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THE CASE FOR ALLOWING "CONVICTED MAFIOSI TO VOTE FOR JUDGES": BEYOND GREEN V. BOARD OF ELECTIONS OF NEW YORK CITY

ELIZABETH AND WILLIAM DU FRESNE*†

When Green v. Board of Electors of New York City, 380 F.2d 445 (2d Cir. 1967) was denied certiorari, 389 U.S. 1048 (1968), there was great concern expressed by civil libertarians as to the impact this would have on judicial consideration of the various rights of which a convicted felon is deprived. The Green case was limited, as is the present inquiry, to the right to vote. The court stated therein that our system did not and could not countenance "convicted Mafiosi . . . (voting for) . . . judges . . . ." The premise of this article is the antithesis of the Green position: Not only is the American system so constructed that the vote of the convicted felon is equal to that of any other citizen in weight, but the convicted felon's vote is worthy of unusually stringent constitutional protections because in the past there has been a pattern of discrimination against him from the very legislators for whom he is not allowed to vote.

The constitutional arguments below are double-pronged: Initially the concept of "fencing out" felons from the election process is examined; then, in the alternative, due process and equal protection are applied to the present system by which some felons are restored to civil rights, while the vast majority are not.

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STATUTES WHICH AUTOMATICALLY AND INDEFINITELY DISFRANCHISE ALL CONVICTED FELONS, REGARDLESS OF THEIR CRIME, ARE, ON THEIR FACE, UNCONSTITUTIONAL.

HISTORICAL BACKGROUND

The word "felony" is taken from a Latin word meaning "venomous" or "poisonous." This definition is consistent with its use in the European feudal system, which was to designate a breach of feudal obligations of a sufficiently serious nature to warrant forfeiture of all properties in addition to capital or corporal punishment. In English common law, the term felony was applied to such major breaches of the King's peace as homicide, arson, rape and robbery.

Quite obviously, under the early treatment of felons, the deprivation of the right to vote did not emerge as a particularly stringent forfeiture. Even relatively late in the history of the term "felon," one sees that in nineteenth century America less than ten per cent of the population were qualified to vote. Sex, color, property holdings, payment of taxes, past servitude, and conviction of "infamous crimes" were all considered legitimate limitations on the "privilege" of suffrage. Disqualification of a certain class of criminals appeared quite acceptable in light of the times. Felonious behavior is the only one of the above named restrictions on voting still with us. However, to the layman, the semantical associations of the word "felon" are still so vile that such an individual seems "unworthy" of the vote.

For an illustration of the latitude which the states assumed in fixing voter qualifications, even after the passage of the Civil War Amendments, one need only read the following passage from Ratliff v. Beale:

If we look at the map of the state, and at the census reports, showing the racial distribution of our population, and consider these in connection with the apportion-

2. 2 Holdsworth, A History of English Law 357 (1923).
3. 4 Blackstone, Commentaries 95 (4th ed. 1769).
7. See Webster's New International Dictionary 931 (1963) for definition of "felon": "Cruel; murderous; wild; malignant; fierce; traitorous; disloyal . . . ."
ment of the constitution, it will at once appear that, unless there shall be a great shifting of population, the control of the legislative department of the state is so fixed in the counties having majorities of whites as to render exceedingly improbable that it can be changed in the near future by the ordinary flow of immigration, or by the growth by births among our own people. The election of the chief executive of the state is also largely affected by the same means. It is in the highest degree improbable that there was not a consistent, controlling directing purpose governing the convention by which these schemes were elaborated and fixed in the constitution. 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 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. A voter who should move out of his election precinct, though only to an adjoining farm, was declared ineligible until his new residence should have continued for a year. Payment of taxes for two years at or before a date fixed many months anterior to an election is another requirement and one well calculated to disqualify the careless. Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications, while robbery and murder and other crimes in which violence was the principal ingredient were not. Surely such blatant racially discriminatory voter qualifications are now recognized to be beyond the realm of state control. The franchise has been greatly expanded in the twentieth century—to those few still denied the right to vote, the Constitution assures strict scrutiny to whatever compelling state interest is put forth as justifying the sanction.

THOSE WITHOUT CIVIL RIGHTS STILL HAVE BASIC CONSTITUTIONAL PROTECTIONS

Before proceeding to the merits of the ex-felons' claim to the right to vote, it should be determined whether their status of being without "civil rights" puts ex-felons beyond the protection of the Constitution. The answer to that is a resounding "No"—or stated affirmatively, the equal protection and due process clauses apply to every citizen and cannot be taken away by a state government.

8. 74 Miss. 247, 266-67, 20 So. 865, 868 (1896) (emphasis added). This was later quoted with approval in Williams v. Mississippi, 170 U.S. 213, 222 (1898).
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Although it is true that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system," . . . it is well established that prisoners do not lose all their constitutional rights and that the Due Process and Equal Protection Clauses of the Fourteenth Amendment follow them into prison and protect them there from unconstitutional action on the part of prison authorities carried out under color of state law.11

THE CONSTITUTION IS A LIVING INSTRUMENT

As Mr. Justice Holmes said nearly fifty years ago:

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.12

Today the significance of Justice Holmes' words are apparent when one considers Davis v. Beason,13 and Murphy v. Ramsey.14 Although these cases were originally limited to the Mormon polygamy issue, the United States Supreme Court recently cited them as indicating that a state may constitutionally disfranchise persons who have committed any crime.15 If the Constitution is a static creature, the arguments of this section of the article are misplaced. However, over and over again, the courts have underscored the dramatic developing quality of the Constitution:

The Constitution of the United States must be read as embodying general principles meant to govern society and the institutions of government as they evolve through time. It is therefore this court's function to apply the Constitution as a living document to the legal cases and controversies of contemporary society.16

13. 133 U.S. 333 (1890).
15. These cases have also been used by the Court to support dicta on the states' primary responsibility in settling voter qualifications. This support is hard to justify, since both cases involved an Act of Congress, rather than an instance of state prerogative.
Noting the evolution of the Constitution since *Davis* and *Murphy*, one is singularly struck by the fact that when those cases were decided the fourteenth amendment was not used to invalidate state voting qualifications—indeed, it was not until the last decade's apportionment and voting rights cases that such a practice gained acceptance.\(^\text{17}\)

Probably the best known case which turned on the modern development of increased social and ethical awareness in society is *Brown v. Board of Education of Topeka*.\(^\text{18}\) In *Brown* the Court found that the legislative history of the equal protection clause as applied to segregated public schools was "inconclusive."\(^\text{19}\)

Less publicized than *Brown*, but even more relevant to the present inquiry, are *Baker v. Carr*\(^\text{20}\) and *Harper v. Virginia Board of Electors*.\(^\text{21}\) In these cases, as well as in *Carrington v. Rash*,\(^\text{22}\) the fourteenth amendment was applied to the right to vote! Thus, earlier cases which did not consider the fourteenth amendment's application to voting rights are of limited significance to current inquiries.\(^\text{23}\)

THE RIGHT TO VOTE AS IT WAS DEVELOPED IN THIS DECADE

It would seem self-evident that democracy and the unabridged right to vote are one and the same. Yet, surprisingly enough, it has taken this country almost 200 years of struggle against tradition and custom to realize the basic doctrine of "one citizen, one vote." \"The only criterion for being able to vote is to be a citizen. And all citizens are to be equally represented.\" As James Madison said in the *Federalist*, No. 57:

\"Who are the electors of the Federal representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.\"

What Madison said so clearly 200 years ago has only slowly been realized, through

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19. Id. at 489. The decision in *Brown* was postponed for a year to permit full argument of the historical background of the fourteenth amendment. Rutgers L. Rev., supra note 17, at 307 n.73.


four constitutional amendments, numerous Supreme Court decisions, and much legis-
lation, giving the idea the reality of law. In the beginning, the only person uni-
formly assured of the right to vote was the white, 21-year-old male, propertied, lit-
erate, a fixed resident, and with means to pay any tax. Gradually these restrictions
have fallen by the wayside, as custom and prejudice gave way to reason, or the
coercion of law. Most recently, through the 24th amendment, the poll tax has been
driven from the list of subtle discriminations against the full exercise of the voting
right.\textsuperscript{24}

In the above-quoted speech, the Congressman mentions the “nu-
merous Supreme Court decisions” on the right to vote—almost all of
which have occurred since 1960. “[I]n particular during the last
decade—the right to vote has received greater recognition by the
courts . . . .”\textsuperscript{25}

Of course, this is not to say that the right to vote did not receive
any attention until modern times. An early example of the Court’s
concern in the area is \textit{Yick Wo v. Hopkins} in which it was said that
the exercise of the franchise is “a fundamental political right because
[it is] preservative of all rights.”\textsuperscript{26} Other courts, too, have invali-
dated processes such as pre-primary elections by white Democrats
which were patently racial and designed to keep Negroes from
voting. However, it remained for the “Warren Court” to expand
the constitutional conception of a \textit{fundamental} right to vote which
was part of the heritage of every citizen.

Summarizing the recent decisions in the field is \textit{United States v.
Texas}:\textsuperscript{27}

To determine whether a right is protected by the due process clause, a court “must
look to the ‘traditions and [collective] conscience of our people’ to determine
whether a principle is ‘so rooted [there] . . . as to be ranked as fundamental.’
\textit{Snyder v. Commonwealth of Massachusetts}, 291 U.S. 97, 105 . . . . The inquiry is
whether a right involved ‘is of such a character that it cannot be denied without
violating those “fundamental principles of liberty and justice which lie at the base
of our civil and political institutions” . . . \textit{Powell v. State of Alabama}, 287 U.S.
47, 67 . . . .’

When measured against these standards and examined in the light of Supreme Court
pronouncements describing it as our most “precious” right, \textit{Wesberry v. Sanders}, 1964,
376 U.S. 1, 17 . . . , and as the “essence of a democratic society.” \textit{Reynolds v. Sims},

\begin{itemize}
  \item \textsuperscript{24} 114 Cong. Rec. 8077 (daily ed. Aug. 1, 1968) (remarks of Representative
  Schwengel) (emphasis added).
  \item \textsuperscript{25} United States v. Alabama, 252 F. Supp. 95, 105 (M.D. Ala. 1966) (3 judge
court) (Johnson, J., “specially” concurring).
  \item \textsuperscript{26} 118 U.S. 356, 370 (1886).
  \item \textsuperscript{27} 252 F. Supp. 234 (W.D. Tex. 1966) (3 judge court), aff’d., 384 U.S. 155
(1966).
\end{itemize}
1964, 377 U.S. 533, 555 . . . it cannot be doubted that the right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the due process clause.28

"The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." Stromberg v. People of State of California, 1931, 283 U.S. 359, 369 . . . . Yet how ineffective is this 'political discussion' protected by the First Amendment if its ultimate objective can be denied at the ballot box.

Even though not specifically mentioned in the Constitution, the right to vote clearly constitutes one of the most basic elements of our freedom—the "core of our constitutional system." Carrington v. Rash, 1965, 380 U.S. 89, 96 . . . .

"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. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.]" Wesberry v. Sanders, 1964, 376 U.S. 1, 17 . . . . See Harmon v. Forssenius, 1965, 380 U. S. 528 . . . ; Carrington v. Rash, supra; Reynolds v. Sims, 1964, 377 U.S. 533 . . . . It would be ironic indeed if the Constitution did not protect the right to vote, since that right was long acknowledged to be "preservative of all rights."29

Any further question as to whether suffrage is a fundamental right is answered by Reynolds v. Sims.30 In the Reynolds opinion, Chief Justice Warren, on behalf of six members of the Court, asserted the "undeniable" protection of the Constitution of the United States for the right of all qualified citizens to vote in state as well as federal elections. The majority opinion dwells on the continuing expansion of the scope of the right of suffrage in this century. Relevant to that expansion, the Court mentioned the seventeenth, nineteenth, twenty-third and twenty-fourth amendments to the federal Constitution and the recent civil rights legislation enacted by Congress.31 As the Court emphasized, the "fundamental" quality of the right of suffrage in a free and democratic society, it explicitly required that any "alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."32

A final eloquent statement of the "right's" position at the heart of

28. Id. at 250. (emphasis added).
29. Id. at 249-50.
31. Id. at 554-55.
32. Id. at 561-62.
the Constitution, is found in the dissent in Fortson v. Morris.\textsuperscript{38} Therein, "the basic instrument of democracy—the vote"—is discussed: "A vote is not an object of art. It is the sacred and most important instrument of democracy. . . ."\textsuperscript{38}

A STATE MAY SET VOTER'S QUALIFICATIONS ONLY SO FAR AS SUCH QUALIFICATIONS MEET CONSTITUTIONAL STANDARDS

As long ago as 1884, the constitutional limitations upon the states' ability to establish voters' qualifications were acknowledged in Ex parte Yarbrough.\textsuperscript{35} In Yarbrough, the Court held that the fifteenth amendment "clearly shows that the right of suffrage was considered to be of supreme importance to the national government and was not intended to be left within the exclusive control of the states."\textsuperscript{35} There is no realm of action in which a state legislature is free to ignore the requirements of the federal Constitution, and when a state acts in violation of the terms of the Constitution, it is the duty of the federal courts to so declare.\textsuperscript{37} A very recent Supreme Court decision is Williams v. Rhodes,\textsuperscript{38} which was concerned with an Ohio election law that made it impossible for a new political party\textsuperscript{39} to be listed on the ballot. In that case, the Court said that they must obviously reject the notion that article II, §1 of the Constitution could give the states the power to impose a burden on the right to vote when "such burdens are expressly prohibited in other constitutional provisions."\textsuperscript{40} The Court held that a state could not pass a law which purported to regulate elections if that law did not meet the requirements of the Equal Protection Clause.

Similarly, in Katzenbach v. Morgan,\textsuperscript{41} which successfully attacked New York's English literacy requirements for voting, the Court spoke of the state-federal involvement in qualifying voters.

\textsuperscript{33} 385 U.S. 231, 249 (1966).
\textsuperscript{34} Id. at 250.
\textsuperscript{35} 110 U.S. 651 (1884).
\textsuperscript{36} Id. at 664.
\textsuperscript{37} Shelley v. Kraemer, 334 U.S. 1 (1948).
\textsuperscript{38} 393 U.S. 23 (1968).
\textsuperscript{39} In that case the party was the American Independent Party of candidate George Wallace.
\textsuperscript{40} Supra note 38, at 10.
\textsuperscript{41} 384 U.S. 641 (1966).
Although the Court recognized that, under the distribution of powers, the states may establish the voting qualifications which in turn determine who may vote in federal elections, the Court also underscored the fact that the states have absolutely no power to grant or withhold the franchise on conditions which are forbidden by either the fourteenth amendment or any provision of the Constitution. Such an exercise of state authority would amount to state action and would be constitutionally cognizable.

Although there is no need to belabor this issue, it is important to cover because the states have contended that voting rights cases invade rights reserved to the states under the tenth amendment.\(^\text{42}\) In support of this contention, reference has been made to *Minor v. Happersett*,\(^\text{43}\) in which the Court stated that “the Constitution of the United States does not confer the right of suffrage upon anyone . . . ,”\(^\text{44}\) and *United States v. Anthony*,\(^\text{45}\) in which the Court said that the right or privilege of voting was dependent upon state citizenship, rather than national, and that the state might constitutionally provide “that no person should vote until he had reached the age of thirty years, or after he had reached the age of fifty, or that no person having gray hair, or who had not the use of all his limbs, should be entitled to vote . . . .”\(^\text{46}\) It is plain that today these cases would be decided quite differently.

**STATE STATUTORY AND CONSTITUTIONAL PROVISIONS WHICH DEPRIVE FELONS OF THE RIGHT TO VOTE INDEFINITELY, REGARDLESS OF THEIR CRIME, OFFEND THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT**

Once the right to vote has been characterized as a “fundamental right,”\(^\text{47}\) the fourteenth amendment tests for invasions of that right become more stringent. The so-called “preferred rights” analysis of testing voting qualifications requires a “compelling state interest,”


\(^{43}\) 88 U.S. 162 (1874).

\(^{44}\) *Id.* at 178.

\(^{45}\) 24 F. Cas. 829 (No. 14459) (C.C.N.C. N.Y. 1873).

\(^{46}\) *Id.* at 830. See also cases cited in *Rutgers L. Rev.*, *supra* note 17, at 302 n.24.

\(^{47}\) See *supra* pp. 116-19 of this article.
and legislation which is drafted with "narrow specificity," that is, regulation which is "carefully confined." Within the framework of the overall fourteenth amendment testing, the Equal Protection Clause basically demands that statutory classifications be reasonable (lacking arbitrariness, discrimination and "over inclusiveness") while substantive due process calls for a rational relationship between the statute and a legitimate legislative purpose.

Were the Disfranchising Provisions Enacted Pursuant to a Legitimate Legislative Purpose? Are they Reasonable in Light of Such Purpose?

In Ratliff v. Beale, the Court felt that the Mississippi state constitutional convention had diligently sought—and found by, amongst other things, disfranchising persons for "Negro-type" crimes—a method of legislating against the bad characteristics of the slave race. The Florida courts, however, saw such disfranchisement as a continuing "punishment." It seems extremely unlikely that either of these stated purposes would today be recognized as "legitimate legislative purposes." If states should choose to support a "punishment" or "racial" theory, rather than some more sophisticated rationale, their position would be indefensible.

For example, if punishment were put forth as the reasonable basis of the deprivation of the vote, one could look to Trop v. Dulles. There Chief Justice Warren used the deprivation of the felon's right to vote as an example of a nonpenal regulation. It was evident from the context of the illustration that had the regulation been for the purpose of punishment it would most probably be invalid as cruel and unusual punishment. And, since one who has been convicted of a

49. See McLaughlin v. Florida, 379 U.S. 184, 189-91 (1964); Carrington v. Rash, supra note 22.
51. Supra note 8.
52. Supra note 8, at 868.
55. Id. at 96.
56. Id. at 100-03. Accord, Otsuka v. Hite, supra note 48.
federal felony under, for instance, the Narcotics Act, comes within the scope of these provisions, the state’s action would amount to a state punishment for a prior federal offense.

Assuming then that the states will reject the "punishment" philosophy under which most of the statutes originally came into being, what other purpose can justify the deprivation of the vote to an entire class of persons? The purpose which has most frequently found endorsement under the law was that such action is necessary to preserve the "purity of the ballot box."

The protection of the "purity of the ballot box," or of the "integrity of the elective process" is a more tenable expression of the state interest and is the most widely used statement of that interest.

The inquiry is not ended here. The mere assertion of a presentable state rationale is not constitutionally sufficient. As stated by the Supreme Court:

[F]undamental personal liberties . . . may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose.

Under the stringent requirements of these constitutional standards, none of the suggested justifications may be sustained. Purification and protection of the ballot may be accomplished by other means as the State of Texas has recognized by the passage of numerous penal provisions.

The question has now become not whether some purpose for the law could conceivably exist, but, more importantly, whether the challenged laws are necessary in light of the stated purpose. But, if the states proffer the "purity of the ballot box" arguments, an inquiry

57. See Washington v. State, 75 Ala. 582, 585, 51 Am. R. 479, 481 (1884): "The manifest purpose is to preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption, just as much as that of ignorance, incapacity or tyranny . . . . The presumption is, that one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship. It is proper, therefore, that this class should be denied a right, the exercise of which might sometimes hazard the welfare of communities, if not that of the State itself, at least in close political contests."

58. In the words of Otsuka, supra note 48, at 611, 414 P.2d at 418.


60. United States v. Texas, supra note 27, at 251.

such as that suggested above by United States v. Texas would defeat the state’s contention. For example, the Election Code of the State of Florida, sets forth 35 punishable election offenses—from buying votes to tampering with a voting machine, and the Florida Statutes set out an additional offense or two related to bribery of candidates and election officers. Yet, the state still feels it must not allow convicted felons to vote. Surely, the Florida Statutes offer all the machinery necessary to protect the electoral system from corruption. If they do not, then supplemental laws should be passed dealing with specific offenses.

If the “purity of the ballot box” logic means more than is encompassed by corrupt election practices, it can only mean that the vote of a convicted felon is somehow impure in and of itself. This cannot be!

In Carrington, the Supreme Court considered a state constitutional provision which made it impossible for any member of the Armed Forces to establish residency for the purpose of voting. The citizens of Texas were afraid of the effect of the military vote. But if they are in fact residents, with the intention of making Texas their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation. . . . "Fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.

"[T]he 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.

In these times of a constantly expanding franchise, the possibility of the “criminal element” controlling a town through the ballot is an imaginary horrible. But even if the fear were well-founded, Carrington leaves no room to doubt that a man cannot be deprived of his right to vote because of how he may cast his vote.

The unreasonableness of using such a drastic remedy cannot be overemphasized. If a classification must be reasonable in light of the classifying law’s purpose, consider the class of “felons” and that

62. Id.
67. Supra note 22, at 94 (emphasis added).
class's deprivations relative to the result desired by the purpose of disfranchising statutes.

As a threshold matter, it should be determined who are "felons" under state law. For example, many states have provisions similar to this one:

The term felony, ... whenever it may occur in this Constitution or in the laws of the State, shall be construed to mean any criminal offense punishable with death or imprisonment in the State Penitentiary. 69

In other words, if two persons commit crimes that are each punishable with one year's imprisonment, but one is convicted under a statute which assigns the violator to the state penitentiary and the other under a statute which specifies the county jail or does not specify the place of imprisonment—the first is a felon and the second a mere perpetrator of a misdemeanor. The first is disfranchised, the second is not. There is hardly a reasonable distinction between the two classes.

Although such a tactic may develop into a game, there is some value in studying the criminal statutes in search of a common bond that would render all felons likely to "corrupt" the elective system and would absolve all misdemeanants from such tendency. Unfortunately no such logical pattern evolves. In fact, little or no formulae can be seen for determining which misconduct will be deemed a felony and which will be a misdemeanor. The only clear pattern is the designation of conduct which harms powerful economic groups such as farmers as felonies—and even that pattern is not pristine.

Only a few illustrations are necessary to show the arbitrariness of the classification based on punishment, rather than the nature of the crime. Because our practice is in Florida, the examples are taken from that State's laws, however, every state statute book can readily provide illustrations of the capriciousness of the categories. For example: one who falsely reports a bombing is a felon, 70 but one who gives false alarms for a fire 71 is a misdemeanant. Unmarried persons who cohabit lewdly and lasciviously 72 are felons, but married

persons who fornicate have only committed a misdemeanor.\textsuperscript{78} One who injures a milldam or machinery of a water mill or cotton gin\textsuperscript{74} is a felon while the much more serious crime, in terms of community rather than economic values, of injuring a dwelling house, school house, or church education building is only a misdemeanor.\textsuperscript{75} Maliciously killing an animal of another\textsuperscript{76} is a felony and the negligent deprival of human children of necessary food, clothing or shelter\textsuperscript{77} is a misdemeanor. Stealing a hog\textsuperscript{78} is a felony, but stealing and/or harming a dog\textsuperscript{79} is a misdemeanor.

Quite obviously the difference between the man who steals a hog and one who steals a dog is an unreasonable basis for depriving one of the vote and not the other.\textsuperscript{80}

The authors' contention is not that there are misdemeanors which should carry disfranchisement, but that the class of felonies is an arbitrary class. There is simply no rational relationship between most felonies and the exercise of the franchise. Does the person who lives in open adultery contaminate the voting process more than the thousands of voters that the sociologists tell us live in secret adultery? The answer is that neither offends the purity of the ballot box \textit{unless} that person is also a briber of election officials, a buyer of votes, or some other category of election offender. These manifestations of corruption may be dealt with under alternative systems which do not indiscriminately take the vote from persons who are no more prone to election misconduct than the average voter.

\begin{itemize}
\item \textsuperscript{73} \textsc{Fla. Stat.} § 798.03 (1965).
\item \textsuperscript{74} \textsc{Fla. Stat.} § 822.06 (1965).
\item \textsuperscript{75} \textsc{Fla. Stat.} § 822.04 (1965).
\item \textsuperscript{76} \textsc{Fla. Stat.} § 828.07 (1965).
\item \textsuperscript{77} \textsc{Fla. Stat.} § 828.04 (1965).
\item \textsuperscript{78} \textsc{Fla. Stat.} § 811.14 (1965).
\item \textsuperscript{79} \textsc{Fla. Stat.} § 811.19 (1965).
\item \textsuperscript{80} There are many misdemeanors which are much more nearly related to the ability to participate in elections without having a corrupting effect than are the majority of felonies. For example, a person who participates in an unauthorized military organization [\textsc{Fla. Stat.} § 870.06 (1965)], one who wantonly, wilfully or maliciously mars, defaces, injures or mutilates the State Capitol or other public, religious, civic or charitable buildings [\textsc{Fla. Stat.} § 822.03 (1965)] and one who wears a hood and plants burning crosses [\textsc{Fla. Stat.} §§ 876.12-876.21 (1965)], commits a misdemeanor and suffers no loss of franchise. The irrationality of separating such offenses from other, far less significant offenses, on the strength of the place of possible confinement is apparent.
\end{itemize}
"There is no such thing as states legitimately being just a little bit discriminatory." In a state's classification of felons as those to be deprived of the vote, there is no reasonable relationship between the offense and any possible purpose of disfranchising. Thus the Equal Protection Clause is violated.

The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. . . . It also imposes a requirement of some rationality in the nature of the class singled out. . . . [T]he Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have "some relevance to the purpose for which classification is made."

The irrationality of such legislation in many states is perfectly highlighted by a consideration of how the matter is handled in other states. Have all states found it necessary to "protect the ballot" by an across-the-board disfranchisement of all convicted felons? If not, is that fact not illustrative of the availability of other methods of giving the election process protection without taking away some citizens' most fundamental entrée into representative government? Upon completion of sentence, the right to vote is automatically restored in Kansas, Ohio, Michigan, Indiana, Wisconsin, Colorado, and West Virginia. There is no disqualification in Maine and only a very limited one in Vermont. In Missouri, Tennessee, and California, the right to vote is automatically restored after a given period of time following release for all crimes

84. KAN. GEN. STAT. ANN. § 62.2252 (1964).
85. OHIO REV. CODE ANN. § 2965.17 (1954).
86. MICH. STAT. ANN. §§ 6.1492, 6.1938 (1956). The MICH. CONST., art. 2, § 2, would allow the legislature to disqualify those convicted of crime from voting but the legislature has not chosen to do so.
89. CAL. PEN. CODE § 1203.4 (Supp. 1966).
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except treason. Pennsylvania's voting restriction only applies to those who have violated election laws and even then is limited to a period of four years. Massachusetts and New Hampshire similarly restrict the franchise to those who have committed an "election crime." Utah's disqualifying provision is similar but includes treason as well as "crimes against the elective franchise."

If these sixteen states (and perhaps others since the listing above does not attempt to be exhaustive) have been able to keep their ballots "pure" without an open-ended disfranchisement of all felons, it seems that the state constitutional and statutory provisions which purport to take from all felons the right to vote are unreasonable, arbitrary, and discriminatory to those persons who are being unnecessarily deprived of suffrage without a "compelling state interest." "Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right [speaking of the right to vote]."

The Challenged Practices are Over-Broad or Over-Inclusive in Violation of the Equal Protection Clause

The Supreme Court has held that state-imposed limitations on the right to exercise suffrage are valid only if there is a showing of a "compelling state interest." It further instructs that such restrictions must be drawn with "narrow specificity" and must be germane to the "intelligent exercise of the franchise."

There is nothing suggesting "narrow specificity" about the disqualification from suffrage of anyone who has been convicted of a felony. Some states base the term felony on the place of punishment, while others make the definition dependent upon the length of sentence. The arbitrariness of the class of "felons" has already been suggested. The only acceptable criterion appears to be the nature of the crime. The California Supreme Court, in a decision which held the class of

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95. PA. CONST. art. VII, § 1.
96. MASS. CONST. amend. XL.
98. UTAH CONST. art. IV, § 6.
101. As suggested by supra note 17.
“felons” to be an invalid one for the purpose of protecting the electoral system, said:

[D]efendant’s proposed construction of “infamous crime” to include any and all felonies would . . . sweep into its ambit malum prohibitum conduct which is but little detrimental to society at large and is totally unrelated to the goal of preservation of the integrity of the elective process.\(^{102}\)

Rather, the inquiry must focus more precisely on the nature of the crime itself, and determine whether the elements of the crime are such that he who has committed it may reasonably be deemed to constitute a threat to the integrity of the elective process.\(^{103}\)

**Keyishian v. Board of Regents of the University of the State of New York**,\(^{104}\) a case in which New York’s loyalty statute which allowed dismissal of public school teachers for “treasonable” and “seditious” acts was held invalid, reiterated that:

[Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.\(^{105}\)]

**Keyishian** also reemphasized that: “precision of regulation must be the touchstone in an area so clearly touching our most precious freedoms.”\(^{106}\)

It has been suggested above that the desired end might be accomplished through penal statutes specifically directed toward election misconduct. However, if this is not felt to be sufficient, the category of persons barred from voting may certainly be made more specific than those who have committed a “felony.” Voting restrictions must be “germane to one’s ability to participate intelligently in the electoral process,”\(^{107}\) and to keep the election machinery free from actual fraudulent acts. Thus, “election crimes” might well be a sufficiently specific category to accomplish the purpose of the legislation. And even after so limiting the class, the quality of indefiniteness in

\(^{102}\) Otsuka v. Hite, *supra* note 48, at 606, 414 P.2d at 419.

\(^{103}\) Otsuka v. Hite, *supra* note 48, at 611, 414 P.2d at 422. *Cf.* State v. Lamboon, 107 S.C. 275, 277, 92 S.E. 622, 623 (1917): “[I]t is not a fact that the nature of all felonies is such as to make it probably that the parties committing them are devoid of truth and insensible to the obligations of an oath. The name by which an offense is designated does not change its moral characteristics which must necessarily be considered in determining whether the person convicted of a felony is disqualified as a witness . . . .”

\(^{104}\) 385 U.S. 589 (1967).

\(^{105}\) *Id.* at 602 (emphasis added).

\(^{106}\) *Id.* at 602-04.

most of the current laws must be curtailed. Presently, unless there is 
an intervention of executive clemency, a felon is frequently deprived 
of the right to vote for the rest of his life.

To curb that indefiniteness, the President's Commission on Law 
Enforcement and Administration of Justice has suggested that the 
states adopt the American Law Institute's Model Penal Code § 306.3 
which states:

Notwithstanding any other provision of law, a person who is convicted of a crime 
shall be disqualified
   (1) from voting in a primary or election if and only so long as he is committed 
      under a sentence of imprisonment and
   (2) from serving as a juror until he has satisfied his sentence.

The Model Penal Code has forsaken traditional negative “punish-
ment” theory in correction and directed itself, instead, to the affir-
mative goal of rehabilitation. "The rehabilitative potential of per-
mitting voting [even in the prison system itself], by at least those 
inmates convicted of crimes not involving dishonesty [or election 
fraud] has been recognized." Since almost all state legislatures 
have frequently committed themselves to the ideal of rehabilitation 
as a desirable goal for our prison systems, the type of laws under 
attack herein are not only unreasonably broad in light of the specific 
purpose of the challenged laws, but, also, are in direct conflict with 
the states' commitment to rehabilitating these individuals and making 
them a meaningful part of the American scheme.

Lifetime deprivations of the vote are especially repugnant when 
one realizes that the vast majority of first time felons are in their early 
twenties and that the average age for all felons is considerably under 
30. The openendedness of the deprivation of the vote means that 
the youthful offender is assumed to be "corrupt" decades after his of-
fense. Thus, any reasonable connection between the committed 
felony and the individual's potential for harming the election process 
may well have long since disappeared, yet the individual continues 
in a state of deprived citizenship. One has only to look to the stat-

108. President's Comm. on Law Enforcement and Administration of Justice, Task Force Report: Corrections Ch. 8 (1967).
utes and constitutions of sixteen states discussed above to realize that an indeterminate deprivation of the vote is not necessary to achieve the desired goal and is too inclusive to meet any fourteenth amendment attacks.

The offensively broad sweep of the law can be corrected by narrowly drawn statutes and specific time limitations on deprivations. Even if—as seems unlikely—this should place an administrative burden on the states in determining which felons actually stand in a position of rational relationship to the purpose of such laws, this is not a ground for unjustly depriving individuals of their vote:

We deal here with matters close to the core of our constitutional system. “The right . . . to choose,” . . . that this Court has been so zealous to protect, means at least, that states may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the state.112

THE CHALLENGED PRACTICE DEPRIVES THE EX-CONVICTS OF RIGHTS OF NATIONAL CITIZENSHIP

As long as ours is a representative form of government and our legislatures are those instruments of government elected by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.113

But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them.114 To the extent that a citizen's right to vote is debased, he is that much less a citizen.115

But does the phrase “qualified voters” make the right beyond the grasp of felons? Certainly not. As Chief Justice Warren said in Trop v. Dulles:

Citizenship is not a license that expires upon misbehavior . . . . And deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be.116

Few activities more symbolically involve a citizen in the process of a democratic government than the action of voting.117 Now, in light of recent case law, it is understood that “political discussion,” which is

114. Id. at 565 (emphasis added).
115. Id. at 567.
117. Supra note 110, at 6.
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a right of citizenship, is an ineffective right under the first amendment "if its ultimate objective can be denied at the ballot box." In other words, when the right to vote is subtracted from citizenship, you are left with something less than full citizenship. This is in startling contrast with the absolute terms with which citizenship is usually described. And that "liberty" which each citizen has as an "inalienable right" is "[l]iberty under law [which] extends to the full range of conduct which the individual is free to pursue." To curtail the liberty of a group of citizens because of a presumption of their "corruption" is to reduce their citizenship into something inferior to that enjoyed by others.

Once acquired, this Fourteenth Amendment citizenship was not to be shifted, cancelled, or deleted at the will of the Federal Government, the States, or any other government unit.

In short, the action of a state in denying the vote to citizens of the United States amounts to a state-created "second-class citizenship."

This country cannot tolerate gradations of citizenship!

In a very recent case, the federal court in Maryland was asked to consider the voteless state of individuals living in a federal enclave. The opinion harkens back to the basis of the American Revolution. This country was founded on the idea that taxation without representation was intolerable.

We conclude that on balance the plaintiffs here are treated by the State of Maryland as State residents to such an extent that it is a violation of the Fourteenth Amendment for the State to deny them the right to vote.

Perhaps it is a simplistic view, but under current law in half the states of the union, convicted felons are taxed while being deprived of the opportunity of participating in representative government.

THE CHALLENGED PRACTICES AMOUNT TO A RESTRAINT ON THE FREEDOM OF MOVEMENT PROTECTED BY THE PRIVILEGES AND IMMUNITIES, CITIZENSHIP AND DUE PROCESS CLAUSES OF THE CONSTITUTION

If one wonders whether the deprivation of freedom of movement

118. Supra note 27, at 249.
119. Supra note 81, at 873.
122. Schneider v. Rusk, supra note 82.
is an actual threat under such laws, he has only to refer to the laws of the sixteen states enumerated above. Citizens of those states whose right to vote becomes automatically restored upon completion of sentence, or after a given term of years, or who committed a felony which would not disqualify them from voting in the convicting state but which is grounds for disfranchisement under the law of a state to which they wish to move, will plainly be reluctant to come into a state where they cannot exercise their full citizenship. If freedom of movement is a constitutionally protected right and the state disqualifying law has the potential of exercising a "chilling effect" upon that right through the discouragement of interstate travel for the purpose of establishing a residence and of voting, the state law must fall. Thus, a three judge federal district court in Connecticut said:

Further support for the proposition that the right of interstate travel also encompasses that right to be free of discouragement of interstate movement may be found by analogy to cases proscribing actions which have a chilling effect on First Amendment rights.

As a three judge federal district court in Kentucky said in considering the constitutionality of that state's vagrancy statute: "Movement is essential to freedom . . . ." The court felt that such movement was a "basic right of citizenship." The Supreme Court, too, has observed that the "right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law . . . ."

Thus, suppression of the right to vote would be an indirect method of denying one's liberty, which is not allowed.

Even if one wrongly views the right to vote in the most archaic light—that is, as a gratuitous privilege granted by the states—it cannot be denied because an individual moved to another state. Deny-

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130. Id.
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ing even a gratuitous benefit because of the exercise of a constitutionally protected right effectively impedes the exercise of that right.\textsuperscript{133}

PRESENT STATE METHODS FOR RESTORATION OF THE RIGHT TO VOTE THROUGH AN EXERCISE OF EXECUTIVE CLEMENCY VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT

In the initial portion of this article, state laws which prohibit all felons from voting were contested. However, most of these states do not simply take the vote from the felons; they disfranchise only convicted felons whose civil rights have not been restored. We shall summarily consider the attack against laws that give the right to vote to some convicted felons while withholding it from others.

Typical of such laws is the Florida statute which provides that:

The following persons are not entitled to vote: . . .

(d) Persons convicted of any felony by any court of record and whose civil rights have not been restored.\textsuperscript{134}

It does not necessarily follow that if the voting right of a convicted felon may be constitutionally forfeited, a state is free of constitutional restraints in establishing the terms on which they may be restored. Nor does it follow that the chief executive of a state is free of constitutional restraints imposed by the fourteenth amendment. The due process and equal protection clauses govern any actions of the state whether through its legislature, its courts, or its executive or administrative officers.\textsuperscript{135}

“RESTORATION” LAWS TREAT MEMBERS OF THE SAME CLASS UNEQUALLY

A state’s grant of the right to vote to some felons while withholding it from others amounts to a classic equal protection breach. People in identical circumstances are treated differently. Some people are forced by law to forego a constitutionally protected right


\textsuperscript{134} FLA. STAT. ANN. § 97.041(5)(d) (1965); FLA. CONST. art. VI, § 4. See FLA. CONST. ART. IV, § 8(a) (1969), which allows the Governor to restore civil rights with the approval of his cabinet.

that others in like circumstances are allowed to exercise.

The United States Supreme Court has spoken on this issue many times:

When the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.\textsuperscript{136}

And, in another case, more nearly on point:

Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the states from fixing voter qualifications which invidiously discriminate.\textsuperscript{137}

Even if one is not convinced by the authors' first argument and finds that a state can take away the vote of a felon, the procedure of giving the vote to some felons and not to others cannot stand. "[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."\textsuperscript{138}

A GOVERNOR'S ABILITY TO GIVE THE VOTE TO SOME CONVICTED FELONS AT HIS DISCRETION VIOLATES EQUAL PROTECTION

There are no standards or regulations governing the restoration of civil rights in most states. Applicants to have their civil rights restored have no way of knowing whether they will be "qualified"; such a law is "susceptible of sweeping and improper application."\textsuperscript{139}

The governor has the power to deny the applicant because of his race, religion, sex, or for any other reason that he desires; whether these reasons are related to the applicant's ability to cast a ballot is immaterial under the present restoration statutes. Frequently, the only restriction placed on this power is in cases of treason and impeachment, in which cases civil rights may not be restored. This process impermissibly "license[s] the jury [authority] to create its own standards in each case."\textsuperscript{140} In the case of Thompson v. Shapiro,\textsuperscript{141} the court held, \textit{inter alia}, that where government con-

\textsuperscript{137}. Harper v. Virginia Bd. of Elections, \textit{supra} note 10, at 666.
\textsuperscript{140}. Herndon v. Lowry, 301 U.S. 242, 263 (1937).
fers advantages on some, it must, in order not to deny equal protection, justify its denial to others by reference to a constitutionally recognized reason.142

Especially relevant to our inquiry is the case of United States v. Penton.143 The Attorney General of the United States sued to enjoin state officials from practices depriving citizens of the United States of the right to register and vote because of their race. The court held that the right to vote is a "personal right" that is vested in qualified individuals "by virtue of their citizenship. [It is] not a privilege to be granted or denied at the whim or caprice of state officers or state governments."144

The law is clear that unfettered discretion on the part of the state, whether in the hands of the legislature, the governor, or state agencies, is in violation of the Equal Protection Clause. For example, in Cox v. Louisiana,145 the city's and state's unfettered discretion in granting permits for meetings was held to be unconstitutional. The Cox decision was reaffirmed in the recent case of Shuttlesworth v. City of Birmingham.146 One of the most obvious reasons for the policy which disfavors overbroad criminal sanctions is that they allow impermissible room for subjective judgments on the part of the authorities. The laws providing for restoration of civil rights such as voting could be used for "harsh and discriminatory enforcement by . . . officials, against particular groups deemed to merit their displeasure. . . ."147

An analogous issue was before the United States Supreme Court in Louisiana v. United States.148 Louisiana had a voters' "interpretation test" in which new registrants had to interpret sections of the Louisiana and federal Constitutions. The state admitted that the statutes establishing the interpretation test vested discretion in the registrars of voters to determine the qualifications of applicants for

142. See also Sherbert v. Verner, supra note 133. In the Thompson case, the State of Connecticut was found to be in violation of the Equal Protection Clause because it gave welfare to some and not to others similarly situated based on unreasonable regulations.
144. Id. at 202 (emphasis added).
146. 382 U.S. 87, 90 (1965).
registration while imposing no definite and objective standards upon the registrars for the administration of the test. Justice Black, expressing the views of eight members of the Court, said:

The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar. Many of our cases have pointed out the invalidity of laws so completely devoid of standards and restraints.140

The logic of *Louisiana v. United States* is highly persuasive in the "restoration" context. A governor is like the Louisiana registrar in that application is made to him and he decides at his "whim or impulse" who may vote. It does not matter what label is used—pardon, restoration of civil rights, or whatever—the felon must apply to the governor and he *may* allow the applicant to vote. The fourteenth amendment's equal protection requirements are not met by this procedure.

**THE PROCEDURE BY WHICH CONVICTED FELONS ARE GIVEN THE RIGHT TO VOTE IN MOST STATES VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE IT IS SO VAGUE AND STANDARD-LESS THAT IT LEAVES APPLICANTS UNCERTAIN AS TO NECESSARY CONDUCT AND REQUIREMENTS TO HAVE THEIR CIVIL RIGHTS RESTORED**

As Mr. Justice Douglas has said:

It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between the rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.150

That the due process clauses will strike down procedures that are so vague and standardless that they leave the public uncertain as to conduct which is prohibited or required, is a proposition that our courts have long recognized.151 This is especially true when fundamental rights are involved. The right to vote is such a right,152 and, as such, it is protected by the Due Process Clause of the fourteenth amendment against any state deprivation which does not meet the standards of due process. This protection is not to be avoided by the simple label which a state may choose to fasten upon its conduct or

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149. *Id.* at 153.
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The states have often chosen to call the restoration of the right to vote an exercise of the pardon power—thus, an act of mercy. By bringing the voting disfranchisement under the pardon umbrella, the states have claimed absolute executive discretion on behalf of the pardoning body and have avoided judicial review—quite an example of semantical gamesmanship. The statutes or regulations which connect the restoration of the vote with pardon power are usually most indirect. Usually, there is an election regulation, statute or oath which removes the convicted felon from the "qualified voter" category until his civil rights are restored. Thus, the basic problem is an election regulation; the pardon power comes into it only as the avenue for qualifying under the election regulation. A state cannot take a regulatory statute, and, by linking it with the governor's clemency power, waive all constitutional restraints. The contention that the restoration of the right to vote is part and parcel of the pardon power, no different from the authority to commute a death sentence to life, cannot stand. When a person is sent to prison as punishment for a crime, the granting of a pardon as an act of mercy has traditionally been beyond judicial review. However, when the executive administers regulatory statutes, his actions have historically been within the purview of judicial review.

CONCLUSION

It must be emphasized that the entire issue of deprivation of a felon's voting rights should be seen in the context of suffrage as it has emerged in recent years. Congress and the courts have constantly expanded the right to vote, even to the point of making it possible for nonresidents to participate in presidential elections. The laws attacked herein are remnants of feudalism and the "punishment" psychology of an earlier age.

It has been argued that the disfranchisement of felons is justified by section two of the fourteenth amendment. Disregarding for the moment whatever meaning "treason or other crime" may have possessed historically, it is not conceivable that today "other crime" can possibly be read as any other crime. Could the lifetime deprivation of suffrage of the one-time vagrant or careless driver or oper-

153. Supra note 151, at 401.
ator of a car without a muffler be tolerated? Rather than such an all-encompassing interpretation of section two, it is contended that section two must be read with the rest of the fourteenth amendment so that a state has the power to disfranchise those whose deprivation meets the equal protection, due process and citizenship tests discussed in this article. In other words, section two only allows disfranchisement of persons who have committed a crime that would rationally be related to the corruption of the electoral system.\textsuperscript{155}

This article has portrayed the right to vote as it has evolved—a fundamental right protected by the Constitution. When one considers the poor voting turnout in this country, the discouragement of any class of persons who wish to vote is tragic. Our task is to make it easier for people to vote, not harder. As President John F. Kennedy once said, rather prophetically: "It is easier today to buy a destructive weapon, a gun in a hardware store than it is to vote. . . . Why make it difficult for people to vote?"\textsuperscript{156}

\textsuperscript{155} See Rutgers L. Rev. supra note 17, at 136-40 and accompanying text.

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