

THE CONSISTENCY OF FELON DISENFRANCHISEMENT WITH CITIZENSHIP THEORY

Jason Schall*

As our republic has matured, the right to vote, once an exclusive privilege, has steadily expanded along the axes of class, race, gender, and age.¹ Voting is now thought of as a universal power. But those convicted of felonies stand alone as the last class of sane adult citizens without a protected entitlement to contribute to the choice of who will govern.² The exclusion of felons from the franchise has sustained broad criticism.³ Is it an anomalous relic of centuries past? Or can it be justified by modern conceptions of democratic citizenship?

In this Article, I assess the compatibility of felon disenfranchisement, whether permanent or temporary, with the two primary variants of citizenship theory: liberalism and republicanism. Part I details the history of felon disenfranchisement and provides background information on its present application. Part II explains the theory of liberal citizenship and explores whether it can justify felon disenfranchisement. Part III sets forth the republican theory of citizenship and examines felon disenfranchisement's consistency with it. I conclude that felon disenfranchisement is inconsistent with liberal thought, but republic philosophy can supply arguments for and against the practice.

* J.D., Harvard Law School, 2004.

1. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (deeming state poll taxes unconstitutional); U.S. CONST. amend. XXIV (prohibiting poll taxes in federal elections); U.S. CONST. amend. XV (granting blacks the right to vote); U.S. CONST. amend. XIX (granting women the right to vote); U.S. CONST. amend. XXVI (lowering the voting age to no younger than 18).
2. Afi S. Johnson-Parris, Note, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 VA. L. REV. 109, 113 (2003) ("All mentally competent adult citizens, save felons, possess the right to vote as parties to the social contract.").
3. See, e.g., ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 303 (2000) (asserting the weakness of the rationales for permanent disenfranchisement and noting the resultant move by many states to eliminate it); Marc Mauer, *Felon Voting Disenfranchisement*, 12 FED. SENT'G. R. 248, *5 (2002) ("In recent years there has been growing interest in revisiting the felon disenfranchisement laws, with new litigation and a variety of legislative proposals.").

I. HISTORICAL BACKGROUND OF FELON DISENFRANCHISEMENT

A. Pre-American Roots

Punishments limiting the political rights of criminals have deep historical roots. Ancient Greeks employed “infamy” to deny criminals the right to vote, appear in court, serve in the army, make speeches, and attend assemblies.⁴ Those who threatened political harmony and consensus were threatened with exile.⁵ The Romans adopted these Greek concepts, prohibiting the “infamous” from holding office or voting⁶ and employing exile to serve as a merciful method of allowing criminals to escape legal punishment, maintain their honor, and start anew far from their prior home.⁷ Roman influence spread the use of civil disabilities throughout Europe.⁸ In England, as well as elsewhere in Europe, those who had violated society’s norms lost society’s protections.⁹ This generally resulted in a death sentence.¹⁰ In England, the tradition of outlawry developed into the practice of “attainder.”¹¹ Under attainder, a criminal’s real and personal property would be seized and returned to the king.¹² The doctrine

4. Waler Matthews Grant, *Special Project-The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 941 (1970).

5. Rebecca Kingston, *The Unmaking of Citizens: Banishment and the Modern Citizenship Regime in France*, 9 CITIZENSHIP STUD. 23 (2005).

6. Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1060 (2002); Grant, *supra* note 4, at 942.

7. Kingston, *supra* note 5, at 3.

Under Roman law the act of excluding citizens from both civil rights and Roman territory went by several names: *interdictio* (in the event of an individual fleeing the territory to avoid a trial and/or punishment); *deportatio* (involving transportation for life to a specific location, usually an island, upon sentencing); and *relegatio* (involving restriction from a specified location, again invoked as a specific sentence).

Id.

8. Grant, *supra* note 4, at 942.

9. *Id.*

10. *Id.*; see also Ewald, *supra* note 6, at 1060 (“During the Renaissance, peoples across Europe used the condition of ‘outlawry’ to punish some criminals; ‘outlaws’ could be killed with impunity, since they were literally considered to be outside the law.”); Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and “The Purity of the Ballot Box,”* 102 HARV. L. REV. 1300, 1301 n.6 (1989).

According to the ancient English concept of outlawry: “he who breaks the law has gone to war with the community; the community goes to war with him. It is the right and duty of every man to pursue him, to ravage his land, to burn his house, to hunt him down like a wild beast and slay him; for a wild beast he is; not merely is he a ‘friendless man,’ he is a wolf.”

(quoting 2 F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 449 (1968)); NJAL’S SAGA 167–71 (Magnus Magnusson & Hermann Palsson eds. & trans., Penguin Books 1960) (n.d.) (In classic Icelandic Bloodsaga, Gunnar, a hero, is killed in an open attack on his home shortly after being sentenced to outlawry).

11. Grant, *supra* note 4, at 942.

12. While the king would officially gain title to the land, the criminal would often retain possession and the ability to transfer the land until the king actually asserted ownership. *Id.* at 943.

of “corruption of blood” dictated that attained criminals would lose the ability to transfer land to heirs, under the theory that the perpetrator’s kin were tainted.¹³ Suffering a “civil death,” or death in the eyes of the law, the attained could not sue, testify in court, serve as a juror, or fulfill any other legal function.¹⁴

When sentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the immediate inseparable consequence by the common law is attainder He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man: for, by an anticipation of his punishment, he is already dead in law.¹⁵

Attainder was not used lightly. As Blackstone noted, it was used “when it is . . . clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society.”¹⁶ In France, perpetual banishment was tantamount to civil death and was considered the fourth harshest punishment behind torture, death, and a life sentence to the galleys.¹⁷

B. *Early Colonial and American Pedigree*

The American colonies adopted England’s tradition of limiting the franchise. These early disenfranchisement laws addressed the fear that “some corrupt members may creep into the best and purest societies.”¹⁸ In Virginia, the franchise was denied to any “convict or person convicted in Great Britain or Ireland during the term for which he is transported.”¹⁹ Maryland disenfranchised citizens upon their third conviction for drunkenness.²⁰ New England colonies strictly monitored the moral standing of their electorates. In Plymouth, the franchise was withheld from “any opposer of the good and wholesome laws of this colonie,” and later the colony required that a would-be voter present “the testimony of his neighbors that he was of ‘sober and peaceable conversation.’”²¹ In Connecticut, first a majority of the town’s freeman, and then the selectmen of the town, had to present a certificate as to the “honest and civil conversation” of an as-

13. *Avery v. Everett*, 110 N.Y. 317, 324 (1888).

14. *Id.*

15. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 373–74 (University of Chicago Press 1979) (1769).

16. *Id.*; see also Ewald, *supra* note 6, at 1061 (“Unlike lifetime disenfranchisement in the United States today . . . early European penalties seem to have been limited to very serious crimes . . .”). Under King George III, attainder was limited to treason, petit treason, and murder. *Id.* See also *Avery*, 110 N.Y. at 328 (citing 54 Geo. 3, c. 45).

17. Kingston, *supra* note 5, at 7.

18. CORTLANDT F. BISHOP, HISTORY OF ELECTIONS IN THE AMERICAN COLONIES 55 (1893). This is emblematic of a republican conception of citizenship. See *infra* Part III.A.

19. 3 Geo. 3, c. 7, cited in CORTLAND F. BISHOP, HISTORY OF ELECTIONS IN THE AMERICAN COLONIES 54 (1893).

20. Ewald, *supra* note 6, at 1062.

21. BISHOP, *supra* note 18, at 54 (quoting MASS. GEN. LAWS ch. 5, § 5 (1671)).

piring voter.²² Rhode Island required that voters be “of civil conversation [and have] acknowledged and are obedient to the civil magistrate.”²³

Freemen could lose their right to vote should their virtue become blemished. In Plymouth, disenfranchisement arose from speaking contemptuously of the laws or court, or from men being deemed “grossly scandalouse, or notoriously vitious, common lyars, drunkards, sucarers or . . . disaffected to this government.”²⁴ Massachusetts later denied voting rights to those convicted of “any evil carriage agnt ye gouerments or churches” until the convicting court removed the restriction.²⁵ In Rhode Island, permanent disenfranchisement met those convicted of bribing an election official or possessing a stolen deed.²⁶ But both of these crimes were intimately tied to the voting process itself, as one involved corrupting an election and the other implicated the property requirement for voting.

After the American Revolution, the new states modified English civil death practices. Bills of attainder, forfeiture for treason, and corruption of blood were constitutionally prohibited.²⁷ Yet, civil death statutes were passed by some states²⁸ and the practice of felon disenfranchisement continued, albeit not without exception.²⁹ Between 1776 and 1821, eleven states disenfranchised at least some convicts.³⁰ Many of these states only disenfranchised the perpetrators of specified crimes thought to have some relationship to the electoral process, such as perjury, bribery, or betting on elections.³¹

The disenfranchisement of felons was only a small slice of the suffrage restrictions that existed in the colonies and shortly after the American Revolution.³² Only the southern colonies used race as a determinative factor for voting.³³ Virginia and North Carolina prohibited any “negro, mulatto, or Indian” from voting, while South Carolina and Georgia limited the franchise to whites.³⁴ Women were not permitted to vote in any colo-

22. *Id.* If a selectman’s certification turned out to be erroneous, he was subject to a five pound fine. *Id.*

23. *Id.* at 54–55.

24. *Id.* at 55 (quoting MASS. GEN. LAWS ch. 5, § 6 (1671)).

25. *Id.* at 56.

26. Ewald, *supra* note 6, at 1062.

27. U.S. CONST. art. III, § 3, cl.2 (“The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”).

28. Ewald, *supra* note 6, at 1063.

29. KEYSSAR, *supra* note 3, at 63 (“Rarely did such constitutional or legislative acts occasion much debate, but it is notable . . . that such provisions were neither universal nor uniform.”).

30. *Id.*; see also *Green v. Bd. of Elections of City of N.Y.*, 380 F.2d 445, 450 n.4 (2d Cir. 1967) (citing VA. CONST. art. 3, § 1 (1776)); KY. CONST. art. 8, § 8 (1799); OHIO CONST. art. 4, § 4 (1802); LA. CONST. art. 6, § 4 (1812); IND. CONST. art. 6, § 4 (1816); MISS. CONST. art. 6, § 5 (1817); CONN. CONST. art. 6, § 2 (1818); ILL. CONST. art. 2, § 30 (1818); ALA. CONST. art. 6, § 5 (1819); MO. CONST. art. 3, § 14 (1820); N.Y. CONST. art. 2, § 2 (1821)).

31. KEYSSAR, *supra* note 3, at 63.

32. *Id.*

33. BISHOP, *supra* note 18, at 51.

34. *Id.* at 51–52. However, Negroes were sometimes permitted to vote. *Id.*

nies,³⁵ though some Massachusetts and New York localities permitted widows to cast votes. Religion also served as a basis for disenfranchisement.³⁶

Property requirements also served to narrow the franchise. This practice, inherited from England, was supported by two contradictory theories. One held that non-property holders, being dependant upon others, would not be able to vote their own minds and instead would be manipulated by others; the other argued that non-property owners would band together and, focusing on their narrow self-interest, violate the property rights of the wealthy.³⁷ Every colony enacted a property floor that must be met before a man could vote.³⁸ With the exception of a period of under one year, Virginia, the first colony, did not have a property qualification until 1670.³⁹ In New England, there was also no property qualification at first, but then a minimum forty shillings per year income, or forty pounds total estate, became the norm.⁴⁰ In East Jersey, Pennsylvania, Delaware, Maryland, North Carolina, and Georgia, a man was required to own fifty acres of land before he could vote.⁴¹

After independence, some states began to discard their property requirements. The notion of voting as a natural right was asserted among the former colonists who had recently revolted on the basis of such Lockean principles.⁴² The blood spilt in the war by non-property owners, and the fact that many of them paid some sort of taxes, giving them a “stake” in the government, also strengthened their claim to the franchise.⁴³ In 1776, Pennsylvania extended voting rights to all those who paid taxes, which essentially led to universal white male suffrage because there was a tax on all heads of households.⁴⁴ Vermont went a step further the next year and abandoned all property and tax-paying requirements for voting.⁴⁵ Georgia, New York, New Hampshire, and New Jersey liberalized their voting laws but maintained some wealth requirement, with New York and North Carolina maintaining a property requirement for their legislatures’ upper houses and for gubernatorial elections.⁴⁶

By 1857, twenty-four states had some sort of constitutional provision calling for or authorizing the disenfranchisement of some felons. Nineteen states specified certain crimes that would be punishable by disenfranchisement, the most common being bribery, treason, perjury, larceny

35. *Id.* at 65–66.

36. Quakers, Catholics, and Jews were among the religious minorities denied the franchise in certain colonies. *See* Bishop, *supra* note 18, at 57–62.

37. *See* KEYSSAR, *supra* note 3, at 9–11.

38. BISHOP, *supra* note 18, at 69.

39. *Id.* at 71.

40. *Id.* at 72–73.

41. *Id.* at 76.

42. Keyssar, *supra* note 3, at 12.

43. *Id.* at 13–15.

44. *Id.* at 16.

45. *Id.* at 17–18.

46. *Id.* at 17; *see also id.* at Table A.1 (discussing suffrage requirements in each state from 1776 to 1790).

and fraud.⁴⁷ Many states provided the disenfranchised with opportunities for the restoration of their voting rights.⁴⁸

C. Post–Civil War Disenfranchisement

When the Fourteenth Amendment was ratified, twenty-nine states had constitutional provisions disenfranchising felons.⁴⁹ Section two of the Fourteenth Amendment reads in part:

[W]hen the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.⁵⁰

The caveat excepting abridgment based on “participation in rebellion, or other crime”⁵¹ served as an opening for Jim Crow legislatures intent on denying blacks the right to vote. These legislatures instituted disenfranchisement as a consequence of crimes blacks were thought to be particularly likely to commit:⁵² “Narrower in scope than literacy test or poll taxes and easier to justify than understanding or grandfather clauses, criminal disenfranchisement laws provided the Southern states with ‘insurance if courts struck down more blatantly unconstitutional clauses.’”⁵³ Mississippi was the first state to take advantage of this strategy, amending its constitution in 1890 to disenfranchise those convicted of many petty crimes that blacks were thought to be more likely to commit than whites.⁵⁴ Expounding upon the purpose of the new disenfranchisement provision, the Mississippi Supreme Court noted approvingly in *Ratliff v. Beale*,

Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from that of the whites—a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to

47. *Id.*

48. *See id.*

49. *Green v. Bd. of Elections of City of N.Y.*, 380 F.2d 445, 450 (2d Cir. 1967).

50. U.S. CONST. amend. XIV, § 2 (emphasis added).

51. *Id.*

52. See John O. Calmore, Symposium, *New Demographics and the Voting Rights Act: Race-Conscious Voting Rights and the New Demography in a Multiracing America*, 79 N.C. L. REV. 1253, 1277 (2001).

53. Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 538 (1993) (quoting J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second*, in MINORITY VOTE DILUTION 27, 35 (Chandler Davidson ed., 1984)).

54. Calmore, *supra* note 52, at 1277.

the robust crimes of the whites. Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone.⁵⁵

Other Southern states followed Mississippi's strategy, with South Carolina, Louisiana, Alabama, and Virginia all amending their constitutions to include targeted disenfranchisement laws shortly afterwards.⁵⁶ John Fielding Burns, who wrote Alabama's disenfranchisement amendment, believed that solely by listing wife-beating as an offense resulting in the loss of suffrage the state could eliminate 60% of negroes from eligibility.⁵⁷ Carter Glass, a delegate to the Virginia Constitutional Convention declared, "Discrimination! . . . [T]hat, exactly is what this Convention was elected for . . . with a view to the elimination of every negro voter."⁵⁸ These measures, along with other tactics, were successful in reducing the black registration rate. Among eligible blacks in Mississippi, registration fell from almost 70% in 1867 to under 6% by 1892, while in Louisiana, blacks went from 44% of the electorate after the Civil War to 1% in 1920.⁵⁹

In the late nineteenth and early twentieth centuries, criminal disenfranchisement laws proliferated. Arizona, California, Idaho, Kansas, Minnesota, New Mexico, Oregon, Utah, and Wyoming encoded criminal disenfranchisement as part of their original constitutions, with Kansas also withholding voting rights from those dishonorably discharged from the United States military.⁶⁰ Colorado, Indiana, Ohio,⁶¹ and Texas (temporarily) allowed felons to vote upon release from prison, while New Jersey, Pennsylvania, and Florida⁶² limited disenfranchisement to a specified number of years.⁶³ All other states allowed for reenfranchisement only after the felon's civil rights were restored or upon grant of a pardon, if at all.⁶⁴ While there were some states with fairly limited disenfranchisement provisions,⁶⁵ the only states without criminal disenfranchisement provisions by 1920 were Maine, Massachusetts, and Michigan.⁶⁶

55. *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896).

56. Shapiro, *supra* note 53, at 541.

57. *Id.* at 541–42.

58. *Id.* at 537 ("Glass claimed that Virginia's new suffrage plan would 'eliminate the darkey as a political factor in this State . . .'" (citing 2 Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia 3076 (1906))).

59. *Id.* at 538.

60. KEYSSAR, *supra* note 3, at Table A.15.

61. Reenfranchisement of released felons in Ohio was conditional on behavior while in prison. *Id.*

62. Those convicted of election betting were disenfranchised for two years. *Id.*

63. *Id.*

64. *Id.*

65. New Hampshire excluded those convicted of "treason, bribery, or election law offenses," Pennsylvania excluded those convicted of "willful violation of election laws," and Utah disenfranchised only treasonous offenders. KEYSSAR, *supra* note 3, at Table A.15.

66. *Id.*

D. Judicial Challenge to Disenfranchisement Provisions

The first wave of cases regarding the constitutionality of felon disenfranchisement measures challenged the practice on equal protection grounds. *Green v. Bd. of Electors of the City of N.Y.* saw a defendant convicted of political crimes and contempt of court challenge New York's felon disenfranchisement statute on a variety of grounds.⁶⁷ The court ruled that the statute was not a bill of attainder since it was not penal,⁶⁸ nor was it cruel and unusual punishment since it was neither cruel nor punishment.⁶⁹ The plaintiff's equal protection claim was given the most attention by the court. Rebuffing the claim, Judge Henry Friendly wrote, "A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact."⁷⁰ Friendly also reasoned that it was reasonable for criminals to be excluded from electing those who would enforce the laws or judge criminal trials.⁷¹ In *Kronlund v. Honstein*, a woman who at the age of 18 was convicted of smuggling heroin into the United States challenged Georgia's felon disenfranchisement provision.⁷² The three judge court upheld the constitutionality of the provision, reasoning that

[a] State has an interest in preserving the integrity of her electoral process by removing from the process those persons with proven anti-social behavior whose behavior can be said to be destructive of society's aims A State may also legitimately be concerned that persons convicted of certain types of crimes may have a greater tendency to commit election offenses.⁷³

In *Dunn v. Blumstein*, the Supreme Court heard a challenge to Tennessee's residency requirement for voter registration. Tennessee's durational residence requirement mandated that a citizen must have lived in the state for one year and in the county for three months by the time of the next election in order to register.⁷⁴ The Court, ruling this requirement unconstitutional, set forth that laws that limit the right to vote must overcome heightened scrutiny to withstand equal protection analysis.⁷⁵

In the wake of this decision, the disenfranchisement of criminals was called into question. In *Ramirez v. Brown*, the California Supreme Court revisiting its seven-year-old decision in *Otsuka v. Hite*⁷⁶ and found that the

67. 380 F.2d 445, 447-48 (2d Cir. 1967).

68. *Id.* at 449. In *Trop v. Dulles*, 356 U.S. 86, 96-97 (1958), the Court specified criminal disenfranchisement as an example of non-punitive law.

69. *Id.* at 450-51.

70. *Id.* at 451.

71. *Id.*

72. 327 F. Supp. 71, 72 (N.D. Ga. 1971).

73. *Id.* at 73.

74. 405 U.S. 330, 331 (1972).

75. *Id.* at 335.

76. 414 P.2d 412 (1966). In *Otsuka*, the court commented that it is permissible to restrict former criminals' right to vote because of the fear that the criminal "might defile 'the purity of the ballot box' by selling or bartering his vote or otherwise engaging in election fraud." *Id.* at 416 (quoting *Washington v. State*, 75 Ala. 582, 585 (1884)).

state's criminal disenfranchisement scheme violated the Equal Protection Clause of the federal Constitution.⁷⁷ Though the court accepted the prevention of election fraud as a compelling state interest sought to be furthered by the measure,⁷⁸ it recognized that regulation and criminal law enforcement served as the primary means of furthering that interest.⁷⁹ Therefore, it reasoned disenfranchisement measures were not necessary to accomplish the state's goal, and the provisions were unconstitutional.⁸⁰ But the U.S. Supreme Court reversed the California Supreme Court decision, upholding felon disenfranchisement's consistency with the Fourteenth Amendment.⁸¹ Writing for the Court, Justice Rehnquist argued that section 2 of the Fourteenth Amendment, which expressly declines to reduce the representation of states on the basis of the disenfranchisement of criminals,⁸² affirmatively permits the removal of criminals from voter rolls.⁸³ Therefore, section 1 of the amendment cannot be interpreted as prohibiting it.⁸⁴ This reasoning generated a wealth of academic criticism⁸⁵ and a vigorous dissent by Justice Marshall, who argued that section 2 of the Fourteenth Amendment was intended to be a politically feasible means by which to prevent southern states from denying the franchise to African Americans,⁸⁶ not a limitation on the other sections of the amendment.⁸⁷ Marshall contended that the disenfranchisement of ex-felons is not narrowly tailored to meet any compelling state interest and is hence unconstitutional.⁸⁸

Despite the Court's broad endorsement of felon disenfranchisement measures in *Ramirez*, an exception was carved out in *Hunter v. Underwood*.

77. *Ramirez v. Brown*, 507 P.2d 1345, 9 Cal.3d 199, 216 (1973).

78. *Id.* at 206, 211–12.

79. *Id.* at 216.

80. *Id.* at 216–17.

81. *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974).

82. U.S. CONST. amend. XIV, § 2.

83. *Ramirez*, 418 U.S. at 54.

84. *Id.* at 55.

85. Note, *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1950 n.99 (2002) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 13–16, at 1094 (2d ed. 1988)); George P. Fletcher, Symposium: *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1900–02 (1999); David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 302, 304 (1976) (calling *Ramirez* a “construction sustaining states’ rights that finds little warrant in the language of the amendment or its legislative history.”); see also Shapiro, *supra* note 53, at 546 n.50–51 (citing Elizabeth Du Frense & William Du Frense, *The Case for Allowing “Convicted Mafiosi To Vote for Judges,”* 19 DEPAUL L. REV. 112, 137–38 (1969) (“It is not conceivable that today ‘other crime’ can possibly be read as any other crime . . . [only those] that would rationally be related to the corruption of the electoral system.”); William W. Van Alstyne, *The Fourteenth Amendment, the “Right” to Vote, and the Understanding of the Thirty-Ninth Congress*, SUP. CT. REV. 33, 58 (1965).

86. *Ramirez*, 418 U.S. at 73 (Marshall, J., dissenting).

87. *Id.*

88. Marshall found that ex-felons do have an interest in the democratic process, and they cannot be excluded based on the substance of the votes they would (presumably) cast. While preventing voter fraud was considered a compelling state interest, disenfranchisement measures were both under- and over-inclusive because some voting crimes are not felonies and many crimes are not indicative of a propensity to commit voter fraud. *Id.* at 78–85.

The plaintiffs in that case were disenfranchised for presenting worthless checks, a misdemeanor that was considered a crime of moral turpitude according to Alabama's Constitution.⁸⁹ Though the provision was facially neutral, it was designed by the 1901 Constitutional Convention with the purpose of excluding African Americans from the franchise.⁹⁰ The measure was struck down because squelching the black vote was a "but for" cause of Alabama's disenfranchisement law, and the law did in fact have the effect of disproportionately disenfranchising this protected class.⁹¹ Section 2 of the Fourteenth Amendment would not protect intentionally discriminatory disenfranchisement laws from attack under section 1 of the Amendment.⁹² Courts have applied the *Hunter* exception sparingly in subsequent decisions. In *Cotton v. Fordice*, for example, the Fifth Circuit upheld the constitutionality of Mississippi's criminal disenfranchisement law even though it was first enacted because of racial animus, reasoning that later amendments cleansed the provision of its taint.⁹³

Another series of challenges to felon disenfranchisement centered on section 2 of the Voting Rights Act. After the Supreme Court, in *City of Mobile v. Bolden*, read section 2 of the Act to require a showing of intentional discrimination,⁹⁴ Congress amended it in 1982 to incorporate a results test.⁹⁵ A violation of the new standard would occur if "based on the totality of the circumstances . . . [members of protected classes] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."⁹⁶

Shortly thereafter, the compatibility of Tennessee's disenfranchisement law with the amended Voting Rights Act was challenged in *Wesley v. Collins*.⁹⁷ The plaintiff claimed that the historical discrimination blacks faced in Tennessee was a cause for the greater frequency with which blacks were convicted of felonies than whites.⁹⁸ Thus, he argued, Tennessee's statute disenfranchising felonies violated the Voting Rights Act.⁹⁹ The District Court interpreted the results test as only prohibiting measures that dilute minority voting strength "unfairly . . . [or] at least for reasons deemed

89. *Hunter v. Underwood*, 471 U.S. 222, 223–24 (1985).

90.

The delegates to the all-white convention were not secretive about their purpose. John B. Knox, president of the convention, stated in his opening address: "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State." 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, May 21st, 1901 to September 3rd, 1901, p. 8 (1940).

Id. at 228–29.

91. *Id.* at 227, 232.

92. *Id.* at 233.

93. 157 F.3d 388, 391 (5th Cir. 1998); see Martine J. Price, Note and Comment: *Addressing Ex-Felon Disenfranchisement: Legislation v. Litigation*, 11 J. L. & POL'Y 369, 382–83 (2002).

94. *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980).

95. Price, *supra* note 93, at 385–86; see Shapiro, *supra* note 53, at 550.

96. Pub. L. No. 97-205, 96 Stat. 131 (1982) § 3(b) (codified as 42 U.S.C. § 1973(b)).

97. 605 F. Supp. 802, 804 (M.D. Tenn. 1985). The plaintiff also claimed that the Tennessee law violated the Fourteenth and Fifteenth Amendments.

98. See *id.* at 807.

99. See *id.*

more culpable than neutral.”¹⁰⁰ Applying the test, the court found that the act in question disproportionately impacted blacks and that historical discrimination still impacted blacks in the district.¹⁰¹ However, the court wrote, “a *causal connection* must be established between the indicia of historically-rooted discrimination and the Tennessee statute disenfranchising felons”¹⁰² This reasoning seemed to reinstitute the intentionality requirement discarded by the 1982 amendments. Setting forth non-discriminatory explanations for the disenfranchisement measure, the court dismissed the plaintiff’s claims.¹⁰³ After citing the discredited *Bolden* opinion when articulating the rule to be applied,¹⁰⁴ the Sixth Circuit applied reasoning similar to the District Court’s, arguing that “the state’s legitimate and compelling rationale for enacting the statute” is the chief factor demanding the rejection of the plaintiff’s Voting Rights Act claim.¹⁰⁵

Other courts have followed *Wesley*’s lead, refusing to strike down felon disenfranchisement statutes because of an absence of causality between the statutes and historical discrimination.¹⁰⁶ But the outlook for Voting Rights Act challenges to felon disenfranchisement may not be entirely bleak. In *Farrakhan v. Locke*, in which the State of Washington’s felon disenfranchisement provision was challenged, the Ninth Circuit recognized that even if a practice is not adopted with the purpose of effectuating racial discrimination, it can nonetheless violate section 2 if it disproportionately impacts minorities “through its interaction with racial discrimination ‘outside of the challenged voting mechanism.’”¹⁰⁷ Therefore, if the District Court finds on remand that there is discrimination in the Washington Criminal justice system, the state’s felon disenfranchisement provision will fail to meet the statutory requirements as interpreted by the Ninth Circuit.¹⁰⁸

However, striking down felon disenfranchisement statutes via the results test may be unconstitutional. *City of Boerne v. Flores* held that Congress’s exercise of its enforcement powers under section 5 of the Fourteenth Amendment must stand in congruence and proportionality to a constitutional injury Congress seeks to redress.¹⁰⁹ This limitation on Congress’s powers also applies to the powers granted by section 2 of the Fifteenth Amendment.¹¹⁰ Because *Ramirez* established the constitutionality of felon

100. *Id.* at 810.

101. *Id.* at 812.

102. *Id.*

103. *Id.* at 812–13.

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

105. *Id.*

106. Note, *supra* note 85, at 1955 n.133 (citing *Jones v. Edgar*, 3 F. Supp.2d 979, 981 (C.D. Ill. 1998); *Howard v. Gilmore*, 205 F.3d 1333, 1 (4th Cir. 2000) (unpublished table opinion); *Baker v. Pataki*, 85 F.3d 919, 929–30 (2d Cir. 1996) (en banc)). In *Baker v. Pataki*, the Second Circuit, sitting en banc, split evenly on the issue of whether § 2 of the Voting Rights Act prohibited New York’s criminal disenfranchisement law, leaving the district court’s rejection of the challenge in tact. *Id.* at 920–21.

107. 338 F.3d 1009, 1019 (9th Cir. 2003).

108. *Id.* at 1020.

109. 521 U.S. 507, 520 (1997).

110. See Note, *supra* note 85, at 1956.

disenfranchisement,¹¹¹ eviscerating these laws may be judged to fail the congruence and proportionality test.¹¹²

E. Present Day

Today, the United States disenfranchises more people than any other democracy in the world.¹¹³ An estimated 4.7 million Americans cannot vote because of their criminal records,¹¹⁴ including almost 600,000 veterans.¹¹⁵ As of 2000, an estimated 1.6 million of these disenfranchised citizens were no longer under the supervision of the criminal justice system, a sum almost one-third greater than the number of current prisoners who were disenfranchised.¹¹⁶ Maine and Vermont are the only states that permit convicts to vote while in prison.¹¹⁷ Prisoners were permitted to vote in Utah and Massachusetts until recent ballot proposals succeeded in eliminating their voting rights.¹¹⁸ Sixteen states and the District of Columbia restore voting rights to felons upon their release from prison.¹¹⁹ Four states allow those on probation, but not on parole, to vote.¹²⁰ Seven states, Alabama, Florida, Iowa, Kentucky, Mississippi, Nevada, and Virginia permanently disen-

111. *Id.* (“[M]ost courts interpret *Richardson* to mean that felon disenfranchisement, even when it results in racial disparities, is constitutionally permissible.”).

112. *See, e.g.*, *Baker v. Pataki*, 85 F.3d 919, 930–31 (2d Cir. 1996) (en banc) (Mahoney, J.); Price, *supra* note 93, at 388; Note, *supra* note 85, at 1956–57.

113. Mark E. Thompson, *Don't do the Crime If You Ever Intend to Vote Again*, 33 SETON HALL L. REV. 167, 175 (2002).

114. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2005), <http://sentencingproject.org/pdfs/1046.pdf>; *see also* DEMOS-USA, RESTORING VOTING RIGHTS TO CITIZENS WITH FELONY CONVICTIONS 1 (2003), at <http://www.demos.org/page26.cfm>.

115. THE SENTENCING PROJECT, DISENFRANCHISED VETERANS IN THE UNITED STATES 1 (2003), <http://sentencingproject.org/pdfs/1023.pdf>.

116. *See* Demos-USA, <http://www.demos.org/page23.cfm>.

117. *See* Price, *supra* note 93, at 372 n.11; *see also* ME. REV. STAT. ANN. tit. 21, § 115 (2001) (listing restrictions for voting); VT. STAT. ANN. tit. 17, § 2121 (2002) (listing voting registration requirements).

118. Utah passed a proposition in 1998, with 80% approval, amending its Constitution to disenfranchise prisoners. THE SENTENCING PROJECT, LEGISLATIVE CHANGES ON FELONY DISENFRANCHISEMENT, 1996–2003 5 (2003) [hereinafter *Legislative Changes*], <http://sentencingproject.org/pdfs/legchanges-report.pdf>. The effort to disenfranchise prisoners in Massachusetts began in 1998 after a political action committee was developed in a state prison. *See id.* at 4. The disenfranchisement proposal sailed through the required two legislative sessions and was approved by over two-thirds of Massachusetts voters. *See id.*

119. Price, *supra* note 93, at 373 (citing D.C. CODE ANN. § 1-1001.02(7) (2002); HAW. CONST. art. II, § 2 (2002); IDAHO CONST. art. VI, § 3 (2002); 10 ILL. COMP. STAT. 5/3-5 (2002); IND. CODE ANN. § 3-7-13-4 (West 2002); LA. REV. STAT. ANN. § 18:102 (West 2002); MASS. GEN. LAWS ch. 1 (2002); MICH. COMP. LAWS § 168.492A (2002); MONT. CODE ANN. § 13-1-111(2) (2002); N.H. REV. STAT. ANN. § 607-A:2, 654:5 (1986); N.D. CONST. art. II, § 2 (2002); N.D. CENT. CODE § 161-04-04 (2002); OHIO REV. CODE ANN. § 2961.01 (West 2002); OR. CONST. art. II, § 3 (2001); 25 PA. CONS. STAT. § 1301 (2002); S.D. CONST. art. VIII, § 1 (2002); UTAH CODE ANN. § 20 A-2-101 (2002)); *see also* *Legislative Changes*, *supra* note 118, at 3 (noting that Kansas passed legislation in 2002 prohibiting parolees and probationers from voting).

120. Demos-USA, <http://www.demos.org/page26.cfm> (“State Report Cards” insert on right of screen); *see also* Note, *supra* note 85, at 1943 n.26.

franchise all ex-felons.¹²¹ Wyoming was a member of this list until 2003 when a statute was passed permitting first-time nonviolent offenders to vote after the completion of a five-year waiting period and any parole and probation.¹²² Delaware also allows former felons to vote after a five-year waiting period, with the exception of those convicted of murder, manslaughter, sex offenses, or violations of the public trust.¹²³ Arizona permanently disenfranchises repeat offenders, and Maryland has a three-year waiting period for nonviolent repeat offenders,¹²⁴ while repeat violent offenders are permanently disenfranchised.¹²⁵ Tennessee permanently disenfranchises felons convicted before 1986, and Washington permanently disenfranchises those convicted before 1984.¹²⁶ Sixteen states allow convicts to vote after their prison sentence and any parole or probation terms are completed.¹²⁷

The racial disparities in the effects of felon disenfranchisement are staggering. About 1.4 million African American men are among the 4.7 million disenfranchised Americans, comprising almost 30% of the total.¹²⁸ Another source estimates that black men make up 36% of the disenfranchised population.¹²⁹ Yet African Americans, male and female, make up only 12.9% of the total U.S. population.¹³⁰ Thirteen percent of African American males, a rate seven times greater than the population as a whole, are disenfranchised based on their felonious status.¹³¹ One source estimates that 30 to 40% of black males born today will lose their right to vote at some point in their adult lives.¹³²

121. Price, *supra* note 93, at 372–73 n.15 (citing ALA. CONST. art. VIII, § 182 (2002); ALA. CONST. amend. 579 (2002); FLA. STAT. ch.97.041(2)(b) (2001); IOWA CODE § 48A.6 (2002); KY. REV. STAT. ANN. § 116.0452(2)(b) (Banks-Baldwin 2002); MISS. CODE ANN. § 23-15-19 (2001); NEV. CONST. art. II, § 1 (2002); VA. CONST. art. II, § 1 (2002); VA. CODE ANN. § 24.2-101, 418 (Michie 2002)).

122. Legislative Changes, *supra* note 118, at 7.

123. *Id.* at 2.

124. Price, *supra* note 93, at 373 n.13. (citing ARIZ. CONST. art. VI, § 3 (2002); MD. ELEC. CODE ANN. § 3-102 (2002)).

125. Legislative Changes, *supra* note 118, at 3.

126. Price, *supra* note 93, at 373 n.13 (citing TENN. CODE ANN. § 2-19-143 (1981); WASH. CONST. art. VI, § 3 (2002)).

127. See Demos-USA, *supra* note 120; Legislative Changes, *supra* note 114, at 3; see also Price, *supra* note 93, at 372 n.12 (citing ALASKA STAT. § 15.05.030 (Michie 2002); ARK. CONST. art. III, § 2 (Michie 2002); COLO. REV. STAT. § 1-2-606(1) (2002); GA. CODE ANN. § 21-2-216(b) (2002); MINN. STAT. § 201.014 (2001); MO. CONST. art. VIII, § 2 (2001); NEB. REV. STAT. § 32-313 (2002); N.J. REV. STAT. § 19:4-1 (2002); N.M. STAT. ANN. 31-13-1 (Michie 2002); N.C. CONST. art. VI, § 2 (2002); OKLA. STAT. tit. 26, § 4-101 (2002); R.I. CONST. art. II, § 1 (2002); S.C. CONST. art. III, § 7 (2001); TEX. ELEC. CODE ANN. § 11.002 (Vernon 2002); W. VA. CODE § 3-1-3 (2002); WISC. STAT. § 6.03 (2001)).

128. See THE SENTENCING PROJECT, *supra* note 115, at 1; see also Calmore, *supra* note 52, at 1274 (“Of [the] total, 1.5 million, or 37.5 percent, are African Americans.”).

129. See Price, *supra* note 93, at 374–75.

130. This figure includes those who consider themselves a combination of black and another race. U.S. CENSUS BUREAU, RACE ALONE OR IN COMBINATION: 2000 (2000), available at American Fact Finder, http://factfinder.census.gov/servlet/SAFFactsCharIteration?_submenuId=factsheet_2&_sse=on (select “Black alone or in combination with one or more other races”).

131. THE SENTENCING PROJECT, *supra* note 115, at 1; see also Price, *supra* note 93, at 375.

132. Mauer, *supra* note 3, at 250.

In some individual states, the picture is even starker. In Florida and Alabama, 31% of African American men are permanently disenfranchised.¹³³ In five other states, over 25% of black men are disenfranchised.¹³⁴ The racial impact of felon disenfranchisement becomes more disturbing when one entertains the premise of racially disparate law enforcement. A recent analysis by the *Miami Herald* recently found, “[w]hite criminal offenders in Florida are nearly 50 percent more likely than blacks to get a ‘withhold of adjudication,’ a plea deal that blocks their felony convictions even though they plead to the crime. White Hispanics are 31 percent more likely than blacks to get a withhold.”¹³⁵ When attorney type was adjusted for, the inequality decreased but still existed.¹³⁶ This disparity in prosecution tactics yields disproportionate disenfranchisement of African Americans.¹³⁷

The *Herald* found that the gap was particularly large with regards to drug crimes, with whites seen as having a drug problem and blacks viewed as criminals.¹³⁸ A 1991 study of 700,000 criminal cases also concluded that whites are more successful than blacks in almost all phases of pretrial negotiation.¹³⁹ Racial disparities extend to Florida’s reenfranchisement process. Though almost half of Floridians convicted of felonies are black, “a recent study revealed that of the estimated 8400 persons who have had their voting rights restored in Florida over the past five years [up until 2002], ‘only 25 percent of them are black.’”¹⁴⁰ Blacks have fared even worse when it comes to full pardons; from 1997 to 2002, only 15% of full pardons granted in Florida have gone to African Americans.¹⁴¹

The effects of felon disenfranchisement have been felt in the outcomes of many close elections. The most obvious example is the 2000 Presiden-

133. Price, *supra* note 93, at 375.

134. THE SENTENCING PROJECT, *supra* note 115, at 1; see also Price, *supra* note 93, at 375 (As of 2002, Iowa, Mississippi, New Mexico, Virginia, and Wyoming each permanently disenfranchised over 25% of their African American citizens. One out of every five African American males is disenfranchised in Delaware.).

135. Manny Garcia & Jason Grotto, *Odds Favor Whites For Plea Deals*, MIAMI HERALD, Jan. 26, 2004, available at http://www.independent-media.tv/item.cfm?fmedia_id=5280&fcategory_desc=Racism.

136.

But even when blacks and whites had the same type of attorney, private or public, the disparity didn’t disappear, The Herald found. An analysis of Miami-Dade County court data from 1999 shows that the disparity dipped from 60 percent to 44 percent when attorney type was taken into account. Jurists also say that factors not captured in The Herald’s analysis—family support, job security, ability to make bail, appearances and the circumstances surrounding a case—could sway judges on whether to give a withhold.

Id.

137. See *id.*

138. “Across Florida, white offenders arrested for crimes like drug possession or dealing are nearly twice as likely to get the break as blacks charged with the same crime.” *Id.*

139. Alice E. Harvey, Comment: *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145, 1158 (1994). For a more detailed discussion of racial disparities in the treatment of accused criminals, see *id.* at 1155–59.

140. Note, *supra* note 85, at 1945–46 (quoting Gary Kane & Scott Hiaasen, *Clemency Process Unfair to Blacks?*, PALM BEACH POST, Dec. 23, 2001, at 1A.).

141. See *id.*

tial election, which was decided by 537 votes in Florida. Before the general election, over 19,000 voters were removed from Florida voting lists.¹⁴² Of these, 8,456, or 44%, were African American.¹⁴³ Appeals were filed by 4,847 of these would-be voters and 2,430 succeeded in their appeals, regaining the vote on the basis that they had never been convicted of a felony.¹⁴⁴ The demographic traits of felons, disproportionately low-income and non-white, would suggest that these votes could have been decisive in titling the election in Al Gore's favor.¹⁴⁵ This speaks nothing of the effect of the disenfranchisement of 817,322 convicted felons in Florida.¹⁴⁶ Christopher Uggen and Jeff Manza conducted a statistical analysis to weigh the effects of felon disenfranchisement and found that if Florida had no disenfranchisement law, Al Gore would have won the state by over 84,000 votes.¹⁴⁷ If only ex-felons were permitted to vote, Gore's margin of victory in Florida was projected as 62,542.¹⁴⁸ Uggen and Manza also predict that if "contemporary rates of criminal punishment held at the time," Richard Nixon would have won the popular vote over John F. Kennedy in 1960, though Kennedy would have maintained his electoral vote victory.¹⁴⁹

The disenfranchisement of convicts also played a determinative role in many senate races, according to Uggen and Manza's estimates. From 1978 to 2000, seven Senate races that have been won by Republicans may have otherwise been won by Democrats if not for felon disenfranchisement.¹⁵⁰ With the exception of Paul Coverdell's 1992 victory in Georgia, Democrats would have won these races even if only ex-felons, who were contemporaneously no longer under the supervision of the criminal justice system, were permitted to vote.¹⁵¹ In the specified Georgia contest, if probationers and parolees were permitted to vote, but inmates were not, the Democratic candidate would likely have won the Senate seat.¹⁵² From

142. Calmore, *supra* note 52, at 1275.

143. *See id.*

144. *Id.*

145. *See* Christopher Uggen & Jeff Manza, *Democratic Contradiction? The Political Consequences of Felon Disenfranchisement Laws in the United States*, 67 AM. SOCIOLOGICAL R. 777, 780–81 (2002); *see also* Calmore, *supra* note 52, at 1275.

146. *See* Demos-USA, *supra* note 114, at 3 (estimating that 817,322 Floridians were ineligible to vote in 2000 because of criminal disenfranchisement provisions); *see also*, Uggen & Manza, *supra* note 145, at 792 (estimating the number at 827,000); Calmore, *supra* note 52, at 1275 ("[I]n Florida alone . . . as a result of permanent disenfranchisement, more than 400,000 ex-felons—almost fifty percent of them black—were ineligible to vote in [the 2000] election.").

147. Based on known voting patterns, a 27.2% turnout rate was projected for the disenfranchised, and 68.9% of the vote was predicted to have been in favor of Al Gore. Uggen & Manza, *supra* note 145, at 793 Table 4a. For more information on the method of analysis employed, *see id.* at 783–87, 790–92.

148. *Id.* at 793 Table 4a.

149. *Id.* at 792–93.

150. The seven races that would likely have been won by Democrats are as follows: Warner's 1978 victory in Virginia over Miller, Tower's 1978 victory in Texas over Krueger, McConnell's defeat of Huddelson in Kentucky in 1984, Mack's 1988 triumph over MacKay in Florida, Wallop's victory against Vinich in Wyoming in 1988, Coverdell's 1992 win over Fowler in Georgia, and Bunning's 1998 defeat of Baesler in Kentucky. *Id.* at 788 Table 2.

151. *Id.* at 789.

152. *Id.*

1978 until 1980, according to this counter-factual premise, Democrats would have had a filibuster-proof majority in the Senate.¹⁵³ If the Democratic party held these seats for as long as the Republican party had in actuality, and lost them when Republicans in fact did, the Democrats would have controlled the Senate throughout the 1990s.¹⁵⁴ Of course it is unlikely that the incumbent party would have won and lost the exact same races, but there is certainly an advantage to incumbency and this hypothetical highlights the significant cumulative effect of felon disenfranchisement on voting outcomes.¹⁵⁵

Public opinion generally favors extending the franchise to non-inmate convicts. According to a recent survey, 80% of Americans favor allowing those who are no longer under the supervision of the criminal justice system to vote.¹⁵⁶ However, when offenders against specific laws are mentioned, public support for reenfranchisement diminishes: “[sixty-six percent] of respondents supported allowing *violent* ex-felons the right to vote, 63% supported allowing ex-felons convicted of illegal trading of stocks to vote, while just 52% supported allowing ex-felons who had been convicted of a sex crime.”¹⁵⁷ The survey also found that 64% of the public supported allowing probationers to vote, while 62% favored extending the franchise to parolees.¹⁵⁸ Thirty-three percent of Americans favor inmate suffrage.¹⁵⁹

II. LIBERAL CONCEPTION OF CITIZENSHIP

A. *Defining and Explaining Liberalism*

Liberalism is one of the major conceptions of citizenship, tracing back from the likes of Thomas Hobbes, John Locke, and Jean-Jacques Rousseau to modern-day philosophers such as John Rawls, Robert Nozick, and Ronald Dworkin.¹⁶⁰ Alec Ewald nicely summed up liberalism by defining it as “an individualistic and rights-oriented view of politics, in which the central purpose of the state is to preserve as much latitude as possible for individuals to choose their own ends.”¹⁶¹

153. See *id.* at 788 Table 2 (There would have been 60 Democratic senators).

154. After the 1994 election, Democrats would have had a 54-46 majority instead of a 52-48 minority. After the 1996 election, Democrats would have had a 51-49 majority instead of a 55-45 minority. After 1998, the Senate composite in fact stayed the same, while the Democrats would have expanded their lead to 52-49 (I believe there is an error regarding this number in Table 2), and after 2000, the Democrats would have commanded a 55-45 majority instead of the Senate being split (before Senator James Jeffords’s defection from the Republican party). Of the seven seats at issue, the only ones to have switched party hands were the Florida seat and the Georgia seat, both of which were lost by Republicans in 2000.

155. But see Note, *supra* note 10, at 1303 (calling the former felon vote “electorally insignificant.”).

156. Jeff Manza, et al., *Summary: Public Attitudes Towards Felon Disenfranchisement in the United States 1*, at <http://sentencingproject.org/pdfs/ManzaBrooksUggenSummary.pdf>.

157. *Id.*

158. *Id.*

159. *Id.*

160. See Ewald, *supra* note 6, at 1051 n.15.

161. *Id.* at 1050.

The application of this principle to the relationship between individuals and the state has manifested itself in many forms. There are also different conceptions of what liberal citizenship consists of which divide along different axes upon which citizenship can be measured.¹⁶² For example, according to Emma Jones and John Gaventa, “liberal theories promote the idea that citizenship is a status, which entails individuals to a specific set of universal rights granted by the state,”¹⁶³ while Ronald Beiner writes that according to liberals, “[c]itizenship = allegiance to the state as something that enforces the rule of law and acts as a protector of universal human rights.”¹⁶⁴ Jones and Gaventa’s definition emphasizes citizenship as a way in which individuals are treated by the state, invoking the “juridical status of legal personhood” dimension of citizenship.¹⁶⁵ Meanwhile, Beiner’s definition focuses on the individual’s attitude towards the state. The protection of rights serves only as the *justification* for the individual’s citizenship, but it is not the fabric of the citizenship itself. Beiner’s inclusion of the individual’s “allegiance,” or feelings of group membership, in his definition of liberal citizenship, reflects his civic republican outlook.¹⁶⁶

Political participation is also submitted as a dimension by which to measure citizenship¹⁶⁷ and this dimension plays a part in the characterization of liberal citizenship. Though liberal thought focuses mainly on negative rights, participation in the political process Though liberal thought focuses mainly on negative rights,¹⁶⁸ participation in the political process is a central pillar of liberal citizenship,¹⁶⁹ both for its own sake and because of its importance for the protection of other rights.¹⁷⁰ However, in

162. See EMMA JONES & JOHN GAVENTA, CONCEPTS OF CITIZENSHIP: A REVIEW 3–4 (2002) (providing for a sampling of some variants of liberal citizenship).

163. *Id.* at 3; see also ENGIN F. ISIN & PATRICK K. WOOD, CITIZENSHIP AND IDENTITY 7 (1999) (“Liberalism denotes those theories that consider the individual as preceding the polity and citizenship as specific rights that protect the individual. The bearer of rights is individual and the granter is the nation-state.”).

164. RONALD BEINER, LIBERALISM NATIONALISM AND CITIZENSHIP 167 (2003).

165. Jean Cohen describes three axes of citizenship, linking each one to a major citizenship conception. “Juridical status of legal personhood,” or the possession of “legally specified rights including the all-important ability of the legal subject to sue in court and to claim the state’s protection” is associated with liberal thought. See Jean L. Cohen, *Changing Paradigms of Citizenship and the Exclusiveness of the Demos*, INT’L SOCIOLOGY, Sept. 1999 at 245, 248; see also ISIN & WOOD, *supra* note 163, at 4 (1999) (“[C]itizenship can be defined as a legal and political status . . .”).

166. See *infra* Part III.A for a discussion on civic republican thought. Cohen associates the axis of “formal group membership” with communitarian thought, not republican, see Cohen, *supra* note 165, at 248, but it is also an important aspect of civic republican citizenship. See BEINER, *supra* note 164, at 30 (“[T]he republican perspective emphasizes ‘civic’ bonds.”). In fact, the line between communitarianism and republicanism is fuzzy, if existent at all.

167. See, e.g., Cohen, *supra* note 165, at 248; DENNIS F. THOMPSON, THE DEMOCRATIC CITIZEN 27 (1970).

168. “Negative rights” can be generally described as the individual’s freedom from government interference. A negative right, in a sense, is the right to be left alone.

169. JONES & GAVENTA, *supra* note 162, at 3.

170. See Richard L. Lippke, *The Disenfranchisement of Felons*, 20 LAW & PHIL. 553, 557 (2001).

liberal thought citizens are not required to vote or otherwise become politically engaged; doing so is a right that may or may not be exercised.¹⁷¹

The concept of the social contract is prevalent through much of liberal theory.¹⁷² John Locke was an early social contract theorist who set out premises that remain cornerstones of liberal thought.¹⁷³ Locke believed in the natural freedom and equality of man.¹⁷⁴ Because man is naturally free and equal, he can only rightfully be subjected to the authority of others by his own consent.¹⁷⁵ One only forfeits his natural liberty “by agreeing with other Men to joyn and unite into a Community.”¹⁷⁶ Upon uniting into a community, an obligation is undertaken by each member to submit to the governance of the majority.¹⁷⁷ Also, anyone who enjoys the fruits of government functions and protections gives her *tacit* consent to acquiesce to the laws of that society, but this consent is withdrawn once the enjoyment ceases.¹⁷⁸ However, one does not become a member of a society unless she gives her explicit, not tacit, consent to be governed by the majority of that society.¹⁷⁹ Locke’s conception of rights is much narrower than that of modern day liberals. The only constraints he places on the legislature’s relationship with its citizens are that the government must rule by standing, established laws, these laws must have as their end the good of the people, and taxes cannot be levied without the consent of the majority.¹⁸⁰

Before man enters a social contract, he exists in a State of Nature which affords him the liberty to do whatever he desires, constrained only by the Laws of Nature.¹⁸¹ He also is entitled to punish anyone who transgresses against his natural rights.¹⁸² Once he enters civil society, though, man yields his largely unconstrained liberty, agreeing to live by the laws of society, and forfeits his right to punish, leaving it to civil authorities to punish transgressors.¹⁸³ In the State of Nature, a criminal may not be punished

171. ISIN & WOOD, *supra* note 163, at 7.

172. See, e.g., Jesse Furman, Note: *Political Illiberalism: The Paradox of Felon Disenfranchisement and the Ambivalences of Rawlsian Justice*, 106 YALE L. J. 1197, 1198–99 (1997) (calling consent “the linchpin of liberalism.”); Ewald, *supra* note 6, at 1050–51 (“[L]iberal ideology tends to depict the rules of society as a neutral ‘contract’ to which rational individuals agree.”).

173. Other social contract philosophers differ from Locke in many respects but here I outline relevant parts of his theory, as it is a particularly influential one, especially in the United States. See Johnson-Parris, *supra* note 2, at 125 (“[T]he directions in which contractarian philosophers have developed this theory are varied and nuanced.”).

174. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 269 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

175. *Id.* at 330.

176. *Id.* at 330–31.

177. *Id.* at 331–32.

178. LOCKE, *supra* note 175, at 348–49.

179. Neither “living quietly, and enjoying the Priviledges and Protection under” a country’s law, nor being born in a society or to citizens of a society can make one a member. *Id.* at 346–49.

180. *Id.* at 363. Regarding taxes, Locke writes, “[T]is fit every one who enjoys his share of the Protection, should pay out of his Estate his proportion for the maintenance of it. But still it must be with his own Consent, i.e., the Consent of the Majority, giving it either by themselves, or their Representatives chosen by them.” *Id.* at 362.

181. *Id.* at 332.

182. *Id.*

183. LOCKE, *supra* note 174, at 332–33.

“according to the passionate hearts, or boundless extravagancy of his own Will, but only to retribute to him, so far as calm reason and conscience dictates, what is proportionate to his Transgression, which is so much as may serve for *Reparation* and *Restraint*.”¹⁸⁴ Anyone, not just the victim, has the right to punish a criminal and a victim has an additional right to seek reparation.¹⁸⁵ A murderer, writes Locke, by abandoning reason and committing a crime that cannot be retributed has “declared War against all Mankind, and therefore may be destroyed as a *Lyon* or *Tyger*, one of those wild Savage Beasts, with whom Men can have no Society nor Security.”¹⁸⁶ In the State of Nature, and in the Commonwealth, “[e]ach transgression may be *punished* to that *degree*, and with so much *Severity* as will suffice to make it an ill bargain to the Offender, give him cause to repent, and terrifie others from doing the like.”¹⁸⁷

John Rawls’s conception of liberalism sets out another common pillar of liberal thought: the government may not compel adherence to any conception of “the good life.”¹⁸⁸ He seeks to discover how “deeply opposed though reasonable comprehensive doctrines may live together and all affirm the political conception of a constitutional regime.”¹⁸⁹ Like Locke, Rawls begins with the idea that citizens are “free and equal.”¹⁹⁰ People’s moral powers, their “capacity for a sense of justice and for a conception of the good,” and their powers of reason, “of judgment, thought, and inference,” are the justification for their freedom.¹⁹¹ Citizens are equal in that they are bestowed with these powers “to the requisite minimum degree to be fully cooperating members of society.”¹⁹² According to Rawls, “reasonableness” consists of a willingness to adhere to rules of cooperation that one considers fair, so long as others do also, and a willingness to recognize “burdens of judgment,” or the sources of disagreement between reasonable people.¹⁹³ Given these burdens of judgment, reasonable people, who are fully rational, can hold different and incompatible moral viewpoints.¹⁹⁴ Because there are various reasonable doctrines¹⁹⁵ to which reasonable people may subscribe, each reasonable person acknowledges that their preferred doc-

184. *Id.* at 272.

185. *Id.* at 272–73.

186. *Id.* at 274.

187. *Id.* at 275; *see also id.* at 357 (The legislature cannot be granted powers by the members of society that they did not possess to begin with.).

188. PETER JOSEPHSON, *THE GREAT ART OF GOVERNMENT: LOCKE’S USE OF CONSENT* 12 (2002).

189. JOHN RAWLS, *POLITICAL LIBERALISM* xviii (1993).

190. *Id.* at 19.

191. *Id.*

192. *Id.*

193. *Id.* at 54–55. Included among the burdens of judgment are empirical and scientific evidence, the relative weight given to different considerations, interpretation of vague ideas, different experiences, and different types of normative considerations. *Id.* at 56–57.

194. RAWLS, *supra* note 189, at 58.

195. Rawls attributes three elements to reasonable doctrines: (1) reasonable doctrines are “exercise[s] of theoretical reason,” yielding largely coherent systems of values; (2) reasonable doctrines employ practical reason, weighing conflicting values; (3) reasonable doctrines are, for the most part, stable over time, though they may evolve. *Id.* at 59.

trine is only one among many reasonable options.¹⁹⁶ Therefore, they do not seek to suppress other reasonable comprehensive views, as to do so would demonstrate an unwillingness to recognize burdens of judgment.¹⁹⁷

Rawls goes on to set forth a list of rights that must be afforded to citizens under his conception of justice as fairness. All persons who possess the moral powers of reasonableness and rationality¹⁹⁸ are deemed equal citizens.¹⁹⁹ There is a set of “primary goods” which are necessary for citizens to bring to bear their two moral powers.²⁰⁰ These include, *inter alia*, the basic liberties of freedom of conscience, freedom of thought, political liberties, freedom of association, etc.,²⁰¹ and “the social bases of self-respect . . . normally essential if citizens are to have a lively sense of their own worth as persons and to be able to develop and exercise their moral powers and to advance their aims with self confidence.”²⁰² These primary goods must be upheld by a society adhering to Rawls’s conception of justice as fairness, regardless of the detriment to other interests.²⁰³

The liberties of Rawls’s liberalism, though, do not extend to those who do not possess the two moral powers of reasonableness and rationality. Rawls acknowledges that there will always be some unreasonable people and suggests that “[t]his gives us the practical task of containing them—like war and disease—so that they do not overturn political justice.”²⁰⁴ Rawls’s derision of utilitarian concerns fades when the fate of those who do not accept his liberal premises is at issue.²⁰⁵ It is only the reasonable whose opinions count in the formation of constitutional principles.²⁰⁶

While there is a panoply of different liberal ideologies,²⁰⁷ a few main pillars are typical of liberal citizenship. The baseline premise of equality among individuals manifests itself in the extension of a set of universal

196. *Id.* at 60.

197. *Id.* at 61.

198. To be reasonable and rational is to have the “capacity to honor fair terms of cooperation . . . and for a conception of the good.” RAWLS, *supra* note 189, at 302.

199. *Id.* at 302.

200. *Id.* at 307.

201. *Id.* at 308; *see id.* at 291; *see also id.* at 334–35 (making the argument for the necessity of these basic liberties, including a system of representative democracy, for the exercise of moral powers and the pursuit of the good).

202. *Id.* at 308–09; *see also id.* at 318 (“[S]elf-respect presupposes the development and exercise of both moral powers and therefore an effective sense of justice. The importance of self-respect is that it provides a secure sense of our own value, a firm conviction that our determinate conception of the good is worth carrying out.”).

203. *See id.* at 294–99.

204. RAWLS, *supra* note 189, at 64 n.19.

205. Furman, *supra* note 172, at 1210; *see also id.* at 1201–14 for a detailed discussion on the limitations and ambivalences of Rawls’s philosophy. But, I believe Furman misconstrues Rawls’s concept of reasonableness. He characterizes the first element of reasonableness as “the willingness to propose principles on which all can agree,” *id.* at 1205, and claims this assumes the existence of norms on which all can agree. This element, however, is more properly described as a general willingness to conform to rules that one believes should be generally applicable, a willingness to avoid exceptionalism or special treatment. *See* RAWLS, *supra* note 189, at 50, 54 (describing the element’s “reciprocity” idea).

206. RAWLS, *supra* note 189, at 137.

207. *See, e.g.*, JONES & GAVENTA, *supra* note 162, at 3 (describing the “civil liberalism” of T. H. Marshal and the “utilitarian liberalism” of John Rawls).

rights guaranteed by the rule of law, the formation of a social contract, toleration of competing moral conceptions, and cosmopolitanism.

B. Felon Disenfranchisement's Consistency with Liberalism

The ability to vote is generally regarded as a fundamental human and political right.²⁰⁸ The right to vote has often been tied to the liberal notion of equality. Locke believed that man's natural equality meant he could not be subjected to the will of another without his consent.²⁰⁹ Equality was the premise by which Rawls justified political liberties,²¹⁰ and Ronald Dworkin argued that because "equal concern and respect" are due to all members of the community, "day-to-day political decisions [must] be made by officials who have been chosen in popular elections."²¹¹ The Supreme Court has declared, "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."²¹²

In the days of civil death, felon disenfranchisement was only logical. If an individual loses all rights and is only "gratuitously" kept alive, one would not expect that individual to have the right to vote.²¹³ But today "civil death" is an obsolete concept. The death penalty is an exceptional punishment,²¹⁴ and we do not adhere to the idea "that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society."²¹⁵ Since ex-felons retain most of their political rights, disenfranchisement seems to be an anomaly in need of justification.

The most elementary aspects of liberalism are protection of individual rights and the equality of mankind. Liberals therefore must look with skepticism at the exclusion of any segment of society from the enjoyment of a

208. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. Doc A/810 (Dec. 12, 1948) (Article 21, clause 1 of the Universal Declaration of Human Rights states, "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives."); see also *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."); KEYSAR, *supra* note 3, at xvi; JONES & GAVENTA, *supra* note 162, at 8; Fletcher, *supra* note 85, at 1901 (1999) ("We cannot tolerate a mass denial of voting rights to a significant segment of the population.").

209. LOCKE, *supra* note 174, at 330–31.

210. See *supra* notes 153–158 and accompanying text.

211. RONALD DWORKIN, *FREEDOM'S LAW* 17 (1996).

212. *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

213. Fletcher, *supra* note 85, at 1899.

214. *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (noting that contemporary standards prohibit mandatory application of the death penalty for any crime, including first degree murder).

215. WILLIAM BLACKSTONE, 4 *COMMENTARIES* *374; see also *Woodson*, 428 U.S. at 289 ("[T]he Colonies at the time of the Revolution imposed death sentences on all persons convicted of any of a considerable number of crimes, typically including at a minimum, murder, treason, piracy, arson, rape, robbery, burglary, and sodomy.").

fundamental right, especially the right to vote, which is so important to the protection of all other rights.²¹⁶ This value is recognized in American Constitutional jurisprudence, as severe limitations on voting rights are subject to heightened scrutiny.²¹⁷ For felon disenfranchisement to conform to the liberal conception of citizenship, it must be demonstrated that felons, for some reason, are unequal to other citizens in a way that implicates their political freedom and justifies their exclusion from the franchise. Generally, felon disenfranchisement laws have been classified as either voting restrictions or as part of the punishment for relevant offenses. But does either classification adhere to liberal principles?

Because felon disenfranchisement does not serve any penological goals, the deprivation of convicts' political liberties cannot be justified as punishment. Locke's principle that criminals should be "punished to that degree, and with so much severity as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like"²¹⁸ has since been reformulated as four aims of punishment: retribution, deterrence, rehabilitation, and incapacity.²¹⁹ Retribution is generally rejected by liberals as a legitimate justification for punishment. "[R]evenge without respect to the example and profit to come," Hobbes wrote, "is a triumph, or glorying, in hurt of another, tending to no end (for the end is always somewhat to come); and glorying to no end is vainglory, and contrary to reason . . ." ²²⁰ For the vast majority of crimes, disenfranchisement would not function as a proper retributive measure. Charles de Montes-

216. In *Reynolds*, the Court addressed the importance of suffrage:

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

377 U.S. at 561–62; see also *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless [voting] is regarded as a fundamental political right, because preservative of all rights."); Lippke, *supra* note 170, at 556–57.

217. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("[A]s we have recognized when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)); see also *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."); *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972) ("In the present case, whether we look to the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel) we conclude that the State must show a substantial and compelling reason for imposing durational residence requirements.").

218. LOCKE, *supra* note 174, at 275.

219. See Andrea Steinacker, Note, *The Prisoner's Campaign: Felon Disenfranchisement Laws and the Right to Hold Public Office*, 2003 B.Y.U. L. REV. 801, 818 (2003) (listing the traditional justifications for disenfranchisement).

220. Thomas L. Pangle, *Should Felons Vote? A Pragmatic Debate Over the Meaning of Civic Responsibility* 7 (2003) (unpublished manuscript, on file with author) (quoting THOMAS HOBBS, *THE LEVIATHAN* chap. 15 (1651)).

quieu wrote, “Liberty is in perfection when criminal laws derive each punishment from the particular nature of the crime.”²²¹ For non-political crimes, it is difficult to see the connection between the crime itself and a punishment of disenfranchisement. Also, permanent disenfranchisement is not a punishment that varies in severity according to the severity of the crime. If the length of the disenfranchisement period is tied to the amount of time a convict is incarcerated or under the supervision of the criminal justice system, it will be proportional to the gravity of the crime committed, assuming the duration of the punishment is tied to the significance of the crime. However, under a regime of permanent disenfranchisement, “the murderer given a life sentence and the shoplifter given a suspended sentence receive the same treatment.”²²² This contravenes the liberal principle that “a criminal sentence must be proportionate to the crime for which the defendant has been convicted.”²²³

It is unrealistic to believe that the other standard purposes for punishment would be advanced by disenfranchisement. Considering the punishment and collateral consequences that already accompany criminal conviction, loss of the right to vote is unlikely to provide any significant deterrent effect. The low visibility of disenfranchisement as a consequence of crime exacerbates its impotence as a deterrent.²²⁴ Not only does felon disenfranchisement not aid rehabilitation, it may in fact impede it. Voting is thought by many to be a virtue-inducing exercise, drawing citizens’ attention to the common good.²²⁵ By blocking the formation of virtue, disenfranchisement may actually serve to make recidivism more likely.²²⁶ Fi-

221. 1 CHARLES DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 98 (Thomas Nugent, trans., J. V. Prichard ed., Fred B. Rothman Co. 1991) (1748); see also *Solem v. Helm*, 463 U.S. 277, 286 (1983) (the Supreme Court has recognized the requirement of proportionality between a crime and its punishment for over a century); *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., dissenting) (“Proportionality—the notion that the punishment should fit the crime—is inherently a concept tied to the penological goal of retribution.”). For a brief history of the proportionality requirement and its common law origins, see *Solem*, 463 U.S. at 284–88.

222. *Johnson-Parris*, *supra* note 2, at 131.

223. *Solem*, 463 U.S. at 290.

Indeed, barely three months after the [English] Bill of Rights was adopted, the House of Lords declared that a “fine of thirty thousand pounds, imposed by the court of King’s Bench upon the earl of Devon, was excessive and exorbitant, against magna charta, the common right of the subject, and against the law of the land.”

Id. at 286 (quoting *Earl of Devon’s Case*, 11 State Trials 133, 136 (1689)).

224. *Johnson-Parris*, *supra* note 2, at 131–32 (noting the “low visibility” of disenfranchisement as a deterrent and questioning its effectiveness).

225. See *infra* Part III; Pangle, *supra* note 220, at 7 (“Now, if we deprive prisoners of the vote, we are cutting them off from participation in the political process, and thereby diminishing the chances that they will take an active interest in the affairs of the community . . .”).

226. MONTESQUIEU, *supra* note 221, at 88.

The severity of punishments is fitter for despotic governments, whose principle is terror, than for a monarchy or a republic, whose spring is honour and virtue. In moderate governments, the love of one’s country, shame, and the fear of blame are restraining motives, capable of preventing a multitude of crimes.

Id.

nally, the only crimes which disenfranchisement could possibly inhibit are undertakings involving voter fraud. The commission of all other crimes is completely unconnected to voting and would not be aided by extending the franchise to felons. Because no penological interest is served by felon disenfranchisement, it is not justifiable as a means of punishment.

One common liberal justification for felon disenfranchisement is that felons have violated the social contract, thereby forfeiting the right to vote; law-abidingness is a qualification for voting. This belief dates back to the English "Levellers" of the 1640s,²²⁷ and was shared by such patriarchs of liberal thought as John Stuart Mill²²⁸ and Jean-Jacques Rousseau, who wrote:

Every malefactor who attacks the social right becomes through his transgressions a rebel and a traitor to the homeland; in violating its laws he ceases to be a member, and he even wages war with it He has broken the social treaty and consequently . . . he is no longer a member of the state.²²⁹

The same argument, with less flourish, was accepted by Judge Friendly in *Green v. Bd. of Elections of the City of N.Y.*²³⁰ Answering the Equal Protection challenge to New York's felon disenfranchisement statute, Friendly wrote,

The early exclusion of felons from the franchise by many states could well have rested on Locke's concept, so influential at the time, that by entering into society every man "authorizes the society, or which is all one, the legislature thereof, to make laws for him as the public good of the society shall require, to the execution whereof his own assistance (as to his own decrees) is due." A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact.²³¹

In *Shepherd v. Trevino*, the Fifth Circuit declared that the state had a legitimate interest in denying the vote to those "who have manifested a fundamental antipathy to the criminal laws of the state or of the nation by violating those laws sufficiently important to be classed as felonies."²³² Such persons, the court reasoned, "have breached the social contract and, like insane persons, have raised questions about their ability to vote responsibly."²³³ According to this theory, felons have entered into a contract with the rest of society by which they pledged to abide by the laws authorized by the

227. Ewald, *supra* note 6, at 1074.

228. *Id.* at 1075.

229. *Id.* at 1074 (quoting JEAN-JACQUES ROUSSEAU, BASIC POLITICAL WRITINGS 159 (Donald A. Cress ed. & trans., Hackett Publ'g 1987) (1762)).

230. 380 F.2d 445 (2d Cir. 1967).

231. *Id.* at 451 (quoting JOHN LOCKE, AN ESSAY CONCERNING THE TRUE, ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT 89 (1690)).

232. 575 F.2d 1110, 1115 (5th Cir. 1978).

233. *Id.*

majority. By committing felonies, they breach the terms of this contract.²³⁴ The provisions of the contracts are constantly reformed through the legislative process, and the breacher loses the right to have a say in the negotiations.²³⁵ The loss of rights resulting from a breach of the contract is proportional to the breach itself; a decision to ignore the laws of society results in an exclusion from the making of the laws.²³⁶

Rawls's social contract granted political liberties and social respect to all *reasonable* citizens, but the "reasonableness" caveat may be employed to justify felon disenfranchisement. Reasonableness, again, lies in citizens' acceptance of reciprocity, while the unreasonable "plan to engage in cooperative schemes but are unwilling to honor . . . any general principles or standards for specifying fair terms of cooperation."²³⁷ By committing a felony, it can be argued, one dishonors fair terms of cooperation. The felon refuses to abide by the rules that she would presumably insist that others abide by. Therefore, she is unreasonable and not entitled to the liberties and respect shared by reasonable and rational citizens. In fact, such a person is a danger to political justice itself and certainly cannot remain an active player in the political system.²³⁸

Despite its initial attractiveness, the use of social contract theory to defend felon disenfranchisement is in fact specious. Under a regime of disenfranchisement, an individual who breaches the social contract continues to be bound by the terms of the contract even after being stripped of the ability to take part in political decisions. However, contract doctrine does not allow an injured party to force the breacher to perform its contractual duties without the injured party performing its own.²³⁹ The contract can be terminated²⁴⁰ or the injured party can accept the performance,²⁴¹ but the injured party cannot simply pick and choose which terms will remain and

234. Johnson-Parris, *supra* note 2, at 129; Pangle, *supra* note 220, at 12.

235. "The contractarian approach to disenfranchisement 'emphasizes the deliberative nature of the criminal's decision to breach the social charter as justification for withholding the franchise and effectively silencing the felon in the ongoing contract negotiation.'" Johnson-Parris, *supra* note 2, at 129 (quoting Note, *supra* note 10, at 1304–05). However, in Lockean thought, the actual laws of the state at any one time are not properly thought of as the terms of the contract. The contract is an agreement to submit to the rule of the majority, not an agreement to any specific substantive laws, unless those conditions on the contract are set out beforehand. See LOCKE, *supra* note 174, at 333 (discussing the significance of consent in the social compact).

236. See Johnson-Parris, *supra* note 2, at 127; Fletcher, *supra* note 85, at 1899 ("The only rationale for disenfranchisement that makes sense is that felons, by virtue of their crime and their conviction forfeit their right to participate in the political process.").

237. RAWLS, *supra* note 189, at 50.

238. *Cf. id.* at 64 n.19 (noting that certain doctrines reject democratic freedoms and must be contained).

239. Farnsworth explains:

The nonoccurrence of a condition of an obligor's duty may have two distinct effects. First, the obligor is entitled to suspend performance on the ground that the performance is not due as long as the condition has not occurred. Second, if a time comes when it is too late for the condition to occur, the obligor is entitled to treat its duty as discharged and the contract as terminated.

E. ALLAN FARNSWORTH, *CONTRACTS* 8.3 at 399–400 (2d ed. 1998).

240. *Id.*

241. *Id.* at 8.19.

which will not. That unfounded remedy is, in essence, what Judge Friendly's argument ratifies. When an individual breaches the social contract by committing a felony, she "pays damages" by enduring the punishment associated with the particular crime. But the felon remains subject to the laws of society, which necessarily means the contract continues (or is immediately renewed).

According to Locke, an individual is only subject to a community's laws if she explicitly or implicitly enters into the social contract.²⁴² Those who are not in a community retain the liberty they enjoyed in the state of nature, while those who are in a community have a voice in the political decisions made by the society.²⁴³ Locke speaks of no halfway status whereby one bears the restrictions of civil society without an accompanying role in determining those restraints: "The *Liberty of Man, in Society*, is to be under no other Legislative Power, but that established, *by consent*, in the Common-wealth . . ." ²⁴⁴ One who is subjected to a society's laws without having the opportunity to partake in the lawmaking process lives under the rule of those with the franchise. Disenfranchisement consigns felons to a status not contemplated by social contract theory whereby they are governed without their consent.²⁴⁵

The contractarian explanation for felon disenfranchisement typically presumes that the criminal has rejected the rule of the majority.²⁴⁶ This presumption would be necessary to justify disenfranchisement from a Rawlsian perspective because a disenfranchised individual must be unreasonable, or unwilling to abide by the rules she deems fair. However, this presumption is not necessarily accurate. Much as not all sinners are heretics or apostates, not all those who violate the laws of civil authorities reject the rule of civil authorities, or even the laws they have violated. In interviews with criminal defendants, Jonathan Casper found that virtually all "believed that they had done something 'wrong,' that the law they violated represented a norm that was worthy of respect and that ought to be followed."²⁴⁷ Some laws are violated in moments of weakness, rage, desperation, or any other of a host of possible emotions. It is a stretch to classify a possibly momentary lapse of judgment as naked rebellion. Even someone who violates the law habitually, such as a drug dealer, may still think that what she is doing is wrong, but continue anyway out of des-

242. See LOCKE, *supra* note 174, at 330–31, 347–49.

243. See LOCKE, *supra* note 174, at 331.

244. *Id.* at 283 (emphasis added).

245. See Johnson-Parris, *supra* note 2, at 133–34. ("The disenfranchised felon, as a party to this social contract, has no part in [the governing] process, which calls into question the government's delegated authority and undermines the fairness of this arrangement.").

246. See *Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978) (attributing to criminals "a fundamental antipathy to the criminal laws of the state or of the nation . . ."); Ewald, *supra* note 6, at 1079–80 ("Felons . . . have 'rejected the right of others to govern them,' and therefore are properly denied 'the right to govern others.'" (quoting John Silber, *Mass. Inmates Shouldn't Vote*, BOSTON HERALD, Oct. 24, 2000, at 33)); Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 172 (2001) ("It is not too much to demand that those who would make the laws for others—who would participate in self-government—be willing to follow those laws themselves.").

247. Ewald, *supra* note 6, at 1100 (quoting JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 146 (1972)).

peration. Often, inmates occupy the lowest rungs of the socioeconomic ladder.²⁴⁸ Hence they are much more likely to have grown up with numerous disadvantages, including lower quality housing, lower quality education, poorer health-care, increased prevalence of substance and child abuse, and greater alienation from society at large.²⁴⁹ Prison inmates are also disproportionately African American and Hispanic²⁵⁰ and often suffer from substance abuse problems.²⁵¹ Their crimes do not necessarily betray a rejection of the rest of society, but can instead be an attempt to deal with society's rejection of them. When crime is the only way for one to obtain any measure of economic security, it is not a moral statement, but rather an act of necessity. "[I]t must be recognized that [felons'] disenfranchisement can plausibly be viewed not as the first step toward rendering them civil and political outcasts, but as one of the final steps toward doing so."²⁵²

Also, not all felons know the legal status of their actions at the time the crime is committed. It is quite conceivable that a Floridian could lasso the legs of a horse²⁵³ or molest a marine turtle species²⁵⁴ without realizing the action is illegal, let alone a felony. Doing so would hardly make one a scofflaw who rejects the rule of the majority. Granted, most felons are probably convicted of crimes they know are illegal. But when a violation is merely *malum prohibitum*, guilt of the crime does not necessarily imply knowledge that the action in question was prohibited. While it would be infeasible to operate a criminal justice system that requires such knowledge for guilt, it is not infeasible to distinguish between different types of felonies when deciding who, if anyone, shall lose the right to vote.

Another potential problem with rooting the disenfranchisement of felons in contractarian terms is that it proves too much. If the violation of a law divulges an unwillingness to be bound by the social contract that

248. See Lippke, *supra* note 170, at 575.

249. See *id.* at 575–76 (also listing decreased cultural exposure, worse neighborhoods, and greater disaffection as disadvantages of poverty).

250. *Id.* at 576 (“[R]oughly half of all prison inmates are African-American, whereas African-Americans constitute only about thirteen percent of the United States population overall.”).

251. *Id.* One may argue that substance abuse is no excuse for violating the social contract because one cannot become addicted without using the drug an initial time before addiction. While this may be true, the majority of young adults have used illicit drugs in their lifetime. See U.S. DEP’T. OF HEALTH AND HUMAN SERVICES, OVERVIEW OF FINDINGS FROM THE 2002 NATIONAL SURVEY ON DRUG USE AND HEALTH, <http://oas.samhsa.gov/nhsda/2k2nsduh/Overview/2k2Overview.htm#toc> (Sept. 2003) (In 2002, 53.8% of young adults ages 18–25 had used marijuana in their lifetime. The peak percentage was 54.4% in 1982 and the figure has not dipped below 43% since the mid-1970s). Therefore, if current trends continue, one day the majority of voting age Americans will have used illegal drugs at some point in their lives. If illegal drug use in and of itself were to be deemed grounds for permanent disenfranchisement, it would be difficult to label our society a democracy.

252. Lippke, *supra* note 170, at 577.

253. FLA. STAT. ANN. § 828.12(4) (West 2004) (“A person who intentionally trips, fells, ropes, or lassos the legs of a horse by any means for the purpose of entertainment or sport shall be guilty of a third degree felony.”).

254. FLA. STAT. ANN. § 370.12(e)(5) (West 2004) (“Any person, firm, or corporation that illegally takes, disturbs, mutilates, destroys, causes to be destroyed, transfers, sells, offers to sell, molests, or harasses any marine turtle species . . . commits a third degree felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.”).

one had previously agreed to and betrays disrespect for the law, then those found guilty of misdemeanors or traffic violations should also be disenfranchised. Though those violations themselves may be less serious than felonies, driving over the speed limit, failing to come to a complete stop at a red light, and intentionally letting a parking meter expire, they nonetheless demonstrate a willingness to ignore laws that were properly enacted by society's chosen representatives. Traffic violators thumb their nose at the democratic process. It is unclear why the seriousness of a crime would affect the applicability of the principle in question.

A justification of the distinction between felonies and misdemeanors for purposes of disenfranchisement could be that only commission of a felony constitutes a substantial breach of the social contract. In contract doctrine, trivial breaches entitle the non-breaching party only to damages in the amount of the decrease in the performance's value stemming from the breach. Neither party's rights or duties are otherwise effected by an insubstantial breach. Likewise, a misdemeanor or minor violation of the law may be thought of as too insubstantial to justify an alteration of the rights or duties of the social contract. However, given that crimes resulting in up to a year in prison are generally classified as misdemeanors, it seems difficult to classify such transgressions as *de minimus*. Furthermore, "[t]he criminal law distinguishes between felonies and misdemeanors on grounds that are simply too arbitrary for philosophical purposes."²⁵⁵ There is no explanation for why the transgressions on one side of this arbitrary line are *de minimus* and should not result in disenfranchisement while those on the other should.

Permanent disenfranchisement in particular is difficult to justify on the basis that the felon has rejected the concept of majority rule. The fact that someone committed a crime in 1932 does not mean that today the person harbors "a fundamental antipathy to the criminal laws of the state or of the nation."²⁵⁶ Even if crimes did constitute some sort of rebellion against the majority at the time they were committed, this would not necessarily reflect the mindset of the ex-felon as she grew older. The fact that youthful rebelliousness often disappears as we age is obvious. Recent research suggests there may be a biological explanation for this phenomenon. A National Institute of Mental Health researcher recently observed that during puberty there are significant changes in the frontal sections of the brain, which are believed to be responsible for judgment, reasoning, and self-control.²⁵⁷ Given the large drop in arrest rate that takes place as age increases,²⁵⁸ the notion that someone who was a criminal at twenty is

255. Lippke, *supra* note 170, at 563 n.18.

256. *Shepherd*, 575 F.2d at 1115.

257. See Shankar Vedantam, *Are Teens Just Wired That Way?*, WASH. POST, June 3, 2001, at A1 ("[Jay] Giedd and [Paul] Thompson's work is part of a growing body of scientific evidence suggesting that rebelliousness and other stereotypical teenage behaviors commonly blamed on raging hormones may be partly caused by a burst of rapid change sculpting the developing teenage brain.").

258. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OJJDP STATISTICAL BRIEFING BOOK, <http://ojjdp.ncjrs.org/ojstatbb/html/qa276.html> (May 21, 2003) (In 2001, the peak age for Violent Crime Index arrest rate was 21. Among 35- to 39-year-olds, the rate was less than half that of 21-year-olds and the rate for 50- to 54-year-olds was less than 13% the 21-year-old rate).

necessarily a criminal at fifty is unsound. Because people's characters are not static, the theory that felons reject the democratic rule cannot justify permanent disenfranchisement.

One of the most common arguments in favor of denying the franchise to felons is also the most illiberal and undemocratic. "This is the fear that criminals will vote, presumably in concert, to weaken the criminal law and law enforcement—that is, they will vote in a way 'subversive of the interests of an orderly society.'"²⁵⁹ This fear was expressed in Congressional testimony²⁶⁰ and by Judge Friendly in *Green v. Bd. of Elections of the City of N.Y.*:

[I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be.²⁶¹

The certainty of Friendly's diction is a thin veil for the weakness of his argument. Nothing could be more abhorrent to a liberal-democratic system than for certain individuals to be excluded from the franchise based on how they would vote. Such a policy entrenches certain policy judgments, insulating them from reconsideration by the majority, who is prevented from enacting their will or choosing their representatives.²⁶² There

259. Ewald, *supra* note 6, at 1079 (quoting *Richardson v. Ramirez*, 418 U.S. 24, 81 (1974) (Marshall, J., dissenting)); see also Fletcher, *supra* note 85, at 1906; Mauer, *supra* note 3, at 249; Lippke, *supra* note 170, at 570; Furman, *supra* note 172, at 1221–22.

260. *A Bill to Secure the Federal Voting Rights of Persons Who Have Been Released from Incarceration: Hearing on H.R. 906 Before the House Comm. on the Judiciary, Subcomm. on the Constitution*, 106th Cong. at 90–95 (1999) (statement of Todd Graziano, Senior Fellow, Heritage Foundation):

[A] large and important part of government is devoted to law enforcement. Criminal disenfranchisement allows citizens to decide law enforcement issues without the dilution of voters who are deemed either to be less trustworthy or to have waived their right to participate in those decisions.

....

... Given that many poor and minority communities are ravaged by crime, the proposed solution could have a perverse effect on the ability of law-abiding citizens to reduce the deadly and debilitating crime in their communities. At least on the crime issue, it could be argued that those communities that currently have the highest level of state disenfranchisement are the most protected by those laws and would be the most adversely affected by the vote of "unreformed" convicts in their communities. The fact that so many states have these felony disenfranchisement laws is strong evidence that many citizens do not want their ability to influence crime control decisions to be diluted by convicted felons on parole or otherwise.

261. 380 F.2d 445, 451–52 (2d Cir. 1967).

262. Granted, all enforceable rights can be viewed as a constraint upon the will of the majority. However, the rights granted by the U.S. Constitution were chosen by democratically elected leaders and can therefore be viewed as decisions, on the part of

is no practical or theoretical difference between keeping individuals out of the voting booth because of positions they may (or may not) hold, and keeping legislators off the ticket because of positions they hold. Friendly and Graziano's position is eerily evocative of the recent Iranian parliamentary elections, in which over 2500 reformist candidates were removed from the ballot by the nation's right-wing clerical Guardian Council based on their substantive views.²⁶³ This flies in the face of many liberal tenets, including toleration of opposing viewpoints,²⁶⁴ majority rule (albeit usually with limits),²⁶⁵ and citizens' ability to use the franchise in defense of their interests.²⁶⁶

The fear of "subversive voting" is not grounded in practical reality. First, it assumes that convicts, as a block, would vote in favor pro-crime policies. This assumption may well be false, as voters usually do not vote on just one issue,²⁶⁷ and convicts may see themselves or their loved ones as potential future victims.²⁶⁸ There is no empirical evidence suggesting the assumption's veracity and Casper's aforementioned interviews would suggest it is likely false.²⁶⁹ Once felons organized into an effective anti-crime-enforcement voting block, they would have to get their pro-crime candidate(s) elected by the majority of the voting population. In order to affect legislation, these pro-crime candidates would have to get the majority of each house of a state's legislature, or Congress, to vote in favor of pro-crime measures, and have these measures signed by the governor or president. This scenario is unrealistic.²⁷⁰ But if this implausible scenario did come to pass, it would mean the majority of the population supported these "pro-crime," or more likely merely lenient, measures. Why then should Mr.

the polis, to bind itself to the mast. See THE FEDERALIST No. 44, at 301 (Jacob E. Cooke ed., 1961):

The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community.

Also, there is a difference between limiting the scope of government and majority rule in favor of individual rights, and limiting individual rights in order to doctor what positions are in the majority.

263. *A Sorry Election*, ECONOMIST, Feb. 23, 2004, http://economist.com/agenda/displayStory.cfm?story_id=2456871.

264. See generally RAWLS, *supra* note 189.

265. See, e.g., LOCKE, *supra* note 174, at 331–33; DWORKIN, *supra* note 211, at 17 ("[T]he constitutional conception requires . . . majoritarian procedures out of a concern for the equal status of citizens . . .").

266. See Ewald, *supra* note 6, at 1079; see also Furman, *supra* note 172, at 1216–17; JONES & GAVENTA, *supra* note 162, at 8 ("[I]n liberal thought 'the function of the political realm is to render service to individual interests and purposes, to protect citizens in the exercise of their rights, and to leave them unhindered in the pursuit of whatever collective and individual interests they have.'" (quoting, ADRIAN OLDFIELD, CIVICSHIP AND COMMUNITY: CIVIC REPUBLICANISM AND THE MODERN WORLD 2 (1990))).

267. See Ewald, *supra* note 6, at 1099.

268. See Lippke, *supra* note 170, at 570.

269. See Ewald, *supra* note 6, at 1099–1100 n.219 and accompanying text.

270. Mauer, *supra* note 3, at 248–49; see also Furman, *supra* note 172, at 1222; Lippke, *supra* note 170, at 570.

Graziano or Judge Friendly's conception of optimal crime policy triumph over the will of the majority? Limiting the franchise to those who adhere to some orthodox position illiberally undermines representative democracy and respect for individuals' moral powers.²⁷¹ The United States Supreme Court has declared, "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. 'The exercise of rights so vital to the maintenance of democratic institutions' cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents."²⁷² Even if all criminals were recidivists,²⁷³ their direct interest in a prosecutor or judge's performance of her duties is not an argument against allowing convicts to vote. As George Fletcher has written, "Indeed voting is precisely about expressing biases, loyalties, commitments and personal values."²⁷⁴ Defendants' accusers are permitted to vote, as is the general public, whose fear of crime may demand the conviction or strenuous prosecution of defendants whose guilt is dubious. Eliminating convicted felons from the voter roles "skews the politics of criminal justice toward one side of the debate."²⁷⁵ Considering many criminal justice scholars have been calling for less harsh penalties for years,²⁷⁶ perhaps dispensing with this skew and bringing greater balance to the criminal justice debate will improve criminal justice policy.

Social contract theory and the objectives of punishment fail to provide a satisfactory explanation for the denial of one of the most fundamental rights to millions of citizens. Furthermore, limiting the franchise based on substantive policy preferences is inconsistent with liberal thought and the concept of democracy itself. Accordingly, liberal citizenship theory stands in opposition to felon disenfranchisement.

III. REPUBLICAN CONCEPT OF CITIZENSHIP

A. *Definition and Explanation of Republicanism*

Republicanism stands in stark contrast to the individual-focused thought of liberalism. Republicanism holds that political community is a good in and of itself: "political traditions constitute living totalities that cannot be reduced to the purposes of individuals or the goals of sub-communities, and our humanity would be diminished if our lives lacked

271. See RAWLS, *supra* note 189, at 19 (discussing the two moral powers attributed to "full participants in a fair system of social cooperation") and 334–35 (discussing the importance of representative democracy), see also LOCKE, *supra* note 174, at 331–33; DWORKIN, *supra* note 211, at 17.

272. *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (internal citation omitted) (rejecting the argument that servicemen who take up residency in Texas may stage a "take over" against the local population and oppose instrumental measures) (quoting *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939)); see also *Dunn v. Blumstein*, 405 U.S. 330, 355–56 (1972).

273. *Green*, 380 F.2d at 451–52 (supplying the prosecution of felons' "further violations" as an example of matters in which convicts cannot have a say).

274. Fletcher, *supra* note 85, at 1906.

275. *Id.*

276. Lippke, *supra* note 170, at 569–70.

a focus for this civic dimension of existence²⁷⁷ The fostering of “civic bonds” between the members of society, rather than preservation of the rights of individuals, is the focal point of republican philosophy.²⁷⁸

These bonds begin with a common identity that members of the political community must share.²⁷⁹ Patriotism, fraternity, sympathy, and a feeling of belonging inspire civic-republican citizens to participate in public affairs and work for the common good.²⁸⁰ Because of the strong civic bonds tying the citizen to the community, the citizen subordinates her own interests in favor of those of the community as a whole.²⁸¹ By virtue of being members of the same community, citizens must have some element of common interest, as there is some shared aspect of their lives.²⁸² This element can help supply the community unity necessary for public-minded deliberation.

Adrian Oldfield lists autonomy, friendship, and judgment as elements necessary for one to take on the role of a citizen in a political community. While humans are deeply affected by their social roles,²⁸³ there is some measure of separation between the self and one’s position in social hierarchies.²⁸⁴ This separation constitutes individual autonomy, but to be consistent with community life, “[a]utonomous conduct requires some kind of affective or moral dimension.”²⁸⁵ Oldfield’s autonomous beings are social

277. BEINER, *supra* note 164, at 31; *see also* Cohen, *supra* note 165, at 246 (“The civic republican and committed democrat . . . argue that democracy and participation are intrinsically valuable, and should play the most important role in specifying, justifying and protecting citizens’ rights.”).

278. BEINER, *supra* note 165, at 30.

279. JONES & GAVENTA, *supra* note 162, at 4–5, 14; *see also* Cohen, *supra* note 165, at 246 (“[Democracy] requires a demos, a ‘we’ to which individual citizens feel they belong, in whose deliberations they have a voice, and toward which they can accordingly feel a sense of shared fate and solidarity.”).

280. “[C]itizenship does not reside solely in the individual possession of rights, or even participation What characterizes citizen participation is not the protection or advancement of individual rights and interests, but a ‘public responsibility’: attention to a version of the common good.” OLDFIELD, *supra* note 266, at 160; *see also id.* at 148; William A. Galston, *The Formation of Civic Character*, in SEEDBEDS OF VIRTUE 46 (Mary Ann Glendon & David Blankenhorn eds., 1995); Pangle, *supra* note 220, at 11.

281. “[R]epublicans tend to view democratic citizens not as atomistic, isolated individuals, but as a body held together by common interest—as ‘a single organic piece . . . with a unitary concern that [is] the only legitimate objective of government policy.’” Ewald, *supra* note 6, at 1051 (quoting GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* 58 (1969)); *cf.* OLDFIELD, *supra* note 266, at 22–23; JONES & GAVENTA, *supra* note 162, at 4–5; Stephen L. Elkin, *Citizen Competence and the Design of Democratic Institutions*, in CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS 401 (Stephen L. Elkin & Karol Edward Soltan eds., 1999); Pangle, *supra* note 220, at 11.

282. *Cf.* JANE MANSBRIDGE, *BEYOND ADVERSARIAL DEMOCRACY* 18 (1980); BEINER, *supra* note 164, at 198 (“One can say that however much pluralism (either individual pluralism or group pluralism or both) there may be within a political society, its very character as a political society confers upon it a shared way of life”).

283. *See* OLDFIELD, *supra* note 266, at 19.

284. *See id.* at 20.

285. *Id.*; *see also* Beiner, *supra* note 164, at 197–98 (arguing that because we do not live in a vacuum, but instead a social network, autonomous individuals must have some control over the structure of these social institutions that shape their lives).

by nature and see “living itself as a shared venture.”²⁸⁶ They feel a unity to the community itself, not just to the members of the community,²⁸⁷ and agree to live together with mutual concern for each other’s interests and respect for each other’s autonomy.²⁸⁸ The members of the community, through the democratic process, set forth the “identity and ethos” of the community, making all burdens voluntary.²⁸⁹ The friendship between community members inspires them to bring their judgment to bear on issues of community-wide importance. Oldfield contends that such citizenship is not natural to humans, and mankind must be educated to take on community concerns.²⁹⁰ To fulfill the obligations of citizenship, an individual must also have the requisite material and political rights to act as effective moral agents.²⁹¹

Without political participation, there is no citizenship. The essence of republican citizenship lies in the actualizing of civic bonds through involvement in public life.²⁹² Republicanism regards citizenship not as a series of rights, as liberalism does, but as the fulfillment of certain duties, mainly related to engagement in public discourse regarding community issues and defense of the nation militarily.²⁹³ Only by taking these rights seriously does one become a citizen. Being born within the borders of a society only provides eligibility for citizenship; attainment of citizenship requires exertion.²⁹⁴

Because of the self-government function fulfilled by citizens, civic-republicanism stresses the importance of maintaining citizens’ virtue. Republicans often argue that voters must have the moral competence of public-spiritedness, or the desire to achieve the common good, for democracy to operate properly.²⁹⁵ This virtue is not thought to come naturally, as humans are “weak and short sighted.”²⁹⁶ Instead, it must be inculcated into

286. OLDFIELD, *supra* note 266, at 20.

287. *See id.*

288. *Cf. id.* at 22–23.

289. *See id.* at 23.

290. *See id.* at 26, 28.

291. *See id.* at 27–28.

292. *See* BEINER, *supra* note 164, at 198 (“Being a citizen in the full sense would require . . . taking an active part, through public deliberation, in shaping and defining the political conditions of one’s life.”).

293. Niccolo Machiavelli saw military service as the primary duty of citizenship and political involvement as a secondary function. Rousseau believed that one who does not participate in public deliberation ceases to be free and will never truly be happy. Taking part in political assemblies and voluntary civic organizations was crucial to Alexis de Tocqueville’s image of the democratic American citizen. Though answering any call to military service was also important, Tocqueville thought America’s geographic isolation would protect it from being drawn into many wars. Tocqueville predicted that if economic pursuits drew citizens out of public life, political liberty would erode. OLDFIELD, *supra* note 266, at 147.

294. *Id.* at 159; *see also* Elkin, *supra* note 281, at 392; JUDITH SHKLAR, AMERICAN CITIZENSHIP 5 (1991) (distinguishing “[c]itizenship as nationality” from “[g]ood citizenship,” which entails being “a political agent who takes part regularly in politics locally and nationally . . . and speak[ing] out against public measures [one] regard[s] as unjust, unwise, or just too expensive.”).

295. Elkin, *supra* note 281, at 387; *see also* Ewald, *supra* note 6, at 1082–83.

296. OLDFIELD, *supra* note 266, at 151; *see also* MICHAEL SANDEL, DEMOCRACY’S DISCONTENT 318 (1996) (“Some republican theorists have assumed that the capacity for civic

the populace through religion, customs, and education.²⁹⁷ Beginning with childhood, individuals must be taught of the importance of public-minded political action and the duties of a citizen.²⁹⁸ While some republican thinkers, such as Rousseau, believed civic education should include breaking individuals' identities and making them all dependent upon the community, others thought independence and judgment were necessary to exercise civic virtue.²⁹⁹ But all republicans emphasize the necessity of virtue to a well-functioning polity.

Not only is virtue necessary for public participation, but public participation enhances virtue. Political participation draws one's attention toward the common good and away from individual interests, simultaneously sharpening one's ability to express one's opinion and engage with others' opinions.³⁰⁰ Voting reaffirms and strengthens one's ties to the community as a whole.³⁰¹

Republicans find liberalism's agnosticism toward competing conceptions of the good alienating. Liberals take important questions of virtue and morals off the table of public discussion, diminishing the reflective nature of the citizenship experience.³⁰² In a leading republican work, Michael Sandel writes of the impossibility of separating substantive notions of the good from politics.³⁰³ "Why insist on separating our identity as citizens from our identity as persons more broadly conceived?" Sandel asks. "Why should political deliberation not reflect our best understanding of the highest human ends?"³⁰⁴ According to Sandel, publicly minded citizens yearn to debate competing conceptions of what the good life is and how to achieve it. The removal of morality from public debate, writes Sandel, left a vacuum that was inevitably filled by the moral fundamentalism of the Christian Right and public attention to private controversies in the form of gossip, sensational talk-shows, and Presidential sex scandals.³⁰⁵ Not only is morality's presence in the public arena desirable, Sandel argues, but it is inescapable.

Republicans often hold up deliberative democracy as the ideal method by which citizens operate their judgment for the public good. Citizens will disagree on what is best and must deliberate in public discourse to try to find a resolution to matters of dispute.³⁰⁶ Since the process of deliberation is thought to enhance virtue and fuel the loyalty that drives true citizenship,³⁰⁷ and in fact serve as a fundamental pillar of citizenship, rep-

virtue corresponds to fixed categories of birth or condition.") Most lines of republicanism that have emerged since the Enlightenment, however, discard this belief in favor of the premise that "good citizens are made, not found." *Id.* at 319.

297. *OLDFIELD*, *supra* note 266, at 151–52.

298. *Id.* at 163–67. This education must include the knowledge, virtues, habits, skills, and patriotism necessary to fulfill one's citizenship duties.

299. *SANDEL*, *supra* note 296, at 319–20.

300. Lippke, *supra* note 170, at 557; *see also* Note, *supra* note 10, at 1309.

301. Ewald, *supra* note 6, at 1110–11; *see also* Pangle, *supra* note 220, at 10.

302. *See SANDEL*, *supra* note 296, at 322–23.

303. *Id.*

304. *Id.* at 322.

305. *See id.* at 323.

306. *See OLDFIELD*, *supra* note 266, at 26; *See JONES & GAVENTA*, *supra* note 162, at 4.

307. *See, e.g.,* Ewald, *supra* note 6, at 1112; *OLDFIELD*, *supra* note 266, at 159–60.

representative democracy is disfavored by many republicans as providing an insufficient citizenship experience and robbing individuals of their robust connections to their communities.³⁰⁸ Civic forums and the sharing of information are just two of the many methods devised by civic-republicans to enhance the depth of the deliberative experience.³⁰⁹ Stephen Elkin criticizes regimes in which “the principal burden of political talk will fall . . . on the political parties whose proposals and counterproposals, criticisms and replies will be the principal stuff of day-to-day politics.”³¹⁰ Instead, citizens and lawmakers must engage in deliberation in order to ensure the law-making process actually serves the citizenry:³¹¹

The casual or arbitrary exercise of power won’t generate self-respect; that’s why push-button participation would make for a morally unsatisfying politics. The citizen must be ready and able, when his time comes, to deliberate with his fellows, listen and be listened to, take responsibility for what he says and does. Ready and able: not only in states, cities, and towns but wherever power is exercised, in companies and factories, too, and in unions, faculties, and professions. Deprived permanently of power, whether at national or local levels, he is deprived also of this sense of himself.³¹²

The currently common feeling that both political parties serve their own interests as much as they serve the interests of the people is a result of the prevalence of the party-based system, Elkin decries. Public-spirited citizens enter the political debate, forcing individuals to focus on the interests of the community as a whole, or at least on interests other than their own.³¹³ Thus, deliberation and debate turn one’s eye toward the public good and one’s bonds with the rest of society. Under a purely representative form of government, it is all too easy to retreat into a cocoon and ignore the interests of others and the bonds that make a number of individuals a community.

B. *Felon Disenfranchisement’s Consistency with Republicanism*

The oldest rationale for felon disenfranchisement that is based on republicanism is the necessity of protecting our fragile democracy by keeping the wickedness of felons at bay. This argument was famously stated in the Alabama case *Washington v. State*:

It is quite common . . . to deny the right of suffrage, in the various American States, to such as have been convicted of infamous crimes. The manifest purpose is to preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption, just as

308. JONES & GAVENTA, *supra* note 162, at 4.

309. Elkin, *supra* note 281, at 391–92.

310. *Id.* at 400.

311. *Id.* at 387–88.

312. MICHAEL WALZER, SPHERES OF JUSTICE 310 (1983).

313. See Elkin, *supra* note 281, at 396.

much as against that of ignorance, incapacity, or tyranny. The evil infection of the one is not more fatal than that of the other.³¹⁴

Under this theory, the body politic is a freestanding entity in and of itself, not merely the aggregate of its members. The inclusion of unvirtuous felons will corrupt the body and weaken it.³¹⁵ Criminals are seen as bearing some sort of supernatural taint that can spread and infect the rest of society.³¹⁶ This “mystical”³¹⁷ argument cannot be taken seriously. There is no explanation for exactly how the ability of felons to vote causes others to become corrupted, nor is there any real indication of what the “purity of the ballot box” even means. There are other justifications for felon disenfranchisement, based on criminals’ immorality, that are more rational, but the “purity of the ballot box” theory is founded on ghostly fiction.

One such justification is that felons’ immorality prevents them from voting responsibly. For republicans, the franchise is not a tool for the voter to use in her best interest, it is a trust granted by the community that is to be operated for the community’s good.³¹⁸ Felons, lacking virtue, cannot be trusted to exercise the franchise with the good of the community in mind. In addition to the “purity of the ballot box” theory, *Washington* expressed the fear that criminals would vote in ways that undermined the good of the community, “It is proper . . . that this class should be denied a right, the exercise of which might sometimes hazard the welfare of communities, if not that of the State itself, at least in close political contests.”³¹⁹ This concern was also echoed in later cases.³²⁰ For republicans, the unwillingness of felons to place the public good over their own private good disqualifies them from voting.³²¹

The fear of subversive voting can also be phrased as a question of loyalty. Roger Clegg points out that foreigners, though affected by our country’s laws, are not permitted to vote in American elections.³²² “People have a right to have a say in governing themselves, but only if we are reasonably sure that they will exercise that right in good faith—that they share a common commitment to our nation, our government, and our laws.”³²³ Felons do not have that commitment and are not “trustworth[y].”³²⁴

There are some problems with these subversive voting arguments. First, assuming all convicts lack the virtue required to be good republican citizens is over-inclusive. The fact that someone violated a law is not nec-

314. 75 Ala. 582, 585 (1884).

315. Ewald, *supra* note 6, at 1082–83.

316. Furman, *supra* note 172, at 1225; Fletcher, *supra* note 85, at 1899; see Ewald, *supra* note 6, at 1083.

317. Fletcher, *supra* note 85, at 1899.

318. See, e.g., Pangle, *supra* note 220, at 12–13; Ewald, *supra* note 6, at 1083, 1087.

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

320. “A State has an interest in preserving the integrity of her electoral process by removing from the process those persons with proven anti-social behavior whose behavior can be said to be destructive of society’s aims.” *Kronlund v. Honstein*, 327 F. Supp. 71, 73 (N.D. Ga. 1971); see also *Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978).

321. Pangle, *supra* note 220, at 11–12; Thompson, *supra* note 113, at 195.

322. Clegg, *supra* note 246, at 162.

323. *Id.*

324. *Id.* at 174; see also Ewald, *supra* note 6, at 1088; Oldfield, *supra* note 266, at 160–61 (quoting WILLIAM A. GALSTON, JUSTICE AND HUMAN GOOD 265–69 (1980)).

essarily a reflection of her voting habits or her concern for the rest of the community. Some felonies, such as drug use, arguably do not harm the rest of the community and are illegal only, or mainly, for paternalistic purposes. Furthermore, as noted above, crime is often more of a reflection of desperation or weakness than it is a moral stance. There is also no evidence that felons' voting habits are any different or any less public-minded than those of the rest of society.³²⁵ As even Clegg admitted, many criminals, especially those who completed their sentences long ago, can no longer realistically be presumed to be unvirtuous.³²⁶ There is no enforcement mechanism to make sure other citizens vote with the interest of the nation as a whole in mind, and in fact the Supreme Court has decided, albeit operating under liberal principles, that the right to vote may not be abridged on the basis of a citizen's choice of how to exercise that right.³²⁷ It seems unfair to prohibit felons from voting on the premise that they do not vote with an eye towards the public good when we do not require anyone else to be publicly interested as a condition of keeping the franchise. That being said, such a requirement would be consistent with republican thought, and its absence can be justified by the impossibility of knowing what is on a voter's mind.

It would be practically impossible for treasonous felons, who seek to harm the country, to achieve their goals with any success through the electoral process. As with the (anti-)liberal fear that felons would vote for pro-crime candidates, candidates who ran on a platform of harming the community would not be elected, even if criminals did vote for them. Certainly they would not be elected in numbers large enough to forward their agenda. Hypothetically, a felon could vote for a mainstream candidate she believes will act contrary to the public good, for instance a Democratic felon could vote Republican or vice-versa. But for any candidate to get elected, her vision of what is best for the community must at least be reasonable and plausible enough to carry a near-plurality of non-felon votes. Voting for such a candidate would not yield much success in undermining society's good.

Supporters of felon disenfranchisement contend that the practice is necessary to prevent voter fraud. In republican fashion, this argument is premised upon the convict's lack of virtue.³²⁸ One who has violated the law in the past is thought to lack virtue and therefore cannot be trusted to follow the law in the future. The convict is therefore likely enough to violate

325. See Thompson, *supra* note 113, at 195 ("[I]t has never been demonstrated 'why [felons] cannot make political decisions just as well or badly as the rest of [society] can.'" (alteration in original) (quoting Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 731 (1991)); cf. *supra* notes 267–269 and accompanying text.

326. Clegg, *supra* note 246, at 174 ("*Disenfranchisement is a disproportionate penalty. Common sense would dictate that some felons be allowed to vote and others not. Some crimes are worse than others; some felons have committed more crimes than others, and some crimes are recent while others are long past.*")

327. See *supra* note 272.

328. Ewald, *supra* note 6, at 1088.

voting laws that she must be disenfranchised to protect the honesty of the electoral system.³²⁹

This argument has been dismissed by critics as fanciful.³³⁰ The remedy is both under- and over-inclusive. Some states disenfranchise all felons but do not disenfranchise those who commit election related misdemeanors such as violent intimidation of voters.³³¹ At the same time, disenfranchisement of all felons broadly sweeps in many criminals who are unlikely to ever commit or attempt a voting crime.³³² As Mark Thompson argues, preventing all felons from voting as a prophylactic measure against voter fraud is like making all felons register as sex offenders as a prophylactic against sexual crimes.³³³ Is the connection between drug crimes, for example, and voter fraud really stronger than the connection between drug crimes and sex offenses? Additionally, there are more effective ways to combat voter fraud than excluding swathes of the population from voting. Both criminal statutes prohibiting voter fraud and modern voting technology diminish the threat that voter fraud poses and accomplish the purported goal of felon disenfranchisement without removing millions from the electoral process.³³⁴ Furthermore, the commission of many voting crimes does not even require the ability to vote. One can intimidate voters and tamper with voting equipment without possessing the right to vote oneself.³³⁵ Disenfranchising over four million Americans to speculatively prevent the sale of votes is a blunderbuss approach to say the least. Prevention of voter fraud is not a plausible justification for general disenfranchisement laws.

The subversive voting theory and the voter fraud theory have a common problem justifying permanent disenfranchisement; namely, they are both premised on the idea that a criminal's corruption is permanent.³³⁶ As indicated earlier,³³⁷ flaws in one's virtue may disappear over time. Defining someone solely by the worst actions of their distant past provides

329. See, e.g., *Kronlund v. Honstein*, 327 F. Supp. 71, 73 (N.D. Ga. 1971); Note, *supra* note 10, at 1303; Fletcher, *supra* note 85, at 1899; Thompson, *supra* note 113, at 190.

330. Fletcher, *supra* note 85, at 1899.

331. *Richardson v. Ramirez*, 418 U.S. 24, 79 (1974); Thompson, *supra* note 113, at 191 n.190 (citing NEV. REV. STAT. § 293.710 (2001) (deeming intimidation of voters a gross misdemeanor); NEV. REV. STAT. § 293.750 (2001) (listing destruction of election equipment as a gross misdemeanor); WYO. STAT. ANN. § 22-26-112 (classifying "causing or attempting to cause" a candidate's withdrawal as a misdemeanor)); Ewald, *supra* note 6, at 1117.

332. See, e.g., *Ramirez*, 418 U.S. at 79 ("[T]here has been no showing that ex-felons generally are any more likely to abuse the ballot than the remainder of the population."); Note, *supra* note 10, at 1303; Thompson, *supra* note 113, at 191-92; Ewald, *supra* note 6, at 1116-17 (citing the lack of empirical evidence for the proposition that ex-felons have an increased propensity to commit voter fraud).

333. See Thompson, *supra* note 113, at 192-93.

334. *Ramirez*, 418 U.S. at 80-81; *Dunn v. Blumstein*, 405 U.S. 330, 353 (1972); Ewald, *supra* note 6, at 1117; Thompson, *supra* note 113, at 190-91.

335. See Thompson, *supra* note 113, at 194.

336. Note, *supra* note 10, at 1309 ("A fixation with what may be an isolated incident in a person's distant past . . . fails to further the goal of measuring a person's virtue in the present."); see also Thompson, *supra* note 113, at 177 ("One needs only to look to prominent politicians who have admitted indiscretions to support the proposition that one can progress beyond the mistakes of his past.")

337. *Supra* notes 257-258 and accompanying text.

an inaccurate picture of the person's ethics.³³⁸ While maintaining the upright morality of the polity is fundamental to republicanism, imputing iniquity with so broad a brush is questionable.

Another justification for felon disenfranchisement is the expressive function that it serves. This theory focuses on "the educative message we send, through the law, to all of us—expressing who we are and what we expect of one another as a democratic community."³³⁹ Felon disenfranchisement therefore emphasizes the strong bonds between citizens. It serves to define the bounds of the polity, constricting full membership to those who respect and abide by the law. It also signifies the community's moral outrage at the conduct of the convict and labels her as "blameworthy."³⁴⁰ It makes political participation a somewhat exclusive badge of honor that can only be donned by those who live up to a certain moral standard, thereby possibly increasing its value to those who hold it. Simultaneously, we are reminded of the duties of self-government and the reality that society cannot be good and just if its citizens, the sovereigns, do not value and practice goodness and justice. Felon disenfranchisement can be seen as an integral part of the civic education cherished by republicans.

Critics take issue with this expressive function of criminal disenfranchisement. First, felon disenfranchisement is a silent, automatic punishment of which many do not know the details or even existence.³⁴¹ Any expressive purpose cannot be fulfilled if the message is not received by those it is directed toward. More importantly, though, the appropriateness of the message expressed by the practice is questionable. One commentator criticized the branding of felons, and ex-felons in particular, as immoral outsiders, contending that doing so glosses over the true causes of crime.³⁴² "By rationalizing and facilitating a tendency to localize the blame for crime in the individual, disenfranchisement helps to obscure the complexity of the roots of crime and their entanglement with contingent social structures."³⁴³ Blaming individuals for their crimes and excising them from the political community allows law-abiding citizens to maintain the delusion of their own superiority instead of questioning how society as a whole, including its social and economic configuration, may be the root cause of these purportedly immoral acts.³⁴⁴ Excluding criminals from full membership in the community draws a fictional line between good blameless individuals and evil blameworthy ones. It is true that law-abidingness becomes a defining feature of community membership, but it is a baseless distinction that ignores true responsibility for crime in favor of a myth that places a halo upon the head of the voting public and dumps false blame on the constructed devils of the criminal population. As one commentator wrote, "As they are not we, their impurities are not ours. Self-congratulation of this sort may comfort, but does not heal."³⁴⁵ Critics and

338. See Ewald, *supra* note 6, at 1116; Harvey, *supra* note 139, at 1172.

339. Pangle, *supra* note 220, at 10.

340. Ewald, *supra* note 6, at 1086; Note, *supra* note 10, at 1310–16.

341. *Id.* at 1117–18.

342. Note, *supra* note 10, at 1310–13.

343. *Id.* at 1311.

344. *Id.* at 1310–11.

345. *Id.* at 1315.

proponents of felon disenfranchisement may agree that the custom increases solidarity and commonness among those left with full political privileges, but whether this justifies the exclusion of convicts from the ballot depends on one's view of the causes of crime and the appropriate scope of the political community—adding another wrinkle to the battle between cosmopolitans and particularists.

A temporary period of disenfranchisement may also serve to remind convicted felons of their responsibilities to the public as a whole. If criminals "have been shown to manifest flagrant disrespect for the laws, which in a democracy have a uniquely intimate link to participation in the electoral process,"³⁴⁶ perhaps being removed from the electoral process will reinvigorate their respect for it.³⁴⁷

The primary republican argument against felon disenfranchisement is that it can serve as an impediment to the rehabilitative process. Republicanism espouses the formative role political participation plays in shaping citizens' virtue. By quarantining felons from the political community, we stand in the way of the improvement of their moral stature.³⁴⁸ Including felons in the political process can influence them to direct their attention away from their own narrow self-interest and toward public issues and the good of the community as a whole.³⁴⁹

Given that over 95% of prisoners and all parolees and probationers are re-released into the community, the edification of convicts' virtue is a matter of pressing importance.³⁵⁰ Disenfranchisement squelches this opportunity. Instead, it adds to the criminal's alienation from the rest of society, which contributed to her criminality in the first place. By placing a mark of infamy on convicts, disenfranchisement can lower criminals' self-esteem, place greater distance between them and the rest of society, and exacerbate the low regard in which others hold them.³⁵¹ All this may increase the incidence of recidivism and impede the assimilation of released offenders into mainstream society.³⁵²

Given the vast number of disenfranchised Americans, and the racial overtones implicated, felon disenfranchisement is assailable on the grounds that it undermines the civic nature of the republic. Beiner and Habermas's civic version of republicanism seeks to avoid the philosophy's exclusionary nature, offering membership in the state as the unifying tie between members of the community.³⁵³ Whereas the national idea, popular among republicans because of the strength of the existing bonds between members of the nation, excludes minority blocks, Beiner and Habermas set

346. Pangle, *supra* note 220, at 12.

347. *Id.* at 13–14.

348. *See, e.g., id.* at 7; Note, *supra* note 10, at 1309 ("[R]epublicanism seeks to nurture civic virtue in its citizens, and is premised on the notion that political participation is the path to moral growth. That premise suggests that to disenfranchise a person on the basis of a single crime is to guarantee that his moral growth will not continue."); Ewald, *supra* note 6, at 1114–15 ("[V]oting constitutes precisely the kind of activity which can help criminals become law-abiding members of the polity.").

349. Pangle, *supra* note 220, at 7.

350. Mauer, *supra* note 3, at 250.

351. Harvey, *supra* note 139, at 1171.

352. *Id.*; *see also* Ewald, *supra* note 6, at 1113–14; Note, *supra* note 10, at 1315–16.

353. BEINER, *supra* note 164, at 197–203.

forth a conception that makes citizenship universal. The disenfranchisement of over four million citizens undermines the model of universal citizenship.³⁵⁴ The racial composition of the disenfranchised population aggravates this problem. Because in some states over a quarter of the black male population is disenfranchised, self-government becomes a reality for non-blacks only.³⁵⁵ Granted, the majority of African Americans are still able to vote, but the high level of disenfranchisement among the black male population severely weakens that group's ability to defend its collective interests. When the voting power of minority groups is weakened, minorities may feel alienated from the electoral process and the larger community as a whole, as the electoral process may fail to serve any shared needs and values of the group. Therefore, felon disenfranchisement may turn some non-disenfranchised citizens away from public discourse, weakening communal bonds. While some forms of republicanism would disregard any argument premised on universal citizenship, once minorities are accepted as full citizens, all republicans would agree upon the importance of fortifying the bonds between individuals who are members of minority groups and the community as a whole.

In conclusion, felon disenfranchisement's consistency with republicanism is ambiguous. It is important to preserve the virtue of the polity, keep the bonds between community members as tight as possible, and remind citizens of the significance of political participation. But nurturing the virtue of prisoners, avoiding fictions, and maintaining the civic bonds of all community members are also republican desiderata.

IV. CONCLUSION

Liberal citizenship theory cannot be employed to justify felon disenfranchisement. Denying felons the opportunity to vote transgresses fundamental political rights and is not consistent with social contract theory. Republican interests fall on both sides of the argument. In deciding whether felons should remain outside the political community, we should engage in discourse about what citizenship means and whether the republican fear of unsavory voting truly justifies the exclusion of millions from the franchise.

354. See e-mail from Ronald Beiner, Professor, University of Toronto, to author (Dec. 20, 2003, 02:52:40 EST) (on file with author).

355. See *id.* Hispanics are also disenfranchised in disproportionately large numbers, although not to the same extent as blacks.

