaver found that each increasing level of criminal system contact, from stop, arrest, conviction, to incarceration, significantly decreases trust in government and the likelihood of voting among people who were legally eligible to vote. Controlling for other factors related to voting, the probability of voting declined by 8% for those who had been stopped and questioned, 16% for those with a history of being arrested, 18% for those with a conviction, 22% for those who were incarcerated less than one year, and 26% for those who were incarcerated more than one year.<sup>71</sup> The effects of being arrested, convicted, or doing time are larger than the effect of any other factor except having a college diploma.<sup>72</sup> These effects remain even after controlling for an individual's previous political participation.<sup>73</sup>

Consistent with these findings, other quantitative analyses using quasi-experimental designs (effectively random assignment to more- or less-punitive judges) have found that brief jail sentences<sup>74</sup> and pretrial detention both significantly decrease the likelihood of voting, in particular among Black citizens.<sup>75</sup> There are a few possible explanations for the particularly pronounced effect on Black citizens: possibility is that the Black citizens who were incarcerated had higher baseline levels of participation before their incarceration. Because police arrest a significantly larger proportion of Black citizens compared to white citizens, they are likelier to arrest people who tended to vote prior to their arrest, so there is more potential for demobilization.<sup>76</sup> Another possibility is that, against a long history of racial subordination and the carceral system's role in maintaining it, carceral encounters have a particularly degrading and subordinating meaning, and are likelier to be interpreted as evidence of a hostile, unwelcoming state.<sup>77</sup>

The impacts discussed above were measured at the individual level, i.e., whether specific individuals who personally experience carceral contact are less likely to vote in the future. Important work by Traci Burch finds that carceral contact also impacts participation at the neighborhood

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71. LERMAN & WEAVER, *supra* note 1, at 223.

72. *Id.* at 221–22.

73. This suggests that carceral contact caused the change in political behavior, and cuts against the alternative hypothesis that some unobserved variable (i.e., an anti-social attitude) is driving both carceral contact and reduced political participation. *Id.*

74. Ariel White, *Misdemeanor Disenfranchisement? The Demobilizing Effect of Brief Jail Spells on Potential Voters*, 113 AM. POL. SCI. REV. 311 (2019).

75. Anne McDonough et al., *Jail While Presumed Innocent: The Demobilizing Effects of Pretrial Incarceration*, 84 J. POL. 1777 (2022).

76. *Id.* at 1781. McDonough et al. also considered, and rejected, resource disparities as a possible explanation for the different effects.

77. *Id.*

level. Controlling for other factors that influence participation, Burch estimates that neighborhood blocks with the highest rates of people under correctional control vote at a rate approximately 8% lower than neighborhoods with no one under correctional control, and that people living in neighborhoods with the highest rates of correctional control are 50% less likely to vote than individuals living in neighborhoods with no one under correctional control.<sup>78</sup>

A neighborhood's rate of carceral control also impacts other modes of civic engagement: people who live in high-imprisonment neighborhoods are also 38.4% less likely to undertake other civic and political activities such as signing petitions and protesting and 65% less likely to volunteer.<sup>79</sup> Burch hypothesizes that this neighborhood-level difference in political participation relates to the fact that high-incarceration neighborhoods tend to have weaker social networks, since people who are incarcerated may be less residentially stable and have fewer opportunities and resources to develop the sorts of social bonds and connections that allow for the transmission of political and participatory values and collective political action.<sup>80</sup>

While these quantitative studies provide significant evidence that criminal contact causes demobilization, and they are important to my argument, I do not want to rely exclusively on quantitative evidence of a causal relationship between incarceration and voting. This relationship is very difficult to isolate and quantify because having carceral contact is closely associated with many other social factors that predict lower participation, such as living in poverty and having less education.<sup>81</sup> Lack of rich

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78. Traci Burch, *Effects of Imprisonment and Community Supervision on Neighborhood Political Participation in North Carolina*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 184 (2014) [hereinafter *Neighborhood Political Participation in North Carolina*]. Though she finds a curvilinear relationship, where at low levels, correctional control appears to be positively associated with voting, the association becomes negative as rates of correctional control increase. *Id.* at 185–86. See also TRACI BURCH, *TRADING DEMOCRACY FOR JUSTICE* (2013).

79. Burch, *Neighborhood Political Participation in North Carolina*, *supra* note 78, at 186.

80. *Id.* at 187–88; see also Ross II & Spencer, *supra* note 20 (discussing the importance of social networks in influencing voting behavior).

81. Criminal system contact is also correlated strongly with other factors that relate to political participation, such as SES and education, and this makes it difficult to parse out their effects—to the extent it makes sense analytically, to do so. For further discussion of this point see Robert Sampson, *Criminal Justice Processing and the Social Matrix of Adversity*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 296 (2014). Studies that try to measure the effect by comparing people with carceral contact to people without it (who are otherwise similarly situated in terms of education, SES, and race) may miss the ways in which people in the 'no carceral contact' group do, in fact, have carceral experiences or are impacted by the carceral system. For example, after controlling for a number of demographic

data about peoples' carceral experiences limits what quantitative studies can control for—to the extent it even makes sense to try to separate out the effect of a specific type of carceral contact from the ways in which the carceral state pervades the lives of people living in race-class subjugated communities, impacting even those who have not personally been arrested or incarcerated.<sup>82</sup> Hence qualitative accounts such as the interviews described above provide necessary context for interpreting and understanding the quantitative studies summarized above.

Sociology literature on legal cynicism and legal estrangement provides another important qualitative account of how experiences with the criminal system may interact with broader systems of socioeconomic and political inequality to produce skeptical attitudes and beliefs about government. Sociologists have used the term “legal cynicism” to describe a “cultural orientation” among members of socially marginalized groups “in which the law and the agents of its enforcement, such as the police and courts, are viewed as illegitimate, unresponsive, and ill equipped to ensure public safety.”<sup>83</sup> Building on this work, Monica Bell uses the term “legal estrangement” to capture both the subjective perception of being outside the law’s protection, and the objective conditions that give rise to this orientation. Bell describes legal estrangement as “detachment and eventual alienation from the law’s enforcers” that “reflects the intuition among many people in poor communities of color that the law operates to exclude them from society.”<sup>84</sup> Bell attributes this perception to mistreatment by law enforcement and other government authorities, structural exclusion, and vicarious experiences of marginalization.<sup>85</sup>

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variables, Gerber et al. found no significant difference in voting between people who were incarcerated and people who were not. But they explain that this null effect may be due to the fact that a majority of people classified in the “no incarceration” group actually had other significant encounters with the criminal legal system (76% had been arrested, 53% had been sentenced to probation, and 38% had been arrested multiple times). Hence people in the “no incarceration” group may have also been demobilized by other experiences with the criminal system. Gerber et al., *Does Incarceration Reduce Voting? Evidence About the Political Consequences of Spending Time in Prison*, 79 J. POL. 1130, 1145 (2017).

82. See Sampson, *supra* note 81.

83. David S. Kirk & Andrew V. Papachristos, *Cultural Mechanisms and the Persistence of Neighborhood Violence*, 116 AM. J. SOC. 1190, 1191 (2011).

84. Monica Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L. J. 2054 (2017) (describing legal estrangement as “a cultural orientation about the law that emanates from collective symbolic and structural exclusion—that is, both subjective and objective factors,” and explaining it is a product of procedural injustice, vicarious marginalization, and structural exclusion).

85. *Id.* See also Monica Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650 (2020) (describing the ways in which policing perpetuates residential segregation).

Taken together, the research discussed above suggests that the criminal legal system aptly fits the description of a “degenerative policy system,” where “group-based political inequalities and divisive policy designs reinforce each other in ways that threaten democracy.”<sup>86</sup> Groups that lack political power are subject to subordinating and stigmatizing treatment. People predictably respond to this treatment by withdrawing and disengaging from politics. This, of course, reinforces their lack of political power, which begets policies that further subordinate, marginalize, and stigmatize, which begets further political withdrawal. It is a self-reinforcing cycle of political powerlessness, subordinating treatment, and political demobilization, which then sustains and deepens political powerlessness that begot the subordinating treatment, and so on.

The foregoing is not to suggest that people who experience carceral contact lack political convictions, ideals, or agency. To the contrary, experiences with the carceral state are profound and lifechanging, and are likely to generate powerful political convictions and political consciousness.<sup>87</sup> People with carceral experiences have been the source of much important de-carceral thinking and activism.<sup>88</sup> However, those who organize and mobilize for change do so by persistently fighting against all

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86. Soss, *supra* note 47, at 293 (quotations omitted).

87. For a discussion of the critical consciousness generated by carceral control, see RIOS, *supra* note 10, at 165–67 (2011).

88. “People in prison have ushered in new metrics to measure public safety, generated innovative ways of thinking to make complex social problems more understandable to policy makers, and spearheaded advancements in criminal procedure to reduce the numbers of people cycling into prison.” Seema Saifee, *Decarceration’s Inside Partners*, 91 *FORDHAM L. REV.* 53, 59 (2022) (discussing the important role that people inside prison have played in influencing decarceral thought and action); *see also* Terrell Carter, Rachel López & Kempis Songster, *Redeeming Justice*, 116 *NW. U. L. REV.* 315, 321–24 (2021) (describing how people incarcerated in a Pennsylvania state prison developed a theory to challenge life-without-parole sentences on the grounds that the law failed to take account of the capacity for change); V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete?: Breaking Cycles of Violence Through Abolition Democracy*, 40 *CARDOZO L. REV.* 1453, 1521 (2019) (article on police abolition, coauthored with a person in prison, highlighting violence-reduction projects in prison led by people in prison). There are many civic organizations led by and comprised of formerly incarcerated people doing vital work to reform the carceral system. For example, Civil Survival, led by and for formerly incarcerated individuals, advocates for legislative reform and provides legal representation and advocacy training to people who have been incarcerated. *See* Civil Survival: Our Work, <https://civilsurvival.org/our-work/>. Voice of The Experienced builds power through community organizing, policy advocacy, and civic engagement. *See* Voice of The Experienced, <https://www.voiceoftheexperienced.org/>. The Formerly Incarcerated, Convicted People & Families Movement launched the Quest for Democracy Fund, which provides grants to organizations led by people with histories of conviction, to work on criminal system reform. For a list of grantees and a description of their work, *see* Quest for Democracy Organizations, <https://ficipm.org/quest-for-democracy/>.



the forces designed to quash their political action and agency.<sup>89</sup> Even though people with carceral experiences have sophisticated knowledge, understanding, and political convictions, their experiences with authoritarian treatment may lead them to believe that power and justice are best sought by “strategically distancing” from state institutions and pursuing “collective autonomy” through organizing and resistance outside of government channels.<sup>90</sup> In this sense, abstaining from official political channels may be an act of political resistance and protest, a means of seeking power and self-determination.<sup>91</sup>

In sum, democratic citizenship depends on more than legal rights to vote—it also depends on how government treats and socializes people in other routine interactions. The carceral state, largely by design, treats and socializes people in a manner that is inconsistent with democratic citizenship. This tends to have significant consequences on political behavior and participation. In the next Part, I will discuss the implications of this de facto suppression from the perspective of constitutional law and voting rights law.

### III. CARCERAL SOCIALIZATION AND VOTING RIGHTS

In this Part, I draw from the foregoing background to argue that de facto suppression (suppression through socialization) threatens the fundamental citizenship interests underlying the right to vote. I begin with a discussion of the seminal cases which first recognized a right to vote. I use these cases to elaborate on the constitutional interests underpinning the right to vote. Then I show how anti-democratic socialization threatens the fundamental citizenship interests underlying the right to vote. Finally, I address objections to the analogy I am drawing between de facto suppression through socialization and de jure suppression through law.

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89. Saifee, *supra* note 88, at 59 (“[T]his phenomenon is astounding. People whom our criminal law places under civil death, who are surviving carceral exile, and who are subject to the oppression, isolation, and indignity of state control are imagining new, rich, and hopeful modes of dismantling the punitive reach of the carceral state. Their visions were born in suffering, in prison cages that were designed neither to invite nor to facilitate innovation, but to quash it.”).

90. Vesla Weaver et al., *Withdrawing and Drawing In: Political Discourse in Policed Communities*, 5 J. RACE, ETHNICITY & POL. 604 (2020).

91. *Id.*

A. *The Values Animating Voting Rights Law*

U.S. law has a fraught and Janus-faced relationship to democracy.<sup>92</sup> While the United States has long boasted about its democracy and freedom, for most of the country's history, large segments of the population have been disenfranchised and effectively under authoritarian rule.<sup>93</sup> Even after the Fourteenth and Fifteenth Amendments banned race-based disenfranchisement, judges tolerated many practices that effectively disenfranchised most citizens who were not deemed "white" by law and many citizens who lacked economic resources.<sup>94</sup> It was not until the 1960s, after centuries of hard-fought and bloody battles, that the Court and Congress recognized voting as a fundamental, universal right of citizenship.<sup>95</sup>

Why did the Court finally recognize voting as a fundamental right? The answer to this is important for my argument, as I contend that the constitutional values expressed in the cases first recognizing an individual right to vote encompass an interest in being treated and socialized as a democratic citizen in other interactions with government. In other

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92. DANIELS, *supra* note 18, at 14 ("[T]he cycle of voter access and denial has served as an integral part of our country's history from the Founding Fathers to the election of Barack Obama as president of the United States and beyond."); Benjamin Justice & Tracey Meares, *Does the Law Recognize Legal Socialization?* 77 J. SOC. ISSUES 462, 474 (2021) (observing the "Janus-faced" nature of states' lofty democratic and republican constitutional provisions when compared to their practices on the ground); cf. Kate Andrias, *Janus's Two Faces*, SUP. CT. REV. 21 (2018) (discussing the Court's "weaponization" of the First Amendment to "erode civil society and democracy at the expense of corporate power").

93. See, e.g., GUINIER, *supra* note 18 (describing how members of minority groups have been shut out of meaningful participation and live under tyranny of majority rule); Franita Tolson, *Countering the Real Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2318 (2021) (discussing Pamela Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2323 (2021)); Vesla M. Weaver & Gwen Prowse, *Racial Authoritarianism in U.S. Democracy*, 369 SCI. 1176 (Sep. 4, 2020) ("Coterminous with democracy in the United States, racially authoritarian patterns are reproduced and innovated after periods of democratic expansion in the United States.").

94. See *Giles v. Harris*, 189 U.S. 473 (1903) (upholding an Alabama scheme that was designed to disenfranchise Black citizens, even though this violated the Fourteenth and Fifteenth Amendments); see also Richard Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 296 (2000) ("[C]onstitutional law played a role in sustaining the blatant manipulations of political institutions that kept America from fully becoming a democracy before 1965."). For a general discussion of the U.S.'s long history of disenfranchisement, see sources cited *supra* notes 18 and 19.

95. See, e.g., ANDERSON, *supra* note 18, at 27-29 (discussing the impact of the Voting Rights Act); WANG, *supra* note 18, at 113-14 (discussing how the Voting Rights Act led to a huge increase in registration and voting among Black citizens); Fishkin, *supra* note 19. One glaring exception to the universal inclusion principle is the disenfranchisement of people with criminal convictions.

words, the carceral system's anti-democratic socialization threatens the same values as vote denial.

For those who were disenfranchised, the right to vote was a fundamental and vital interest for at least two distinct reasons:

First, there is obvious instrumental value. If electoral processes are structured fairly, voting rights enable constituencies to elect representatives who will reflect their interests and adopt favorable policies.<sup>96</sup> This allows for self-rule, autonomy, and responsive government, all central values of democracy.<sup>97</sup>

However, this instrumental interest in representation is not the only constitutional value associated with voting. The right to vote also serves a second, distinct, intrinsic social-psychological value: it recognizes (thereby establishes and socializes) the person as a full member of the political community, entitled to mutual respect and concern.<sup>98</sup> This individual dignitary interest is evident in the way Frederick Douglass described the harm of disenfranchisement: “[T]o rule us out is to make us an exception, to brand us with the stigma of inferiority.”<sup>99</sup> Likewise, Martin Luther King, Jr. stated that denying a citizen the ability to vote “degrades

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96. Guinier, *supra* note 18, at 44-46 (discussing how members of the civil rights movement saw voting rights as foundational for effective social change, representation in government, and advancing a progressive legislative agenda).

97. Without more, the right to vote alone is insufficient for guaranteeing representation. Electoral districts and elected bodies must also be structured in a way that gives minority groups (particularly those who have been shut out from coalitions) fair opportunities to elect candidates of their choice. Otherwise they will perpetually be in the minority. *See id.* at 7-8. Hence, the Voting Rights Act (as amended in 1982) prohibits practices that result in members of a protected group having “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 52 U.S.C. § 10301(b) (amending 52 U.S.C. § 10301 (1982)). These interests are measured and evaluated at the group level, rather than the individual level, since shared-interest groups have a collective interest in representation, whereas no individual can claim a right to have their personal views represented. Gerken, *Understanding the Right to an Undiluted Vote*, *supra* note 19, at 1681 (observing that in vote dilution claims, “fairness is measured in group terms,” and the right to an undiluted vote “is unindividuated among members of the group” in that “no group member is more or less injured than any other group member”).

98. *See, e.g.*, Fishkin, *supra* note 19, at 1319 (making this point); Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 331 (1993) (“[T]he vote should be protected not simply because it enables individuals to pursue political ends, but also because voting is a meaningful participatory act through which individuals create and affirm their membership in the community . . .”).

99. JUDITH SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 55-56 (1991) (quoting 4 FREDERICK DOUGLASS, *WHAT NEGROES WANT*, IN *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS*, 159-160 (1955)).

him as a human being.”<sup>100</sup> And as Judith Shklar explained, those denied the vote “were not merely [being] deprived of casual political privileges, they were being betrayed and humiliated by their fellow citizens.”<sup>101</sup> This is an intrinsic value because it does not depend on the instrumental value of voting—i.e., voting serves this value even if one’s vote is unlikely to change an election outcome.

After centuries of hard-fought, bloody battles for voting rights, the Court and Congress finally recognized these claims.<sup>102</sup> In a series of seminal decisions (which I call “the voting rights cases”), the Warren Court held that voting is a fundamental individual right, protected by the Fourteenth Amendment, and that “any alleged infringement on the right of citizens to vote must be carefully scrutinized.”<sup>103</sup> Applying strict scrutiny, it invalidated poll taxes (regardless of how small)<sup>104</sup> and rules that disqualified members of the armed forces,<sup>105</sup> people who did not own property in a school district,<sup>106</sup> and people who had resided in the state for less

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100. See generally MANZA & UGGEN, *supra* note 21, at 3 (statement of Susan B. Anthony in her trial for voting illegality) (denial of the vote was “the denial of my right to consent as one of the governed” and “therefore, the denial of my sacred right to life, liberty, and property.”).

101. SHKLAR, *supra* note 99, at 38 (1991). See also Fishkin, *supra* note 19, at 1334 (“The ballot has always been a certificate of full membership in society, and its value depends primarily on its capacity to confer a minimum of social dignity. . . . [D]isenfranchised people have sought ‘not just . . . the ability to promote their interests’ politically, but the ‘marks of civic dignity’ that inhere in counting as a full, equal citizen.”). On the social-psychological foundations of the civil rights revolution, see BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 3: CIVIL RIGHTS REVOLUTION* 223–24 (2014) (arguing that the civil rights movement was fundamentally concerned with the “eradication of institutionalized humiliation”).

102. This shift was likely motivated to some extent by the civil rights movement, Dr. King, and the powerful demonstrations and marches for freedom and justice. A more realist take is that the Court and Congress were motivated to shift toward universal suffrage because it converged with the nation’s geo-political interests: namely, concerns that the widely publicized, pervasive, and oftentimes violent voter suppression was undermining the U.S.’s international image; making the nation look hypocritical for preaching democracy abroad while disenfranchising many of its own citizens.

103. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966).

104. *Id.* at 666.

105. *Carrington v. Rash*, 380 U.S. 89, 96 (1965).

106. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (striking down a rule that required people to own property in the school district or to have children attending the school in order to vote in a school board election).

than one year.<sup>107</sup> It also invalidated apportionment schemes that did not provide relatively equal weight to each person's vote.<sup>108</sup>

In *Kramer v. Union Free School District*, the Court explained why courts should apply stricter scrutiny to laws and policies that restrict voting.<sup>109</sup> The Court held that even if there was a conceivable rational basis for a rule requiring people to own property in the district (or have children in school) in order to vote in the school board election, the rationale was not sufficiently compelling to justify disenfranchisement. The Court explained: “[T]he presumption of constitutionality and the approval given ‘rational’ classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people.”<sup>110</sup> However this does not apply to restrictions on voting, because they are “in effect, a challenge of this basic assumption,” and “the assumption can no longer serve as the basis for presuming constitutionality.”<sup>111</sup> Exacting scrutiny is necessary because “[a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.”<sup>112</sup>

The reasoning in *Kramer* represents a fundamental point about the role of judicial review in a democracy: that courts have a vital role to play in policing the political process, to ensure that politicians do not adopt policies that distort the political process in their own favor.<sup>113</sup> While judi-

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107. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

108. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”).

109. *Kramer*, 395 U.S. at 627–28.

110. *Id.* at 628.

111. *Id.*

112. *Id.* at 626.

113. *Id.* This reasoning resembles what is commonly known as “political process theory,” first developed and articulated by John Hart Ely. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 177 (1981) (stricter review was appropriate, i.e., not anti-democratic, in the voting rights cases because they “involve rights (1) that are essential to the democratic process and (2) whose dimensions cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo.”). This idea—that courts are justified in intervening to protect the political process has been widely accepted (though not without debate) as one of the most compelling theories of judicial review in a democracy. David A. Strauss, *Is Carolene Products Obsolete?*, 2010 UNIV. ILL. L. REV. 1251 (arguing that, while there are flaws with political process theory, no one has come up with a better theory of judicial review); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991) (describing political process theory as the “final attempt” to reconcile judicial review with democracy, and stating that should political process theory prove to be logically incoherent or normatively unappealing, “then constitutional theory may well be ‘impossible’”). For a line of argument that differs somewhat

cial review may be anti-democratic or counter-majoritarian when courts strike down “ordinary” legislation, it can be pro-democratic when courts strike down laws that entrench one political party or suppress certain voters. The seminal voting rights cases recognized that those in power have an incentive to dilute or abridge the voting power of people who support the opposition, and when this happens, judicial review may be necessary to protect democratic governance.<sup>114</sup>

With the Voting Rights Act in 1965, Congress took more significant measures to protect universal suffrage. It subjected jurisdictions with a history of racial discrimination in voting to special oversight, requiring preclearance for changes in election procedures.<sup>115</sup> It barred literacy tests and English-language requirements (in certain scenarios), and prohibited voting rules or policies that abridge or dilute voting rights based on race.<sup>116</sup> The Court upheld these provisions as a valid exercise of Con-

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from Ely’s, but also advocates for judicial intervention in order to advance democratic values, see Charles, *Constitutional Pluralism*, *supra* note 19, at 1106 (“Constitutionalization of democratic politics—and consequently judicial supervision of the political process—finds its strongest justification when democratic practices do not serve any legitimate democratic ends and violate multiple democratic principles.”); see also Charles & Fuentes-Rohwer, *supra* note 19 (arguing that judicial intervention in political gerrymandering would be an act of judicial restraint because it would obviate the need for judicial intervention in other partisan disputes that arise from political gerrymandering); Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183 (2020) (arguing that courts should apply guarantee clause to protect voting rights).

114. Many constitutional scholars have endorsed this idea that judicial oversight is appropriate (or even necessary) to protect the Constitution’s democratic principles. See, e.g., Tolson, *supra* note 93, at 2385 (“[J]udicial review is imperative, because the constituency who makes up ‘we the people’ (or those whose preferences that legislation purports to represent) can shrink or expand depending on the prevailing politics.”); Charles, *Constitutional Pluralism*, *supra* note 19; Charles, *Democracy and Distortion*, *supra* note 19; Charles & Fuentes-Rohwer, *supra* note 19. See also Nicholas Stephanopoulos, *The Anti-Carolene Court*, 112 S. CT. REV. 111 (2019); Geoffrey Stone & William P. Marshall, *The Framers’ Constitution: Toward a Principled Theory of Constitutionalism*, AM. CONST. SOC’Y ISSUE BRIEF (Sept. 2011), [https://www.acslaw.org/wp-content/uploads/2018/04/Stone\\_Marshall\\_-\\_The\\_Framers\\_Constitution\\_Issue\\_Brief\\_1.pdf](https://www.acslaw.org/wp-content/uploads/2018/04/Stone_Marshall_-_The_Framers_Constitution_Issue_Brief_1.pdf) (describing this as an “essential tenet of principled constitutionalism”).

115. *South Carolina v. Katzenbach*, 383 U.S. 301, 315–316 (1966) (describing the Voting Rights Act provisions).

116. *Id.* In 1982, Congress amended Section 2 of the Voting Rights Act to expressly prohibit practices that result in members of a protected group having “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 52 U.S.C. § 10301(b). This was a response to the Court’s decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which held that discriminatory intent was required to succeed on a Section 2 claim.

gress's power to enforce the Fourteenth and Fifteenth Amendments.<sup>117</sup> In so doing, it reiterated that the right to vote is fundamental, and that even if states had ostensibly legitimate reasons for imposing voter qualifications, Congress could require states to "tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened."<sup>118</sup> These provisions were tremendously successful in making the right to vote a reality for many people.<sup>119</sup>

As with most advancements in equality law, these steps toward universal suffrage were met with immediate resistance.<sup>120</sup> As soon as the Court and Congress outlawed many of the older methods of suppression, new ones emerged.<sup>121</sup> These tactics involved nationally coordinated campaigns of poll watchers, challenges to voters' eligibility, and demands for identification, oftentimes predicated on unfounded claims about voter fraud.<sup>122</sup> They also involved spreading misinformation about elections and

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117. *Id.* at 327-28 (upholding provisions of the Voting Rights Act as a valid exercise of Congress's power to enforce the Fifteenth Amendment); *Katzenbach v. Morgan*, 348 U.S. 641, 657-58 (1966) (upholding provisions of the Voting Rights Act which prohibited voting discrimination against those who do not speak English in certain scenarios as a valid exercise of Fourteenth Amendment enforcement power).

118. *Morgan*, 348 U.S. at 654 n.15.

119. WANG, *supra* note 18, at 113 ("According to reports of the United States Commission on Civil Rights, just between 1965 and May 1967, 566,767 new black voters registered to vote in the South. In Mississippi, black registration rose from 6.7 percent to 59.8 percent; in Alabama, from 19.3 to 51.6 percent; in Georgia, from 27.4 percent to 52.6 percent; in Louisiana, from 31.6 percent to 58.9 percent; and in South Carolina, from 37.3 percent to 51.2 percent.").

120. *See, e.g.*, ANDERSON, *supra* note 18, at 26-35. For more on identity threat, backlash, and its role in shaping conservative shifts in crime control policy and other areas of law, *see generally* IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS, HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2014); KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 38 (1997); NAOMI MURAKAWA, *ELECTING TO PUNISH: CONGRESS, RACE, AND THE AMERICAN CRIMINAL JUSTICE STATE* (2005); Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 *STUD. IN AM. POL. DEV.* 230 (2007); Lawrence Glickman, *How White Backlash Controls American Progress*, *THE ATLANTIC*, May 21, 2020, <https://www.theatlantic.com/ideas/archive/2020/05/white-backlash-nothing-new/611914/>; Hutchinson, *supra* note 25.

121. Reva Siegel uses the phrase "preservation through transformation" to describe how status-enforcing state action evolves to take new forms as older forms are contested and outlawed. Reva Siegel, *Why Equal Protection No Longer Protects*, 49 *STAN. L. REV.* 1111, 1113 (1997) ("The ways in which the legal system enforces social stratification are various and evolve over time. Efforts to reform a status regime bring about changes in its rule structure and justificatory rhetoric.").

122. WANG, *supra* note 18, at 58-87 (describing the suppression tactics that were used after the Voting Rights Act).

intimidating eligible voters by stating that they may face criminal sanctions for voting under circumstances that are actually perfectly lawful.<sup>123</sup>

The story of the devolution of voting rights (and civil rights more generally) is familiar: during the 1970s and 80s, the conservative legal movement gained power, in part, through exploiting racialized narratives about crime and appealing to fear of lawlessness and disorder among people who felt the social order had been threatened by the equality advancements of the civil rights era.<sup>124</sup> The Reagan Justice Department, including future Chief Justice Rehnquist, worked to hamper enforcement of voting rights laws and other anti-discrimination laws, as it “successfully recast civil rights as ‘special interest’ politics.”<sup>125</sup> President Reagan appointed over 350 judges, who were selected for ideological compatibility with these views.<sup>126</sup> These judges did what they were appointed to do: “limit (and reverse where possible) the rights-protective decisions of the Warren Court” and defer to states and local authorities on matters related to civil rights.<sup>127</sup>

While the seminal voting rights cases stated that infringements on voting were subject to strict scrutiny, in subsequent decades, the Court significantly relaxed this standard, holding that election regulations are

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123. *Id.* at 87 (describing a flyer that was distributed in predominately Black neighborhoods in Milwaukee around the 2004 presidential election, purportedly from the “Milwaukee Black Voters League,” stating: “if you’ve already voted in an election this year, you can’t vote,” and “if you [or anybody in your family] have ever been found guilty of anything, even a traffic violation, you can’t vote in the presidential election,” and that violations will be punished by ten years in prison and removal of one’s child). Gerrymandering and changing the voting rules within elected bodies also became more common techniques, sometimes called “second” and “third” generation voting rights issues. See generally GUINIER, *supra* note 18, at 8–13.

124. For more on identity threat, backlash, and its role in shaping conservative shifts in crime control policy and other areas of law, see generally LÓPEZ, *supra* note 120. See also sources cited *supra* note 120.

125. GUINIER, *supra* note 19, 23–24; see also Ari Berman, *Inside John Roberts’ Decades-Long Crusade Against the Voting Rights Act*, POLITICO (Aug. 10, 2015), <https://www.politico.com/magazine/story/2015/08/john-roberts-voting-rights-act-121222/>. For a discussion of the conservative legal movement, and its impact on the federal judiciary, see MICHAEL GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* (2016); JOHN JENKINS, *THE PARTISAN: THE LIFE OF WILLIAM REHNQUIST* (2013); STEPHEN TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2010). For a discussion of how the Court has retreated from protecting civil rights, see AZIZ HUQ, *THE COLLAPSE OF CONSTITUTIONAL REMEDIES* (2021).

126. GUINIER, *supra* note 18, at 23–24 (pointing out that only a few of these judges were Black).

127. Hasbrouck, *supra* note 30, at 640.



subject to a more flexible balancing test.<sup>128</sup> This more relaxed standard gives courts significant latitude to decide that a burden is not severe and hence defer to the state's alleged interest, even without any evidence supporting it.<sup>129</sup> Following this, the Court upheld voter I.D. laws, which others have compared to the poll tax, based on entirely unsubstantiated assertions of voter fraud.<sup>130</sup> Scholars have noted that contemporary voter I.D. laws would not have passed the stricter scrutiny the Court applied in *Harper* to invalidate the poll tax.<sup>131</sup> And while the Court no longer applies strict scrutiny to restrictions on voting, it *does* apply strict scrutiny to race-conscious legislation aimed at addressing historic race discrimination in voting.<sup>132</sup> It has also significantly curtailed Congress's power to protect voting rights by striking down the preclearance formula and effectively

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128. Under this test, a court asks whether the burden on voting is severe, and then it asks whether the state's interest is sufficiently weighty to justify the burden. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008) (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789, 806 (1983)). The more severe the burden, the more important the state's interest must be. This places significant emphasis on the severity of the burden, and how courts characterize the burden.

129. Dissenting Justices in these cases have pointed out the Court's unwarranted level of deference to the state's justifications for restrictive election rules, despite the lack of evidence to support them. See e.g., *Burdick*, 504 U.S. at 448-49 (Kennedy, J., dissenting) (arguing that the State had failed to justify the ban on write in voting "under any level of scrutiny" because the ban does not serve the State's interest in preventing sore loser candidacies); *Crawford*, 553 U.S. at 209 (Souter, J., dissenting) (criticizing the majority for failing to appreciate the seriousness of the burden imposed by the voter I.D. law, and for not demanding enough evidence that the law was necessary to prevent fraud).

130. *Crawford*, 553 U.S. at 194 (noting that there was no record of voter fraud in the state's history). For further discussion of unprincipled and apparently partisan application of voting rights law, see Wilfred U. Codrington III, *Purcell in Pandemic*, 96 N.Y.U. L. REV. 941 (2021) (describing the Court's selective and unprincipled reliance on the "Purcell principle" to prevent jurisdictions from taking measures to make voting more accessible, particularly during the pandemic election in 2020).

131. Manheim & Porter, *supra* note 19, at 228 n.71 (observing that the voter I.D. law the Court upheld in *Crawford* "strikingly resembled" the poll tax the Court struck down in *Harper*, and noting that both restrictions imposed a relatively minor burden on most people subject to them (comparing the poll tax of \$1.50 in *Harper*, and the cost and time to obtain the required ID)); Pamela S. Karlan, *Undue Burdens and Potential Opportunities in Voting Rights and Abortion Law*, 93 IND. L. J. 139, 148 (2018) ("There is simply no way to reconcile the Court's extraordinary deference in [the cases upholding voter I.D. laws] with its earlier skepticism about voting restrictions."); Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. 59, 60 (2021) ("The problem has only become worse as a renewed, undue deference doctrine has emerged. The Court has not explicitly overruled the *Anderson-Burdick* test, but its jurisprudence and the case law from the circuit courts of appeals in 2020 demonstrates that there is little federal judicial protection for the constitutional right to vote.").

132. *Shaw v. Reno*, 503 U.S. 630, 645-48 (1993); Hasbrouck, *supra* note 30, at 643 (noting the irony of this holding).

suspending federal oversight of states with a history of discrimination in voting, making it significantly more difficult to prove claims of racial discrimination under the Voting Rights Act.<sup>133</sup>

In recent decades, as the Court relaxed constitutional scrutiny for burdens on voting and weakened the Voting Rights Act, states have passed a wave of new policies that make voting more difficult.<sup>134</sup> Scholars have cited this rise in voter suppression as an “obvious indicator that our democracy is failing.”<sup>135</sup> Many view these “anti-democracy” precedents as a significant threat to democratic government.<sup>136</sup> In upholding voter I.D. laws and the like on the grounds that these impediments do not pose a significant enough burden to warrant scrutiny, the Court adopted a hyper-formalist view of the right to vote.<sup>137</sup> While it continues to maintain that the right is fundamental, it protects it largely in theory, and not in substance or in practice. In other words, it is concerned only about whether people are technically eligible to vote under law, and not about whether they have a practical opportunity or choice to exercise that

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133. In *Shelby County v. Holder*, 570 U.S. at 555-57, it invalidated the formula for determining which states were subject to preclearance requirements under Section 5, on the grounds that this violated an equal sovereignty principle in the Constitution and Congress had not established an adequate record to justify subjecting certain jurisdictions to more stringent requirements. This enabled states to pass a new wave of restrictive voting measures, and the following election saw a significant reduction in Black voters participating. ANDERSON, *supra* note 18, at 41-43. At the time of this writing, the Court appears poised to eviscerate or significantly limit Section 2 of the Voting Rights Act, as well, by significantly restricting or barring the consideration of race when challenging race-based gerrymandering. *Merrill v. Milligan*, No. 21-2086 (U.S. argued Oct. 4, 2022); *see also* *Brnovich v. Democratic Nat'l Comm.*, 141 S.Ct 2321 (2021) (upholding policies restricted in-person and mail-in voting with a demonstrated (and arguably intentional) disparate impact on minority voters, and suggesting that the burdens imposed by these restrictions were not severe enough to warrant a remedy, as other avenues for voting remained open).

134. *See generally* sources cited *supra* notes 18 and 19.

135. Tolson, *supra* note 93, at 2386.

136. Hasbrouck, *supra* note 30, at 642; *id.* at 639 (“Our democracy is in danger.”); Michael Klarman, *Forward: The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1 (2020); Tolson, *supra* note 93, at 2386 (“[T]he Supreme Court’s refusal to aggressively intervene is yet another sign that, not only is the march towards a more inclusive democracy not linear, achieving the aspiration of majoritarian democracy is also not certain.”); *see also* Charles, *Democracy and Distortion*, *supra* note 19; Nicholas Stephanopoulos, *The Anti-Carolene Court*, *supra* note 114.

137. Fishkin, *supra* note 19, at 1333 (arguing that the right to vote “requires a substantive, rather than merely formal, opportunity to cast a ballot and have that ballot counted”).

right, or whether election policies make exercising that right unreasonably costly, complicated, or difficult.<sup>138</sup>

Because voting rights are under siege and so hotly contested, voting rights advocates and scholars are actively rethinking voting rights law with an eye toward building more robust and comprehensive protection for voting rights, centered around political equality and the ideal of universal participation and inclusion.<sup>139</sup> A meaningful, substantive conception of voting rights would understand the obvious reality that voting depends not only on technical legal eligibility, but also on practical ability to get to the ballot box without going to unrealistic, untenable, or irrational expense, difficulty, or inconvenience (such as missing hours of work, traveling to a far-away government office, or spending months tracking down a birth certificate).<sup>140</sup> Some of this vision is reflected in the John R. Lewis Freedom to Vote Act, introduced in the Senate in 2021, which would universalize voting rights, limit partisan gerrymandering, and take measures to address disenfranchisement of people convicted of crimes.<sup>141</sup>

I fully endorse these proposals. However, I submit that in addition to addressing de jure suppression, advocates, judges, policymakers, and scholars who are concerned about voting rights should also be concerned with de facto suppression caused by socializing experiences with the carceral system. A robust, substantive understanding of voting rights would recognize that these rights encompass a constitutional interest in being socialized as a political equal, as well as in formally equal and open access to the ballot. In the next Section I show why this is so.

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138. This harkens back to how the Court treated voting before the voting rights revolution of the 1960s, when poll taxes, literacy tests, and various qualifications prevented many people from voting in practice, even though they had the right to vote in theory. *Id.* at 1345 (“The exclusions that fell in the [1960s] were typically of a kind that ‘falsely ascribed personal deficiencies’ to voters and then denied them the vote based on those deficiencies, so that many citizens had the franchise in theory but lacked it in practice.”).

139. See, e.g., *Race and Regulation Podcast: Creating an Inclusive National Politics*, *supra* note 18 (discussing ideas for a more inclusive law of democracy); see DANIELS, *supra* note 18 (discussing reform); see WANG, *supra* note 18 (discussing reform proposals).

140. Fishkin, *supra* note 19, at 1337–38.

141. The Freedom to Vote Act, introduced in the Senate in September 2021, would require states and localities to adopt more open and fair voting procedures, prohibit political gerrymandering, affirm the Voting Rights Act’s protections against vote dilution, and limit the disenfranchisement of people convicted of crimes. S. 2747, 117th Cong. (2021).

B. *Carceral Socialization as Suppression*

In this Section I will develop the argument that a substantive conception of voting rights—one that protects the right to vote in practice, not just in theory—should implicate the carceral system’s de facto suppression (suppression through socialization) as well as de jure suppression (laws imposing restrictions on voting). Both threaten the core values underlying the individual right to vote. In making this argument, I appeal to the constitutional principles reflected in the seminal voting rights cases of the 1960s, since they derived the right to vote from constitutional principles, and they articulate a substantive, rather than purely formal, conception of voting rights.<sup>142</sup> I largely ignore the “anti-democracy” cases of the Rehnquist and Roberts Courts, as they supply no substantive account of the constitutional values underpinning a right to vote or the judiciary’s role in protecting these values.<sup>143</sup>

In recognizing the right to vote as a fundamental individual right, and protecting it in substance, not merely in form, the voting rights cases of the 1960s recognized a few points which are important to my argument: first, the Court never suggested that burdens on voting should be scrutinized *only* if their impact was large enough to influence election outcomes. Second, these cases applied strict scrutiny without any finding of class-based discrimination.<sup>144</sup> They scrutinized restrictions that impacted only a few people, not defined by any suspect characteristic—e.g., people who resided in the state of Tennessee for less than one year; people who were in the armed forces; or people who resided in a school dis-

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142. Fishkin, *supra* note 19, at 1345 (“The changes that took place in this period thus established unmistakably that democratic inclusion requires more than an end to the official, de jure exclusion of one’s group from the polity. Full and equal citizenship requires actually being able to cast a ballot—a substantive, rather than merely formal, right to vote.”).

143. These cases do not purport to defend their deference to restrictions on voting based on principled, substantive conception of voting rights or democratic citizenship—rather they rely on reasoning related to limiting the role of federal courts in reviewing states’ election policies and deferring to states to decide the scope of voting rights. *See supra* notes 128, 132–33. This logic is circular when states are distorting the political process in a way that makes it very difficult to advance voting rights through political channels.

144. *See* Fishkin, *supra* note 19, at 1345 (“[T]he universalist turn in this period established that . . . [t]he wrongness of disenfranchisement is not simply the wrongness of race discrimination or other similar group-based exclusion: it is also a violation of a fundamental right of citizens.”); *see also* Joshua A. Douglas, *The Foundational Importance of Voting: A Response to Professor Flanders*, 66 OKLA. L. REV. 81, 83 (2013) (arguing that unnecessary obstacles and barriers to voting are constitutionally problematic, even if they affect all voters equally).

strict but neither own property nor have children in school there.<sup>145</sup> These points together imply that randomly disenfranchising a single voter would be problematic, even if that voter's preferred candidate was guaranteed to win, and even if their exclusion was not based on any suspect characteristic.<sup>146</sup> Being denied the ability to vote is a constitutional harm, even if it makes no difference in the election outcome, because that individual has a protected constitutional interest in being recognized, dignified, and thereby socialized as a political equal.<sup>147</sup>

This point—that the right to vote protects an individual's intrinsic interest in being recognized and socialized as a political equal—is important because the same interest is implicated by socializing interactions with the carceral system, albeit outside the domain of voting. A voter I.D. law that prevents someone from voting causes social-psychological harm: it conveys the person lacks credentials to vote, therefore they are not a full member of the political community.<sup>148</sup> The state can inflict the same social-psychological harm when it treats a person as a second-class citizen during a carceral encounter. If the ability to vote is valuable because it establishes a person as a full member of the community, the state can undermine this value by otherwise treating the person in a stigmatiz-

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145. See *supra*, notes 105-107 and accompanying discussion. There was no suggestion in these decisions that excluding these voters changed the election outcome.

146. Judge Wood articulated this point nicely in dissent from the Seventh Circuit's denial of rehearing en banc in *Crawford v. Marion County*, which upheld Illinois's voter I.D. law. The panel's opinion, written by Judge Posner, suggested that a restriction on voting is not a constitutionally cognizable burden if it does not suppress enough votes to alter an election outcome. 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 ("The benefits of voting to the individual voter are elusive (a vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote), and even very slight costs in time or bother or out-of-pocket expense deter many people from voting, or at least from voting in elections they're not much interested in."). In response to this, Judge Wood explained: "[A]s a matter of law the Supreme Court's voting cases do not support a rule that depends . . . on the idea that no one vote matters." For example, "[e]ven if only a single citizen is deprived completely of her right to vote—perhaps by a law preventing anyone named Natalia Burzynski from voting without showing 10 pieces of photo identification—this is still a 'severe' injury for that particular individual." *Crawford v. Marion Cnty. Election Bd.*, 484 F.3d 436, 438 (7th Cir. 2007) (Wood, J., dissenting from the denial of reh'g en banc). This is because "[v]oting is a complex act that both helps to decide elections and involves individual citizens in the group act of self-governance." *Id.*; see also Fishkin, *supra* note 19, at 1319 (making this point, and citing Judge Wood's opinion, as well).

147. Fishkin, *supra* note 19, at 1337 ("[F]rom the perspective of what we might call the substantive view, being included as a full and equal citizen requires more than formal inclusion: it also requires actually being able to cast a ballot. On this view, when any individual citizen attempts to vote but is blocked from doing so, she is being excluded from the circle of full and equal citizens.").

148. *Id.* at 1334, 1337.

ing, degrading, and subordinating manner. This is reflected in Lerman and Weaver's observation that people who have had contact with the criminal system come to see themselves being as "outside the bounds of consideration," regardless of whether they are legally eligible to vote.<sup>149</sup>

The carceral state's anti-democratic socialization may also threaten the instrumental values of the right to vote—i.e., electing representatives who will adopt policies that advance one's interests. This would be true if carceral socialization altered the voting behavior among enough people to impact election outcomes. If the effects were concentrated in one group of voters who share common interests and typically vote together, then it could reduce the entire group's opportunity to elect their preferred candidates. Burch's research (discussed in Part II.C) suggests that the criminal system changes voting behavior on an aggregate neighborhood level. After controlling for a range of variables associated with political participation,<sup>150</sup> Burch found that residents of neighborhoods with the highest rates of people under carceral control (276 people incarcerated or on community supervision per square mile, in her sample), were 50% less likely to vote, compared to residents of neighborhoods with no people under criminal supervision.<sup>151</sup> She interpreted these results to "suggest[] that the criminal justice interactions of community members have important spillover effects that suppress participation not only of the supervised individual but also of those living around him or her."<sup>152</sup>

Burch's findings suggest that demobilization through carceral socialization could have a large enough effect to change an election outcome. If this occurs, carceral socialization would make it so that residents of heavily policed and criminalized communities have less opportunity to elect candidates of their choice. Burch recognizes this, stating that "the criminal justice system denies law-abiding citizens the right to participate on an equal footing with people from neighboring communities with

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149. See *supra* notes 63–68 and accompanying discussion.

150. At the individual level, age, race, gender, ideology, educational attainment, political knowledge, political interest, and income. At the neighborhood level, median income, percent receiving public assistance, poverty rate, unemployment rate, percent vacant housing units, ex-inmate-serving institutions, homicide rate, median age, citizenship rate, racial composition, and percent of the population in group housing quarters. Burch, *Neighborhood Political Participation in North Carolina*, *supra* note 78, at 196.

151. *Id.*

152. *Id.* at 197–98 ("The magnitude of the turnout reduction measured at the neighborhood level is too large to attribute to the supervision of only one or two inmates or probationers. Likewise, the demonstrated participatory reduction among people who are not themselves under supervision also supports the claim that these analyses are capturing spillover effects, rather than the primary effect on felons themselves.").

lower criminal justice involvement.”<sup>153</sup> This would disproportionately impact Black citizens, since racial demographics are one of the strongest predictors of a neighborhood’s supervision density.<sup>154</sup>

Socialization may be a more powerful determinant of voting behavior than laws restricting voting. Democracy scholars have long observed that the voter turnout rate in the United States is quite low, especially among the lowest income quintile.<sup>155</sup> Voting experts have noted that the sociological factors that influence voting behavior (de facto suppression) are as important, if not more so, than laws restricting voting (de jure suppression).<sup>156</sup> As an illustration of how suppression through socialization may be more powerful than de jure suppression, consider the following hypothetical:

In state X, there are two major competing political parties: the orange party and the purple party. The state is geographically segregated such that members of the orange party tend to live in different school districts from members of the purple party. When the orange party is in power, the state education agency, under the authority of an orange party appointee, issues a directive that mandates teaching two different curriculums in different school districts. Schools in predominately orange districts are directed to teach a curriculum that is designed to prepare students for civic engagement and leadership. This curriculum emphasizes the standard ideals of democracy: that government exists at the will of the people, that citizens have a right and responsibility to vote and their vote is to count equally, that offices are open to all, that elected officials should be representative of and responsive to constituents, and that civic engagement can achieve meaningful political change. Moreover, authorities model this behavior by giving students ample voice and opportunity to participate in determining the school’s policies.

Meanwhile, schools in purple districts are directed to eliminate civics education in grades K-12, and to instead focus on preparing students

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153. *Id.* at 198. She concludes by asking: “Is it fair that the votes of people who live in neighborhoods with or share the same social background of convicted offenders count less than those of the more fortunate citizens who live in other, low involvement neighborhoods?” *Id.*

154. *Id.* at 190.

155. See, e.g., Ross II & Spencer, *supra* note 20, at 657 (reporting a turnout rate in general elections of less than 50% among the lowest income quintile).

156. Ross II & Spencer, *supra* note 20, at 668-69 (“[T]he tangible costs of voting that are central to voting rights claims are a relatively unimportant determinant under the sociological theories of voting.”); see also DANIELS, *supra* note 18, at 200-01 (“Our biggest problems are not disenfranchisement. And that’s not to say that those aren’t problems. But the biggest problems . . . are that we do not have enough Americans who engage in the voting process.”) (quoting Nicole Austin-Hillery, a leading voting rights activist).

for following rules and performing vocational work. They teach classes emphasizing filling out forms correctly and performing administrative tasks. They do not teach students anything about the structure of government, nor do they teach students that they have the right to vote and to have their vote count equally, that elected offices are open to everyone, that government officials are supposed to be accountable to their interests, that they are entitled to petition, assemble, organize, or that these tactics have proven effective for social movements. To the extent teachers discuss the political system, they tell students that the wealthy elites make policy and that no other votes really count. Further, they warn students that if they were to attempt to vote, polling officials would treat them with scorn and suspicion, and maybe even arrest them. Finally, they treat students in an authoritarian manner, subjecting them to commands and instructions without giving them any opportunity to voice their views or participate in determining the school's policies.

Without any formal restrictions on voting, this dual-track educational scheme effectively creates two classes of citizens: orange district students who see themselves as political equals, who perceive the process as being open and receptive to them; and purple district students who see themselves as subordinates and perceive the political process as being closed and hostile to them. The purple districts here are analogous to the lessons in “anti-citizenry” taught by the criminal system.<sup>157</sup> The literature discussed in Part II suggests that these differences would impact political behavior, such that students from purple schools would vote less, and engage in less political action. The students from purple schools would be expected to have lower perceptions of democratic legitimacy, less trust in government, and identify less with legal norms and rules, as they will see those rules as democratically legitimate, or reflecting their own preferences and input. This difference in behavior would be likely to persist regardless of whether the laws governing elections are formally open on equal terms to people educated in purple districts.

This example illustrates how socialization can influence behavior in systemic, reliable ways that would threaten the values underlying the right to vote. Students in purple districts would not experience many of the values conferred by the formal right to vote: they would likely lose out on the instrumental value of group-based representation, insofar as their lower rates of participation may impair their ability to elect candidates of their choice, and influence policy outcomes. And they would also lose out on the intrinsic social-psychological value of voting rights: the right to vote is intrinsically valuable because it dignifies a person as a po-

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157. See Justice & Meares, *supra* note 12.



litical equal, but the daily treatment and lessons from school officials would undermine this message.

I use a hypothetical from education because education's purpose is socialization, and the importance of socialization is perhaps easier to appreciate in this context.<sup>158</sup> My argument certainly has implications for education, as well.<sup>159</sup> However, I focus on the carceral state as a starting point for developing this argument because, for reasons discussed previously, carceral interactions are inherently anti-democratic in a way education and other forms of state-sponsored socialization are not.<sup>160</sup>

This reasoning in support of stricter judicial review applies to suppression through socialization, just as it does to de jure suppression. The socialization literature discussed in Part II and the foregoing hypothetical show how elected officials can distort the political process in their favor by subjecting people whose views they wish to suppress to systematic anti-democratic treatment and socialization.

This research on political socialization complicates the picture of democracy that courts take for granted when they defer to legislative judgements. They typically reason that legislation reflects the preferences of voters, and that if people do not like a policy, they can work through political channels to change it.<sup>161</sup> As the voting rights cases recognized,

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158. The Court has recognized this to some extent (but not nearly to the extent it could) in cases involving the denial of education and segregated education. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (“We have recognized ‘the public schools as a most vital civic institution for the preservation of a democratic system of government,’ (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) . . . ‘[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.’” (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972))); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, . . . [i]t is the very foundation of good citizenship.”).

159. My argument implicates other socializing institutions, as well, and it implies that civics education and curriculum may be a form of de facto suppression that threatens the values underlying the right to vote. *Plyler* acknowledged this in a very fleeting and inadequate way. See *supra* note 158. However, my argument would require much more, in terms of treating and socializing students as political equals. I plan to elaborate on this in future work.

160. See *supra* notes 58–61 and accompanying text.

161. See, e.g., *Ewing v. Cal.*, 538 U.S. 11, 28 (2003) (rejecting the claim that a sentence of 25 years-to-life for stealing three golf clubs violated the Eighth Amendment, and stating that Ewing’s claim that the punishment lacked any legitimate justification “is appropriately directed at the legislature, which has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme,” and the Court “do[es] not sit as a ‘superlegislature’ to second-guess these policy choices.”).

this rationale is not applicable when lawmakers enact rules that restrict or burden voting.<sup>162</sup> The same reasoning applies to carceral socialization. The policies of the carceral system are likely to demobilize the very people who have the strongest interest in changing them.<sup>163</sup> Because of this, it is not safe to assume that the carceral policies are representative, responsive, or democratically legitimate with respect to those most impacted by them, or that political channels will provide meaningful recourse for people harmed by these policies. Just like policies restricting voting, anti-democratic socialization distorts the political process that might ordinarily be relied upon to bring about change, and it is not fair to assume that democratically enacted policies represent the values and preferences of the electorate, particularly those most impacted.<sup>164</sup>

Finally, it is important to note that the de facto and de jure voter suppression both disproportionately impact race-class subjugated communities.<sup>165</sup> These groups are subject to subordinating treatment in many areas of life and in different interactions with government. Subordinating treatment in the carceral state, in the welfare system, in the education system, discrimination in housing and the workplace, and exclusionary or restrictive voting rules combine to convey a broader message of second-class citizenship.<sup>166</sup> If other socializing experiences have taught a person to be skeptical of the value of voting, they may be less inclined to jump through the various hurdles and obstacles imposed by voter I.D. laws and similar means of de jure suppression.

### C. Responding to Objections

I anticipate a few specific objections to the analogy I am drawing between de jure suppression (laws that regulate voting) and de facto suppression (demobilization through socialization): the first objection is that

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162. See *supra* notes 103-109 and accompanying discussion.

163. See *supra* notes 53-57 and accompanying discussion.

164. *Id.*

165. On the racial disparate impact of voter I.D. laws, see *Oppose Voter ID Legislation - Fact Sheet*, ACLU, <https://www.aclu.org/fact-sheet/oppose-voter-id-legislation-fact-sheet>. On racial disparities in policing and criminalization, see NAT'L CONF. OF STATE LEGISLATURES, RACIAL AND ETHNIC DISPARITIES IN THE JUSTICE SYSTEM (2022), [https://www.ncsl.org/Portals/1/Documents/cj/Racial-and-Ethnic-Disparities-in-the-Justice-System\\_v03.pdf](https://www.ncsl.org/Portals/1/Documents/cj/Racial-and-Ethnic-Disparities-in-the-Justice-System_v03.pdf).

166. Cf. Bell, *supra* note 84, at 2057 (“[i]n addition to the jurisprudential message that poor people of color are ‘subject[s] of a carceral state’ or ‘second-class citizens,’ research in sociology, criminology, political science, and other fields suggests that these groups often see themselves as essentially stateless—unprotected by the law and its enforcers and marginal to the project of making American society.”).

socialization is not real or tangible in the same way as formal election laws and policies that burden or dilute voting, and therefore is not legally cognizable. This view is likely animated, in part, by a concern about whether judges can objectively evaluate socialization, and relatedly, that a socialization-based understanding of suppression could potentially implicate a vast and undefined range of policies and practices. The second objection is that suppression should be defined in terms of intent—i.e., whether the policy was adopted for the purpose of distorting the political process in an unfair way. I address each of these objections in turn.

### 1. Formal rules vs. intangible sociological forces

Scholars who support a robust substantive conception of voting rights have nonetheless expressed skepticism about the idea that voting rights law should be concerned about de facto suppression (through sociological or psychological forces). Ironically, courts have gestured at this idea when upholding voter I.D. laws and other rules restricting access to the polls. These courts appeal to the State's interest in combatting the *perception* of rampant election fraud, even if there is no evidence of actual fraud. For example, in *Purcell v. Gonzalez*, the Court reversed the Ninth Circuit's decision enjoining the enforcement of a restrictive voter I.D. law, allowing the law to go into effect weeks before the election.<sup>167</sup> In discussing the State's interest in the voter I.D. law, the Court noted: "Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."<sup>168</sup> Similarly, upholding a voter I.D. law, a court in Ohio reasoned "[w]here persons who are eligible to vote lose faith that their ballot will count, . . . [t]hey may decline to exercise the franchise, thereby giving up the most fundamental right of our democracy as completely as if it had been taken from them forcibly."<sup>169</sup>

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167. 549 U.S. 1 (2006) (per curiam). The Court emphasized that the Ninth Circuit's injunction was issued close to the election, and therefore might cause voter confusion. *Id.* at 4-5. Courts have subsequently relied on this "*Purcell* principle" in numerous cases during the pandemic election, arguably opportunistically, to justify preventing changes that would make voting easier. For discussion and critique of *Purcell*, see Codrington III, *supra* note 130.

168. *Purcell*, 549 U.S. at 1.

169. *League of Women Voters v. Blackwell*, 340 F. Supp. 2d 823, 829 (N.D. Ohio 2004); see also *Crawford v. Marion Cnty.*, 553 U.S. 181, 197 (recognizing that the state's interest in "public confidence in the integrity of the electoral process has independent significance [from preventing voter fraud] because it encourages citizen participation in the democratic process").

Voting rights scholars have rightly criticized this line of reasoning.<sup>170</sup> Critics make four main points in objection to this: first, that there is no empirical evidence supporting the idea that perceptions of voter fraud reduce voter turnout.<sup>171</sup> Second, they question the equivalence of “being” disenfranchised with “feeling” disenfranchised.<sup>172</sup> Third, that it is unfair to consider feelings of disenfranchisement caused by perceived fraud, but not the feelings of disenfranchisement caused by voter I.D. laws and other restrictive voting rules.<sup>173</sup> And fourth, even if perceptions of fraud actually reduced participation among some voters, it does not automatically follow that this would justify a policy of disenfranchising other people; the state could address misperceptions of fraud through other means, like an education campaign.<sup>174</sup>

I agree largely with these criticisms of the reasoning in *Purcell* and other cases suggesting that restrictive voting laws can be justified on the theory that perceived fraud is demobilizing. I do not mean to endorse the holdings of these cases. However, I do believe these courts were correct in recognizing one point: that genuinely “feeling” or perceiving oneself as being disenfranchised is a real and powerful demobilizing force—one that should matter from the perspective of voting rights law. A voter’s beliefs about their own standing, including the mistaken perception that their vote will not count, may be just as effective at suppressing participation as de jure suppression. Thus, policies and practices that systematically shape voters’ perceptions of civic standing and political equality should be

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170. Codrington III, *supra* note 130, at 955–56 (saying this reasoning is “as incredible as it is audacious”); Richard Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 33–36 (2007).

171. Nathaniel Persily & Stephen Ansolabehere, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737 (2008).

172. Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L. J. 743, 765 (2007) (“The Court’s equation of state denial of the right to vote with voters’ private decisions not to participate in a process in which they lack confidence represents a breathtaking expansion of the concept of vote dilution.”); *see also* Fishkin, *supra* note 19, at 1314 (“[F]eeling disenfranchised is not the same thing as being disenfranchised.”).

173. Hasen, *supra* note 170, at 36.

174. *Id.* (“[T]he Court offered no explanation why it is appropriate to balance feelings of disenfranchisement against actual disenfranchisement, whatever the appropriate standard of review.”); Alex Keyssar, “Disenfranchised”? *When Words Lose Meaning*, HUFFINGTON POST (Oct. 22, 2006), [http://www.huffingtonpost.com/alex-keyssar/disenfranchised-when-\\_b\\_32241.html](http://www.huffingtonpost.com/alex-keyssar/disenfranchised-when-_b_32241.html) (“FEEL disenfranchised? Is that the same as ‘being disenfranchised’? So if I might ‘feel’ disenfranchised, I have a right to make it harder for you to vote? What on earth is going on here?”).

a concern for voting rights law, even if there is no tangible legal barrier to participation.

For reasons elaborated above, socializing experiences that lead one to understand oneself as a second-class citizen can be as powerful as suppression by law, and can threaten the social-psychological and representational value of the right to vote. Beliefs and perceptions determine behavior. If someone has been socialized to genuinely believe their vote does not count, that politicians won't respond to them, or that voting may lead to retaliation, it would be rational for them to abstain from voting, and they will therefore lose out on the experience of political equality and fair representation, and government will not be legitimate with respect to them.

For this reason, sociological determinants of voting behavior should not be categorically outside what counts as voter suppression. De facto suppression is antithetical to the principles animating voting rights law. Where there are multiple high-quality quantitative and qualitative studies demonstrating a systemic relationship between the socializing practice (the criminal system) and political withdrawal, this is a cognizable form of suppression that is a threat to the values underlying voting rights law.

Recognizing anti-democratic socialization as a form of suppression does not mean that government would be justified in adopting a restrictive voting law, such as a voter I.D. law, that burdens or abridges the voting rights of other people as a means of counteracting misperceptions of fraud, as the courts suggested in the voter I.D. cases discussed above. The right to vote requires the government to use the least-burdensome alternative for achieving its objective, and there are many other less-burdensome alternatives for addressing mistaken perceptions of fraud that do not involve restricting other peoples' ability to vote, such as public education or engagement and outreach.<sup>175</sup>

Furthermore, there is another important difference between cases where people are ostensibly disenfranchised by the perception of fraud and the anti-democratic socialization of the carceral state: only the latter involves treating the would-be voter in a subordinating and stigmatizing manner—i.e., in a way that largely negates the social-psychological value of the right to vote. A voter may believe that election fraud is happening without losing or compromising their own sense of equal citizenship, belonging, and status within the community.

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175. For a somewhat similar line of argument, see Nicholas Stephanopoulos, *The New Vote Dilution*, 96 N.Y.U. L. REV. 1179 (2021) (addressing claims of dilution-by-fraud, and arguing that they should be cognizable if there were in fact empirical support for them, and if other conditions were met).

In a related vein, I anticipate concerns about the potential breadth of my argument. Elected officials and politicians can influence voting behavior in various ways, including through carefully crafted public messaging, and by enacting policies that are popular and therefore difficult to repeal.<sup>176</sup> One might ask whether my argument implies all of them should be a concern for voting rights law. My argument does not implicate every method of partisan entrenchment or every policy that changes voting behavior. My concern is specifically about socialization, and how it impacts civic identity (i.e., one's sense of citizenship), as distinct from policies that manipulate voter preferences in other ways.

Many other mechanisms of entrenchment work by appealing to voters, either through messaging or through enacting favorable policies, to influence which policies or politicians they support. My concern is not about the manipulation of substantive policy preferences, but instead about the experience of being degraded by the government in a way that evokes a sense of exclusion or alienation. This is a distinct subordinating social-psychological harm, comparable to being legally disenfranchised, that does not occur when politicians appeal to voters with favorable messaging or policy proposals. Such tactics do not degrade and stigmatize, but, to the contrary, appealing to voters, convey that voters' preferences matter and that government is concerned about them. They do not deprive voters of the experience of being an equal member of the political community and do not undermine the social/dignitary value of voting. And while these other means of entrenchment may influence *how* voters vote, they do not necessarily demobilize or cause political withdrawal. There may be other issues with these types of entrenchment, but they do not fall under my argument as a form of de facto suppression.

While my argument does not implicate all political entrenchment, it may implicate other socializing institutions beyond the criminal system. Various state institutions teach citizens lessons about their standing and potentially influence civic identity and participation (schools and interactions with other government agencies that regulate welfare and families are obvious examples). However, I focus here on the carceral state because its policies are inherently and largely by design in tension with democratic citizenship. In future work, I plan to explore the implications of this argument for anti-democratic practices of other state institutions. Carceral policies are a logical place to start because courts could take gen-

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176. Charles, *Democracy and Distortion*, *supra* note 19, at 610-14 (discussing ways in which politicians shape policy preferences, such as political messaging and campaign advertising); Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 *YALE L. J.* 400 (2015) (discussing various ways in which policymakers can entrench their preferences, including by enacting popular benefits schemes like Social Security).

eral notice of the fact that they are designed to subordinate, stigmatize, and deny the core attributes of democratic citizenship; this is not something that would need to be evaluated or proven on a case-by-case basis.<sup>177</sup>

## 2. Purpose for the policy

Some courts and scholars have suggested that election regulations should trigger scrutiny only insofar as they were adopted for the conscious purpose of suppressing voting or distorting the political process.<sup>178</sup> Proving illicit purpose is notoriously difficult, and for this reason among others, I would advocate for an approach that does not require proof of purpose to suppress voting. Perhaps a more fundamental reason for not defining suppression in terms of intent behind the policy is that the intent is not dispositive in terms of the concerns animating voting rights law. A policy that degrades people and suppresses their participation incidentally threatens the interests underlying the right to vote—both the group-based interest in representation and the individual social-psychological interest in being dignified as a full member of the political community. This is true whether the suppression results from carceral socialization or laws whose purpose is to restrict voting.<sup>179</sup>

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177. Courts could take judicial notice of this as a social fact (i.e., a general fact about the world that does not need to be thereafter re-proved on a case-by-case basis), just like the Court in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) recognized that state-sanctioned segregation conveys a stigma of inferiority. A social fact is “social science research used for the purpose of creating or modifying a rule of law.” Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CAL. L. REV. 877, 881 n.26 (1988). The Court recognized comparable social facts when it cited the importance of education in democratic citizenship in *Brown* and *Plyler*. *Brown*, 347 U.S. at 493-94; *Plyler*, 457 U.S. at 223.

178. Richard Hasen, *Bad Legislative Intent*, 2006 WISC. L. REV. 843, 846-48 (2006) (discussing this argument). Relatedly, Manheim & Porter argue that courts should hold that “a state acts unconstitutionally when it engages in intentional voter suppression.” They recommend this approach, though they acknowledge that this principle would not cover all forms of voter suppression, because it would fit within existing precedent, and would “at least prevent further constitutional backsliding and help protect the right to vote.” Manheim & Porter, *supra* note 19 at 218-19. I do not read them as necessarily suggesting they would oppose defining voter suppression more broadly to include non-intentional acts with suppressive effects, but rather as making a pragmatic argument that the intentional suppression principle is perhaps an easier argument to fit within the Court’s equal protection jurisprudence.

179. Hasen gives three reasons for why “bad” intent should not be dispositive: first, bad election laws can emerge even when the legislature has noble intentions. Second, bad legislative intent is sometimes going to be difficult to prove. Third, a rule premised on proof of bad legislative intent will be easy to circumvent, and could quickly become a useless

This understanding is consistent with the voting rights cases of the 1960s and more recent cases, where purpose to suppress has not been an essential part of the analysis.<sup>180</sup> The Court has recognized for a similar point when scrutinizing laws that threaten to chill speech or political association, such as donor disclosure rules, in the absence of any evidence the law was intended to chill speech or association.<sup>181</sup> If a policy burdens voting, the intent behind it should not matter. The focus should be on whether the burden is justified.

However, even if the law did require intent to suppress political participation, there would be a strong argument for scrutinizing carceral policies. Other scholars have shown how the tough-on-crime policies, particularly the war on drugs, gained popularity in response to the civil rights movement, with support fueled by politicians' coded racialized appeals to crime and disorder.<sup>182</sup> The criminal system's design to suppress

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rule for policing anticompetitive election laws. He also points out that it isn't always a clear-cut question whether intent is good or bad. *Id.* at 846-49.

180. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (stating that the voter I.D. law is subject to this balancing test without requiring any evidence of illegitimate intent).

181. *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2383 (2021).

182. See generally ALEXANDER, *supra* note 10, at 49-58. Alexander describes mass incarceration as an example of "preservation through transformation." *Id.* at 21; see also Roberts, *supra* note 25, at 16 ("[B]eginning in the 1960s, U.S. policymakers have supported elites by intensifying carceral measures in order to address the social problems and quell the unrest generated by racial capitalism."); *id.* at 42 ("[P]risons, police, and the death penalty function to subordinate black people and maintain a racial capitalist regime."). Elizabeth Hinton has shown how the civil rights agenda and the war on poverty transformed the war on crime, whereby the federal government deprioritized social welfare and instead channeled funding into law-and-order tactics and militarized policing, and the modern carceral state. ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016); see also Naomi Murakawa, *The Origins of the Carceral Crisis: Racial Order as Law and Order in Postwar American Politics*, in *RACE AND AMERICAN POLITICAL DEVELOPMENT* (Lowndes, Novkov & Warren eds., 2008); Ian Haney López, *Post Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010). For further discussion of the connection between backlash to the civil rights movement and crime control, see sources cited *supra* note 123. For a discussion and critique of "the New Jim Crow" narrative, see James Forman Jr., *Racial Critiques of Mass Incarceration; Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012) (discussing scholarship making a connection between Jim Crow and mass incarceration, and questioning the scope of this analogy).

Alexander presents a compelling account of how the war on drugs disproportionately targeted Black communities in ways that are difficult to rationalize with any legitimate neutral objective of the criminal law. ALEXANDER, *supra* note 10, at 49-58. The racial disparity in drug convictions is especially telling, as there is significant evidence that Black people use drugs at the same rate as white people, yet they are many more times likely to be prosecuted and convicted of a drug crime. Elizabeth Hinton, LaShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA



participation is most apparent in laws disenfranchising people with criminal convictions.<sup>183</sup> Almost all states disenfranchise people who have been convicted of crimes, at least while they are incarcerated, and many disenfranchise people convicted of certain crimes until they complete parole or probation, and some for indefinite periods or permanently.<sup>184</sup> Empirical research suggests that disenfranchisement based on criminal convictions rose significantly in response to each major gain in voting rights.<sup>185</sup> The authors of one study observe that “[f]elon disenfranchisement provisions offered a tangible response to the threat of new African-American voters that would help preserve existing racial hierarchies.”<sup>186</sup> There is no reason to think this motive would be cabined to felon disenfranchisement provisions.

While there is a strong argument that much of the carceral state arose to sustain racial subordination, my argument does not rest on that claim. Just like with a voter I.D. law or another restriction on voting, what should matter is that the policy in question has the effect of depriving people of the values protected by voting rights law. The law should scrutinize policies with this effect regardless of whether they ostensibly serve some legitimate goal. Even if there is some plausible rationale for the policy, policymakers should be required to avoid any unnecessary burden on voting rights—including unnecessary anti-democratic socialization.

In the next Part, I discuss the implications of this argument for courts, legislatures, and executive officials.

#### IV. IMPLICATIONS FOR COURTS AND POLICYMAKERS

In this final Part, I will briefly discuss my argument’s implications for courts and for policymakers. I begin with a discussion of its implica-

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INSTITUTE (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> (showing that Black people constitute 15% of people who used drugs, but they constitute 31% and 38% of people sentenced to state and federal prison, respectively, for drug offenses).

183. See MANZA & UGGEN, *supra* note 21, at 41-58.

184. Approximately 6.2 citizens cannot vote due to a previous felony conviction; 2.6 of them have completed their sentences. All but 2 states disenfranchise people while they are incarcerated; 34 states require people to complete parole or probation (and potentially other terms of their sentence) before voting. 1 in 13 Black citizens are disenfranchised, compared to 1 in 56 citizens who are not Black. DANIELS, *supra* note 18, at 171.

185. *Id.* at 166-67 (discussing a study finding that states with larger Black populations were most likely to have felon disenfranchisement statutes when compared to those with smaller Black populations).

186. *Id.* at 166.

tions for federal and state courts. Then I discuss measures that policymakers who are concerned about protecting voting rights could take to reform and counteract the carceral system's anti-democratic socialization.

### A. Courts

I will begin by explaining why I believe courts have a responsibility to intervene in the carceral state's anti-democratic socialization. Judges have arguably been a force of oppression more than a force for justice and democracy.<sup>187</sup> Given this, readers may reasonably ask why I would propose a pro-democracy intervention that relies on judges. I appreciate that it may seem naïve to suggest that judges would meaningfully check anti-democratic practices. This is an important challenge to my argument, so I will explain why I think judges are an important part of the picture when it comes to addressing the anti-democratic practices of the carceral state.

There are two reasons why I believe judges have a role to play when it comes to checking the anti-democratic practices of criminal law and opening the political channels to meaningful reform: the first is that judges are themselves part of the problem. By enforcing criminal laws and deferring to the judgements of those who make and implement carceral policy, judges actively participate in the anti-democratic socialization of the carceral state. In each case where a court upholds or enforces a harmful and subordinating carceral policy without any scrutiny, the court is itself conveying that the person's interests are not worthy of equal consideration.<sup>188</sup> To allow the carceral state to harm people without demand-

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187. See *supra* note 94 and accompanying discussion. One need not look far back in history to find examples of judges consciously endorsing inequality and injustice. *E.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (recognizing that the death penalty is administered in a racially biased manner, but upholding it anyway); *id.* at 339 (Brennan, J., dissenting) (“The Court[’s] . . . unwillingness to regard petitioner’s evidence as sufficient is based in part on the fear that recognition of *McCleskey*’s claim would open the door to widespread challenges to all aspects of criminal sentencing. . . . [S]uch a statement *seems* to suggest a fear of too much justice.”); *Terry v. Ohio*, 392 U.S. 1, 14 n.11 (1968) (acknowledging that police use aggressive stop and frisk tactics for “wholesale harassment” of minority groups, particularly Black communities, but upholding the practice anyway); *Atwater v. City of Lago Vista*, 532 U.S. 315, 346–47 (recognizing the arrest was “gratuitous humiliation[]” and “pointless indignity and confinement,” but upholding it anyway); *Rucho v. Common Cause*, 139 S.Ct. 2484, 3506–07 (2019) (recognizing that partisan gerrymandering is “incompatible with democratic principles,” but holding that there is no remedy in the federal courts).

188. Justice Sotomayor’s dissent in *Utah v. Strieff* recognized this when it says “*this case* tells everyone, white and black, guilty and innocent, that . . . you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.” 579 U.S. 232,

ing the harm be justified in terms of some public interest undermines the constitutional value of equal citizenship.

The second reason I believe courts have an important role to play in overseeing the criminal law is the notoriously pathological politics that drive crime control policy. In criminal law, perhaps more than anywhere else, political incentives are misaligned in a way that leads to policies that are irrational and unjustifiably harmful, especially to communities that have been socially and politically marginalized.<sup>189</sup> This makes it very challenging to achieve reform through political channels.

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252 (Sotomayor, J., dissenting) (emphasis added). This says that the Court is sending this message by upholding an unlawful stop. It is not only the police who conducted the unlawful stop.

189. Many scholars have made this point. *See generally* sources cited *supra* note 4. Explanations include: there is no single coordinated criminal legal system, but rather thousands of jurisdictions making independent, uncoordinated policy choices. State and local officials have vast discretion, and they are likely to make policies that are particularly reactionary and short-sighted, without appreciation of the externalities, aggregate social costs, or long-term harms. PFAFF, *supra* note 10, at 161-84. The most engaged and influential portions of the local electorate are typically wealthier voters in the suburbs, whose fears and perceptions of crime are not based on evidence or reality, but on media portrayals of rare but high-salience events. These voters tend to support tough-on-crime policies without any experience or appreciation of the harms and costs these policies impose on people living in more heavily policed and criminalized parts of the jurisdiction. *Id.* Law enforcement officers' unions have been very effective at mobilizing at the state and local level to oppose and defeat any decarceral measure. These groups effectively threaten to excoriate any politician who supports more lenient reforms whenever a publicized crime occurs, or whenever there appears to be a rise in crime. *See, e.g., id.* at 127-59; Zoe Robinson & Stephen Rushin, *The Law Enforcement Lobby*, 107 MINN. L. REV. (2022). The state and federal government have invested heavily in law enforcement and correctional infrastructure. Many agencies, careers, private vendor contracts, and physical infrastructure have been built around law enforcement and correctional control. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007). Scholars have long observed that crime control policy is a means of maintaining racial hierarchy, and that the current system cannot be understood or rationalized in any other way. Hutchinson, *supra* note 25; ALEXANDER, *supra* note 10; BUTLER, *supra* note 10; Roberts, *supra* note 25, at 4 (“[C]riminal procedure and punishment in the United States still function to maintain forms of racial subordination that originated in the institution of slavery — despite the dominant constitutional narrative that those forms of subordination were abolished. Key aspects of carceral law enforcement — police, prisons, and the death penalty — can be traced back to slavery and the white supremacist regime that replaced slavery after white terror nullified Reconstruction.”). Research links punitive attitudes among white people to racial bias and status-oriented anxiety. Rebecca Hetey & Jennifer Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 *Psychological Science* 1949 (2014); Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1329-1332 (2006); Justin Levinson et al., *An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839 (2019) (finding that implicit racial bias predicted support for retributivist views of criminal punishment).

This problem is exacerbated by the fact that carceral contact tends to suppress participation. Understanding the criminal system as a demobilizing force means that the carceral system is not just a product of political inequality and unrepresentative institutions, it is also a cause of political inequality and unrepresentative institutions. In a constitutional democracy, courts have a responsibility to scrutinize policies that threaten to distort the political process and render political institutions unrepresentative. The carceral state's anti-democratic socialization is a case where such scrutiny is warranted.

Recognizing this should change how courts evaluate claims of unconstitutional policing under the Fourth Amendment and claims of unconstitutional punishment under the Eighth Amendment.<sup>190</sup> In both contexts the existing constitutional standard could accommodate a more rigorous proportionality analysis that involves balancing the government's interest against the harm to the individual, taking account of the civic harms discussed here. But just as in recent voting rights cases, the Court tends to do this balancing in a categorical way that trivializes the harms of the state's actions, while presuming (without requiring any evidence) that the government's asserted interest is sufficient to justify those harms.<sup>191</sup> This deference ostensibly rests on democratic legitimacy: local elected of-

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190. While my argument rests on the right to vote, which is protected by the Fourteenth Amendment, I am not proposing a Fourteenth Amendment claim that carceral policies directly violate the right to vote. While I would not rule out this sort of claim, it would raise complicated issues of proof related to causation, standing, and redressability that I am not prepared to resolve here. Rather my argument is that the fundamental right to vote reflects underlying constitutional values related to democracy and citizenship (i.e., political equality and representative government), and courts should interpret other provisions of the Constitution with an eye toward these values. In other words, they should not interpret the Fourth and Eighth Amendments in a way that would undermine the right to vote, as protected by the Fourteenth Amendment.

191. The proportionality framework is one that courts in other western democracies use to evaluate constitutional rights. When a policy burdens a constitutionally protected right or interest, the courts ask whether it is necessary, and the least-harmful alternative for pursuing a legitimate government objective, and even if so, whether that government objective is important enough to justify the harm. Vicki Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L. J. 3094, 3112-15 (2015). While U.S. Courts do not apply this rigorous form of proportionality review, several doctrines in U.S. constitutional law resemble a loose and unstructured form of proportionality review, including the Eighth Amendment "gross disproportionality" test. *Id.* at 1304-05. But, while the Fourth Amendment's reasonableness language seems like an invitation to apply a proportionality principle, the Court has not taken proportionality seriously in many Fourth Amendment cases. *Id.* at 3102 ("Fourth Amendment cases like *Atwater v. City of Lago Vista*, [532 U.S. 315,] with rigid rules allowing police to detain and search regardless of the severity of the offense . . . facilitate humiliating and badly intentioned police conduct. Excluding proportionality considerations neither fulfills the purpose of the Fourth Amendment nor promotes respect for the Constitution as law.").

ficials are more accountable to the public, and their decisions presumptively reflect public sentiment about the most appropriate approach to crime and punishment.<sup>192</sup> However, understanding carceral socialization as voter suppression undermines this rationale. Because policies that suppress participation undermine the presumption that legislatures fairly represent all members of the public, the rationale for deferring to legislative decisions does not apply.

### 1. Fourth Amendment reasonableness

In evaluating whether a seizure is constitutional under the Fourth Amendment, the Court balances the nature and degree of the intrusion against the state's justification for the harm.<sup>193</sup> In applying this standard, the Court has repeatedly minimized the harms associated with stop, frisk, and arrest, describing them as temporary inconveniences, "annoying," "frightening," and "perhaps humiliating."<sup>194</sup> It has not recognized the significant harm that these encounters cause.<sup>195</sup> It has been highly defer-

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192. See, e.g., *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980) ("[T]he lines to be drawn are indeed 'subjective,' and therefore properly within the province of legislatures, not courts."); *id.* at 284 ("Penologists themselves have been unable to agree whether sentences should be light or heavy, discretionary or determinate. This uncertainty reinforces our conviction that any 'nationwide trend' toward lighter, discretionary sentences must find its source and its sustaining force in the legislatures, not in the federal courts."). See *id.* at 303, 307 (Powell, J., dissenting) (arguing that "[t]he State has not attempted to justify the sentence as necessary either to deter other persons or to isolate a potentially violent individual" and "objective criteria clearly establish that a mandatory life sentence for defrauding persons of about \$230 crosses any rationally drawn line separating punishment that lawfully may be imposed from that which is proscribed by the Eighth Amendment").

193. *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968).

194. *Id.* at 24-25.

195. Many have criticized the *Terry* decision for granting police discretion to stop, question, and frisk people based on very thin justification, despite the Court's own acknowledgement that police had a demonstrated pattern of using such stop-and-frisk authority to abuse and control people of color. See, e.g., Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1309 (1998) ("*Terry* indicated that the Court was no longer prepared to force change . . . on police departments and officers who ignored or resisted the application of constitutional commands."); *id.* at 1321 ("[T]hose that have been the most vocal defenders of *Terry* tend to come from socio-economic and racial backgrounds that are predominately free from police harassment. For many [B]lacks and other disfavored groups, however, the *Terry* Court wrongly subordinated their Fourth Amendment rights to police safety."); Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio's Pathway to Police Violence*, 64 UCLA L. REV. 1508 (2017) (criticizing the opinion for explicitly recognizing the risk that this would lead to police targeting African American communities while professing that the Court was "powerlessness to address the very social problem [the] opinion exacerbated"); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182,

ential to police officers' justifications for stopping, frisking, and arresting someone, as well as using force.<sup>196</sup>

For example, consider *Atwater v. City of Lago Vista*,<sup>197</sup> which upheld a custodial arrest for a minor seatbelt-related traffic infraction, punishable by fine only. Though the Fourth Amendment reasonableness test ostensibly requires the Court to balance the state's interest against the harm caused by the seizure, the Court deferred almost unquestioningly to the law enforcement rationale: it acknowledged that the arrest was unnecessary, and served no purpose beyond "gratuitous humiliation," but it nonetheless held it was reasonable for an officer to arrest someone any time they have probable cause to believe the person has committed an infraction, no matter how minor, and no matter whether any safety-related justification for arrest applies in that particular scenario.<sup>198</sup> The Court expressly held that the government is not required to use the least-harmful means of accomplishing its law enforcement-related goals, even if a less-harmful approach would have plainly sufficed.<sup>199</sup> In other words, it held that the state may impose gratuitous and unnecessary harm for the sake of having a simple bright-line rule that does not require officers to second-guess their decisions to arrest.

A decision like *Atwater* shows how the courts trivialize the interests of people who are subject to carceral control by failing to appreciate the tremendous physical, economic, psychological, and sociological harms of coercive police encounters.<sup>200</sup> These are not mere fleeting experiences,

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1198 (2017) ("Terry and a long line of cases after it explicitly encouraged the police to approach people, to ask them questions, to seek permission to search their persons or their belongings – even in the absence of any reason to suspect them of wrongdoing" and "courts characterize these encounters as healthy collaborations rather than oppressive interventions"). In analyzing Terry-style stops as isolated incidents, courts fail to see their programmatic nature, i.e., that many people in heavily policed communities, primarily young men of color, "do not experience the stops as one-off incidents[,] [t]hey experience them as a program to police them as a group, which is of course, the reality." Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159 (2015) (arguing that Fourth Amendment reasonableness should take the programmatic nature of stop-and-frisk policies into account).

196. On judicial deference to police expertise, see Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017). For discussion of the Court's lenience in use-of-force cases, see, e.g., CARBADO, *supra* note 10; BUTLER, *supra* note 10.

197. *Atwater*, 532 U.S. at 318.

198. *Id.* at 346-47.

199. *Id.* at 350-51.

200. For a comprehensive and thoughtful discussion of the harms of policing, see Ndjuoh MehChu, *Policing as Assault*, CAL. L. REV. (forthcoming 2023) (on file with author). Public health research has shown that policing is associated with adverse physical,

like *Terry* and *Atwater* suggest, but they are socializing experiences with lasting impact on a person's sense of civic identity, political participation, and ultimately, their relationship to government and the law.<sup>201</sup> This is particularly true if stops are a routine experience that cumulatively threaten one's sense of freedom, equality, and belonging.<sup>202</sup> Many have argued that arrests themselves are criminal punishment, even if the person is not charged or convicted.<sup>203</sup>

Courts should recognize that coercive police encounters are a form of carceral socialization that threatens to undermine the intrinsic and instrumental values associated with the right to vote. When balancing the state's interest against the harm caused by a search or seizure, they should recognize these deeper citizenship harms, in addition to the harms of physical intrusion, humiliation, and inconvenience. Recognizing these significant harms would tip the balance more heavily against the search or seizure. Giving due weight to the citizenship interests at stake should require the government to show that a coercive police encounter is a last resort (i.e., no more harmful than necessary) to accomplish a goal that is sufficiently compelling to justify the harm.<sup>204</sup> This is what interest balancing would look like if courts were to give due weight to the citizenship interests of those harmed by the intrusion. Requiring to avoid unneces-

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emotional, and behavioral health effects. See, e.g., DeVlyder et al., *Police Violence and Public Health*, 18 ANN. REV. CLINICAL PSYCH. 527 (2022).

201. Scholars have criticized this decision for its failure to appreciate the significant harm imposed by an arrest, and for giving officers carte blanche to impose that harm without any legitimate justification. See, e.g., Alexandra Natapoff, *Atwater and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147 (2020); Jackson, *supra* note 191, at 3130-35 (discussing *Atwater* as an example of a case where the Court failed to apply proportionality principles).

202. See, e.g., Meares, *supra* note 195 (explaining how people in heavily policed communities experience routine stops as part of a program to control and scrutinize their group, rather than isolated one-off incidents).

203. Scholars have long considered arrests to be a form of criminal punishment. See, e.g., Rachel Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 316 (2016) (“[M]any arrests are for crimes that are so minor that the harms of arrest would be far too serious a punishment if they were imposed for a retributive or deterrent purpose.”); Cyril D. Robinson, *Alternatives to Arrest of Lesser Offenders*, 11 CRIME & DELINQ. 8, 8-9 (1965) (“[A]rrest is not a process merely preliminary to possible punishment; it frequently is the punishment where the lesser offender is concerned.”); see also Natapoff, *supra* note 201.

204. There is a strong argument that in most cases, less harmful alternatives (e.g., issuing citations) would suffice to enforce traffic law, and would not be too difficult to administer. For a comprehensive argument to this effect, see Harmon, *supra* note 203. And if a custodial arrest was the only way of enforcing traffic regulations, there remains the fourth question (“proportionality as such”): is the government's interest in enforcing traffic regulations important enough to justify the harm of an arrest? This too seems debatable.

sary, unjustified harm is what it means to treat a person as a full citizen whose interests are entitled to equal respect and concern.<sup>205</sup>

Justice Sotomayor's dissent in *Utah v. Streiff*,<sup>206</sup> where the Court upheld a suspicionless police stop, is a powerful illustration of what it might look like for a court to recognize how coercive police encounters threaten the values of equal citizenship. Her dissent vividly explains how "degrading" police stops are: "[T]he indignity of being told you look like a criminal"; the humiliation when an officer, in a public place, "order[s] you to stand helpless, perhaps facing a wall with [your] hands raised," then "feel[s] with sensitive fingers every portion of [your] body."<sup>207</sup> Then, if the officer arrests you (which he can do for almost any reason), "he can fingerprint you, swab DNA from the inside of your mouth, and force you to shower with a delousing agent' while you lift [your] tongue, hold out [your] arms, turn around, and lift [your] genitals."<sup>208</sup> And "[e]ven if you are innocent, you will now join the 65 million Americans with an arrest record and experience the 'civil death' of discrimination by employers, landlords, and whoever else conducts a background check."<sup>209</sup>

Most important for my argument, Justice Sotomayor's dissent doesn't stop with describing the degrading nature of the stop, but it goes on to explicitly recognize that such degrading treatment is anti-democratic socialization: these encounters "treat[] members of our communities as second-class citizens,"<sup>210</sup> and by allowing them, the Court "tells everyone, white and black, guilty and innocent, that . . . your body is subject to invasion," and "that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."<sup>211</sup>

This passage recognizes that non-consensual police encounters threaten democratic citizenship. Opinions like this one, which vividly acknowledge the lasting and systemic harm of coercive police stops, are an important step toward recognizing and addressing the citizenship interests of those who are subject to such carceral control.

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205. See discussion and sources cited *supra* note 191. Cf. Bell, *supra* note 84, at 2142 ("Judges who rule on the constitutionality of searches should keep in mind the stakes of giving too much leeway to the police, stakes that legal estrangement theory illuminates. . . . [A]s important as individual privacy is, the collective stakes are even higher.").

206. *Streiff*, 579 U.S. 232 (2015) (holding that the discovery of an outstanding warrant purges the taint of an illegal police stop).

207. *Id.* at 252 (Sotomayor, J., dissenting).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*



## 2. Eighth Amendment proportionality

The same principles should apply when courts evaluate the constitutionality of criminalization and punishment. Courts have imposed very few limits on what the state can criminalize.<sup>212</sup> And in evaluating particular sentences for a given crime, the Court has been extremely deferential to legislative judgments about punishment.<sup>213</sup> It repeatedly stated that the Eighth Amendment does not require proportionality between crime and punishment, that only “grossly disproportionate” sentences trigger further judicial scrutiny, and only “extreme” sentences—ones that cannot conceivably serve any legitimate penal goal—will violate the Eighth Amendment.<sup>214</sup>

This deferential standard was not a foregone conclusion in the 1970s. In 1972, when the Court struck down Georgia’s death penalty scheme, Justices Brennan and Marshall recognized the connection between citizenship, dignity, and punishment. They argued that respecting the equal citizenship of the defendant would mean that the state cannot do gratuitous harm—it cannot impose more severe punishment than necessary to achieve its penal goals. In Justice Brennan’s words, a punishment “cannot comport with human dignity when it is nothing more than the pointless infliction of suffering,” and therefore, “[i]f there is a significantly

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212. The main cases hold that overly vague laws or laws that criminalize innocent conduct violate due process, *e.g.*, *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), and laws criminalizing a “status” alone, without any action, like “being addicted to narcotics,” violate the Eighth Amendment. *Robinson v. California*, 370 U.S. 660 (1962).

213. The Court upheld life sentences for non-violent property and drug crimes. *See, e.g.*, *Rummel*, 445 U.S. at 263 (1980) (upholding a life sentence for a third nonviolent property crime, where the largest amount stolen in all three crimes was \$120.75); *Hutto v. Davis*, 454 U. S. 370 (1982) (*per curiam*) (upholding a sentence to two consecutive terms of 20 years in prison for possession with intent to distribute nine ounces of marijuana and distribution of marijuana); *Harmelin v. Michigan*, 501 U. S. 957 (1991) (upholding a sentence of life in prison without the possibility of parole for a first time conviction of possessing 672 grams of cocaine); *Ewing v. Cal.*, 538 U.S. 11, 21–22 (2003). For a discussion of the Court’s deferential stance, *see generally* Ristroph, *supra* note 24, at 266 (“The arguments most frequently raised against a proportionality requirement for criminal sentences focus on institutional competence, legislative prerogative, and the difficulty of developing an objective standard.”).

214. *See, e.g.*, *Ewing*, 538 U.S. at 21–22 (explaining that in evaluating whether a sentence is disproportionate, the Court follows several principles, all reflecting deference to state decision-making: “the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors,” and these principles inform the ultimate principle that the Eighth Amendment “does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are “grossly disproportionate” to the crime.”).

less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive.”<sup>215</sup> But in the 1980s, the Court flatly rejected this least-severe-alternative requirement in favor of the highly deferential approach that governs now.<sup>216</sup>

A reading of the Eighth Amendment that recognized the connection between punishment, dignity, and citizenship would follow Justice Brennan’s standard: it would require the state to use the least-harmful alternative to serve its penal goals. Courts would ask what interest the punishment is ostensibly serving,<sup>217</sup> and then evaluate whether the punishment is necessary to serve that interest.<sup>218</sup> Treating all citizens as full members of the political community who are entitled to equal respect and concern means that the state should not be allowed to harm a citizen without a compelling public welfare justification.<sup>219</sup>

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215. *Furman v. Georgia*, 408 U.S. 238, 274 (1972) (Brennan, J., concurring); *accord id.* at 331–32 (Marshall, J., concurring) (“[T]his Court has steadfastly maintained that a penalty is unconstitutional whenever it is unnecessarily harsh or cruel.”).

216. *Hart v. Coiner*, 483 F.2d 136, 141 (4th Cir. 1973) found a sentence of 40 years for a drug crime unconstitutional, following Justice Brennan’s view that “[i]f there is a significantly less severe punishment to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive.” The Court reversed this decision and firmly rejected this less-severe alternative standard in *Hutto v. Davis*, 454 U.S. 370, 373 (1982).

217. Usually, the state justifies punishment in terms of four rationales: deterrence; incapacitation; rehabilitation; and retribution. JOSHUA DRESSLER & STEPHEN P. GARVEY, *CRIMINAL LAW: CASES AND MATERIALS* 33–51 (8TH ED. 2019). There are reasons to question whether retribution is a legitimate state interest, as it seems inherently non-secular, impossible to objectively justify based on any neutral, generally applicable public welfare goal. For discussion along these lines, see, e.g., Benjamin Ewing, *Political Legitimacy of Retribution: Two Reasons for Skepticism*, 34 L. & PHIL. 369, 392 (2015). See also Ristroph, *supra* note 189, at 1329–32 (arguing that desert is an indeterminate concept and that intuitions about desert may reflect social biases); Levinson, et al., *supra* note 189 (finding that implicit racial bias predicted support for retributivist views of criminal punishment).

218. For an example of what this test might look like, it is helpful to consider Justice Marshall’s concurrence in *Furman*, which evaluated whether the death penalty was more severe than necessary to serve any legitimate penal goal. 408 U.S. at 342–60. Another example in this type of analysis of whether the punishment effectively advances the goals of punishment is in *Graham v. Florida*, 560 U.S. 48 (2010), which held (albeit based on a more deferential standard of review) that juvenile life without the possibility of parole violates the Eighth Amendment because it does not conceivably serve any legitimate penal goal.

219. Ewing, *supra* note 217, at 392 (“The characteristic feature of a political liberal state is that . . . it acts only on the basis of reasons that may at least in principle secure the principled endorsement of all reasonable people . . . . By confining themselves to considerations that reasonable people can share, they can display respect for one another’s equality and capacity for freedom.”).

Many scholars have critiqued the Court's failure to impose stricter limits on what the state can criminalize and how much it can punish.<sup>220</sup> Ristroph argues that proportionality constraints on punishment should be understood as a political principle—a constraint derived from principles of limited government and separation of powers.<sup>221</sup> Like Ristroph, I am arguing for understanding proportionality as an external constraint on criminal punishment that follows from principles related to the structure of democratic government. While Ristroph derives proportionality constraints from separation of powers principles, I am suggesting that proportionality constraints follow from principles of equal citizenship and participation. Understanding carceral socialization as a form of political suppression supports Ristroph's argument and other arguments for stricter proportionality review of criminal punishment, and also supplies an additional argument for stricter proportionality review.<sup>222</sup>

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220. For arguments for stricter proportionality review of the severity of a given punishment for a given crime, see, e.g., Ristroph, *supra* note 24; Frase, *supra* note 24; Chemerinsky, *supra* note 24; BARKOW, *supra* note 10; Lee, *supra* note 24; Van Cleave, *supra* note 24. Others have argued for substantive limits on what the state can criminalize (as distinct from how much punishment the state can impose for a conviction). See, e.g., STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE*, *supra* note 24; Stuntz, *Substance, Process, and the Civil-Criminal Line*, *supra* note 24; Hart, *supra* note 24; and Bendor & Dancig-Rosenburg, *supra* note 24. Husak argues that criminal punishment violates a right “not to be punished,” and legislatures should therefore only pass criminal laws that could satisfy an intermediate scrutiny standard of review. HUSAK, *supra* note 24, at 122-23. Husak's proposal appears to be concerned primarily with limiting overbroad criminal laws, as opposed to limiting the use of criminal law all together. The scrutiny he contemplates asks only whether the state is using the most narrowly drafted *criminal law* available, but he would not ask whether criminal law is necessary, relative to alternative, non-criminal intervention. *Id.* at 157-58. Colb argues that confinement violates the liberty interests protected by substantive due process, and therefore any coerced physical confinement should be subject to strict scrutiny. See Colb, *supra* note 24.

221. Ristroph, *supra* note 24, at 291 (“Consideration of the larger political context reveals the limits of penal theory—one sees that there are some exercises of force that no penal theory can justify. Political proportionality is a claim about the limits of penal theory in a liberal state. It is not a theory of punishment, but a theory of the relationship between state power and individual right.”).

222. Some who argue for stricter proportionality review suggest that proportionality should be evaluated by comparing the punishment imposed to the punishment typically imposed for comparable crimes in other jurisdictions, and in the same jurisdiction. See, e.g., Ristroph, *supra* note 24; Frase, *supra* note 24; Chemerinsky, *supra* note 24. However, because of the fundamental citizenship interests at stake, I would advocate for a least-severe alternative standard regardless of how common a punishment is. Even if a punishment is in line with prevailing practices, in my view, it should still be unconstitutional if it is unnecessarily severe, as treating people as equals requires imposing no more suffering than necessary. I understand that it is difficult to evaluate whether a punishment is more severe than necessary if one accepts retribution as a legitimate state interest. However, I question that proposition for reasons I mention briefly in note 217.

I recognize, of course, that I am proposing courts play a significantly more active role in protecting democratic citizenship interests than they have done. I recognize that judges who are willing to do this may be in dissent much of the time. But even a “demosprudential” dissent along the lines of Justice Sotomayor’s dissent in *Strieff* is an important acknowledgement of the interests of those harmed by these policies, and this itself can help somewhat to name and address the anti-democratic nature of the carceral system.<sup>223</sup> To date, such acknowledgements have been rare even among progressive judges who are otherwise proponents of voting rights and political equality.<sup>224</sup>

### B. State Courts

I also hope that this argument might inspire state courts interpreting state constitutions. Compared to the federal constitution, state constitutions have stronger protections for democracy and democratic citizenship: all protect the right to vote, and many have other protections related to voting rights and political equality.<sup>225</sup> Hence, these constitutions may offer a clearer textual foundation for recognizing a constitu-

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223. Justice Sotomayor’s dissent is a powerful example of what Lani Guinier and Gerald Torres call “demosprudence”: a form of judicial opinion writing, typically in dissent, that breaks from the conventional formal legal analysis and addresses issues of “democratic legitimacy, democratic accountability, democratic structure, or democratic viability.” Lani Guinier, *Forward: Demosprudence Through Dissent*, 122 HARV. L. REV. 1, 49 (2008); Monica Bell et al., *Toward a Demosprudence of Poverty*, 69 DUKE L. J. 1473, 1509 (2020) (discussing the value of discussing poverty and social disadvantage in demosprudence and/or dissent, even if courts lack jurisprudential tools to address these problems). As an example of the potential significance of demosprudence, Bell notes that a person who was incarcerated told her about a district court opinion that included a detailed discussion of social inequality that limits opportunities in many heavily criminalized communities. She explains that its “description of interlocking social and legal conditions rang true to him, while most opinions he was reading in the prison’s library seemed to ignore the context of the cases they analyzed.” *Id.* at 1516 n.233.

Likewise, Hasbrouck discusses the importance of “movement judges” who do speak out forcefully—oftentimes in dissent—in solidarity with grassroots social movements, in support of transformational, democracy-affirming interpretations of the Constitution, and he cites Justice Sotomayor’s dissent in *Strieff* as an example. *Strieff*, 579 U.S. 232 (2016); Hasbrouck, *supra* note 30, at 667-88.

224. It is worth noting that the other progressive-leaning members of the Court, including Justices Kagan, Ginsburg, and Breyer, joined the portion of Justice Sotomayor’s dissent in *Strieff* discussing the anti-democratic nature of the carceral state, even though in voting rights cases they typically rule in favor of more voting rights protection. 579 U.S. 232.

225. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021).

tional interest in political socialization.<sup>226</sup> Many provide that it is the duty of state government to cultivate knowledge, morality, and citizenship.<sup>227</sup> To this end, some require the state to provide free public education,<sup>228</sup> and some preambles provide that the aims of government are to maintain a representative government, eliminate poverty and inequality, assure legal, social, and economic justice, provide for the fullest development of the individual, improve quality of life, and promote equal opportunity.<sup>229</sup> These provisions imply that the state has an affirmative responsibility to treat and socialize people as democratic citizens.

In some instances, state courts have done more to protect voting rights than federal courts. For example, while the U.S. Supreme Court held partisan gerrymandering non-justiciable, state supreme courts have struck down partisan gerrymanders based on provisions of their constitutions protecting free and open elections.<sup>230</sup>

Voting rights advocates might draw on these provisions, as well as the state constitutional right to education, to press the argument I advanced above. These constitutional provisions are clearly about cultivating democratic citizenship and empowering citizens to engage meaningfully in self-government. Carceral socialization is inconsistent with this responsibility.

In addition to containing more robust protections for democratic citizenship interests, state constitutions also contain more specific provisions defining the purpose of punishment and limiting unnecessary or unduly harsh punishment. These constitutions provide that punishment ought to be proportionate to the offense; that punishment should be oriented toward reformation; that “sanguinary punishments” ought to be avoided; and that people who are arrested and incarcerated ought not to be treated with “unnecessary rigour.”<sup>231</sup> While state courts have not interpreted them this way, these provisions could be interpreted to require the state to show that coercive law enforcement encounters and criminal punishments are the necessary and least-harmful alternative for advancing

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226. See Justice and Meares, *supra* note 92 (analyzing how state constitutions recognize legal socialization as a purpose of law, an obligation of the state, or a right of the individual citizen).

227. *Id.*

228. *Id.* at 475-78.

229. *Id.* at 465-70.

230. See Bulman-Pozen & Seifter, *supra* note 225, at 911-13. League of Women Voters v. Commonwealth, 178 A.3d 737, 814 (Pa. 2018) (adopting a “broad and robust” reading of the free and equal elections clause, and stating “for our form of government to operate as intended, each and every Pennsylvania voter must have the same free and equal opportunity to select his or her representatives”).

231. *Id.* at 474.

a legitimate government interest, that the interest is sufficiently compelling to justify the harm. For reasons stated previously, such stringent review is necessary to treat those harmed as full and equal citizens.

While state courts have not gone nearly as far as I am arguing for, some have interpreted their constitutions to set more stringent limits on policing and punishment than the federal Constitution. For example, some states have rejected the holding from *Atwater*, and instead interpret their constitutions to prohibit arrests for non-jailable infractions or minor misdemeanors.<sup>232</sup> A number of states interpret their constitutions as imposing stricter proportionality requirements than the federal constitution.<sup>233</sup> Oregon's Supreme Court has interpreted its "unnecessary rigour" provision as requiring the state to treat people who are arrested and incarcerated with respect and dignity, and prohibiting practices that are "abus[ive] to the extent that [they] cannot be justified by ty."<sup>234</sup> And in a decision that is notably sensitive to racial bias and inequality, the Washington Supreme Court has held that courts must take account of a person's race (in light of the social context of racial subordination and inequality) in evaluating whether a person would have felt free to terminate an encounter with a police officer.<sup>235</sup>

Yet these decisions go nowhere near as far as would seem to follow from the language the courts use to describe their constitutional principles. For example, Oregon courts have applied their constitution's "unnecessary rigour" provision, which ostensibly prohibits practices that are more abusive than can be justified by necessity, to prohibit strip searches by prison guards of the opposite sex, but not to prohibit or limit the circumstances under which prison officers may perform strip searches more generally, or to constrain the many other ways in which incarceration deprives a person of dignity and autonomy, unnecessarily subordinates and stigmatizes.<sup>236</sup> If the clause is grounded in the ideals of respecting

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232. *E.g.*, *State v. Rodarte*, 125 P.3d 647 (N.M. 2005); *State v. Bauer*, 36 P.3d 892 (Mont. 2001); *State v. Bayard*, 71 P.3d 498 (Nev. 2003); *State v. Brown*, 792 N.E.2d 175 (Ohio 2003).

233. *People v. Hauschild*, 871 N.E.2d 1 (Ill. 2007) (holding that a 15-year statutory enhancement to sentence for armed robbery violated proportionate penalties clause); *State v. Gregory*, 427 P.3d 621 (Wash. 2018) (holding that the death penalty violates the Washington Constitution).

234. *Sterling v. Cupp*, 625 P.2d 123, 130 (Or. 1981).

235. *State v. Sum*, 511 P.3d 92 (Wash. 2022).

236. *Sterling*, 625 P.2d at 130 ("There is no attempt in this case to broaden this principle so as to disregard the numerous and pervasive conditions intrinsic to the life of prisoners to which persons who have not forfeited their liberty would not willingly submit. . . . Only the forced exposure to intimate touching by guards of the opposite sex, in the institutional context of the prison, is here claimed to invade the constitutionally protected sphere.").

each citizen's equal dignity and worth, the state should not be allowed to subject people to harmful, subordinating treatment without meeting a high standard of justification.

Thus, state courts have been somewhat hypocritical in purporting to protect constitutional principles of political equality, democratic socialization, and respect for individual dignity, while allowing and sustaining the practices of the carceral state. Justice and Meares observe that state "constitutional provisions pertinent to legal socialization in the criminal law realm reflect [a] Janus-faced approach," in that there are "deep fissures between the law's commitments to democratic republicanism and its anti-democratic commitments to the maintenance of privilege and overt oppression."<sup>237</sup> In order to bring their practices more in line with the lofty democratic ideals in their constitutions, state courts should more explicitly recognize how interactions with the carceral system threaten democratic citizenship and voting rights, and apply meaningful scrutiny, just as they should for policies that restrict voting or make it so that some citizens have less opportunity than others to participate meaningfully in the political process.

### C. Legislatures

State and federal legislators have an important responsibility to enforce their constitutions. To protect the democracy-related principles in their constitutions, they should consider the arguments laid out above—namely, that the crime control policies they adopt have important implications for the right to vote, and constitutional guarantees of full and equal citizenship.

State legislatures are responsible for much of criminal law, and for the reasons argued herein, they should subject these laws to a much more stringent standard of justification. I am not the first to suggest something along these lines. Husak has argued that, because punishment is in tension with a constitutional interest in being free from punishment, legislatures should subject criminal statutes to a standard akin to an intermediate scrutiny to ensure they are not drafted in broader terms than necessary to achieve their purposes.<sup>238</sup> My argument rests on a different constitutional interest (citizenship and voting-rights as opposed to a right to be free

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237. Justice & Meares, *supra* note 92, at 462, 474.

238. HUSAK, *supra* note 24, at 122-23. Husak's proposal appears to be concerned primarily with limiting overbroad criminal laws, as opposed to limiting the use of criminal law all together. The standard he proposes would ask only whether the state is using the most narrowly drafted *criminal law* available, but he would not ask whether criminal law is necessary or a last resort relative to non-carceral options. *Id.* at 157-58.

from punishment), but it reaches results that are consistent with Husak's proposal. However, I would go further to argue that, given the political harms of carceral socialization, legislatures should only adopt carceral interventions if they make an explicit finding that they are a last resort relative to non-carceral alternatives for advancing a public safety or welfare interest that is sufficiently compelling to justify the harm.

In addition to reforming criminal law, legislatures should focus on increasing opportunities for social, economic, and civic engagement among people who have had contact with the carceral system. The research on political socialization indicates that people who have experiences participating in politics, on juries, or in other types of civic organizations are likelier to understand themselves as members of the polity, to identify with the polity, and to engage in future political activity.<sup>239</sup> In short, cultivating participation is a powerful way of cultivating civic responsibility and civic values. Hence, to the extent state legislatures aim to realize constitutional ideals related to democracy and equal political opportunity, they should prioritize civic engagement and education among people who have contact with the carceral system.

This would mean revising laws that exclude people with criminal histories from participation in politics, education, and the economy, and providing much more opportunity for people who have contact with the criminal system and people under carceral control to participate in education, political decisionmaking, and other aspects of civic life.<sup>240</sup> Doing this would entail not only eliminating obvious barriers to participation, such as disenfranchisement laws, but also affirmatively providing for education, voting, and other means of civic organizing and engagement among incarcerated people and people under correctional control.<sup>241</sup>

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239. MANZA & UGGEN, *supra* note 21, at 127-29.

240. See Bard Prison Initiative, *College Behind Bars*, BARD COLLEGE (2020), <https://bpi.bard.edu/college-behind-bars/> (documenting that education in prison is woefully underfunded, and in-prison education programs have remarkably positive and empowering results in terms of improving the lives of participants, cultivating political consciousness, civic engagement, and participation).

241. People in prison are permitted to vote in many western democracies and in two U.S. states. *E.g.*, Daniel A. Gross, *Why Shouldn't Prisoners be Voters?* NEW YORKER (Feb. 27, 2020), <https://www.newyorker.com/news/the-future-of-democracy/why-shouldnt-prisoners-be-voters>. People under correctional control should also be allowed and encouraged to vote and to participate in organizing activities. States should remove restrictions on serving on juries, participating in governing organizations, occupational licensing, employment, housing, education, and volunteer/community service work. *See, e.g.*, Barriers to Successful Reentry of Formerly Incarcerated People, Leadership Conference on Civil and Human Rights, <https://civilrights.org/resource/barriers-to-successful-re-entry-of-formerly-incarcerated-people/>. States should channel energy and funding (where possible) to supporting political organizing and engagement among people who



At the federal level, Congress also has an important role to play: Congresspeople who are concerned about protecting voting rights and making the electoral system open and fair should also be aiming to pass laws that will significantly curtail the carceral state and carceral socialization. Just like state legislatures, Congress should revise federal criminal law to impose carceral interventions only as a last resort. Furthermore, Congress has significant power to influence state and local policy through its spending power. Through various programs, Congress provides funds to states to assist with policing and incarceration.<sup>242</sup> In providing grants to states for public safety infrastructure, Congress should do much more to incentivize states to choose alternatives that do not involve criminalization, and instead build civic identity and enhance civic power, rather than suppressing participation.

The Justice Reinvestment Initiative (“JRI”) is an example of a federal program where Congress has an opportunity to incentivize states to take measures to limit and counteract carceral socialization. Under JRI, the federal government provides grants to states to reform their criminal legal systems, with the goal of reducing incarceration while enhancing public welfare and safety. The original idea behind the program was that the funds saved from reduced incarceration were to be reinvested in the communities most harmed by mass incarceration. Experts have critiqued the way JRI has been administered, in that the funds have been reinvested primarily into state correctional programming that adheres to a carceral logic.<sup>243</sup>

Reinvesting the funds in correctional programming contributes to, rather than mitigates, carceral socialization. Congress should require reinvested funds be invested in grassroots community organizations, non-carceral approaches to building community (education, employment, housing, health care agencies), and programs that work to build civic power among individuals and communities that have been subject to carceral control.<sup>244</sup> And beyond JRI, when providing grants to states for the purpose of public safety, Congress should require recipients to allocate a

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have been incarcerated, rather than funding programs run by correctional and law enforcement agencies. *See infra* note 243 and accompanying discussion.

242. *Grants for Law Enforcement*, U.S. DEP’T OF JUST., <https://www.justice.gov/grants>.

243. Cadora, *supra* note 11, at 280–82; LERMAN & WEAVER, *supra* note 1, at 253–55.

244. LERMAN & WEAVER, *supra* note 1, at 254–55 (proposing that money saved through JRI go to vouchers for community-based organizations that build civic capacity); *see also The Ezra Klein Show: Why is Murder Spiking? And Can Cities Address it Without Police?* N.Y. TIMES (Nov. 23, 2021) (interview with Patrick Sharkey), <https://www.nytimes.com/2021/11/23/opinion/ezra-klein-podcast-patrick-sharkey.html> (discussing the role of community organizations in building civic infrastructure and reducing violence, and the importance of funding those organizations).

portion of funding to community-based organizations and other programs that build the civic power and capacity of those who have been impacted by the criminal system.

Congress should also require grant recipients to take various measures to reduce the carceral system's disparate impact on historically marginalized communities, such as: issuing impact statements that account for racial, socioeconomic, and other harms of criminal law and law enforcement policies, making demonstrable progress toward eliminating racial and socioeconomic disparities in enforcement; requiring recipient states to restore voting rights to people who have been convicted of any crime; and requiring recipient states to show measurable improvements on metrics not only related to crime and recidivism, but also related to community-members' trust in government, sense of democratic citizenship, or social trust.<sup>245</sup> These are just a few ideas that might begin to address the civic harms of carceral socialization. A comprehensive list would go well beyond this.<sup>246</sup>

#### D. Executive Officials

At both the state and federal level, executive branch officers and agencies play an important role in interpreting and enforcing their constitutions, and they have broad discretion to control policing and punishment.<sup>247</sup> Hence they have significant power to minimize carceral socialization and its suppressive effects.

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245. See Joshua Kleinfeld & Hadar Dancig-Rosenberg, *Social Trust in Criminal Justice: A Metric*, 98 NOTRE DAME L. REV. 815 (2022).

246. One interesting idea advanced by some voting rights experts is to make voting (more specifically, appearing at the polls) a compulsory duty like jury service. See, e.g., LIFT EVERY VOICE: THE URGENCY OF UNIVERSAL CIVIC DUTY VOTING, BROOKINGS INSTITUTE & ASH CENTER FOR DEMOCRATIC GOVERNANCE AND INNOVATION, WORKING GROUP ON UNIVERSAL VOTING (July 2020), [https://www.brookings.edu/wp-content/uploads/2020/07/Br\\_LIFT\\_Every\\_Voice\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2020/07/Br_LIFT_Every_Voice_final.pdf). One might ask whether compulsory voting could counteract or compensate for carceral socialization. While I generally support the idea of universal civic duties (subject to caveats), I do not know whether imposing a legal duty to appear at the polls, in and of itself, would be sufficient to counteract the anti-democratic messages bombarding people who are subject to carceral control. I can imagine that, even if a person casts a ballot under a legal duty to vote, carceral socialization may nonetheless negate the core dignitary/expressive value of voting—that a person is worthy of equal respect and concern. This empirical question is perhaps worth further consideration and investigation.

247. A significant body of scholarship on “administrative constitutionalism” describes how executive agencies interpret and enforce constitutional provisions, and thereby play a role in shaping their meaning. See generally Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699,

Scholars have argued that law enforcement policies suffer from a lack of public oversight and input and have suggested various mechanisms for public oversight of how executive officers exercise coercive state power.<sup>248</sup> More public participation, particularly among people who have first-hand experience with the carceral system, would be a crucial step toward making the carceral system more inclusive, participatory, and therefore less anti-democratic. This may, to some degree, counteract some of the harms of carceral socialization.

Beyond this, crime control agencies should reform their policies to reflect the civic consequences of coercive law enforcement actions, and to subject those actions to a higher standard of justification. When exercising their coercive powers, crime control agencies should be cognizant that they are teaching people lessons about their status as citizens and impacting their future civic behavior. Anytime they subject a person to unnecessary or unjustified harm, they teach a lesson in “anti-citizenry.”<sup>249</sup> Hence they should exercise their discretion in a way that makes the suffering, stigma, and subordination of criminal interventions a last resort. Whenever possible, they should use non-carceral alternatives. Some examples of this include law enforcement assisted diversion programs,<sup>250</sup> and other programs diverting people to treatment or restorative justice alternatives, rather than criminal prosecution.<sup>251</sup> In making choices about how

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1705 (2019) (the term “refers to agencies’ role in constructing constitutional norms”); Jeremy Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083 (2014) (arguing that executive branch officials played a major role in developing our modern understanding of civil liberties).

248. For a thorough treatment of this, see Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1892 (2015) (“[C]ourts ought to defer to police decisions about enforcement methods only to the extent that those decisions represent considered, fact-based judgments formulated with democratic input.”); see also BARKOW, *supra* note 10, at 165-79 (suggesting that crime control policies be subject to a “substantial evidence” standard akin to the standard of review that governs agency rulemaking under the federal Administrative Procedure Act and state analogues).

249. Justice & Meares, *supra* note 12, at 159.

250. E.g., Susan Collins et al., *Seattle’s Law Enforcement Assisted Diversion (LEAD): Program Effects on Recidivism Outcomes*, 64 EVALUATION & PROGRAM PLAN. 49 (2017) (describing how Seattle implemented a Law Enforcement Assisted Diversion program, where police have discretion to not arrest people who are suspected of drug and sex-related crimes, and to instead recruit them to participate in a program that provides comprehensive social services, treatment, housing and other supports. This program has been much more successful at accomplishing public welfare and safety related goals, compared to arrest and incarceration).

251. E.g., Yotam Shem-Tov et al., *The Impact of the Make it Right Program on Recidivism*, CAL. POL’Y LAB (Jan. 2022), <https://sfdistrictattorney.org/wp-content/uploads/2022/03/Impacts-of-the-Make-it-Right-Program-on-Recidivism.pdf> (describing how the San Francisco District Attorney implemented a mandatory diversion program, which made all

to interact with, supervise, and manage people under correctional control, both inside prisons and on community supervision, agencies should take an approach that centers democratic citizenship—i.e., full participation in society—and makes exclusionary, restrictive, or subordinating treatment a last resort.<sup>252</sup>

At the federal level, the Department of Justice has substantial power to influence both the enforcement of federal criminal law as well as state policing and punishment policies.

First, the Office of Justice Programs administers grants to state and local governments for law enforcement and criminal legal system improvements, including the Justice Reinvestment Initiative. It has some discretion to determine funding priorities.<sup>253</sup> It can choose to prioritize states and programs that support community organizations, building civic power and local control through means that are not punitive, stigmatizing, or exclusionary.<sup>254</sup> Second, the Civil Rights Division has the power to bring suit or cut off federal funds when law enforcement agencies engage in a pattern or practice of violating the Constitution or federal law, including laws prohibiting racial discrimination.<sup>255</sup> These suits typically result in detailed settlement agreements that require departments to take a

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juveniles charged with a specific category of offenses eligible for restorative justice program, rather than being charged in the formal system; those who went through the restorative justice program had significantly better outcomes, compared to those who were “processed” through the traditional criminal system).

252. I do not have space to elaborate on the full implications of this statement, but it would mean things like avoiding unnecessary restraints within prisons and jails, giving people maximum access to participate in the community, including work and other forms of volunteering and engagement, allowing and encouraging organizing, journalism, and other forms of civic responsibility within carceral facilities. For people on community supervision, it would mean placing minimal restrictions on freedom of movement and participation, it would also mean using revocations, in-prison treatment programs, limitations on travel, and other practices that deprive people of agency and autonomy, as a last resort.

253. U.S. Department of Justice, Grants for Law Enforcement, <https://www.justice.gov/grants>.

254. For a discussion of the types of designs and practices that might shift power to communities, see, e.g., Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 *YALE L. J.* 778, 811 (2021) (explaining that power shifting in police reform reflects the ideas “that the history of policing has been one of subordination and racialized violence; that prior police reforms have left the power in the hands of elites who have always controlled policing; and that those who come from neighborhoods that have been targets of policing in recent decades have developed their own expertise based on their experience”); K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 103 *CAL. L. REV.* 679 (2020).

255. See CIVIL RIGHTS DIVISION, U.S. DEP’T OF JUST., *THE CIVIL RIGHTS DIVISION’S PATTERN OR PRACTICE POLICE REFORM WORK: 1994-PRESENT* (Jan. 2017), <https://www.justice.gov/crt/file/922421/download>.

range of specific measures, many of which have potential to address some of the law enforcement practices that are the most coercive and anti-democratic. Agreements typically require the department to adopt a community-oriented and problem-oriented policing strategy, promote bias-free policing, reduce use of unjustified force, increase community engagement, improve personnel practices and training, accountability systems, and in some cases, address institutional failures outside police departments that contribute to police misconduct.<sup>256</sup>

Others have critiqued the DOJ for failing to design and implement these settlement agreements in a manner that grants meaningful control to members of the communities that have been subject to unconstitutional and authoritarian policing.<sup>257</sup> The DOJ could do more with these agreements to promote civic engagement and power, in the form of meaningful involvement and input, among people who been impacted by policing and criminalization.<sup>258</sup> Success should be measured in terms of improvements in trust in government, social trust, and perhaps community members' perceptions of their own civic standing and their political participation.

Third, the Department of Justice has power over federal prosecutors and the Bureau of Prisons. It could direct federal prosecutors to exercise their discretion consistent with proportionality, parsimony, and harm reduction (i.e., in accordance with the proportionality framework I laid out above). This would mean avoiding the harm of incarceration unless there is no other alternative for accomplishing important government interests, and pursuing alternatives to criminal punishment whenever they could accomplish the same objectives.<sup>259</sup>

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256. Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 17-19 (2009).

257. Sunita Patel shows how the DOJ has adopted a community policing framework that emphasizes crime fighting, which many members of heavily-policed communities see as illegitimate and in tension with their own goals of changing power relationships. Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 868 (2016); *id.* at 870 ("In most jurisdictions, affected individuals (and even stakeholders) within community engagement structures have no delineated involvement when the parties are engaged in compromises and negotiations. This has led advocates and individuals involved in community engagement to question their ability to influence the process with community-centered values and proposals.").

258. *Id.* at 870-79. For a discussion of what it might look like to give communities meaningful voice and oversight, see Friedman & Ponomarenko, *supra* note 248; sources cited *supra* note 253; see also K. SABEEL RAHMAN & HOLLIE RUSSON GILMAN, CIVIC POWER: REBUILDING AMERICAN DEMOCRACY IN AN ERA OF CRISIS (2019).

259. In contrast, the existing DOJ guidance to prosecutors instructs them to charge the most serious offense they can prove. See DEPARTMENT OF JUSTICE, JUSTICE MANUAL,

The Bureau of Prisons could take many steps to mitigate the anti-democratic nature of incarceration. People who are incarcerated should otherwise be treated as democratic citizens and political equals to the greatest extent possible. This would mean minimizing restraints on movement, encouraging voting, civic engagement and organizing, offering high quality education, providing opportunities to do meaningful work, and otherwise encouraging and cultivating active citizenship.<sup>260</sup> Incarcerated people should be restrained no more than necessary for safety reasons, and be encouraged to engage in civic activities, unions, prison letters and newspapers, and inmate oversight boards and grievance committees. These are just a few ways in which the Executive Branch could use its power to minimize and counteract the carceral socialization and de facto suppression of the criminal system.

## V. CONCLUSION

In a moment when voting rights are under siege, we are in a heated discussion about how our federal and state constitutions protect ideals of democratic citizenship and political equality. I have argued that a robust, substantive conception of voting rights—one that fully vindicates the underlying constitutional values of political equality and representative government—would encompass more than free and open elections. It would encompass an interest in being treated and socialized as a democratic citizen during all interactions with government. Thus, the constitutional values underlying voting rights law would implicate not only de jure suppression, but also institutions like policing and criminal punishment, which systematically treat and socialize people in a manner that is inconsistent with political equality.

As Reuben Jonathan Miller observes so keenly, “the problem of mass incarceration is really a problem of citizenship.”<sup>261</sup> A constitutional vision committed to realizing a substantive conception of democratic citi-

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PRINCIPLES OF FEDERAL PROSECUTION, 9-27.300 SELECTING CHARGES—CHARGING MOST SERIOUS OFFENSE (Feb. 2018), <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.300>. Provisions on sentencing recommendations do not instruct prosecutors to seek the least-severe sentence that could accomplish the government’s penal goals. *Id.* 9.27.730—MAKING SENTENCING RECOMMENDATIONS (Feb. 2018), <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.730>.

260. For a description of what a prison might look like if it were to treat people as democratic citizens to the greatest extent possible while restraining their liberty, see Jessica Benko, *The Radical Humaneness of Norway’s Halden Prison*, N.Y. TIMES MAG. (March 26, 2015), <https://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html>.

261. MILLER, *supra* note 3, at 245.

zanship should recognize that full citizenship depends on more than access to the ballot. It also depends on how government officials treat people and what those interactions convey about a person's belonging and status.