

**CIVIL DEATH IN A MODERN WORLD:
CRIMINAL DISENFRANCHISEMENT AND THE FIRST AMENDMENT**

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INTRODUCTION

“Vote for Change”,¹ “Get out the Vote”,² and “Rock the Vote.”³ These, among others, are campaigns designed to stimulate American participation in the electoral process. In particular, the goal of these campaigns is to instill individuals with a renewed sense of connection to the responsibilities that come with citizenship. Certainly, voting is essential to the electoral process, which in turn is essential to a functioning democracy. Furthermore, voting is core to most people’s understanding of American citizenry. Specifically, voting is a communicative act that conveys a person’s beliefs, such as who they believe the best person to put in a position of leadership is and what decisions they believe those people will make. However, for a segment of the American population, whether or not to participate in choosing America’s leaders is a decision they are no longer permitted to make.

What follows is an examination of criminal disenfranchisement in relation to First Amendment freedom of speech. Section one examines the history of criminal disenfranchisement to show how we, as Americans, have found ourselves in the position we are in today. Section two explores how states, individually, handle the issue of criminal disenfranchisement. Section three unveils the varying arguments for criminal disenfranchisement and raises counterpoints to those arguments. Section four poses voting as political speech, presents the route that the United States Supreme Court has taken in regard to voting as political speech, and scrutinizes the effect this has had on disenfranchised individuals. Finally, section five sets forth reasoning why criminal disenfranchisement is an outdated relic that, as America moves forward, we should discard.

I. THE HISTORY OF CRIMINAL DISENFRANCHISEMENT

Criminal disenfranchisement is not a new idea. At common law, criminal disenfranchisement was known as civil death. To illustrate, a 1326 statute levying civil death, *De Cattilus Felonum*, provided that “a felon forfeited his or her personal property and also lost all rights and means of acquiring property.”⁴ Also, in the Athenian form of democracy in ancient Greece, *atimia* or being made *atimos*, “literally without honor or value,” was a form of total political disenfranchisement, which was inheritable by the disenfranchised’s descendent, and the violation of which carried the death penalty.⁵ Likewise, under Roman law certain crimes carried the punishment of *infamia*, “a loss of legal or social standing.”⁶ Accordingly, criminal disenfranchisement was well established under ancient law and those laws would bleed into the American form of democracy.

Moving forward, despite intense debate over how to treat the right to vote, the founders ultimately decided to allow the states to retain the power to set voter qualifications subject to certain constitutional limits.⁷ As a result, states enacted laws limiting the ability to vote. The first

¹ MOVEON PAC, *Vote for Change Tour*, <http://pol.moveon.org/vfc/> (last visited Nov. 19, 2012).

² AIGA, *Get Out the Vote*, <http://www.aiga.org/get-out-the-vote/> (last visited Nov. 19, 2012).

³ ROCK THE VOTE, <http://www.rockthevote.com/> (last visited Nov. 19, 2012).

⁴ BLACK’S LAW DICTIONARY 465 (9th ed. 2009).

⁵ *Atimia*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Atimia> (last updated Feb. 27, 2013).

⁶ *Infamia*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Infamia> (last modified March 26, 2013).

⁷ *See, e.g.*, U.S. CONST. amend XIV, § 1.

relating to criminal disenfranchisement,⁸ the Kentucky Constitution ratified in 1792, removed the right to vote from people convicted of “bribery, perjury, forgery, or other high crimes or misdemeanors.”⁹ At first, few states had similar constitutional provisions; only four out of the eighteen states in existence in 1812 had followed Kentucky’s lead.¹⁰ However, as America grew in population and size, many states would include criminal disenfranchisement provisions in their constitutions.¹¹ One notable instance, the Rhode Island Constitution, ratified in November of 1842, included a provision excluding from voting those convicted of “bribery, or any other infamous crime . . .”¹² Earlier that year there arose a conflict over extending voting franchise to non-land-owner white men, which escalated to the point of armed conflict. This conflict came to be known as the Dorr Rebellion and likely resulted in this provision of the Rhode Island Constitution.¹³ All told, by 1859 twenty-five of the thirty-three states in existence had put into place constitutional provisions for criminal disenfranchisement.¹⁴

In 1870, the Fifteenth Amendment to the United States Constitution was ratified, guaranteeing to all men that the “right” to vote would not “denied or abridged” because of “race, color, or previous condition of servitude.”¹⁵ In response, many southern states passed laws to curtail the ability of African Americans to vote. For example, in Article VII § 182 of the 1901 Alabama Constitution, there was a provision for criminal disenfranchisement for crimes such as “assault and battery on the wife . . .”¹⁶ According to one of the original authors of that section, that “alone would disqualify sixty percent of the Negroes.”¹⁷ Before long, Article VII § 182 of Alabama’s 1901 Constitution was struck down by the United States Supreme Court in *Hunter v. Underwood*.¹⁸ Justice Rehnquist, writing for the court, found that § 182 was enacted with a racially discriminatory purpose.¹⁹ In reaching that conclusion he looked to the “Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901.” The president of the convention, John B. Knox, said “[a]nd 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.”²⁰ Also, until the late 1960s in Mississippi, a rapist retained the right to vote, but a person convicted of miscegenation lost the right to vote indefinitely.²¹ Similarly, South Carolina restricted the right to vote in dealing with crimes that were more likely to be committed by an African American, such as “thievery . . . , adultery, [and] housebreaking.”²² However, crimes more likely to be committed by a White American as

⁸ *Felon Voting, Historical Timeline: US History of Felon Voting/Disenfranchisement*, PROCON.ORG, <http://felonvoting.procon.org/view.resource.php?resourceID=000285> (last visited Nov. 19, 2012).

⁹ KY. CONST. art. VIII, § 2 (1792), available at http://felonvoting.procon.org/sourcefiles/1792_KY_Constitution.pdf.

¹⁰ See *supra* note 8.

¹¹ *Id.*

¹² R.I. CONST. art. II § 4, available at http://felonvoting.procon.org/sourcefiles/1842_RI_Constitution.pdf.

¹³ *Dorr Rebellion*, WIKIPEDIA, http://en.wikipedia.org/wiki/Dorr_Rebellion (last modified Nov. 13, 2012).

¹⁴ See *supra* note 8.

¹⁵ U.S. CONST. amend. XV.

¹⁶ See *Hunter v. Underwood*, 471 U.S. 222, 232 (1985).

¹⁷ ELIZABETH A. HULL, *THE DISENFRANCHISEMENT OF EX-FELONS* 20 (Suzanne Wolk et al. eds., 2006).

¹⁸ See *Hunter*, 471 U.S. at 222.

¹⁹ *Id.* at 233.

²⁰ *Id.* at 229.

²¹ See HULL, *supra* note 17, at 19.

²² *Id.* at 20.

opposed to an African American, like “murder and fighting”, did not result in disenfranchisement.²³ In short, disenfranchisement laws have proliferated since America’s inception, due in large part to an attempt to silence the dissident voice, and they continue to be an issue in today’s society.

Certainly, the issue of voting is timely as this is written during a highly contentious presidential election where voting is the subject of strong and emotional debate. Criminal disenfranchisement has been an intensely debated issue leading up to this year’s election. For instance, Representative John Conyers Jr., said “an estimated five million people continue to be ineligible to vote in Federal elections,” while speaking to the House of Representatives regarding the Democracy Restoration Act of 2011.²⁴ He also said:

Denying voting rights to ex-offenders robs them of the opportunity to fully participate and contribute to their society. Disenfranchisement laws isolate and alienate ex-offenders, and have been shown to serve as one more obstacle in their attempt to successfully reintegrate into society. Moreover, these obstacles adversely impact the voting participation of their families, further undermining the effectiveness of our voting system.²⁵

In contrast, according to Roger Clegg, President and general counsel for the Center for Equal Opportunity, “[t]hose who are not willing to follow the law cannot claim a right to make the law for everyone else. And when you vote, you are indeed making the law – either directly, in a ballot initiative or referendum, or indirectly, by choosing lawmakers.”²⁶ He further argues that:

[w]hile serving a sentence discharges a felon's ‘debt to society’ in the sense that his basic right to live in society is restored, serving a sentence does not require society to forget what he has done or bar society from making judgments based on his past crimes.²⁷

The clash between ideals—reintegration on one side, total civil death on the other—is indicative of the strong emotions and fervent advocacy the topic of criminal disenfranchisement engenders.

In conclusion, America has a long history of criminal disenfranchisement. It is a history replete with evidence of improper racial purposes, and continues to be a hotly debated topic. It is a topic of great importance and can be a major contributing factor in an election. It is a debate that centers on the core of what it means to be an American Citizen.

II. THE STATES –SETTING THE PLAYING FIELD

²³ *Id.*

²⁴ Hon. John Conyers Jr., *Congressional Record – Extension of Remarks, Democracy Restoration Act of 2011*, <http://www.gpo.gov/fdsys/pkg/CREC-2011-06-16/pdf/CREC-2011-06-16-pt1-PgE1121-2.pdf#page=1> (last visited Nov. 19, 2012).

²⁵ *Id.*

²⁶ *Democracy Restoration Act: Hearing on H.R. 3335 Before H. Subcomm. On the Constitution, Civil Rights, and Civil Liberties of the H Comm on the Judiciary*, 111th Cong. 7 (2010) (statement of Roger Clegg, President and General Counsel, Center for Equal Opportunity), available at <http://judiciary.house.gov/hearings/pdf/Clegg100316.pdf>.

²⁷ *Id.* at 8.

Now that we have explored our history, it is time to look at where we stand. As previously mentioned, the states retain the power to set voting qualifications as long as the states do not violate federal law, namely the Constitution. This creates a patchwork of laws on the subject, each state having a fabric with a different feel, each state's laws being a little different from another state's. Thus, a review of them is necessary to understand how these variations impact the almost six million Americans that are criminally disenfranchised.²⁸

To simply enumerate: two states, Maine and Vermont, do not restrict voting rights at all, prisoners can vote absentee from prison.²⁹ Next, in twelve states a felon may lose the right to vote permanently.³⁰ Furthermore, Kentucky, the state with the original constitutional disenfranchisement provision, requires an executive pardon for an individual convicted of a qualifying felony or "high misdemeanor" before that individual is allowed to vote again.³¹ Keeping this overview in mind, further investigation into (1) state specifics, (2) the specific nature of disenfranchisement laws, and (3) the resulting number of disenfranchised individuals will reveal the arduous burden on the disenfranchised, the wide variances in the legal landscape, and some of the potential conflicts arising out of this area.

To begin, Mississippi's Constitution arguably contains the most oppressive disenfranchisement provisions. Namely, Article XII § 241's requirement that only people:

who ha[ve] never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, is declared to be a qualified elector, except that he shall be qualified to vote for President and Vice President of the United States if he meets the requirements established by Congress therefor and is otherwise a qualified elector.³²

Note that Mississippi allows otherwise criminally disenfranchised individuals to vote in the presidential election as long as the individual meets other residency, age, and sound mind requirements.³³ Adding to the list of crimes for which they will disenfranchise an individual, Mississippi also requires that, in order to have the right to vote restored, a person has to introduce a bill in the legislature specifically addressing the restoration of his or her rights. The person must then receive a two-thirds vote in favor of this bill in both houses before his or her rights are restored.³⁴

Florida recently toughened its criminal disenfranchisement laws. Specifically, Florida amended its Rules of Executive Clemency to require a five to seven year waiting period before a person can apply for restoration of his civil rights.³⁵ In the past, the Clemency Board automatically restored the civil rights for non-violent felons after they complete all the

²⁸ *Felon Voting, State Felon Disenfranchisement Totals 2010*, PROCON.ORG, <http://felonvoting.procon.org/view.resource.php?resourceID=000287> (last visited Nov. 19, 2012).

²⁹ *Felon Voting, State Felon Voting Laws*, PROCON.ORG, <http://felonvoting.procon.org/view.resource.php?resourceID=000286> (last visited Nov. 19, 2012).

³⁰ *Id.*

³¹ *Id.*

³² MISS. CONST. art. XII, § 241.

³³ *Id.*

³⁴ MISS. CONST. art. XII, § 253.

³⁵ Florida Parole Commission, *Clemency, Rules of Executive Clemency*, https://fpc.state.fl.us/PDFs/clemency_rules.pdf (last visited Nov. 19, 2012).

conditions of release, including full payment of fines and fees.³⁶ Similarly, Iowa has tightened its voting laws recently via an Executive Order by Republican Governor Terry Branstad. Executive Order 70 rescinded democratic Governor Thomas Vilsack's previous Executive Order allowing automatic restoration of citizenship rights and required that before restoration of citizenship rights, an offender must completely pay restitution and all other costs.³⁷ Finally, the other forty-four states with criminal disenfranchisement laws include those from thirteen states that generally restore voting rights after incarceration, to four states that generally restore the right to vote after incarceration and parole, to nineteen states that restore the right to vote after incarceration, parole, and probation. Needless to say, these varied laws concerning restoration of the right to vote have a definite impact on the number of people who are restricted from voting.³⁸

Not surprisingly, Florida has the highest rate of disenfranchisement with 10.42 percent of the state's eligible voters, more than 1.5 million people, unable to participate in the electoral process because of disenfranchisement.³⁹ Following Florida, Mississippi and Kentucky have 8.27 percent and 7.35 percent of their respective populations disenfranchised for criminal violations.⁴⁰ In fact, the disenfranchised populations of only eight states make up almost seventy percent of the total number of disenfranchised voters.⁴¹ Of course, on the other end of the spectrum are Maine and Vermont with no disenfranchised voters. Close behind them, Massachusetts and New Hampshire each have a disenfranchisement rate of 0.25 percent and 0.29 percent respectively.⁴² In fact, New Hampshire allows for disenfranchisement of felons but only while they are incarcerated.⁴³ Similarly, Massachusetts only restricts the right to vote while imprisoned.⁴⁴ In contrast to the eight states that comprise close to 70 percent of disenfranchised voters, 36 states' disenfranchised populations make up less than 20 percent of disenfranchised voters.⁴⁵

To sum up, the legal landscape for disenfranchising criminal offenders is wide, covering no disenfranchisement to total and permanent disenfranchisement, with an illusory opportunity for re-enfranchisement. Furthermore, a handful of states control more than two-thirds of disenfranchised persons. Frighteningly, Florida, a key election state, strikes from its rolls over 1.5 million voters for criminal conduct, and is currently in the process of strengthening and extending its disenfranchisement laws. Germane to this issue is the topic of choice of laws in deciding which jurisdiction controls whether the individual is still disenfranchised. This is an area as mottled as the re-enfranchisement subject. Suffice it to say, generally states allow for another state's re-enfranchisement. However, some states impose specific conditions before the

³⁶ *Felon Voting, State Felon Voting Laws*, PROCON.ORG, <http://felonvoting.procon.org/view.resource.php?resourceID=000286#florida> (last visited Nov. 19, 2012).

³⁷ *Office of the Governor of Iowa Terry Branstad, Executive Order Number Seventy*, IOWA.GOV, https://governor.iowa.gov/wp-content/uploads/2011/03/Exec_Order_70.pdf (last visited Nov. 19, 2012).

³⁸ *See supra* note 27.

³⁹ *Felon Voting, State Felon Disenfranchisement Totals 2010*, PROCON.ORG, <http://felonvoting.procon.org/view.resource.php?resourceID=000287> (last visited Nov. 19, 2012).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ N.H. REV. STAT. ANN. § 654:5 (2012); N.H. REV. STAT. ANN. § 607-A:2 (2012).

⁴⁴ MASS. GEN. LAWS ANN. ch. 51, § 1 (West).

⁴⁵ *Felon Voting, State Felon Disenfranchisement Totals 2010*, PROCON.ORG, <http://felonvoting.procon.org/view.resource.php?resourceID=000287> (last visited Nov. 19, 2012).

state will restore an individual's civil rights.⁴⁶ All told, navigating one's way through the disenfranchisement landscape is difficult, and this is made more difficult by the emotionally charged arguments put forth for criminal disenfranchisement.

III. THE ARGUMENTS FOR DISENFRANCHISEMENT

The basic argument is that once a criminal, always a criminal. In other words, the underlying premise to the following arguments is that once people have shown themselves to be untrustworthy, they cannot be trusted to vote. In truth, what that means is that people are incapable of change. Also, it means that the lives of the disenfranchised can then be influenced, through the electoral process, by those who have not lost their right to vote. Exactly what qualifies those people to make such decisions is left unclear.

To begin, the issue of disenfranchisement boils down to a policy argument. It is an "us against them" argument, meaning the "us" are at most law abiding citizens—or at least citizens free of felony convictions—and the "us" who have a higher interest in participating in America's system of governance than the "them" who are regarded as untrustworthy convicted felons. President of the Center for Equal Opportunity, Roger Clegg, has testified to Congress to this effect several times. Recently, in a hearing in front of a House Subcommittee, Clegg stated "[t]hose who are not willing to follow the law cannot claim a right to make the law for everyone else. . . . 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."⁴⁷ At any rate, Mr. Clegg agrees that not all felons should be "equally . . . mistrusted with the ballot," but posits that the federal government lacks the authority and the ability to handle the matter and bestows his view of the proper method for states to handle the issue.⁴⁸ Specifically, he says that:

at the state level, drafting a statute that would properly calibrate seriousness of offense, number of offenses, and how recently they occurred is probably impossible. The better approach is a general presumption against felons voting but with an efficacious administrative mechanism for restoring the franchise on a case-by-case basis through an application procedure. (If those procedures are not working well, as is sometimes complained, then those complaining should work to improve them, rather than arguing that the solution is to let all felons vote automatically).⁴⁹

Thus, Mr. Clegg's argument is that felons cannot be trusted to make laws. Both the federal and state governments are incapable of setting a regulatory scheme to gradate felonies in respect to voting rights. Hence, all felons should be denied the right to vote, and if there are problems with the system, the disenfranchised should just work to improve the system.

⁴⁶ *Frequently Asked Questions*, Florida Rights Restoration Coalition, http://restorerights.org/FRRC%20-%20FAQ%20Sheet%20with%20logo_FINAL.pdf (last visited Nov. 19, 2012).

⁴⁷ *Democracy Restoration Act: Hearing on H.R. 3335 Before H. Subcomm. On the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 7 (2010) (statement of Roger Clegg, President and General Counsel, Center for Equal Opportunity), available at <http://judiciary.house.gov/hearings/pdf/Clegg100316.pdf>.

⁴⁸ *Id.* at 9.

⁴⁹ *Id.*

It is not hard to spot the glaring flaws in Mr. Clegg's argument. First, the assumption that felons are inherently untrustworthy and undeserving of the right to vote is not only fictitious but also dangerous. To explain, the goals of the American penal system are to deter future crime (deterrence), punish those that committed the crime (retribution), and to prepare the offender to re-enter society (rehabilitation).⁵⁰ Although criminal disenfranchisement serves the retributive goal, it does not serve to deter future crime or help rehabilitate offenders. Carl Wicklund, Executive Director of the American Probation and Parole Society, speaking at the same hearing as Richard Clegg, testified that:

One of the core missions of parole and probation supervision is to support successful transition from prison to the community. Civic participation is an integral part of this transition, because it helps transform one's identity from deviant to law-abiding citizen. Civic participation and successful rehabilitation are intuitively linked. One of the greatest challenges facing those who are coming out of prison or jail is the transition from focus on one's self as an individual that is central to the incarceration experience, to a focus on one's self as a member of community that is the reality of life in our democratic society. One study tracking the relationship between voting and recidivism found that former offenders who voted were half as likely to be arrested than those who did not.⁵¹

Accordingly, restoring civil rights benefits society as a whole by increasing an offender's feeling of connection to their community, directly resulting in a reduction of an offender's tendency to recommit crimes, which in turn makes the quintessential law-abiding citizen safer.⁵²

Second, Mr. Clegg's argument assumes the federal government lacks the power to set national criminal disenfranchisement laws. Admittedly, this is an area dealing with Fourteenth Amendment issues. However, it is important to mention these issues at this juncture if for nothing else, to help the reader gain a complete grasp on the valid interplay of federal and state law. To that end, Professor of Civil Liberties from New York University School of Law, Burt Neuborne, testified at the same hearing. Based on a unanimous decision in *Oregon v. Mitchell*⁵³ to eliminate literacy tests, Mr. Neuborne laid out four reasons why the House had authority to pass HR 3335 (Democracy Restoration Act of 2009).⁵⁴ Additionally, one fatal portion of Mr. Clegg's "us against them" argument deserves mention. Specifically, Mr. Clegg asserts that if you

⁵⁰ *Democracy Restoration Act of 2009: Hearing on H.R. 3335 Before the Subcomm. On the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 63-64 (2010) (statement of Carl Wicklund, Executive Director, Probation and Parole Association) available at http://judiciary.house.gov/hearings/printers/111th/111-84_55480.PDF.

⁵¹ *Id.* at 60.

⁵² *Id.*

⁵³ *Oregon v. Mitchell*, 400 U.S. 112 (1970).

⁵⁴ *See, supra* note 1, at 38 (statement of Burt Neuborne, Inez Mulholland Professor of Civil Liberties, New York University School of Law) ("First, the legislation would operate only in Federal elections, leaving States to do what they will. Second, they both have long and ugly histories of racially discriminatory animus in their genesis and in their use after the Civil War. Three, they both today operate with disproportionate impact and prevent large numbers of poor people and racial minorities from voting. And fourth, it is difficult and . . . virtually impossible to prove a racial animus in a sophisticated world where people know that they are not supposed to admit it.").

do not like how the system is working you should work to improve the system.⁵⁵ However, there is a major flaw to this premise. Particularly, those most likely to complain about the system will be those that are most affected by it, and thus unable to effectively advocate for change without the help of a third party.

Finally, the Subversive Voting Bloc Theory is another argument against restoring rights. This theory adopts the idea that criminals vote as a bloc. Furthermore, they vote to subvert law enforcement in targeted locations in order to further criminal intentions. Perhaps this is an overstatement of the devious intent of criminals who desire to vote; however, Mr. Clegg testified that

[m]uch has been made of the high percentage of criminals -- and, thus, disenfranchised people -- in some communities. But the fact that the effects of disenfranchisement may be concentrated in particular neighborhoods is actually an argument in the laws favor. If these laws did not exist there would be a real danger of creating an anti-law enforcement voting bloc in local municipal elections . . .⁵⁶

To be fair, Mr. Clegg did not originate this theory. As a matter of fact, Justice Matthews espoused this very idea in *Murphy v. Ramsey*, which dealt with the disenfranchisement of bigamists and polygamists.⁵⁷ In that decision, speaking about legislation establishing the “basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman . . . the sure foundation of all that is stable and noble in our civilization” Justice Matthews said “no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.”⁵⁸ Thus, this idea has some support; however, opponents have recently voiced their views.

The Subversive Voting Bloc Theory, a content-based theory, has its opponents. Most notably, Justice Marshall spoke out against its validity in his dissent in *Richardson v. Ramirez*.⁵⁹ He specifically stated that:

[t]o the extent . . . that citizens can be barred from the ballot box because they would vote to change the existing criminal law, those decisions are surely of minimal continuing precedential value. We have since explicitly held that such ‘differences of opinion cannot justify for excluding (any) group from . . . the franchise’ . . .⁶⁰

⁵⁵ *Democracy Restoration Act: Hearing on H.R. 3335 Before the Subcomm. On the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 9 (2010) (statement of Roger Clegg, President and General Counsel, Center for Equal Opportunity), available at <http://judiciary.house.gov/hearings/pdf/Clegg100316.pdf>.

⁵⁶ *Id.* at 10.

⁵⁷ *Murphy v. Ramsey*, 114 U.S. 15 (1885).

⁵⁸ *Id.* at 45.

⁵⁹ *Richardson v. Ramirez*, 418 U.S. 24, 56-86 (1974).

⁶⁰ *Id.* at 81-82.

Also, Alec Ewald, Professor of Constitutional Law and American Politics at the University of Vermont, has spoken about the fallacy of the Subversive Voting Bloc Theory. Particularly pertinent, Professor Ewald said that:

thieves planning to vote subversively would have to find a candidate running on a platform that calls for lowering the penalties for burglary, then find 51 percent of the electorate that wanted to vote for that candidate, and then have that candidate convince his or her fellow legislators to also lower the penalties for burglary. Such a sequence is wholly unimaginable, particularly in the United States's 'tough on crime' political climate.⁶¹

On balance, the argument in favor of the Subversive Voting Bloc Theory seems to be one rooted in an unproven fear of a general descent into lawlessness. Whereas, the argument against the theory is rooted in the logical difficulties that this theory presents. All things considered, while the arguments against allowing felons to vote are seriously flawed, they carry enough persuasive power to create the varied landscape in which only two states have foregone disenfranchising felons.

IV. VOTING AS POLITICAL SPEECH: AN ARGUMENT AGAINST CRIMINAL DISENFRANCHISEMENT

One of the most effective arguments against criminal disenfranchisement, given in a First Amendment context, is the argument that voting is political speech. Issues regarding the limitation of political speech arise in various situations. For example, anonymous political pamphleting often raises concerns about political speech; such was the case in *McIntyre v. Ohio Elections Commission*.⁶² In that case, a woman was fined for distributing anonymous leaflets disapproving of an anticipated school tax levy. In particular, the court said that "handing out leaflets in the advocacy of a politically controversial viewpoint—is the essence of First Amendment expression."⁶³ To put it differently, Justice Stevens said that ". . . circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'"⁶⁴ However, pamphleting is not the only area where political speech is implicated.

Campaign finance and political expenditures are other areas where the nature of political speech is critical. For example, the Supreme Court struck down a portion of the Federal Election Campaign Act of 1971 that ". . . limits political contributions to candidates for federal elective office by an individual or a group to \$1,000[.]"⁶⁵ In response to this portion of the Act, the Supreme Court said that those requirements "impose direct and substantial restraints on the quantity of political speech . . . [t]he restrictions, while neutral as to the ideas expressed, limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'"⁶⁶ Alas, the Supreme Court did not stop there. Arguably, one of the most important

⁶¹ Alec C. Ewald, *An "Agenda for Demolition": The Fallacy and the Danger of the "Subversive Voting" Argument for Felony Disenfranchisement*, 36 COLUM. HUM. RTS. L. REV. 109, 124 (2004).

⁶² *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

⁶³ *Id.* at 347.

⁶⁴ *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988).

⁶⁵ *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁶⁶ *Id.* at 39.

decisions of this century, *Citizens United v. Fed. Election Comm'n*, broadens the idea of political expenditures as political speech.⁶⁷ In essence, this case stands for the proposition that money is speech, and corporations cannot be limited in the amount that they spend for political speech.⁶⁸ In particular, the Supreme Court stated that it was returning “to the principle established in *Buckley and Bellotti* that the Government may not suppress political speech based on the speaker's corporate identity.”⁶⁹ Important for the discussion at hand, the Court also stated “[w]e find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion.”⁷⁰ As shown above, the Supreme Court adopts the old saw of put your money where your mouth is.

Looking at what the Supreme Court has stated about political speech as a whole, it appears at first glance that political speech takes two to tango. That is, there is some inherent shared aspect where one is attempting to elucidate a point to another. However, allowing unlimited political expenditures by corporations casts a shadow on that position. Given the complex nature of these donations, it is hard to say that they are more interactive than a natural person's vote. After all, large sums of money are an effective way for a corporation to influence a political competition, much the same way that an individual's vote is an effective way for that particular person to influence a political competition. Both are interactive because each performs an essential function in a successful campaign. Without either the money to run a campaign or the necessary votes to win, any campaign is doomed to fail.

Of particular importance to understanding political speech is a grasp of the protection that it affords. The Supreme Court laid out the standard of review succinctly in *McIntyre*.⁷¹ Specifically, Justice Stevens stated that “[w]hen a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.”⁷² In short, strict scrutiny applies, which is usually a death warrant for the challenged law. However, the application of strict scrutiny is not without limitations.

Even in public forums the government can impose time, place, and manner restrictions. Specifically, the Supreme Court has said that

. . . the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information.⁷³

In short, laws are constitutional amid dictating when, where, and how a person can engage in political speech while using a space traditionally used for this type of speech if they meet the abovementioned three-part test.

⁶⁷ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

⁶⁸ *Id.*

⁶⁹ *Id.* at 885.

⁷⁰ *Id.* at 883.

⁷¹ *McIntyre*, 514 U.S. at 347.

⁷² *Id.*

⁷³ *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981).

Taking this a step further, the government can regulate political speech in non-public forums, sometimes severely. Thus, if the location of the speaker is an area traditionally not open to the public, does not discriminate between speakers on the basis of the speaker's views, and the regulation is within the bounds of reason, it will likely be upheld. In explanation, the Court has stated:

. . . [t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.⁷⁴

Even more onerous is that if the forum is a prison and the speaker a prisoner, First Amendment protections fly out the window. In this type of situation, despite saying the “prison walls do not form a barrier separating prison inmates from the protections of the Constitution,”⁷⁵ the Supreme Court has lowered the standard to a rational basis review. In applying this standard of review the Court stated they are “ill equipped” and so grant “considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world.”⁷⁶ All in all, political speech is capable of being the most protected type of speech available. However, this is limited by the station of the speaker. Moreover, as expected, prisoners lose all functional rights to engage in political speech while incarcerated. Thus, if classified as political speech, voting provides a venue to engage in political discourse protected by the highest level of scrutiny. This is because voting is the primary way people interact with the political system, the voting booth is a location traditionally open to the public, and is specifically designed for that purpose.

Voting is an integral part of a functioning democracy. In addition, voting is how most people engage themselves in political dialogue. For this reason, voting is critical to our representative form of government, something the founding fathers were keenly aware of. For instance, Alexander Hamilton once said “[a] share in the sovereignty of the state, which is exercised by the citizens at large, in voting at elections is one of the most important rights of the subject, and in a republic ought to stand foremost in the estimation of the law.”⁷⁷ Following the same tone, the Supreme Court has said that “we have often reiterated that voting is of the most fundamental significance under our constitutional structure.”⁷⁸ In addition, the Supreme Court has said “[n]o 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 . . . we must live.”⁷⁹ In essence, voting is “among the most important legal rights in a society philosophically devoted to liberty and self-

⁷⁴ *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966).

⁷⁵ *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989).

⁷⁶ *Id.* at 408.

⁷⁷ Alexander Hamilton, *The Papers of Alexander Hamilton*, Vol. III 544-545 (Harold C. Syrett, ed. 1962), <http://famguardian.org/Subjects/LawAndGovt/Articles/ImportVoting.htm>.

⁷⁸ *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).

⁷⁹ *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

governance.”⁸⁰ With these powerful statements in mind, it is incomprehensible that the Supreme Court has taken the stance that voting is not political speech.

Whether voting is a form of speech is controversial. Indeed, many lower courts have held that voting is a form of political speech.⁸¹ Also, the Supreme Court has alluded toward a willingness to consider voting as speech. For example, Justice Alito said in a recent concurrence that “[i]f an ordinary citizen casts a vote in a straw poll on an important proposal pending before a legislative body, that act indisputably constitutes a form of speech.”⁸² Unfortunately, this view of voting as speech is the minority view and does not extend to disenfranchisement laws. Specifically, the recent decision in *Nevada Commission on Ethics v. Carrigan* held that voting was not a form of protected speech. In that case, a city council member was censured because he did not recuse himself from a vote where he had a conflict of interest. Justice Scalia, writing for the court, said “. . . the act of voting symbolizes nothing.”⁸³ He also said “[m]oreover the fact that a nonsymbolic act is the product of deeply held personal belief—even if the actor would like it to convey his deeply held personal belief—does not transform action into First Amendment speech.”⁸⁴ Generally, courts faced with a case involving whether a criminal disenfranchisement law violates a person’s First Amendment right to speech cite to *Farrakhan v. Locke*.⁸⁵ In that case, convicted felons raised a First Amendment challenge to state disenfranchisement laws in Washington. The Court held that the First Amendment did not grant protection to a felon’s right to vote. Specifically, the court said:

[i]n order to uphold these claims against Defendants' motion to dismiss, the Court would have to conclude that the same Constitution that recognizes felon disenfranchisement under § 2 of the Fourteenth Amendment also prohibits disenfranchisement under other amendments. The Court is not inclined to interpret the Constitution in this internally inconsistent manner or to determine that the Supreme Court's declaration of the facial validity of felon disenfranchisement laws in *Richardson v. Ramirez* was based only on the fortuity that the plaintiffs therein did not make their arguments under different sections of the Constitution.⁸⁶

In like manner, *Richardson v. Ramirez* was a case where the Supreme Court considered a challenge to California’s disenfranchisement laws. The court was comfortable upholding the facial validity of California’s disenfranchisement laws, although it was unable to find case law

⁸⁰ Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. REV. 330 (1993).

⁸¹ *E.g.* Colson v. Grohman, 174 F.3d 498, 506 (5th Cir. 1999) (“There is no question that political expression such as Colson's positions and votes on City matters is protected speech under the First Amendment.”); Miller v. Town of Hull, Mass., 878 F.2d 523, 532 (1st Cir. 1989) (“Although we have found no cases directly on point, probably because it is considered unassailable, we have no difficulty finding that the act of voting on public issues[. . .] comes within the freedom of speech guarantee of the first amendment[. . .] There can be no more definite expression of opinion than by voting on a controversial public issue.”).

⁸² Nevada Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2355 (2011).

⁸³ *Id.* at 2350.

⁸⁴ *Id.*

⁸⁵ Farrakhan v. Locke, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997).

⁸⁶ *Id.*

supporting its specific view.⁸⁷ In support of this view, the court said “[w]e have strongly suggested in dicta that exclusion of convicted felons from the franchise violates no constitutional provision.”⁸⁸ In essence, the Supreme Court has adopted the view that voting is not a protected form of political speech.

Adherence to the view that voting is not a form of protected political speech is a mistake. Ordinarily, far be it from me to argue with such a learned legal scholar as Justice Scalia. However, not viewing voting as political speech works as a detriment to America’s political system. Initially, it is important to describe the effect of casting voting as political speech. Under the current view, a “flexible standard applies.”⁸⁹ Unfortunately, criminal disenfranchisement is seen as merely a regulatory restriction on voting.⁹⁰ As such, disenfranchisement laws are subject to, at most, intermediate scrutiny that in reality seems to be a rational basis review.⁹¹ Thus, the Supreme Court appears to have given the green light for states to disenfranchise individuals based solely on their criminal record.

Viewing voting as political speech drastically changes the validity of disenfranchisement laws. First, a law that disenfranchises an individual would be seen as impinging on a fundamental right and as such would be subject to strict scrutiny. Thus, the law would be presumed invalid unless the government could show a compelling state interest, and that the law was narrowly tailored to achieve that interest. Second, strict scrutiny would force the government to articulate reasons why disenfranchising criminals is necessary to the operation of its election laws. Clearly, this would be nearly impossible since the arguments in favor of disenfranchisement center on the unproven fallacy that an individual convicted of a felony cannot be trusted with the right to vote.⁹² Finally, even if the government could show that disenfranchisement laws are necessary, it would then have to show that the law was narrowly tailored to reach that end. Assuredly, this task would prove more difficult than showing a compelling government interest. For instance, a required psychological interview upon release from incarceration would be one way to ensure that the particular disenfranchised individual was sufficiently rehabilitated to vote. Such an interview would enable a case by case determination, and would alleviate the need to disenfranchise those convicted of specific crimes across the

⁸⁷ Richardson v. Ramirez, 418 U.S. 24, 53 (1974) (“Although the Court has never given plenary consideration to the precise question of whether a State may constitutionally exclude some or all convicted felons from the franchise, we have indicated approval of such exclusions on a number of occasions.”).

⁸⁸ *Id.*

⁸⁹ Burdick v. Takushi, 504 U.S. 428, 434, (1992) (“[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as 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.’ But when a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.”).

⁹⁰ Trop v. Dulles, 356 U.S. 86, 96-97 (1958) (“The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.”).

⁹¹ Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 51 (1959) (“Residence requirements, age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters.”).

⁹² Democracy Restoration Act, *supra* note 45

board. To be sure, viewing voting as political speech broadens the electorate and increases the likelihood for a felon's successful reintegration into society.⁹³

V. CRIMINAL DISENFRANCHISEMENT IN A MODERN WORLD

Criminal disenfranchisement is a multifaceted problem. Thus, many different theories are advanced to combat the problem of modern civil death. Mainly, the workhorse of movements against criminal disenfranchisement has been the Fourteenth Amendment. However, when dealing with issues like the right to vote—a right that is core to America's representative government—it is important to continue to advance alternative theories. After all, it is only by advancing these theories that previous flaws in reasoning, given changed circumstances, can be exposed. To this end, this essay has examined the history behind criminal disenfranchisement, some of the current landscape of disenfranchisement laws, the arguments driving the discussion, and the possible effect of treating the right to vote as protected political speech. The hope is that if voting were treated as protected political speech disenfranchisement laws would fail strict scrutiny analysis. Unfortunately, courts have treated the First Amendment argument dismissively, pointing towards vague dicta and inconsistent interpretation of the Fourteenth Amendment. This view is dangerous in light of current trends in incarceration and the narrowing margins for political victory.

Incarceration rates are at the highest rate they have ever been in this country. In fact, some say that incarceration rates are higher now in America than they were in Soviet Russia under Stalin's rule.⁹⁴ In 2009 there were an estimated 7,225,800 people under correctional supervision.⁹⁵ This is approximately a 400 percent increase in prison population in the last thirty years. In 2010 the United States Census Bureau announced that America's population had increased to 308,745,538.⁹⁶ According to these figures 1 out of 42 Americans is under correctional supervision. As a result of the drastic increase in incarceration rates, America has seen the rise in profitability of private prisons.⁹⁷ In 2006 about 7 percent of prisoners in America were being housed in private prisons.⁹⁸ Privatization of prisons was supposed to be a cost-effective way to deal with the increase of prison populations saving up to 20 percent, however the savings never materialized.⁹⁹ Furthermore, private prisons have proven to be more violent. In

⁹³ See *supra* text accompanying note 50.

⁹⁴ See Adam Gopnik, *The Caging of America*, THE NEW YORKER (Jan. 30, 2012), http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik?currentPage=all; *Incarceration in the United States*, WIKIPEDIA, http://en.wikipedia.org/wiki/Incarceration_in_the_United_States (last visited Nov. 16, 2012).

⁹⁵ *Key Facts at a Glance Correctional Populations*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm> (last visited Nov. 20, 2012).

⁹⁶ *News, U.S. Census Bureau Announces 2010 Census Population Counts*, UNITED STATES CENSUS 2010, http://www.census.gov/newsroom/releases/archives/2010_census/cb10-cn93.html (last visited Jan. 6, 2014).

⁹⁷ Suevon Lee, *By the Numbers: The U.S.'s Growing For-Profit Detention Industry*, PROPUBLICA, <http://www.propublica.org/article/by-the-numbers-the-u.s.s-growing-for-profit-detention-industry> (last visited Jan. 6, 2014).

⁹⁸ Gerry Gaes Ph. D., *Cost, Performance Studies Look at Prison Privatization*, NATIONAL INSTITUTE OF JUSTICE, <http://www.nij.gov/nij/journals/259/prison-privatization.htm#note1> (last visited Nov. 20, 2012).

⁹⁹ Amy Cheung, *Prison Privatization and the Use of Incarceration*, THE SENTENCING PROJECT, http://www.sentencingproject.org/doc/publications/inc_prisonprivatization.pdf (last updated Sept. 2004) ("In a 1996 General Accounting Office (GAO) review of several comparative studies on private versus public prisons, researchers acknowledged, 'because the studies reported little difference and/or mixed

fact, privately operated facilities have a much higher rate of inmate-on-inmate and inmate-on-staff assaults and other disturbances, 65 percent and 49 percent higher respectively.¹⁰⁰ In addition, at least one incident of corruption in the judicial branch shows the dangers of allowing private prisons to operate.¹⁰¹ Given these points, it is disquieting that criminal disenfranchisement laws receive sanction from the courts. Obviously, the drastic increase in incarceration rates correlates to a drastic decrease in eligible voters. Also, privatization of prisons raises important issues that felons are in a unique position to be aware of and concerned with. Thus, disenfranchisement laws disadvantage America's representative government by removing large numbers from the voting pool and effectively silencing the voices of those most affected by the laws themselves.

It is important to view current disenfranchisement laws in light of current political trends and movements. In the 2012 election President Barack Obama won by less than 3.5 million votes.¹⁰² Thus, with a minimum estimate of over seven million disenfranchised individuals in this country the number of disenfranchised people becomes significant. To emphasize, now President Barack Obama won Florida by a margin of less than 750,000 votes, and a disenfranchised population of over 1.5 million. Also remember, Florida recently changed its laws to make it more difficult for felons to vote.¹⁰³ In view of the tightness of political campaigns and efforts by states to keep felons off the voters list disenfranchisement laws are detrimental to America. For one, their votes are sufficient in number to sway entire presidential elections. Moreover, it is obvious that those in politics view them as a threat, otherwise they would not be concerned with changing their state's laws right before an election.

Civil death has no place in a modern world, it is an abhorrent practice. Criminal disenfranchisement ensures that the current incarceration models will continue into the future. Also, criminal disenfranchisement stands as a significant barrier to the reintegration of convicted felons to law abiding and contributing members of society. Furthermore, protecting voting as political speech would be an effective way to ensure that if a state does have a law disenfranchising criminals, the law is narrowly tailored to achieve a compelling interest rather

results in comparing private and public facilities, we could not conclude whether privatization saved money.' A study by the Bureau of Justice Assistance (BJA) released in 2001 had similar conclusions, stating that 'rather than the projected 20-percent savings, the average saving from privatization was only 1 percent' and 'the promises of 20-percent savings in operational costs have simply not materialized.'")

¹⁰⁰ *Id.*

¹⁰¹ Timothy M. Stengel, *Absolute Judicial Immunity Makes Absolutely No Sense: An Argument for an Exception to Judicial Immunity*, 84 Temp. L. Rev. 1071, 1072–73 (2012) ("In January 2009, the U.S. Attorney's Office for the Middle District of Pennsylvania filed a criminal information in federal court. That information charged two Luzerne County, Pennsylvania judges with depriving the citizens of Pennsylvania of their honest services and conspiring to defraud the United States government. The root of these charges was more than \$2,600,000 of secret income from a series of deals with the developers of a privately run, for-profit juvenile detention center. The judges allegedly received that income in exchange for their official acts, which included placing juvenile offenders in the detention center, as well as procuring state funding to house those juveniles . . . The grand jury indictment included forty-eight counts . . . Perhaps the most egregious charge against the two judges was that they had not only guaranteed placement of guilty juveniles in the private detention center but that they were also actively funneling juveniles into that detention center, regardless if their 'crimes' warranted such sentences . . . In the wake of the grand jury indictment, Michael Conahan pled guilty and was sentenced to 17.5 years in prison. Mark Ciavarella was convicted on twelve counts and was sentenced to twenty-eight years in prison. Both judges were ordered to pay restitution.").

¹⁰² 2012 Presidential Election, POLITICO, <http://www.politico.com/2012-election/map/#/President/2012/> (last updated Nov. 19, 2012).

¹⁰³ See *Rules of Executive Clemency*, *supra* note 33.

than an important or merely reasonable interest. Perhaps, it is merely a matter of time. To put it another way, in the words of Stanley Fish, Professor at Cardozo School of Law,

[t]he transformation of everything into speech and therefore into a candidate for constitutional protection has been going on for quite a while. Flag burning is speech, pornography is speech, a scurrilous and false representation of an evangelist's mother is speech, a video depicting the killing of kittens by a high-heeled dominatrix is speech, burning a cross is speech and, of course, spending huge amounts of money in an effort to buy elections is speech.¹⁰⁴

However, it will take more than the winds of change to pick this issue up off the ground. It will take diligent effort by people concerned with governmental limitations on speech, and it will take the court opening its eyes to the antiquated nature of laws that impose civil death.

¹⁰⁴ Stanley Fish, *The Opinion Pages, Is Voting Speech?*, THE NEW YORK TIMES, (June 20, 2011, 8:30 pm), <http://opinionator.blogs.nytimes.com/2011/06/20/is-voting-speech/>.