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EXPRESSIVE VOTING

by

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NOTE

EXPRESSIVE VOTING

ADAM WINKLER*

INTRODUCTION

The Supreme Court has long called the right to vote “fundamental,”¹ declaring that “[n]o right is more precious in a free country”² and that the “right to vote freely for the candidate of one’s choice is the essence of a democratic society.”³ Such sentiments reflect the notion that enfranchisement—the formal ability to participate in elections as a voter⁴—is among the most important legal rights in a society philosophically devoted to liberty and self-governance.

It is therefore surprising to discover that the Supreme Court has evidenced in its right-to-vote jurisprudence what may be characterized as a limited view of the value of voting. The Court tends to rely implicitly

* I am deeply indebted to those who read, critiqued, and challenged the ideas of this Note at various stages: Professors Mitchell Duneier, Christopher Eisgruber, David Garland, Pamela Karlan, and Edward Shils, Judge James Zagel, James Merriman, and the editors of the New York University Law Review. Special mention must be made of Melissa Bomers, who not only engaged me with her insight and understanding but also encouraged me with her faith and support.

¹ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966).

² *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

³ *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

⁴ See Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 *Tex. L. Rev.* 1705, 1707-08 (1993). The “right to vote” is multi-faceted, reflecting three distinct, though certainly related concepts: “enfranchisement” (or “participation”), “aggregation,” and “governance.” *Id.* The first concept, enfranchisement, involves the basic ability to participate in an election as a voter. The law of enfranchisement governs the contours of the electorate, deciding who is allowed to cast a ballot. *Id.* at 1709-12. Aggregation is the method by which votes are counted and weighed to determine election outcomes. *Id.* at 1712-16. Questions of aggregation relate to a structure the political body adopts to aggregate votes into representation, such as majoritarian or cumulative voting systems and districting. Finally, governance is the process of interest representation and decisionmaking by elected officials within political institutions, such as the legislature. *Id.* at 1716-19. While these three concepts are clearly interrelated and mutually supporting, each involves a host of divergent issues and problems, and thus they can be isolated for analytical reasons.

Although much legal discourse centers on issues of districting, dilution, and adequate interest representation, the argument of this Note is concerned specifically with enfranchisement. The determination of who will be allowed to participate is foundational, establishing the groundwork on which are built the issues of aggregation and governance—essentially questions of the *effect* of votes post-enfranchisement. As used throughout this Note, “the right to vote” refers specifically to enfranchisement while “voting rights” is used to signify the larger category including enfranchisement, aggregation, and governance.

on an "instrumental" view of the franchise in which voting is seen solely as a societal tool for exerting political power. According to the Court's instrumentalist approach, the individual's right to vote is protected only to the extent that it can be used as a means of pursuing informed political choices in an effort to direct governmental institutions.⁵ In other words, the individual right to vote is confined to the societal goal of gauging and institutionalizing the political will.

This Note offers a broader conception of the values promoted by the right to vote. According to this alternative approach, the vote should be protected not simply because it enables individuals to pursue political ends, but also because voting is a meaningful participatory act through which individuals create and affirm their membership in the community and thereby transform their identities both as individuals and as part of a greater collectivity.⁶ Using insights from a host of social science disciplines—including political science, sociology, and anthropology—this Note constructs an "expressive" approach to participation, which is then translated into a functional legal doctrine. This alternative approach to enfranchisement is termed "expressive" because it rests on the argument that for the individual voter, voting is an act of expression,⁷ and moreover that the vital political ethos of the American identity is expressed and furthered by elections.⁸ While recognizing that voting has instrumental aspects⁹—there can be little doubt that voting does serve, in part, to gauge systematically the political will of the electorate—the expressive approach offered here broadens those instrumental aspects and supplements them with a constitutive understanding of electoral participation.¹⁰ Thus, voting is viewed as valuable both for how it gauges the political will and for how the experience of voting itself affects and transforms the individual voter, regardless of the content of that person's vote.

In recognition of the argument that voting has an expressive character, Part I of this Note briefly considers the relationship between the right to vote and the first amendment's guarantee of free speech. The consideration of this relationship is undertaken at this stage in order to locate the theoretical bases for the expressive approach to voting and to

⁵ See text accompanying notes 42-50 *infra* (defining Supreme Court's "instrumental power" approach).

⁶ See notes 166-208 and accompanying text *infra* (analyzing constitutive value of voting).

⁷ See text accompanying notes 11-12, 152-208 *infra* (discussing expressive quality of voting).

⁸ See notes 170-207 and accompanying text *infra* (probing role of expressive voting in fortifying American identity).

⁹ See notes 157-65 and accompanying text *infra*. The expressive approach to voting recognizes the instrumental importance of the vote, but it seeks to protect both instrumental and constitutive values of voting.

¹⁰ See notes 166-208 and accompanying text *infra*.

address some concerns raised by terming the approach "expressive." Part I continues by introducing the instrumentalist conception of enfranchisement, exploring how this view is evidenced in the conclusions reached and the types of arguments legitimated by the Supreme Court's right-to-vote jurisprudence. The Court's "instrumental power" approach is then criticized as inadequate and internally incoherent, inviting a new conception of the values served by enfranchisement and the basic act of electoral participation.

Part II responds to this invitation by offering an expressive conception of enfranchisement. Two main aspects of this conception are examined. First, this Part considers the instrumental aspects of enfranchisement as viewed from an expressive understanding of voting. This Part reformulates and expands the Supreme Court's relatively narrow recognition of instrumental aspects of enfranchisement. Second, it explores the constitutive aspects of expressive voting stemming from the nature of voting as a meaningful social act that implicates one's sense of attachment to the greater community. Focusing on the context of the United States, this Part considers how voting regenerates and affirms the American cultural identity among the citizenry. In contrast to a "pure" instrumentalist conception of voting, which focuses exclusively on the individual's use of the vote as a tool for furthering political ends, the expressive conception offered here seeks to protect both the instrumental use of the ballot and those values derived from the act of voting itself.

Finally, Part III briefly analyzes the jurisprudential implications of the expressive approach to enfranchisement. This Part examines the major cases of the enfranchisement jurisprudence through the lens of an expressive conception of voting, questioning which restrictions would remain valid if the proposed vision of the right to vote ever is accepted. Where necessary, current restrictions are reconceptualized and reformulated to reflect the assumptions of the expressive view of voting.

This Note suggests that the Supreme Court should adopt a new approach to voting that will facilitate a fuller comprehension of the range of values served by the right to vote. The expressive approach presented here, by capturing both instrumental and constitutive aspects of voting, will enable the Court to accomplish this task, giving content and coherence to the Court's intuition that voting is crucial to the American people.

I

THE JURISPRUDENCE OF ENFRANCHISEMENT: TRACES OF
AN INSTRUMENTALIST APPROACH TO VOTING*A. Voting as Expressive: Locating the Right to Vote
in the Constitution and in Theory*

Voting is essentially an expressive exercise. By voting, the individual shows something of herself, displaying desires, beliefs, judgments, and perceptions. The voter gives voice to her sentiments and views, concretizes them, and asserts them, though anonymously, through the marking of a candidate's name or the "yes" or "no" of a referendum. This may be a communicative effort, one that creates a link between the voter and someone else—for example, government officials, political parties, or the general public—and passes a message from one to the other.

But like a diary writer whose words are intended never to be read, the individual may express herself for purely constitutive reasons. Rather than attempting to communicate, a voter may seek instead to project certain aspects of her identity, such as values, ideals, and experiences, in an effort to exert herself among others, even if that exertion will remain completely anonymous and, for the most part, unrecognized. Such a voter, like the diary writer, engages in this act because it is inherently meaningful to her, allowing her to shape or constitute her identity. Thus, voting, like other forms of expression, may be understood to have two roles: it may be used as a vehicle or tool for communicating ideas (an "instrumental" role),¹¹ and it may be used to exert and shape one's identity without any corresponding desire to convey messages (a "constitutive" role).¹²

This Note will return later to the issue of voting's expressive character and will explore this aspect of voting in greater depth.¹³ The preliminary recognition of this expressive quality of voting, however, raises a threshold question for that analysis: if voting is viewed as expressive at all, what role should the constitutional guarantee of freedom of expression¹⁴ play? This question requires preliminary discussion because first amendment protection for the right to vote might render a detailed analysis of the contours of expressive voting unnecessary on account of the well developed jurisprudence of the first amendment.

¹¹ See notes 157-65 and accompanying text *infra*.

¹² See notes 166-208 and accompanying text *infra*.

¹³ See Part II *infra*.

¹⁴ U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

1. *The Right to Vote in the Constitution's Guarantee of Free Speech?*

Currently, the right to vote is protected by the several constitutional amendments prohibiting denial of the franchise on the basis of race,¹⁵ gender,¹⁶ age,¹⁷ and the ability to pay a poll tax in federal elections.¹⁸ When denial of the right to vote is not based on one of these characteristics, the right finds constitutional protection in the fourteenth amendment's guarantee of "equal protection of the laws."¹⁹ There is no single amendment that clearly and firmly states that the right to vote shall not be denied, unlike that for other liberties, such as freedom of speech and religion. Due to the ambiguity of this textual mandate, the Court is forced to formulate its own conception of the values served by the right to vote.

If considered under free speech doctrine, however, the right to vote would be subject to a well-developed jurisprudence with a firmly established framework for determining whether states may impinge on the free speech rights of individuals.²⁰ As a result, perhaps one need not ponder what theories or conceptions of values guide or should guide the adjudication of disputes concerning the right to vote. If voting is expression protected by the first amendment, we need only ask what type of speech it is—commercial, violence-inciting, obscene, political, etc.—and subsequently what standard of review the jurisprudence requires one to apply to determine the constitutionality of laws restricting the right.

Thus conceptualized under the constitutional doctrine of free speech, voting would be paradigmatic of political speech; through voting, the individual expresses, among other things, support for a candidate for political office. Her "yea" or "nea" communicates her political views,

¹⁵ U.S. Const. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude.").

¹⁶ U.S. Const. amend. XIX ("The right of citizens of the United States to vote shall not be denied . . . on account of sex.").

¹⁷ U.S. Const. amend. XXVI ("The right of citizens of the United States, who are eighteen years of age or older, shall not be denied or abridged . . . on account of age.").

¹⁸ U.S. Const. amend. XXIV ("The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax."). Two years after the adoption of this amendment, the Supreme Court, in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966), held that conditioning the right to vote on the payment of a poll tax in state elections was unconstitutional.

¹⁹ See, e.g., *United States v. Cruikshank*, 92 U.S. 542, 556 (1875) ("The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been."); *Harper*, 383 U.S. at 665, 667-69 (applying equal protection clause to invalidate state poll-tax restriction on the right to vote).

²⁰ For an overview of free speech doctrine, see John E. Nowak et al., *Constitutional Law* §§ 16.1-16.61 (3d ed. 1986).

judgments, and ideals. Under current first amendment jurisprudence, voting, as political speech, would gain the utmost constitutional protection: application of the strict scrutiny standard of review.²¹ To that extent, we might be satisfied with the high degree of protection expressive voting would receive under the first amendment and find little need to look further into the nature and scope of values underlying voting. After all, strict scrutiny analysis focuses on the nature of the restricting statute instead of on the values served by the underlying right.

However, we must first address the question of whether the right to vote, understood expressively, ought to find protection in the first amendment's guarantee of freedom of speech.²² While the first amendment might serve as an adequate basis for protecting the right, it is unnecessary, and possibly even unwise, to use the first amendment as the textual basis for the constitutional right to vote.²³ As a textual matter, first amendment protection for the right to vote would leave the Constitution

²¹ Strict scrutiny requires the state to prove that its infringement on constitutional rights is mandated by a compelling governmental interest and pursued by the least restrictive means possible. Commentators have noted that while such scrutiny theoretically allows restrictions on the underlying right, in practice this level of scrutiny inevitably is fatal to the government's effort. See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

²² A few commentators have argued for first amendment protection for the right to vote. See, e.g., Alexander Bickel, *The Supreme Court and the Idea of Progress* 59-61 (1978) (arguing that first amendment analysis might avoid subjective judicial judgments in voting rights cases); 1 Norman Dorsen et al., *Political and Civil Rights in the United States* 848-49 (1976) (suggesting first amendment analysis for right to vote); Alexander Meiklejohn, *Political Freedom* 39-40 (1960) (proposing that voting is act of speech that ought to be protected by first amendment); Emily M. Calhoun, *The First Amendment and Distributional Voting Rights Controversies*, 52 Tenn. L. Rev. 549, 550-51 (1985) (discussing relevance of first amendment principles to voting rights controversies).

²³ Though only intermittently and without much discussion, the Court has recognized that some link may exist between voting and the first amendment. See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 786 n.7 (1983) (stating, without analysis, that the Court was basing its conclusions directly on the first and fourteenth amendments). Yet, in *Burdick v. Takushi*, 112 S. Ct. 2059 (1992), the Court rejected the argument that the ability to cast write-in votes was protected by the first amendment's guarantee of free speech. *Id.* at 2066 ("Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and effectively.") (citations omitted). The Court did not discuss how an expressive understanding of the vote would wreak such havoc.

The *Burdick* Court did, however, maintain its stated commitment to *Anderson's* claim that the first amendment was somehow implicated by voting, see *id.* at 2063, thus raising the possibility that the first amendment value the Court earlier recognized was not the freedom of speech, but the freedom of association. See *id.* at 2064 n.5. Cf. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958) (holding that first amendment guarantees freedom of association). This conclusion is supported by other right-to-vote cases dealing with ballot access where the Court has noticed the free association right and its relation to voting. See *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) ("Restrictions upon the access of political parties to the ballot impinge upon the *rights of individuals to associate for political purposes*, as well as the rights of qualified voters to cast their votes effectively . . .") (citing *Williams v.*

with a number of redundant provisions. While originally silent with regard to the right to vote,²⁴ the Constitution currently has a host of provisions that would be affected by relocating the right to vote in the first amendment freedom of speech. Nearly half the amendments to the Constitution concern the franchise and election procedures.²⁵ If the right to vote were to find a broad, generalized grant in the first amendment, these amendments would be rendered superfluous and textually unnecessary.

Similarly, first amendment protection threatens the distinct identity of the right to vote. The right to vote is now conceptualized as one of a

Rhodes, 393 U.S. 23, 30 (1968)) (emphasis added).

At best, the Court is inconsistent with regard to the first amendment values implicated by the right to vote. Compare *Munro*, 479 U.S. at 193 (promoting an associational analysis of voting) with *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("By limiting the choices available to voters, the State impairs *the voters' ability to express their political preferences.*") (emphasis added). Part of this problem may stem from the freedom of association jurisprudence, which often blurs the line between association and speech. See, e.g., *Patterson*, 357 U.S. at 460 ("It is beyond debate that the freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.").

In light of the general confusion, it is not surprising that lower courts have split on whether voting can be seen as expression. Compare *Dixon v. Maryland Admin. Bd. of Elections*, 878 F.2d 776, 780 (4th Cir. 1989) (noting expression's relationship to voting) and *Socialist Labor Party v. Rhodes*, 290 F. Supp. 983, 986 (S.D. Ohio 1968) (same) with *Georges v. Carney*, 691 F.2d 297, 300 (7th Cir. 1982) (rejecting any link between voting and expression as that latter term is understood in first amendment jurisprudence).

²⁴ As the Supreme Court said many years after ratification, "[T]he Constitution of the United States does not confer the right of suffrage upon any one." *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1875). See generally Christopher Collier, *The American People as Christian White Men of Property: Suffrage and Elections in Colonial and Early National America*, in *Voting and the Spirit of American Democracy* 19 (Donald W. Rogers ed., 1990) (discussing framers' limited view of the franchise).

The Constitution did, however, originally contain three provisions that relate to the franchise. Article I, § 2 established that the House of Representatives would be composed of "Members chosen . . . by the People of the several States." U.S. Const. art. I, § 2. Article I, § 4 gave the states the ability to regulate the "Times, Places and Manner of holding Elections" with Congressional oversight. U.S. Const. art. I, § 4. Finally, Article II, § 1 established the procedure by which the members of the Electoral College were to be selected. U.S. Const. art. II, § 1 ("Each State shall appoint, in such manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . ."). None of these provisions granted individuals the right to vote. See *Minor*, 88 U.S. (21 Wall.) at 178. Indeed, at the time of the Constitution's adoption, voting was strictly the province of the white, male, propertied elite. See Collier, *supra*, at 20-21.

²⁵ See U.S. Const. amend. XII (setting forth procedures for election of President and Vice President); U.S. Const. amend. XIV (establishing rules of apportionment of congressional representation and limiting eligibility of Confederate officials for Congress); U.S. Const. amend. XV (proscribing denial of franchise on account of race); U.S. Const. amend. XVII (governing election of Senators); U.S. Const. amend. XIX (proscribing conditioning right to vote on account of sex); U.S. Const. amend. XXII (limiting number of terms one may serve as President); U.S. Const. amend. XXIV (proscribing poll taxes in federal elections); U.S. Const. amend. XXVI (proscribing denial of franchise on account of age to anyone over eighteen years old).

number of "fundamental rights" protected by the equal protection guarantee²⁶—a constitutional umbrella for rights lacking firm textual bases, such as the right to vote,²⁷ the right of privacy,²⁸ and the right of interstate travel.²⁹ Maintaining voting's equal protection basis or relocating it in the first amendment thus appears to be a choice among equals. However, if the right to vote were covered by free speech jurisprudence, the right's similarities to speech would be emphasized in order to provide doctrinal coherence. As the right to vote gradually becomes subsumed into categories of free speech, it may lose its conceptually distinct character, instead becoming part and parcel of free speech doctrine. But under fundamental rights analysis (where the right to vote is currently moored), the variety of rights covered, as well as their marked differences, do not pose a similar threat of overwhelming right-to-vote theory and doctrine, for each right is still viewed as a distinct, first-order right. Because those rights characterized as fundamental are so different, the ideas, notions, and precedents of one have little effect on the substance of the others. For example, privacy notions do not readily seep into voting law. Thus, the fundamental rights doctrine better preserves the conceptual independence of the right to vote than does the free speech doctrine.

In addition, using the textual anchor of free speech would fracture voting rights—broadly understood to include enfranchisement, aggregation, and governance.³⁰ Free speech protection would mainly apply to the first facet of the right to vote, enfranchisement—the basic ability to express one's self in the forum of elections. Beyond that basic ability, however, critical voting rights issues remain, primarily concerning questions of weight and equality (such as apportionment, dilution, and districting). The thriving, often intricate jurisprudential thought and doctrine concerning these other voting rights issues may be stifled by

²⁶ See J. Nowak et al., *supra* note 20, § 11.7, at 370-71 ("[T]he right to vote and to participate in the electoral process has been held to be a fundamental constitutional value which is reflected in several amendments and given recognition as a form of 'liberty' under the due process clauses.")

²⁷ See *Reynolds v. Sims*, 377 U.S. 533, 561 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (characterizing "the political franchise of voting" as a "fundamental political right, because preservative of all rights"); see also *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Yick Wo* and *Reynolds*).

²⁸ See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678, 681-82 (1977) (invalidating on privacy grounds statute prohibiting sales of contraceptives to persons under sixteen years old).

²⁹ See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (overturning statute requiring residency in state for one year before gaining eligibility to vote as violation of right to vote and right to travel); *Shapiro v. Thompson*, 394 U.S. 618, 621-22 (1969) (holding unconstitutional statutes denying welfare benefits to residents who had not resided within jurisdiction for at least one year).

³⁰ See Karlan, *supra* note 4, at 1709-19 (describing three distinct conceptions of voting within broad right to vote).

confusion with the vast array of ideas and discussions on the freedom of speech.

Perhaps the best reason not to ground the right to vote in the first amendment is that, even understood to have expressive components, voting is but a muted and limited form of speech with a confined range of expressions available to the voter. We can see how voting is akin to speech: it involves linguistic forms ("yeas," "neases," or a candidate's name) to communicate messages, such as support for political ideas and candidates. It takes a written form, either as a preprinted card with marks or holes to mark expressions or as a scribbled name on a write-in ballot. However, the voter cannot take the opportunity to vote as a general expressive forum for speech; she may only speak names or simple versions of "yes" and "no" and cannot use the ballot to engage in a free-ranging discussion. The voter's speech opportunity is thus clearly confined to a narrow range, as must be the case in order to ensure efficient administration of elections. Imagine the difficulties of tabulation and publication if every voter tried to write a paragraph of issues and policies that they supported or opposed on the ballot. In addition to these constraints, voting is also restricted by the fact that elections occur only occasionally, and even then the voter is limited to addressing the specific issues or candidacies on the ballot. Thus, if the vote is speech, it is a tightly confined form of speech. Therefore the expressive dimension to voting does not require that we characterize voting as first amendment speech.

Even if finding protection for the right to vote in the first amendment may make sense, we may also reject such a basis for the right to vote because it is simply unnecessary. The right to vote, understood expressively, can find adequate protection elsewhere in the Constitution. The Supreme Court's general interpretive framework for the right to vote—equal protection fundamental rights analysis—can protect expressive voting perfectly well if based on a broader conception of the values inherent in voting. As this Note argues, any problem with the Court's right-to-vote jurisprudence is not the lack of a firm textual anchor, but rather the failure of the Court's guiding conception of the right to vote to capture certain expressive values inherent in voting.³¹

2. *The Right to Vote in First Amendment Theory?*

The discussion of the first amendment, however, should not end here. Inquiring into the propriety of a first amendment analysis can provide a theoretical context into which the later analysis of expressive voting may fit. As noted above, expressive voting has two functions: it

³¹ See Part II *infra*.

serves as a method of communication between the voter and other members of the political community, and it provides a forum for constituting individual identity. These two roles correspond roughly to the two prevailing understandings of the first amendment—the “instrumental” and the “constitutive” theories that scholars and judges have offered for explaining the central function of the freedom of speech.

Both of these theories recognize that freedom of speech is not absolute; like any right, it has its limits. To determine where those boundaries should lie, the Court is well served by approaching restrictions aided by a conception of the values served by the right in question, particularly where the foundation for the right is textually ambiguous or confusing. In that instance, the values embedded in the conception are considered; if they are not offended by the restriction, then the restriction may stand; if they are offended, however, the restriction must be invalidated. Identifying voting’s expressive character helps to locate the right to vote within this theoretical framework of free speech.

The main theoretical constructions for free speech fall into two basic categories or, roughly, two models. The first is instrumentalist: it views the freedom of speech as a tool for achieving certain societal objectives. Thus, philosophers and jurists have argued that free speech is valuable because it enables the search for truth in the marketplace of ideas³² or because it furthers the ability of the people to govern themselves by protecting political information.³³ Under such theories, the freedom of speech is not valuable in itself but only for the results that unfettered dialogue can bring to society, in terms of either the “truth” or good self-government. The ends to which speech is directed determine whether the speech should be constitutionally protected.

The second major theoretical model for free speech focuses on the constitutive value of speech: it argues that freedom of speech is necessary because it is essential to one’s dignity³⁴ or self-fulfill-

³² John Stuart Mill was the main philosophical source of the “marketplace of ideas” theory of free speech. See John S. Mill, *On Liberty* 15-52 (Hackett ed. 1978) (1859). Perhaps the most famous statement of the theory was, however, that of Justice Holmes in his dissent in *Abrams v. United States*, 250 U.S. 616 (1919):

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market
Id. at 630 (Holmes, J., dissenting).

³³ See A. Meiklejohn, *supra* note 22, at 24-28, 72-75 (arguing that essential function of free speech is to facilitate exchange of political information for purposes of self-government); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 26-28 (1971) (arguing that scope of free speech should be tied to whether speech is political in order to further objectives of democratic governance).

³⁴ See C. Edwin Baker, *Human Liberty and Freedom of Speech* 47-69 (1989) (arguing that

ment,³⁵ vital aspects of one's identity. These aspects of identity are not objectives that can be separated from the underlying freedom but rather are inherently intertwined with it.³⁶ Most importantly for the purposes of this Note, constitutive approaches to the freedom of speech posit that the right has intrinsic value apart from the mere ability to use speech as a method of conveying ideas for external ends.

It is within these theoretical models that the right to vote, understood expressively, can be located and given context. As alluded to earlier,³⁷ voting can be seen to have similar instrumental and constitutive roles. Instrumentally, the vote is valuable to the extent it enables one to convey political messages in an effort to further or defend one's power and place in society. Constitutively, the vote has value because the experience of voting itself can transform and shape aspects of the voter's identity.³⁸ Thus, the dominant theoretical models justifying freedom of speech may serve to inform and enlighten the analysis of expressive voting.

pursuit and maintenance of individual dignity is core value of free speech); C. Edwin Baker, *Scope of First Amendment Freedom of Speech*, 25 U.C.L.A. L. Rev. 964, 990-1009 (1978) (same) [hereinafter Baker, *Scope of First Amendment*].

³⁵ See Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 Tex. L. Rev. 1, 43-47 (1990) (describing how expression is character-building experience); Martin Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 593 (1982) (proposing view that free speech is valuable because through expression one may find self-realization and fulfillment); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. Pa. L. Rev. 45, 62 (1974) (arguing that freedom of speech ought to be valued because it "nurtures and sustains the self-respect of the mature person"). For a judicial articulation, see *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[T]he final end of the State [is] to make men free to develop their faculties.").

³⁶ See Baker, *Scope of First Amendment*, *supra* note 34, at 966 (noting intrinsic value of free expression).

³⁷ See text accompanying notes 11-12 *supra*.

³⁸ See, e.g., Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 Fla. L. Rev. 443 (1989):

Political participation is valued instrumentally as a means to defend or further interests formed and defined outside of politics. In a strictly instrumental valuation of political participation, the experience of the participation itself neither contains any positive value nor affects the content of anyone's or any group's interests and ends. . . . By contrast, in a constitutive understanding, the point of engagement in politics lies not in any ulterior end but in the ends-affecting—the dialogic—experience of the engagement itself. That experience is valued as a process of formation or field of exertion of self or community. Through political engagement, persons or communities (or both, reciprocally) forge identities, and persons assume freedom in the "positive" sense of social and moral agency.

Id. at 451. Instrumentalism as it is defined in this Note departs from Michelman's definition by requiring that the ends themselves be political ones. Michelman merely requires that the interests not be attributable to one's "experience of . . . engagement." See *id.*

B. The Jurisprudence of Enfranchisement: Signs of Instrumentalism

Expressive voting may be adequately protected via the guarantee of equal protection, as discussed in the previous Section, if the Supreme Court properly conceives of the expressive values inherent in voting. This raises two questions: what is the conception of values that currently drives the Court's jurisprudence of enfranchisement, and why is that conception inadequate?

An instrumentalist conception of voting³⁹ has driven the Court's enfranchisement jurisprudence.⁴⁰ Although the Court has never explicitly stated that it was using an "instrumentalist" approach, the assumptions and ideals implicit in its right-to-vote opinions reveal that the Court conceives of the vote as valuable insofar as it is used as an instrument to further political objectives. The Court has viewed the vote primarily as a tool for exerting political power.

There is, however, more than one possible type of instrumentalist understanding of the right to vote. Even if one accepts the idea that voting can be a useful tool for pursuing political objectives, one might believe that the vote is valuable only when used to further certain types of political ends. One may say, for instance, that the vote should be protected only when the voter wishes to cast her ballot for narrowly defined policy choices, such as raising a specific tax or cancelling a military defense program. Alternatively, one may hold that broader political objectives ought to be protected, such as when a person wishes to vote for generalized notions of "change," "strong defense," or "the economy." In both possibilities, the voter is using the ballot as a tool for furthering political judgments and will, but the scope and breadth of those ends differ. In the former instance, the political objective is on the narrow end of the spectrum, while the objectives of the latter case are less carefully defined. Thus, even for those who conceive of the vote as an instrument, there may arise differences as to how that instrument should be used.

There may also be disagreements as to other conditions on which access to the vote, understood instrumentally, should hinge. One might insist, for example, that an individual should only be allowed to vote if she has a direct, objective "stake" in the outcome of the election. While we can imagine an individual who wishes to vote in an election in which she has no direct stake—say, a California resident who wishes to vote in Pennsylvania to support state representatives of a certain ideological

³⁹ An approach is "instrumentalist" if it makes voting's value contingent on whether voters use the opportunity to further or defend political objectives. Instrumentalism emphasizes how the vote is useful as a tool for pursuing certain types of political objectives. See notes 157-65 and accompanying text *infra*.

⁴⁰ See notes 42-50 and accompanying text *infra*.

bent—we might not allow such a person to vote in that election. Even though she wishes to use the vote instrumentally to further political objectives, she might be denied that opportunity for failure to meet the condition of stake.⁴¹

Disenfranchisement for lack of a direct interest or stake in the outcome is not, however, a necessary feature of instrumentalism. One who values the instrumentalist use of the vote could allow *anyone* who wishes to pursue political objectives in an election to exercise the right to vote. As long as the potential voter may use the vote as a tool for gaining subjective ends of a political nature, an instrumentalist view of voting might, in theory, hold open the franchise without regard to objective stake.

Thus, within the general category of instrumentalism, there is more than one way of envisioning the right to vote. Although each accepts the premise that voting is valuable only when used as a means for pursuing political objectives, the various options may differ as to the type of political objectives a voter can pursue and the sort of people who will be allowed to vote. Hence, to claim that the Court uses an instrumentalist conception of the vote is of limited utility; we must ask what sort of instrumentalist conception the Court uses.

The Supreme Court's jurisprudence of enfranchisement evidences a particular instrumentalist conception of the vote that will here be termed the "instrumental power" approach. Although broken down and detailed throughout the remainder of this Part, it may be helpful to introduce the contours of the Court's approach. This approach interprets voting solely as an instrument for pursuing narrow, informed policy options. The Court's decisions on enfranchisement often seem to reason from the premise that voting is a specialized activity that has value only to the extent that it enables citizens to advance or defend narrowly defined political objectives—in contrast to the broader, generalized political notions discussed above—where such narrow objectives can be formed and analyzed in an educated, knowledgeable manner.⁴²

The Court's restrictive instrumental power approach is limited because individuals deemed by the state to have an insufficient interest in political outcomes or to be incapable of voting intelligently for instrumentalist reasons are not protected. While the instrumental power approach correctly recognizes the necessity of maintaining geographically bounded political units through residency requirements,⁴³ that approach draws a variety of questionable distinctions among members of the unit's

⁴¹ See text accompanying notes 78-97 *infra* (analyzing stake requirements in the right-to-vote jurisprudence).

⁴² See notes 59-77 and accompanying text *infra*.

⁴³ See note 54 *infra*.

community in deciding who can vote. Specifically, the theory allows states to disenfranchise in order to promote an "intelligent"⁴⁴ electorate or to insure that voters have a direct stake (or "interest") in the outcome.⁴⁵ The underlying basis for such distinctions, while never explicitly articulated, is a notion that those who fail to meet the qualifications cannot define with specificity their policy choices in a rational and informed way and pursue such choices through voting.⁴⁶ Disenfranchisement will be allowed for those in the electorate insufficiently intelligent or knowledgeable to be capable of understanding the political issues of the day. Furthermore, if the voter has no objectively discernable stake in the election, then she will lack the basic motivation to seek out political information in order to make an informed choice and therefore may be disenfranchised.

Once the threshold competence requirements of the instrumentalist approach are met, the Supreme Court generally takes a neutral position regarding competing conceptions of the political good. From this stance, disenfranchisement may not be based on a dislike or mistrust of the particular political ends of the voter so long as those ends are narrowly defined. The content of one's vote does not preclude one from using the vote to pursue political ends. If elections are for gauging the popular political will, disenfranchisement based on mistrust of the political ideas promoted by the voter only interferes with the accuracy of that gauge. Thus, the Court has stated that "[f]encing out' from the franchise a sector of the population because of the way they may vote"⁴⁷ is impermissible. Although the Supreme Court generally takes this neutral stance on competing political ends once a voter meets the threshold competency requirements, the Court has allowed a subtle tension to emerge. Specifically, the Court has allowed the disenfranchisement of one group of seemingly interested and intellectually capable voters: ex-felons.⁴⁸ As

⁴⁴ See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966) (invalidating poll taxes because "wealth . . . is not germane to one's ability to participate intelligently"); *Lassiter v. Northampton Election Bd.*, 360 U.S. 45, 52-53 (1959) (upholding literacy tests because state's motivating desire "to insure an 'independent and intelligent' exercise of the right to vote" is constitutionally allowed); see also notes 59-77 and accompanying text *infra*.

⁴⁵ Hence, states may disenfranchise voters who are not "primarily interested" in the election. See *Ball v. James*, 451 U.S. 355 (1981) (upholding restriction of franchise to those citizens with direct or primary stake in outcome of disputed election); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (same); see also notes 78-97 and accompanying text *infra*.

⁴⁶ See notes 59-97 and accompanying text *infra*.

⁴⁷ *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (holding that state could not deny right to vote to bona fide resident solely on basis of membership in military).

⁴⁸ See *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (upholding California's disenfranchisement of persons convicted of certain felonies).

discussed below,⁴⁹ this decision arguably challenges the Court's "quasi-content neutral"⁵⁰ stance.

The instrumental power approach of the Court is an unstated, yet readily apparent, theoretical model that tends to guide the decisionmaking of the Justices. It bears notice, however, that no matter how limited the Court's instrumentalist conception is, most of us remain unaffected by it. Many of us have voted in an election despite not being well-informed as to the issues. In addition, many of us may have voted to further broad, generalized political objectives rather than on the narrower basis of particular policy choices, yet we are not disenfranchised. This recognition highlights that whatever conception of voting undergirds the Court's current jurisprudence, most of us are safe from disenfranchisement. Yet, states continue to disenfranchise resident citizens on a large variety of bases, and enfranchisement cases continue to arise in the courts, thus warranting an analysis of the prevalent judicial model.

Three restrictions on the franchise which are allowed within the current right-to-vote jurisprudence will not be addressed extensively in this Note, neither in the discussion of the Court's instrumental approach nor in that of the expressive approach offered here; these are citizenship, residency, and maturity/cognitive capacity requirements. While each of these currently allowed requirements fits easily into the instrumentalist conception guiding the Court, there are a number of considerations that justify such requirements in any conceivable voting system in the United States.

The official tag of citizenship is a mark of entrance into the American community and, by extension, its polity. Although non-citizens may be affected by government, the right to determine the shape of government and to affirm one's attachment to the community by voting can be limited to those who have officially declared their commitment to the community by attaining citizenship. Indeed, this appears to be envisioned by the text of the Constitution.⁵¹ While some commentators have argued that resident aliens should be allowed to vote in local elections,⁵²

⁴⁹ See notes 109-24 and accompanying text *infra*.

⁵⁰ The term "quasi-content neutral" is used because under the Court's approach, which invalidates discrimination among competing political views, the content of the protected vote must still be "political" and must be of a narrow instrumentalist sort. Hence, the approach is not truly "content neutral," though it has aspects of such neutrality.

⁵¹ See, e.g., U.S. Const. amend. XV ("The right of *citizens* of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude.") (emphasis added); U.S. Const. amend. XIX ("The right of *citizens* of the United States to vote shall not be denied . . . on account of sex.") (emphasis added).

⁵² See, e.g., Jamin B. Raskin, *Their Chance to Vote*, Wash. Post, Oct. 13, 1991, at C8 ("The circle of political community must widen to take in all of those governed by the community's decisions.").

the Supreme Court has taken no position in the modern era on citizenry restrictions on the franchise.⁵³ On account of the Constitution's language limiting the franchise to citizens and the role of citizenship in defining membership in the American community, citizenship requirements will be assumed to be necessary for the right to vote in the United States.

For much the same reason, residency requirements are not merely permissible,⁵⁴ but necessary features of a governmental election scheme; they too are methods of determining membership in the relevant political unit. As the Court has noted, bona fide residency requirements "may be necessary to preserve the basic conception of a political community."⁵⁵ Such requirements are based on the recognition that "nonresidents may be affected by and interested in what a state or municipality does, but [these requirements] nonetheless accept[] *territory* as the best available means of drawing a boundary for purposes of the franchise."⁵⁶ This is particularly so in the United States on account of its federalist political structure, which places a high value on maintaining the sovereignty of state governments and their subdivisions. This is only possible if each level is an identifiable and basically distinct political unit. Without residency requirements, it is difficult to imagine how the various political units would remain self-governing because, for example, citizens from one state could then vote in another state's elections.⁵⁷ Residence requirements are inherent in American federalism.

Third, minors and the mentally disabled may be disenfranchised on account of their inability to comprehend the nature of elections, coupled with their susceptibility to intimidation and manipulation by elders. They are disenfranchised because of the presumption of cognitive incapacity, meaning that they will fail as a class to understand the process in

⁵³ But cf. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 177 (1875) (holding disenfranchisement of women constitutionally permissible, in part because right to vote is not an inherent right of citizenship). Of course, *Minor* is an old case based on outdated, blatantly sexist notions, and has no precedential value for modern cases.

⁵⁴ For examples of the Supreme Court's legitimation of reasonable residency requirements, see *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69-70 (1978) (holding that individuals who lived beyond official borders of Tuscaloosa had no right to vote in city's elections); *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (holding that durational residency requirements are constitutional but invalidating one-year period as too long).

⁵⁵ *Dunn*, 405 U.S. at 343-44.

⁵⁶ Laurence H. Tribe, *American Constitutional Law* § 13-12, at 1088-89 (2d ed. 1988) (emphasis added).

⁵⁷ Of course, current expansive notions of federal power over the states go a long way toward diluting any state's sovereignty. Cf. Bruce Ackerman, *We The People: Foundations* 3-33 (1991) (noting that fundamental shifts in American constitutional history have moved nation away from predominant concern with states' rights vis-à-vis federal government to strong notions of individual liberties); Garry Wills, *Lincoln at Gettysburg: The Words That Remade America* 121-47 (1992) (arguing that Lincoln's Gettysburg Address was key turning point in American history, switching dominant theme from states' rights to individual liberties).

which they are engaged. As to minors, the line-drawing to separate the capable from the incapable is inherently problematic. However, the constitutional text envisions their disenfranchisement—in particular the twenty-sixth amendment which only protects the franchise of citizens over eighteen years old.⁵⁸ Disenfranchising the “mentally disabled” is also problematic because of the amorphousness of the terms. It seems clear that individuals who cannot understand that pulling a lever inside a voting booth is indeed “voting” do not have a legitimate claim to the right. Courts should, however, ensure that the statutory definitions are not overinclusive when deciding right-to-vote cases involving the mentally disabled.

States, however, deny people the vote for reasons besides those discussed above, and disenfranchised voters appeal to the Supreme Court for constitutional protection of their right to vote in the disputed circumstances. At those moments, the Court reveals its instrumentalist approach, upholding statutes denying the right to vote when the state can justify its disenfranchisement law as a means to promote an “intelligent” electorate or to limit the franchise to “interested” voters.

1. *Disenfranchisement Based on a Presumed Lack of Intelligence*

The Court’s right-to-vote jurisprudence has allowed states to disenfranchise when necessary to promote the states’ asserted interest in maintaining “intelligent” or “knowledgeable” electorate.⁵⁹ Two cases illustrate particularly well the Court’s acceptance of intelligence requirements: *Lassiter v. Northampton Election Board*,⁶⁰ which upheld literacy tests, and *Harper v. Virginia Board of Elections*,⁶¹ which found unconstitutional poll taxes in state elections. Although each of these cases scrutinized intelligence requirements in a distinct manner—*Lassiter* under the rational relationship test,⁶² and *Harper* under more exacting strict scru-

⁵⁸ See U.S. Const. amend. XXVI (proscribing denial of franchise on basis of age to citizens of age eighteen or older).

⁵⁹ See, e.g., *Dunn*, 405 U.S. at 354-58 (holding that state’s interest in promoting an intelligent electorate was compelling but that method used—law requiring instate residence for one year prior to election—was overly broad). The Court has given particularly strong voice to the validity of state invocations of the need to insure an intelligent electorate in candidate ballot access cases (which are analyzed from the perspective of the voters’ right to vote and not the candidate’s right to run for office). See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983) (finding that states have “important and legitimate interest in voter education”).

⁶⁰ 360 U.S. 45 (1959).

⁶¹ 383 U.S. 663 (1966).

⁶² The *Lassiter* Court never named the standard it was using. However, it is apparent from language in the opinion that what is now known as the “rational relationship” or “rational basis” test was indeed the standard applied. See *Lassiter*, 360 U.S. at 51 (“The ability to read and write likewise has *some relation* to standards designed to promote intelligent use of the ballot.”) (emphasis added); *id.* at 54 (“Certainly we cannot condemn [the literacy test] on its

tiny⁶³—both declared that a state may condition the right to vote on the intelligence of the voter. Thus, the interest states have in establishing or maintaining an intelligent electorate was considered legitimate and, indeed, even “compelling.”

In *Lassiter*, the Court first established the legitimacy of using measures of intelligence in determining who possesses a constitutionally protected right to vote. The plaintiff challenged the constitutionality of a state-imposed literacy test.⁶⁴ In defense, North Carolina argued that literacy tests helped ensure that all voters would be intelligent and informed as to the political issues of the day.⁶⁵ Agreeing with the state, the Court found disenfranchisement on the basis of illiteracy constitutionally permissible, for the Court accepted the claim that literacy served as a roughly accurate gauge for intelligence.⁶⁶

The Court's acceptance of intelligence requirements can be explained by an instrumental power approach to the right to vote: if voting

face as a device *unrelated* to the desire of North Carolina to raise the standards for people of all races who cast the ballot.”) (emphasis added).

Because of the stricter scrutiny now applied to infringements on the right to vote—as exemplified in *Harper*, 383 U.S. at 670—the Court's use of the rational relationship test in *Lassiter* renders that decision uncontrolling legal precedent. However, the Court's opinion in *Lassiter* is still helpful in showing how the Court has tended to conceive of voting in its modern right-to-vote jurisprudence, especially with regard to the Court's legitimation of state efforts to ensure an intelligent electorate, which later cases, such as *Harper*, would uphold.

⁶³ See *Harper*, 383 U.S. at 670 (declaring that restriction on right to vote must be “closely scrutinized and carefully confined”).

⁶⁴ See *Lassiter*, 360 U.S. at 45-46. In *Guinn v. United States*, 238 U.S. 347 (1915), the Court originally upheld the constitutionality of literacy tests, while simultaneously rejecting the “grandfather clause” legislation that allowed otherwise unqualified persons to vote if they were descendants of legal voters. *Id.* at 364-67. Grandfather clauses allowed illiterate whites to vote, as most were descendants of legal voters, while granting no protection to newly enfranchised African-Americans whose ancestors had consistently been denied the opportunity to vote legally. Even in the absence of legal exemptions for whites based on their heritage, literacy tests were used effectively to deny many African-Americans the right to vote because the tests were administered in a racially discriminatory manner. See V.O. Key, Jr., *Southern Politics* 560-76 (1949). Created as part of the Jim Crow laws by the “Redemption” governments of the post-Reconstruction South, grandfather clauses and literacy tests were devastating to African-American voter participation. For instance, in 1888, 62.5% of adult male Southerners voted in the presidential election, while less than 20 years later, the adult male turnout figure had dropped to 28.6%. This decline was mainly attributable to reduced participation by African-American voters who were either denied the ability to register or otherwise intimidated from exercising their right to vote. See Steven J. Rosenstone & John M. Hansen, *Mobilization, Participation, and Democracy in America* 197 (1993) (discussing effect of racially motivated restrictions on the franchise in the South).

Literacy tests have since been outlawed in all governmental elections by federal statute. See Voting Rights Act of 1965, 42 U.S.C. § 1973aa (1988); see also *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (upholding constitutionality of Voting Rights Act); *Oregon v. Mitchell*, 400 U.S. 112, 131-34 (1970) (upholding Voting Rights Act's universal proscription on literacy tests as condition to voting in governmental elections).

⁶⁵ See *Lassiter*, 360 U.S. at 51.

⁶⁶ See *id.* at 53-54.

is valuable only to the extent that one can use it to further one's narrow, informed policy choices, then governments might reasonably limit the franchise to people with sufficient ability to inform themselves of the issues. Where one lacks an awareness or understanding of the issues at stake, one's vote will not meaningfully contribute to the accurate gauging of the political will. And because the addition of any one vote to the pool of voters dilutes the relative effect of each individual's voice, there is a natural tendency to exclude those who are unable to understand the issues; indeed, the very conception of elections as primarily a functional tool for governance demands it. Literacy, according to *Lassiter*, offers at least a rough gauge of the likely political intelligence and awareness of the voter,⁶⁷ particularly if electoral issues are debated frequently in the print media.⁶⁸ Thus, the *Lassiter* Court indicated that illiterate people would lack access to debates concerning the significant political issues of a campaign.⁶⁹ In such an environment, an illiterate person may be capable of voting, but not in an informed manner. When viewed in this fashion, disenfranchisement is legitimate as a method of insuring that voters will base their electoral choices on some minimum access to information concerning political issues at stake in an election.

The Court's analysis in *Lassiter* highlights the instrumental power approach's emphasis on a confined type of instrumentalism, one which protects the pursuit of narrow policy options while excluding broader political notions and objectives. Presumably, one needs less detailed information to evaluate abstract political objectives. It is imaginable that an illiterate person would be able to make broad political decisions—such as whether she desires to “make America strong” or to support political reform—based only on the information she receives through routine interaction with others in the community.⁷⁰ Without reading a single newspaper or policy position paper, the illiterate voter could certainly determine the general desirability to her of these broad political notions. The specifics of any plan, however, would likely prove more elusive, since they are found primarily in printed material and are less likely to be the subject of in-depth, accurate, daily discussion within her neighborhood. By allowing disenfranchisement of people unable to make more detailed and precise policy choices—because they miss out on de-

⁶⁷ See *id.* at 51 (“The ability to read and write . . . has some relation to standards designed to promote *intelligent* use of the ballot.”) (emphasis added).

⁶⁸ See *id.* (“[I]n our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise.”).

⁶⁹ See *id.* (emphasizing need for access to dialogue concerning campaign issues).

⁷⁰ A more detailed analysis of broad instrumentalism is presented in the later discussion of expressive voting. See notes 157-65 and accompanying text *infra*.

bates regarding “campaign issues”⁷¹—the Court chooses an instrumentalism which values only the pursuit of narrow political choices or plans. Broader, more abstract political objectives are beyond the pale of the particular instrumentalist approach at work in *Lassiter*.

In *Harper v. Virginia Board of Elections*,⁷² the Court again legitimated a state’s assertion of an important interest in maintaining an intelligent electorate. In *Harper*, residents of Virginia challenged the constitutionality of a poll tax for state elections.⁷³ Although it found the state’s interest in establishing and preserving an intelligent electorate compelling, the Court held the tax unconstitutional because it viewed the ability to pay even the smallest fee entirely irrelevant to ensuring intelligent use of the ballot.⁷⁴ Although the Court rejected an instrumentalist law, it accepted the instrumentalist premise on which that law was ostensibly based: the state’s desire to maintain an intelligent electorate.⁷⁵ However, the state’s definition of the measure of intelligence—a spare dollar and fifty cents—was unconstitutionally arbitrary. “Wealth, like race, creed, or color, is not germane to one’s ability to *participate intelligently* in the electoral process. . . . To introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor.”⁷⁶ Hence, according to the Court, the state’s asserted instrumentalist aspiration to limit the franchise to intelligent voters was justifiable, but it was misguided in the way it was codified in this instance.

Poll taxes served to disenfranchise groups of voters—those not “motivated” enough to pay the minimal tax—whom the state considered ill-equipped to use the franchise as a vehicle for pursuing political objectives. As Justice Harlan’s dissent points out, the poll tax served to “weed[] out those who do not care enough about public affairs to pay \$1.50 or thereabouts a year for the exercise of the franchise.”⁷⁷ Those who did not care enough about the election to pay the minimal fee would be unmotivated; they would be unlikely to seek out information about matters of public concern facing the community. A voter who values electoral participation less than the dollar amount of the tax lacks commitment to the polity—a commitment that those in Justice Harlan’s camp deem essential to motivate the voter to devote the resources necessary to obtain and comprehend information about competing policies. In

⁷¹ See *Lassiter*, 360 U.S. at 51.

⁷² 383 U.S. 663 (1966).

⁷³ See *id.* at 664-65.

⁷⁴ *Id.* at 666, 668.

⁷⁵ See *id.* at 668.

⁷⁶ *Id.* (emphasis added).

⁷⁷ *Id.* at 684-85 (Harlan, J., dissenting).

other words, unmotivated voters will be uninformed voters, lacking the information necessary to decide intelligently among political choices.

The right-to-vote jurisprudence finds legitimate, and even compelling, state interest in maintaining an informed and intelligent electorate. Intelligence requirements for enfranchisement are, at bottom, meant to serve as measures not of "intelligence" per se, but of information and motivation. The Supreme Court's (and the states') fear of insufficiently informed voters is best understood as arising from a conception of "proper" political objectives that values narrow, specific choices among policy options, as opposed to broader, more abstract political notions.

2. *Disenfranchisement Based on Presumed Lack of Interest*

An instrumentalist conception of voting also underlies the Court's decisions upholding interest or stake restrictions on the right to vote. Such restrictions are used to confine the size of the electorate in limited-purpose governmental bodies—such as school districts or public utilities—to those resident citizens who are "directly" or "primarily" affected by the bodies' decisions. The two cases examined here, *Kramer v. Union Free School District No. 15*⁷⁸ and *Ball v. James*⁷⁹—suggest two aspects of the Court's implicit instrumental power approach. First, they highlight how the Court conceives of voters as instrumentally driven actors whose behavior is governed by rationalized cost-benefit analyses. Second, the cases provide further support for the conclusion that the Court's instrumental power approach values foremost the informed, motivated voter in determining whose right to vote should be constitutionally protected.

The Court first faced an interest-based disenfranchisement scheme in *Kramer*.⁸⁰ Although it overturned the particular statute in dispute, the Court legitimated the possibility of restricting the right to vote to those with a "direct" or "primary" stake in the election's outcome.⁸¹ At issue in *Kramer* was a New York law restricting eligibility to vote in school district elections to owners or lessees of taxable real property within the district and parents or guardians of children who attended district schools.⁸² The plaintiff, a childless adult resident of the district who lived there rent-free, failed to meet these requirements.⁸³ Therefore, the state argued, he was not "primarily interested" in the election and could be disenfranchised.⁸⁴

⁷⁸ 395 U.S. 621 (1969).

⁷⁹ 451 U.S. 355 (1981).

⁸⁰ See *Kramer*, 395 U.S. at 621.

⁸¹ See *id.* at 632.

⁸² See *id.* at 622-25.

⁸³ See *id.* at 625.

⁸⁴ See *id.* at 631.

The state's argument was instrumentalist: only primarily interested voters would have sufficient motivation to seek out information about policy choices and issues in dispute.⁸⁵ As the state argued, "the ever increasing complexity of the many interacting phases of the school system and structure make it extremely difficult for the electorate fully to understand the whys and wherefores of the detailed operation of the school system."⁸⁶ Without a direct stake, voters would lack the motivation "to acquire such information as they may need"⁸⁷ to make political choices.

The *Kramer* Court did not offer a thorough analysis of the compelling nature of New York's asserted interests but agreed with them *arguendo*.⁸⁸ The Court based its holding specifically on the second prong of the strict scrutiny standard, which requires that the statute at issue be "narrowly tailored" to meet its "compelling" objectives, and overturned the disenfranchising statute solely because it was over- and under-inclusive.⁸⁹ The legitimacy of "direct" interest or stake requirements—assumed in *Kramer* and explicitly licensed in later cases, such as *Ball v. James*⁹⁰—is based on an instrumentalist conception of voting that emphasizes access to information and motivation as essential ingredients of the constitutionally protected voter.

Interest requirements, like intelligence requirements, can be traced to the vision of the motivated voter seeking information in amounts proportional to her level of incentive. The incentive flows from her direct stake in the outcomes of elections; she feels the primary impact of governmental decisions. Because of this immediacy, the voter who meets an interest or stake requirement will be more likely to care, hence more likely to participate thoughtfully in electoral processes. Other members of a political community—other residents—can be excluded if the decisions to be made will have a substantially less direct impact on them. The instrumental power approach does not deny that those community members will be affected eventually, perhaps even in a significant way; it simply determines that they will not have sufficient motivation to gain enough information to be the kind of voters to whom the state must

⁸⁵ See *id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See *id.* at 632.

⁸⁹ *Id.* ("The classifications . . . permit inclusion of many persons who have, at best, a remote and indirect interest in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions.").

⁹⁰ 451 U.S. 355, 371 (1981). Post-*Kramer*, the Court has rejected the strict scrutiny standard, demanding instead only that the challenged statute meet the lower threshold of the rational relationship test—which the Court has consistently found satisfied. See, e.g., *id.* at 371; *Salzer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728 (1973).

guarantee the franchise.

New York's argument in *Kramer* further indicates a view that voters should base their instrumentalist use of the ballot on the pursuit of narrow policy options, rather than broader, more abstract political notions. Voters must be responsible for "complex[,]," "difficult" decisions about the "whys and wherefores of the detailed operation of the school system."⁹¹ They should be knowledgeable about how the governmental body operates, the context in which that operation takes place, and the choices and options the body faces. It is not primarily broad, general political issues that should be pursued through voting, but routine, mundane ones of day-to-day, nuts-and-bolts governance. Voters who feel only an indirect or secondary impact, it is supposed, would not be concerned with such routine affairs. Under this instrumentalist argument, the proper subject of a voter's ballot is the choice among narrow policy options.

Ball v. James again posed the issue of disenfranchisement in terms of the voter's lack of a primary stake in the election.⁹² The governmental body at issue was a water reclamation district in Arizona with two main functions: to distribute water to landowners in the district and to supply electricity to residents of the state.⁹³ Although the water district's revenues were derived overwhelmingly from electricity generation and sales—the source of up to ninety-eight percent of its income⁹⁴—under Arizona law, landowners, whose stake was mainly in water delivery, were the only ones allowed to vote in elections for directors of the water district.⁹⁵ Resident electricity users were disenfranchised. Agreeing with the state, the Court held that landowners were the portion of the electorate primarily affected by the water district's actions.⁹⁶ Thus, Arizona could reasonably limit the franchise to them, at the cost of representation of the resident population of electricity users.⁹⁷

By emphasizing who would bear the burdens and reap the benefits of an election, the Court offered an insight into its approach, namely that the Court conceives of voters as what we might term "instrumentally rational actors." Instrumentally rational actors are individuals who

⁹¹ *Kramer*, 395 U.S. at 631.

⁹² See *Ball*, 451 U.S. at 369-71.

⁹³ See *id.* at 381-82 (White, J., dissenting).

⁹⁴ See *id.* at 382.

⁹⁵ See *id.* at 357-60.

⁹⁶ *Id.* at 369-71. But see *id.* at 385 (White, J., dissenting) (arguing that electricity users were electorate more accurately described as primarily interested in water district's activities).

According to the Court in *Ball*, because the governmental body had a limited purpose, it was unnecessary to use the standard applied in right-to-vote disputes for governmental bodies with more generalized functions. See *id.* at 362-70.

⁹⁷ See *id.* at 369-71.

make their voting decisions primarily on cost-benefit analyses in which the relevant advantages and disadvantages gauged are political in nature. According to this view, individuals base their decision to vote or not on the desire to maximize benefits while minimizing losses from participation. In addition, if one will not be advantaged or disadvantaged by the choice of competing governmental policies, then presumably one should have no preference for one outcome over another; they should be interchangeable to the "uninterested" individual. If one lacks a clear stake in the political outcome, there are few, if any, benefits to be derived from electoral participation. There are, however, numerous costs involved, owing to procedural necessities of registering, travelling to the polling place at a constrained time, waiting in line, etc. Moreover, if one accepts the instrumental power approach's position on the necessity of having an intelligent, informed electorate, the additional cost to the voter of gathering, digesting, and thoughtfully considering information and issues is high. And all this time and effort invested comes at the expense of pursuing other opportunities where the rewards may be greater or more obvious. Only those with real benefits to be gained—those with a direct stake in the outcome—will incur the costs of being not only a voter, but an informed one.

3. *A Tension in the Instrumental Power Theory? Neutrality Versus Discrimination*

The instrumentalist approach of the Supreme Court recognizes a series of threshold qualifications for enfranchisement, including the ability to vote intelligently and the possession of a primary interest in election results. In its discussions of these qualifications, the Court has made plain that it conceives of the ballot as an opportunity to pursue certain types of ends, specifically narrow policy options. As exemplified by its opinion in *Carrington v. Rash*,⁹⁸ the Court also tends toward neutrality among the competing political objectives of voters, so long as those voters clear any hurdles to prove their intelligence or interest, and so long as they seek to promote narrow political ends. This is what here is termed "quasi-content neutrality," for while neutral to differing ideas of the political good, it only allows the pursuit of narrowly defined political ends. Yet, as we shall see, in at least one case, *Richardson v. Ramirez*,⁹⁹ the Court arguably calls into question its commitment to the principle of quasi-content neutrality.

In *Carrington*, a military serviceman challenged a Texas law prohibiting military personnel who resided in the state from voting, even when

⁹⁸ 380 U.S. 89 (1965).

⁹⁹ 418 U.S. 24 (1974).

they had an uncontested intention to remain as Texas residents following military service.¹⁰⁰ Texas argued that allowing resident military personnel to vote would introduce into state elections the unwelcome threat of bloc voting, a threat stemming from a perceived uniformity of interests among members of the armed forces.¹⁰¹ The local community might thereby lose its distinctive voice and be subject to military interests and policies rather than those that the remainder of the community would choose for itself.¹⁰²

The Court found the disenfranchisement unconstitutional,¹⁰³ again on instrumentalist grounds. Texas's contention that military personnel might form a political power bloc that could overwhelm those within the community was itself an instrumentalist argument: this group of voters would have recognizable political ends and would vote in an effort to further them in great numbers.¹⁰⁴ The state mistrusted the substance of these policy choices, believing that they would conflict with the policy choices of non-military residents.¹⁰⁵ Both the local community and the military personnel were seen as instrumentally rational actors who would have political objectives to pursue and benefits to be gained by voting, but whose respective ends would differ significantly. In spite of the instrumental interest of the military personnel, they were disenfranchised in order to eliminate their policy choices from the electoral arena.

In striking down the Texas law, the Supreme Court did not reject the instrumentalist premise of Texas's argument but indicated instead that Texas's statute was improperly motivated by a desire to discriminate among instrumentally interested groups in the electorate. Indeed, the very promise of instrumental voting by military personnel was why Texas could not disenfranchise them. According to the opinion, military personnel "have a right to an equal opportunity for political representation."¹⁰⁶ Because they have relevant political interests to be represented in the halls of government, military personnel who were bona fide residents could not be discriminated against based on the substance of their vote. "[T]he exercise of rights so vital to the maintenance of democratic

¹⁰⁰ *Carrington*, 380 U.S. at 91.

¹⁰¹ See *id.* at 93. Texas also argued that military personnel were generally transients without bona-fide residence in the state and thus not part of the political unit. See *id.* While accepting the idea that bona-fide residence is a necessity for enfranchisement, the Court rejected Texas's effort because the state simply assumed that all military personnel were transients, without providing servicemen and women the opportunity to show that they were in fact bona-fide residents because they intended to stay permanently. See *id.* at 94.

¹⁰² See *id.* at 93 (discussing Texas's asserted fear of "concentrated balloting of military personnel, whose collective voice may overwhelm a small local civilian community").

¹⁰³ *Id.* at 96.

¹⁰⁴ See *id.* at 93.

¹⁰⁵ See *id.*

¹⁰⁶ *Id.* at 94.

institutions,' " the Court explained, "cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents."¹⁰⁷ There could be no discrimination among competing political views in the electorate. Thus, "[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."¹⁰⁸

On one occasion, the Court has arguably strayed from this principle of quasi-content neutrality, exposing a tension within its right-to-vote jurisprudence. In *Richardson v. Ramirez*,¹⁰⁹ the Court upheld California's disenfranchisement of ex-felons in what may represent a departure from neutrality toward discrimination on the basis of the political content of votes. The Court in *Richardson* claimed to base its holding on rather formalist grounds, looking only to original intent and the confusing interplay of language in two textual provisions of the Constitution. The relevant provisions were sections one and two of the fourteenth amendment. Section one provides the general grant of equal protection,¹¹⁰ the foundation on which the right-to-vote jurisprudence rests.¹¹¹ Section two states that disenfranchisement of those convicted of engaging in "rebellion, or other crime"¹¹² will not result in a proportionate loss of federal representation, although disenfranchisement of others will.¹¹³ Reasoning that section two permitted the disenfranchisement of ex-felons, the Court deemed the guarantee of equal protection inapplicable on the theory that the general language of section one could not be read to question what was apparently allowed by the more specific language of section two.¹¹⁴ In other words, the right to vote of ex-felons was not subject to equal

¹⁰⁷ *Id.* (quoting *Schneider v. State*, 308 U.S. 147, 161 (1939)) (alteration in original).

¹⁰⁸ *Id.*

¹⁰⁹ 418 U.S. 24 (1974).

¹¹⁰ U.S. Const. amend. XIV, § 1.

¹¹¹ See note 19 and accompanying text *supra* (describing how right to vote is protected via constitutional mandate of equal protection).

¹¹² U.S. Const. amend. XIV, § 2. This section provides:

Representatives shall be apportioned among the several States according to their respective numbers. . . . But when the right to vote at any election . . . is denied to any male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced

Id. (emphasis added). The reasoning of the Court would logically extend beyond felonies to include misdemeanors, as the textual anchor was the word "crime," which is broad enough to encompass any illegal activity. See *Richardson*, 418 U.S. at 75-76 n.24 (Marshall, J., dissenting). The Court has since rejected Alabama's disenfranchisement of persons convicted of crimes of "moral turpitude." See *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). *Hunter* did not overrule *Richardson* because the Court found that the statute in *Hunter* was motivated by a racially discriminatory purpose while the one in *Richardson* was not. See *id.* at 233.

¹¹³ See *Richardson*, 418 U.S. at 43.

¹¹⁴ See *id.*

protection review. According to the Court, this construction was buttressed by the intent of the legislators who adopted the fourteenth amendment; it appeared that they did not object to the disenfranchisement of criminals.¹¹⁵ Thus, the Court took an interpretive stance which looked solely to language and intent.

On account of the Supreme Court's interpretive posture in *Richardson*, it is difficult to discern whether the Court's holding stemmed from a toleration of discrimination among substantive political views or whether the Court was in fact still committed to quasi-content neutrality.¹¹⁶ The stated reasoning itself has been subject to harsh criticism¹¹⁷ and verges on disingenuousness, contradicting the traditional rejection of original intent with regard to the mandate of equal protection¹¹⁸ and acceptance of equal protection analysis as the constitutional anchor for right-to-vote cases.¹¹⁹

¹¹⁵ See *id.*

¹¹⁶ An alternative basis for disenfranchisement of ex-felons would be punitive, whereby the denial of the right to vote is an additional form of punishment imposed on the criminal offender. However, as the Court has made clear in other cases, measures disenfranchising ex-felons are not upheld on a punitive rationale but rather are permitted as means of governing eligibility. See *Trop v. Dulles*, 356 U.S. 86 (1958):

In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. . . . [B]ecause the purpose of [a statute disenfranchising ex-felons] 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.

Id. at 96-97 (citations omitted).

Other commentators have argued that disenfranchisement of ex-felons is primarily a symbolic measure by which the community defines itself as good or pure, while simultaneously defining ex-felons as unworthy of communal membership. See Note, *The Disenfranchisement of Ex-Felons: Citizens, Criminality, and "The Purity of the Ballot Box,"* 102 Harv. L. Rev. 1300, 1301 (1989).

¹¹⁷ See, e.g., David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 Harv. L. Rev. 293, 303 (1976) (insisting that "there is not a word in the fourteenth amendment suggesting that the exemptions in section two's formula are in any way a barrier to the judicial application of section one in voting rights cases").

¹¹⁸ Contrast *Richardson's* reliance on legislative intent with the Court's statement in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966):

[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.

Id. at 669; see also L. Tribe, *supra* note 56, § 13-16, at 1094 (arguing that recourse to historical intent contradicts Court's own claims that equal protection is evolving doctrine that changes to reflect contemporary environment).

¹¹⁹ The Court's reasoning calls into question the entire right-to-vote jurisprudence, which is based on the general grant of equal protection without regard to § 2. Section 2 sets up a

Justice Marshall's dissent suggests a concern that underlies and motivates the disenfranchisement of ex-felons: fear of subversive voting.¹²⁰ As Justice Marshall explained, California feared that the "likely voting pattern [of ex-felons] might be subversive of the interests of an orderly society."¹²¹ According to other courts that have more forcefully and fully articulated this fear, ex-felons would vote en masse to further antisocial ends and undermine the administration of criminal justice:

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

framework implicitly allowing *all* forms of disenfranchisement, thus undermining the application of the equal protection guarantee to analyze any disenfranchisement scheme. Section 2 provides that states who disenfranchise any male citizens over the age of 21 will lose a proportional share of federal representation. U.S. Const. amend. XIV, § 2. However, there will be no similar loss of federal representation if the basis for the disenfranchisement was participation in a rebellion or crime. *Id.* In constitutional terms, each of these provisions "allows" disenfranchisement; the former section merely ascribes a price to the action without preventing it from continuing. Although penalized, disenfranchisement under the first part of § 2 is more legitimate than most conduct that violates a fundamental right. Even if the state disenfranchises citizens protected by § 2 (male citizens 21 years of age), such conduct merely results in a penalty—the loss of a proportional amount of federal representation—and not judicial invalidation or court-ordered cessation. As long as the state could find some rational basis for disenfranchising some portion of its population, it could simply conduct a cost-benefit balancing that weighs the disadvantages of less federal representation against the benefits of disenfranchising some citizens. This is, overall, considerably more leeway than the state has in setting policies that infringe, say, the free exercise of religion, where the Court will order cessation of application of the statute (either for the general public or for the particular plaintiffs). See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972) (ordering, on free exercise grounds, cessation of application of Wisconsin law mandating that members of Amish church send their children to public school after eighth grade); *Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (ordering, on free exercise grounds, cessation of application of state statute which denied Seventh Day Adventists unemployment benefits because of their religiously motivated refusal to work on Saturdays).

Nothing in § 2 appears to make room for judicial invalidation and court-ordered cessation of a statute's application, only for penalization via proportional losses of federal representatives in Congress. Yet, in prior cases of disenfranchisement, the Court never once considered as a remedy penalizing the state by decreasing its federal representation; instead, it simply struck down the relevant state law. See, e.g., *Harper*, 383 U.S. at 666, 667 (declaring Virginia's poll tax unconstitutional). Instead of choosing the rather simple formula of § 2—determine how many subject citizens were disenfranchised and their relative proportion of the electorate, then lower the number of congressional representatives proportionately—the Court had always questioned the validity of the measures by which citizens were denied the right to vote, scrutinizing the disenfranchisement's bases and motivations. Under a rigorous application of the *Richardson* reasoning, however, the Court would have to refrain from questioning a rational disenfranchisement scheme, instead analyzing only what the proportional loss of federal representation ought to be—a result clearly inconsistent with precedent.

¹²⁰ See *Richardson*, 418 U.S. at 81-83 (Marshall, J., dissenting).

¹²¹ *Id.* at 81.

contention that the [Constitution] requires [a state] to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be.¹²²

If the disenfranchisement of ex-felons is indeed guided by this fear of subversive voting, then it clearly violates the principle of neutrality toward competing conceptions of the political good. Ex-felons do not as a class fail to meet the threshold eligibility qualifications of the instrumental power approach: intelligence and interest. Convicted felons, such as former Wall Street tycoon Michael Milken, surely would be intelligent, informed voters capable of sophisticated political thought. They would also have instrumentalist stakes or interests in elections as directly affected constituents of various political units or governmental bodies. As Justice Marshall pointed out in dissent, "There is certainly no basis for asserting that ex-felons have any less interest in the democratic process than any other citizen. Like everyone else, their daily lives are deeply affected and changed by the decisions of government."¹²³ Yet, according to the Court's opinion in *Richardson*, they may be disenfranchised. When the Court's formalistic veil is lifted, it appears that denying ex-felons the right to vote might indeed be based on mistrust of how they may vote, thus a retreat from the Court's quasi-content neutrality.¹²⁴

C. *A Critique of the Instrumental Power Approach*

As the preceding discussion demonstrates, the Supreme Court's jurisprudence reveals an intricate and complex approach to determining who may be denied the right to vote, here termed the "instrumental power" approach to voting. This approach comprises several components. First, the instrumental power approach recognizes two legitimate bases for disenfranchisement: inability to contribute to an intelligent electorate and lack of a primary interest.¹²⁵ The Court's acceptance of these qualifications illuminates how it emphasizes motivation,¹²⁶ access to information,¹²⁷ and instrumental rationality¹²⁸ as essential characteristics of those entitled to the franchise. Next, in discussing the threshold eligibility questions, the Court has exhibited a conception of voting that

¹²² *Green v. Board of Elections*, 380 F.2d 445, 451-52 (2d Cir. 1967) (citation omitted), cert. denied, 389 U.S. 1048 (1968).

¹²³ *Richardson*, 418 U.S. at 78 (Marshall, J., dissenting). Note that even in dissent, Justice Marshall proffers an instrumentalist view of the franchise, arguing that ex-felons have an interest in voting because they "are deeply affected and changed by the decisions of government." *Id.*

¹²⁴ For other possible bases, see note 116 *supra*.

¹²⁵ See notes 59-97 and accompanying text *supra*.

¹²⁶ See text accompanying notes 77, 85-91 *supra*.

¹²⁷ See text accompanying notes 67-69 *supra*.

¹²⁸ See text accompanying notes 92-97 *supra*.

prioritizes the voter's pursuit of narrowly defined, specific policy choices over broader, more generalized and abstract political ends and desires. Finally, the instrumental power approach is in tension as to whether it is neutral toward competing political positions. While in one case the Court found that "[f]encing out" individuals based on mistrust of their substantive political goals is impermissible,¹²⁹ in another it allowed the disenfranchisement of ex-felons,¹³⁰ a result which indeed may be based on such mistrust. These various factors form the basic structure of the instrumental power approach.

The Supreme Court's instrumentalist approach is a complex, if not always consistent jurisprudential framework for interpreting right-to-vote controversies. It has gone essentially unnoticed, however, despite the fact that it affects a right the Court has characterized as "the essence of a democratic society."¹³¹ The jurisprudential approach to enfranchisement can easily be ignored, for its outcomes are not adversely felt by the vast majority of citizens. For most, enfranchisement—the basic ability to vote in elections—seems to rest unthreatened, lulling us from paying much attention to problems of disenfranchisement. Yet this sense of security may be false, stemming not from a lack of attempts by state and local governments to limit the franchise, but more likely from the indifference of the citizenry to their electoral opportunities. With discouragingly low voter turnout rates, especially in state and municipal elections,¹³² the majority of Americans prefer not to vote in many elections in which they are already enfranchised. Hence, there is little public concern for the right to vote in other elections where states often limit participation—for example, in elections for limited-purpose governmental bodies such as *Kramer's* school board or *Ball's* public utility.

Enfranchisement issues, and by extension enfranchisement jurisprudence, may also be easy to ignore because other areas of voting rights are more obviously threatened for many. Issues such as redistricting,¹³³ vote

¹²⁹ See *Carrington v. Rash*, 380 U.S. 89, 94 (1965); text accompanying notes 98-108 *supra*.

¹³⁰ See *Richardson v. Ramirez*, 418 U.S. 43 (1974); notes 109-24 and accompanying text *supra*.

¹³¹ *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

¹³² Voter turnout in so-called "off-year" elections—that is, elections in years without a presidential race—drops off nearly 40% from presidential election years. See Ruy A. Teixeira, *The Disappearing American Voter* 6 (1992).

¹³³ See, e.g., *Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993) (holding open to challenge on grounds of racial gerrymandering North Carolina's bizarre, serpent-shaped district which connected pockets of minority voters for much of its length by stretches no wider than Interstate 85).

dilution,¹³⁴ and term limits¹³⁵ have become the central battlefields in the war for mass voting rights. In these issues, there is often a racial component attracting heated debate and focused energy. Enfranchisement issues are easily lost among such voting rights controversies. Moreover, the enfranchisement issues that affected large groups of citizens and consequently gained the most public attention, such as literacy tests, have been taken up by Congress, whose stream of voting rights acts have protected citizens from these widespread, often racially motivated denials of the vote.¹³⁶

Though easy to ignore, enfranchisement issues still arise in the courts when state laws are challenged by people or organizations who are not indifferent to their electoral opportunities. Such disputes are resolved by the Supreme Court's right-to-vote jurisprudence, yet this jurisprudence rests on an implicit, unstated instrumentalist framework. This framework is internally inconsistent with regard to neutrality among competing political ideas, and it makes a fundamental right contingent on vague factors such as intelligence and interest, motivation and informational access. If nothing else, the implicit yet influential vision of instrumentalist voting held by the Court needs public clarification, articulation, and justification.¹³⁷ By articulating its perspective, the Court would enable the public—from litigants, scholars, and judges to ordinary citizens—to examine critically and probe carefully the premises and assumptions of the instrumentalist approach to the important right to vote, of which the Court itself has said "[n]o right is more precious in a free country."¹³⁸ In addition to allowing competing views to arise, public articulation helps to maintain the Court's commitment to honest and straightforward adjudication; thus, the Court should at least make more explicit its reliance on this particular conception of voting's values.¹³⁹

Even if articulated by the Court, instrumentalism as the sole guiding

¹³⁴ See, e.g., *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 829 (1992) (holding Etowah County's restructuring of County Commission shortly after election of an African-American was not change with respect to voting covered by Voting Rights Act).

¹³⁵ See, e.g., Robert Reinhold, *Move to Limit Terms Gathers Steam After Winning in 14 States*, N.Y. Times, Nov. 5, 1992, at B8 (describing how term limit proponents were galvanized by 1992 elections, in which term limit initiatives won in several states).

¹³⁶ See, e.g., Voting Rights Act of 1965, 42 U.S.C. § 1973aa (1988) (outlawing literacy tests by federal statute).

¹³⁷ For the view that judicial review is legitimate because judges are called on to give reasoned public justification for their decisions in opinions, see Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* 131-52 (1990).

¹³⁸ *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

¹³⁹ This claim may be more controversial than it would seem on its face. See generally David L. Shapiro, *In Defense of Judicial Candor*, 100 Harv. L. Rev. 731 (1987) (examining whether judicial role mandates that judges sacrifice candor and openness in opinions).

force for the right to vote is inherently problematic, even self-contradictory. For instance, restrictions on the right to vote for state-determined purposes may offend the important values served by maintaining free governmental processes.¹⁴⁰ Elected representatives who erect barriers to enfranchisement interfere with the ability of the people to elect their representatives freely; thus the “ins” exclude and decide the fate of the “outs.” This protection of the status quo hinders political and social evolution, and flaws in the democratic process itself are left unaddressed.¹⁴¹ In limited purpose governmental bodies especially, the exclusion of the “outs” serves to maintain the political strength of the “ins,” whose control of the agenda is institutionalized by the instrumentalist approach. In the words of Professor John Hart Ely, we “cannot trust the ins to decide who stays out, and it is therefore incumbent on the courts to ensure not only that no one is denied the vote for no reason, but also that where there is a reason (as there will be) it had better be a very convincing one.”¹⁴²

Furthermore, the instrumental power approach cannot claim a persuasive descriptive foundation, for relatively few votes actually cast will meet its premises or requirements. While accurate numerical estimation is likely impossible, there can be little doubt that the vast majority of the electorate is not well informed as to specific policy options but rather makes its choice on the basis of general judgments supported by pieces of information received from the media and daily social interaction with others.¹⁴³ Thus, to acquire a degree of information equivalent to that possessed by the majority of the current electorate, one need not be highly motivated or even particularly intelligent.

The instrumental power approach’s reliance on the instrumental rationality of the voter¹⁴⁴ is also mistaken because purely instrumental voting in the modern electorate is itself irrational. Political scientists have long recognized the irrationality of voting purely for instrumental reasons and termed this phenomenon the “paradox of voting.”¹⁴⁵ In the

¹⁴⁰ On the importance of free governmental processes in a democratic state, see generally John H. Ely, *Democracy and Distrust* (1980).

¹⁴¹ Arguably, such flaws should invite particularly intense judicial scrutiny. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

¹⁴² J. Ely, *supra* note 140, at 120.

¹⁴³ Cf. generally Robert Huckfeldt & John Sprague, *Networks in Context: The Social Flow of Political Information*, 81 *Am. Pol. Sci. Rev.* 1197 (1987) (discussing influence of political information obtained through social contacts).

¹⁴⁴ See text accompanying notes 92-97 *supra*.

¹⁴⁵ See S. Rosenstone & J. Hansen, *supra* note 64, at 21. For an influential earlier discussion of this phenomenon, see Mancur Olson, Jr., *The Logic of Collective Action* 2 (1965) (arguing that rational actors will not vote in most elections). As the following discussion in the text shows, political scientists who discuss the “paradox of voting” base their analysis on an instrumentalist understanding of the vote—i.e., one which posits that voting has value to the

modern electorate containing hundreds of thousands or millions of voters, the political impact from one individual's vote is completely negligible; one vote will virtually never cast the deciding ballot in a governmental election.¹⁴⁶ On an individual level, voting is not a cost-effective instrument or tool for furthering one's political agenda. Voting may in rare cases help get one's street paved, but if one is pursuing instrumental ends, one's time may be better spent, for example, by making speeches, lobbying, and interacting with the governmental bureaucracies. The instrumental benefits arising from voting are minimal. Yet, the costs of instrumental voting—registration, thoughtful consideration of policy alternatives and preferences, and, finally, going to the voting booth and voting—are not insignificant and come at the opportunity cost of other activities.¹⁴⁷ If one assumes that each individual makes her decision whether or not to vote in accordance with the personal costs and benefits that accrue from instrumental voting¹⁴⁸—in other words, if one assumes that voters are instrumentally rational actors—then because the costs will likely be higher than the benefits, people will not vote. The instrumentalist conception's assumption of rationality, if taken seriously, should predict that citizens would forgo voting altogether.¹⁴⁹

A narrow instrumentalist approach such as the Supreme Court's also fails to explain why voter turnout drastically declines when the ability of individuals to influence the outcome of an election rises. Indeed, voting figures show that turnout is highest in years when the presidential election takes place, and hence when the electorate is the largest.¹⁵⁰ Because the pool of voters is larger, the ability of any individual to have an impact upon the election results is correspondingly smaller. In addition, the larger an official's constituency, the greater the variety of interests that representative must meet, and hence the diminishing chance that an issue of importance to any one voter will be dealt with in accordance with her desires. Yet, as a general rule, voter turnout drops considerably

extent that it can be used to further political ideas and goals. However, in this context the terms "instrumental," "instrumentalist," and "instrumentalism" are my own, thus they do not necessarily mirror those used by political scientists.

¹⁴⁶ See S. Rosenstone & J. Hansen, *supra* note 64, at 21.

¹⁴⁷ See *id.* at 21-22.

¹⁴⁸ Some have suggested that social expectations—the judgment of peer groups—may provide additional benefits to voting that might make it rational to vote. See *id.* at 23. However, positive social judgments are not political ends, but social ones, and thus are not based on an "instrumentalist" exercise of the vote, as that term is defined here.

¹⁴⁹ Requiring an informed and interested (hence motivated) electorate only makes voting more irrational. To be knowledgeable about an issue, one must invest time and resources toward obtaining information: reading newspapers, discussing issues, attending rallies, and so forth. Each of these activities adds a cost that voting's instrumentalist scales cannot bear.

¹⁵⁰ See R. Rosenstone & J. Hansen, *supra* note 64, at 57-63; R. Teixeira, *supra* note 132, at 6.

(nearly forty percent) when only state and local issues or candidacies are on the ballot.¹⁵¹ These figures undermine the assumption of voters as instrumentally rational actors, for citizens are less likely to vote when they can benefit the most.

The argument that voters are instrumentally rational actors similarly fails to account for those who vote for third-party or minor candidates. With occasional exceptions—particularly in local elections—such candidates have little, if any, hope of winning an election or influencing its outcome. For example, those people who vote for frequent presidential candidate Lenora Fulani (the New Alliance Party) or Andre Marrou (the Libertarian Party) are likely to be fully aware that their candidate will not end up in the White House. It is not the promise of instrumental gains motivating such voters but something else—something the Court's instrumental power approach does not capture.

It appears, then, that voting may serve values other than those normally recognized by the Supreme Court. This is not to say that the instrumental aspect of elections ought to be ignored completely; elections are unquestionably important mechanisms for shaping the direction of governance. Any satisfying approach to the right to vote must account for this aspect of elections. However, if such an approach is to reflect the spectrum of values derived from voting, it must go further to recognize and protect those values that evade the narrow instrumentalism of the Court's right-to-vote jurisprudence. The task of exploring those additional values is undertaken in the remainder of this Note.

II

EXPRESSIVE VOTING

The expressive conception of voting offered here posits that voting is of value for a variety of reasons not captured by the instrumental power approach. It contends that a fuller range of values served by voting, particularly in the American context,¹⁵² can be summarized by three propositions. First, voting is an expressive act with both instrumental and constitutive components.¹⁵³ Second, as Section A of this Part argues, the instrumental use of the ballot extends beyond the narrow policy choices envisioned by the instrumental power approach to include valuable,

¹⁵¹ See R. Teixeira, *supra* note 132, at 6.

¹⁵² The argument in this Part is addressed specifically to voting in the United States. Although aspects of the expressive conception of voting will surely apply elsewhere, its significant features refer explicitly to the American experience and identity. Thus, in other contexts, the analysis undertaken here may be less useful. Throughout this discussion, the use of the terms "America" or "American" are intended to signify solely the United States.

¹⁵³ See notes 157-208 and accompanying text *infra*; text accompanying notes 11-12 *supra*.

broad political notions and desires.¹⁵⁴ Third, as Section B of this Part proposes, voting is a meaningful form of social participation that—beyond its role in shaping government—shapes the identity of the participant, promoting the central values of the American identity and affirming the participant's sense of attachment to the larger community.¹⁵⁵

An expressive conception of voting posits that the vote possesses both instrumental and constitutive features.¹⁵⁶ The instrumental aspect of voting valued by the expressive conception diverges from the narrow instrumentalism of the instrumental power approach; thus Section A paints a broader picture of how voting is used instrumentally to pursue political objectives. The expressive conception offered here is intended in part to facilitate a more accurate, and hence more intelligent, discussion about how voters actually use electoral opportunities to promote political ends.

Yet even this broader version of instrumentalism does not capture a major aspect of voting's value. The expressive conception of voting is so named because it goes further to encompass the constitutive or "identity-shaping" influence that voting can have on the individual, particularly in the environment shaped by American political ideals and aspirations. Voting, under this analysis, is an expressive form of social participation that transforms and affirms the individual's sense of membership in the community and in the American identity. The discussion of Section B examines the important constitutive values that ought to be protected by the jurisprudence of the right to vote. Both these constitutive values and the range of instrumental ones analyzed in Section A are fundamental to an understanding of voting's expressive qualities.

A. The Instrumental Value in Expressive Voting

Through elections, a self-governing society determines its official political direction by registering the popular will. For the voter participating in this process instrumentally, casting a ballot is her effort to express her preferences and communicate her desired political direction. Her political preferences and desires are received and counted by the society, and she thereby helps to distribute power and influence political organization. For the voter who participates in elections only for instrumental reasons, the act of voting itself lacks meaning; it is how she uses the opportunity to express and further political will that matters.

This instrumentalist conception of voting is, of course, related to the

¹⁵⁴ See notes 157-65 and accompanying text *infra*.

¹⁵⁵ See notes 166-208 and accompanying text *infra*.

¹⁵⁶ See Michelman, *supra* note 38, at 451.

instrumental power approach of the Supreme Court's right-to-vote jurisprudence.¹⁵⁷ Unlike the instrumental power approach, however, expressive voting values the larger category of instrumental voting wherein voting is considered a means of communicating various political ends and desires. Within this broad category of instrumental voting, a spectrum of political notions can be expressed. On one end of the spectrum are narrow, informed policy choices, as captured by the Court's instrumental power approach.¹⁵⁸ A voter may seek to express a choice among competing policies, such as whether to raise the capital gains tax, to establish certain limits on the availability of abortion, or to adopt a particular curriculum for neighborhood schools. Each of these possibilities rests on a choice of specific policy options; they all refer to outcomes of rather narrow, definite issues facing legislators. These narrow policy choices can vary in significance both for the voter and for society in general. They may concern life-or-death issues, such as abortion or war, or more mundane ones, such as a tax hike or bond issuance. It is not the significance of the political ideas expressed that makes such choices policy options, but the specificity and narrowness of the political expression. Understood in this way, the instrumental voter is one who exercises the right to vote in pursuit of narrow, specific outcomes to debates regarding political issues of the day. But this is only one possible manifestation of valuable instrumentalism.

On the other end of the instrumentalist spectrum are broader, more abstract political generalizations that may reflect the voter's political will but only indirectly implicate specific policy options. Even in a purely instrumentalist view, voting can be, and often is, more than the pursuit of specific, defined policy choices. For example, it is common in elections to find candidates rallying support on vague political notions, such as "change" or "progress."¹⁵⁹ Such candidates gather support not because they offer specific policies, but rather because they may accurately reflect the lack of certainty members of the electorate feel when it comes to narrow policy options. Voters may want "change" or "progress" even if they do not know the details of what they want changed or how to change it, much less what particular policies this candidate supports to

¹⁵⁷ See notes 42-124 and accompanying text *supra* (describing instrumental power approach of Supreme Court in its enfranchisement jurisprudence).

¹⁵⁸ For a discussion of the instrumental power theory's conception of voting's instrumental value, see notes 42-50 and accompanying text *supra*.

¹⁵⁹ H. Ross Perot, the 1992 presidential candidate, was initially propelled by his image as a bearer of the vague, undefined image of "change" from the political status quo. See, e.g., Jeffrey Schmalz, *Perot Petition Embraced As Manifesto of Change*, N.Y. Times, May 31, 1992, at A20 ("I hate politicians. . . . I don't know anything about Perot except that he's not a politician. That's enough for me." (quoting Perot supporter)).

bring about their desires.¹⁶⁰ Or people may support this candidate simply out of the desire not to support one of the other candidates; they may wish to display displeasure with the status quo rather than support for specific policy outcomes.

Furthermore, a voter may simply be more influenced by general political notions than by specific policies because the former are more accessible and comprehensible. Few members of the electorate have the time or the ability to master competing policy options, even those that concern issues important to them.¹⁶¹ "As important and interesting as politics may be, its significance pales in comparison with paying the rent, maintaining the car, keeping the children in school, and putting food on the table. In short, for people whose resources are limited, politics is a luxury they often cannot afford"¹⁶² Many people are incapable of informing themselves of the precise issues and policy alternatives at stake in any given election; there is simply too much information and too many issues. People's time is mainly occupied by other affairs, such as tending to a family or pursuing a career, that distract from the time available to spend on educating themselves about policy options.¹⁶³ A general notion such as "change" may be a good short-cut for voters with political interests but too many other things to do.

Moreover, the expression of generalized political notions is an inherent part of any representative system in which elected officials serve for some period of time. Because the representative will invariably face numerous issues, some of which will not have been considered by any particular voter, an approach to the right to vote that protects only narrow policy choices is too confined and restrictive. No voter will have made her electoral choice based on a careful consideration of *all* the policy options on which the representative will be called to vote. Elected officials must often deal with issues that arise rapidly and unexpectedly. Knowing this, the voter may ignore specific policy options and vote instead for the candidate who she believes would make the right decision in such situations, basing her vote on broad, vague political notions of "competence" and "trust." Indeed, the multiplicity and unforeseeability of issues facing elected representatives make generalized instrumental

¹⁶⁰ Perot's meteoric rise from political obscurity, unaccompanied as it was by many policy specifics, exemplifies this phenomenon. See Robin Toner, Poll Shows Perot Gaining Strength to Rival Clinton's, *N.Y. Times*, Apr. 26, 1992, at A1 (citing New York Times/CBS News Poll which showed that Perot, at that time, was gaining popular support, despite fact that two-thirds of those polled admitted to knowing little about him).

¹⁶¹ See S. Rosenstone & J. Hansen, *supra* note 64, at 13.

¹⁶² *Id.*

¹⁶³ Cf. Steven J. Rosenstone, Economic Adversity and Voter Turnout, 26 *Am. J. Pol. Sci.* 25 (1982) (concluding that unemployment, poverty, and decreases in wealth suppress voter turnout).

voting a necessity in our representative system.

Votes cast on the basis of generalized political judgments are prospective expressions: they represent statements of choices about the directions in which the voter wishes society to go. They are expressions of choices regarding what the future should look like and how to make that vision come to life. When an incumbent is running, a voter's expression may be more complex. It may still be prospective—the voter may believe that this candidate, no matter what has happened in the past, will achieve the best results—but it may also be retrospective.¹⁶⁴ Conversely, a retrospective vote is essentially the voter's expression of judgment on the past and in particular this candidate's previous performance. Consider, for example, the oft-repeated election appeal to voters, "Are you better off now than you were four years ago?"¹⁶⁵ If they respond by voting for the non-incumbent, they may be expressing support not out of a prospective faith in that candidate, but instead out of dislike for the record of the incumbent. Again, votes cast for such reasons are instrumental, utilized for broad rather than narrow political purposes.

Consideration of these features of voting illuminates how general political notions are communicated and projected through casting a ballot. Voting can convey messages from the voter to others—messages including, but not limited to, trust, condemnation, and a desire for change or progress—in an instrumentalist effort to register political will and shape the direction of society. Hence, instrumentalist voting goes beyond the narrow conception of the instrumental power approach to encompass not only narrow policy choices but broader, more abstract political notions as well.

B. The Constitutive Value of Voting: Participation and Identity

Enfranchisement is valuable not only for the instrumental role it plays in societal governance, but also for its role in transforming the identity of the voter. Elections are specialized forums for expressive participation by which the voter projects, transforms, and affirms her sense of membership in the collective self-consciousness of the American society. Beyond the instrumental uses that may be made of the vote, the participatory experience of voting is valuable in itself.¹⁶⁶ Through that

¹⁶⁴ See Kim Ezra Shienbaum, *Beyond the Electoral Connection: A Reassessment of the Role of Voting in Contemporary American Politics* 16 (1984) (discussing prevalence of retrospective voting); V.O. Key, Jr., *The Responsible Electorate* 9 (1966) (same).

¹⁶⁵ Ronald Reagan was perhaps the most successful candidate of recent years to use this familiar refrain. Cf. Francis X. Clines, *Crowd Applauds Reagan's Message*, N.Y. Times, Nov. 3, 1984, at A11 ("To crowds delighted at being cued, [President Reagan] brandished his trademark rhetorical question: 'Are you better off now than you were four years ago?'").

¹⁶⁶ In a distinct, yet not dissimilar context, James Q. Wilson has termed the values that attach to the act of participation, apart from the ends achieved or sought, "purposive" incen-

experience, the voter's identity may be shaped as the voter is given a sense of belonging, transcendence, and dignity that comes from being a valued member of the society.¹⁶⁷

Voting's constitutive characteristics take two forms, each contributing to the identity-shaping effect that electoral participation has on a voter. First, voting may be an expression of the individual's identity: the voter, by the act of participation, expresses the ideas and sentiments of belonging and membership.¹⁶⁸ The individual says essentially, "I am a member of the American community." Through participation itself, the voter expresses an identification with the greater community and reveals her attachments to and associations with it. In this way, the act of voting is the individual's act of alignment to the greater society; it is the method by which the individual "signs" her name to the social contract and becomes herself part of the collective self-consciousness.¹⁶⁹

Second, American society uses the institution of elections—and the voting inherent in them—to express its values to the members of the community, transmitting and regenerating the ideals that form the core of our cultural identity.¹⁷⁰ When citizens participate by voting, they in-

tives to collective action. See James Q. Wilson, *Political Organizations* 34-51 (1973).

¹⁶⁷ Legal scholars have previously noted that voting may affect the voters' sense of belonging to the community. See, e.g., Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 *Harv. C.R.-C.L. L. Rev.* 173, 180 (1989) (discussing "civic inclusion" by voting whereby one gains "a sense of connectedness to the community and of equal political dignity"); see also Ronald Dworkin, *What is Equality? Part 4: Political Equality*, 22 *U.S.F. L. Rev.* 1, 4 (1987) (noting that members of an egalitarian community will take an interest in participatory consequences of political process).

¹⁶⁸ The individual, of course, may also express more distinctly political messages, such as policy preferences or broad political notions. See notes 157-65 and accompanying text *supra*.

¹⁶⁹ On the social contract generally, see John Locke, *Second Treatise of Government* (C.B. Macpherson ed., 1980) (1690). The influence of John Locke's conception of the social contract on American political theory is strong. See generally David A.J. Richards, *Foundations of American Constitutionalism* (1989) (detailing major intellectual influences on framers of Constitution, including Locke, Hume, and Montesquieu).

¹⁷⁰ Defining a culture as "ours" is a risky endeavor, but ultimately a justifiable one. The dangers posed are twofold. First, the characterization is necessarily one of exclusion, strengthening the sense of distinctness between "us" and "them." Second, characterizing a populace as "us" risks ignoring the diversity of perspectives, traditions, experiences, and interpretations of identifiably different groups within the defined boundaries.

Yet, these dangers should not silence dialogue on themes of national culture and identity. Defining anything is an exclusionary act; indeed, the very reason one seeks to define is to isolate those aspects or qualities that make the subject of definition distinct or unique. With nations, this should be largely uncontroversial on account of borders, languages, and histories (though problems of who controls the interpretation of national identity do arise—often with violent results). In addition, while any characterization of "us" or "ours" in the context of the United States must generalize at the expense of the country's very real and valuable diversity, one may still recognize that there exist certain traits that many Americans, if not most, share or aspire to.

Use of the first person plural and its derivatives—"us," "we," and "ours"—can also be inclusive, affirming a sense of togetherness and community among otherwise independent indi-

volve themselves with one of the most significant aspects of the American cultural identity, its political ethos. Elections are the primary mass rituals by which the political ethos is projected and affirmed. As a consequence of the voter's personal choice to participate, she may receive, or "hear," the messages of that political ethos. To pass on valuable features of the American identity and strengthen the bonds of membership, the society regenerates social meanings and practices that are highly valued, such as political autonomy and democratic governance.

Elections embody the core of the American identity, which is here taken to consist of the principles, aspirations, and values of a political ethos distinctly significant to the American experience. As a social institution and practice, elections symbolically represent the "sacred" and definitive concepts, meanings, and ideals of our culture.¹⁷¹ Not only is the political ethos represented symbolically by elections, but it is expressed, communicated, and taught to individuals through their involvement with the institution.¹⁷² Elections actively regenerate and reaffirm certain cultural meanings and concepts which are impressed upon and absorbed by

viduals or separate groups by focusing on the similarities that bind them together. These terms must, however, be used carefully so as neither to exclude people who deserve recognition nor to promote domination or oppression within a society.

The intellectual tradition of civic republicanism highlights both the dangers of exclusion within a community and the promise of inclusion. See generally Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4 (1986) (probing civic republicanism's troubled past as an instrument for hierarchy and repression and recasting its principles for a future of equality, toleration, and inclusion). Although the argument of this Note does not center on civic republicanism, nor does it necessarily accept major tenets of that intellectual tradition, it does borrow valuable insights and understandings from some of its proponents.

¹⁷¹ In this light, elections share the characteristics of social "centers"—institutions or spaces in society that project highly valued symbolic meanings and representations which serve to define the social group. See Edward Shils, *Center and Periphery: Essays in Macrosociology* 3 (1975) [hereinafter E. Shils, *Center*]; Edward Shils, *Center and Periphery: An Idea and Its Career, 1935-1987*, in *Center: Ideas and Institutions* 250, 251-52 (Liah Greenfeld & Michel Martin eds., 1988) [hereinafter Shils, *An Idea*].

Centers "consist in the point or points in a society where its leading ideas come together with its leading institutions to create an arena in which the events that most vitally affect its members' lives take place." Clifford Geertz, *Centers, Kings, and Charisma: Reflections on the Symbolics of Power*, in *Local Knowledge: Further Essays in Interpretive Anthropology* 121, 122-23 (1983). A center is "a structure of activities, of roles and persons, within [a] network of institutions. It is in these roles that the values and beliefs which are central are embodied and propounded." E. Shils, *Center*, supra, at 3.

¹⁷² Involvement or participation may be broadly or narrowly defined. Throughout this discussion, this Note operates under a narrow definition that limits "participants" to those who exercise the right to vote. A broader definition might posit that anyone who has a personally meaningful experience involving elections is a participant, and thus include the individual who abstains from voting to make a statement (such as a protest). Elections, as an expressive institution, will convey messages to a wide public audience that includes non-voters. Even those who choose not to act out the ritual of voting may affect and be affected by the values, aspirations, and meanings that elections reflect. They, too, are an "audience" of the rhetorical quali-

the participants.¹⁷³ In turn, the participants also exert their own values, identifications, and sensibilities, expressing attachment to the larger society and the political ethos that defines it. It is a two-way process whereby individuals construct and support the core of the American identity, while simultaneously receiving and assimilating its contents.¹⁷⁴ One important result of this interactive engagement of the citizens with the central social institutions—such as elections—is the strengthening of the collective self-consciousness as individuals gain a sense of membership in the larger society and culture.¹⁷⁵ The citizens take their place as members of the American community and as creatures of the American identity.

ties of the institutions and practices of elections.

Of course, the expressive value of elections to those who choose *not* to vote falls outside the concern of any right-to-vote jurisprudence and poses no judicial issue so long as voting is not made mandatory by law. Therefore, this Note focuses on the expressive qualities of voting as they affect voters or disenfranchised citizens who wish to vote.

¹⁷³ Social practices often have a signifying or expressive function by which messages and meanings are regenerated and affirmed among the members of the audience. See David Garland, *Punishment and Modern Society* 249-60 (1990) (arguing that “punishment” is a set of signifying practices that conveys messages and regenerates social meanings).

¹⁷⁴ The seeming paradox of simultaneous expression and reception—of projection and socialization—is at the heart of how humans create meaning and culture. As an expository device, one can break down the paradox to a three-stage process of “externalization,” “objectivation,” and “internalization.” See Peter L. Berger, *The Sacred Canopy* 1-23 (1967). See also generally, Peter L. Berger & Thomas Luckmann, *The Social Construction of Reality* (1966) (analyzing how people engage in “world building”). “Externalization” is the constant outpouring of our values, beliefs, and meanings into our surrounding environment. See P. Berger, *supra*, at 4. As a consequence of this outpouring, we create social institutions and practices that represent the values and meanings we have expressed. Over time, these creations attain a degree of distinctness from their human creators. See *id.* at 8. They are, ultimately, objectified, or, to use Berger’s terminology, “objectivated”: they take on the character of objective fact, or “facticity,” existing as an identifiable, powerful force confronting their creators:

The humanly produced world becomes something ‘out there.’ . . . Once produced, this world cannot simply be wished away. Although all culture originates and is rooted in the subjective consciousness of human beings, once formed it cannot be reabsorbed into consciousness at will. It stands outside the subjectivity of the individual as, indeed, a world.

Id. at 9. The institutions transcend the society’s members, who have little ability to alter their fundamental shape and content. As the strength of their objective character grows, the institutions become increasingly able to affect or even overwhelm individuals. See Clifford Geertz, *The Interpretation of Cultures* 5 (1973) (“[M]an is an animal suspended in webs of significance he himself has spun . . .”). As a result, they project meanings back onto the members of society, serving both to socialize each new generation and to reinforce values continuously over the course of a lifetime. See P. Berger, *supra*, at 16-17. The members “internalize” these projections and thus transform and affirm corresponding aspects of their identities. *Id.*

Of course, the breakdown of this process into distinct “stages” is artificial, though necessary for analytical purposes. In practice, each of the “stages” is continually at work, reinforcing and regenerating the others.

¹⁷⁵ Cf. Shils, *An Idea*, *supra* note 171, at 251-53 (discussing how interaction with centers affirms collectivity’s sense of “self”).

While it may be an impossible task to set forth conclusively the substance of the elusive "American identity" in its entirety, some of its contours are easily recognizable. Most importantly for this Note's purposes, it is clear that a central feature of the American experience has been the political aspirations of its people.¹⁷⁶ To this extent, we may say that the American identity is, in part, a highly aspirational series of political principles, values, ideals, and traditions whose mix is peculiar to the American people. The United States was founded on a set of aspirational political concepts, such as autonomy, equality, and democracy.¹⁷⁷ Its moment of origin was a political revolution dedicated, albeit not consistently committed, to these aspirations. Thomas Jefferson magnificently captured this dedication in the Declaration of Independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.¹⁷⁸

The "American creed" is essentially a series of explicit political aspirations that emphasize individual rights and democratic rule,¹⁷⁹ "truths" that we, as a people, hold in high esteem.¹⁸⁰ These sentiments motivated the struggle to create a nation, and they helped to forge a distinctly American cultural tradition.¹⁸¹ These values reflect aspects of our

¹⁷⁶ See generally Louis Hartz, *The Liberal Tradition in America* (1955) (identifying limited government, individual liberty, and political equality—in short, liberalism—as democratic ethos that distinguished America historically).

¹⁷⁷ The conception of "American identity" offered here is indisputably aspirational, reflecting the best desires of the American people rather than the actual experience of American life. For the vast majority of Americans throughout history, the aspirational ideals of the political ethos have not been met. Of course, the failure to live up to the demands of an ethos is hardly sufficient reason to discard the ethos; instead, it provides a motivation to reassess methods of achieving those demands. It is a testament to the aspirational strength of the ethos that even those who have been historically marginalized have often defined their struggles for justice in terms of the ethos. See notes 184-85 and accompanying text *infra*.

¹⁷⁸ The Declaration of Independence para. 2 (U.S. 1776), reprinted in *The Democracy Reader* 100, 101 (Diane Ravitch & Abigail Phernstrom eds., 1992).

¹⁷⁹ See Samuel P. Huntington, *American Politics: The Promise of Disharmony* 22-23 (1981) (analyzing how national identity of America is based on affirmation of a democratic political ethos); see also Sanford Levinson, *Constitutional Faith* 94-96 (1988) (discussing Huntington's and Whittle Johnson's conceptions of the American creed).

¹⁸⁰ S. Levinson, *supra* note 179, at 96 ("Americans were defined substantially as those 'who adhere to' the 'truths' enunciated in the Declaration.").

¹⁸¹ Some attribute the political character of our national identity to the lack of ethnic, religious, and cultural common history among those who forged the nation. See S. Huntington, *supra* note 179, at 22; S. Levinson, *supra* note 179, at 95-96. Seymour Martin Lipset offers a comparative analysis of the emergence of the United States and several nations in the twentieth century. See generally Seymour M. Lipset, *The First New Nation: The United States in Historical and Comparative Perspective* (1963). According to Lipset, what distinguished the forging of the United States was the lack of "the weight of ancient tradition which is present in

"conscience collective"¹⁸² and define our national identity.¹⁸³

Of course, having a set of identifying values, principles, and ideals is not a guarantee that one will live in accordance with them. Indeed, American history provides a plethora of sobering examples of how a people can fail to live up to its most dear principles. Yet despite the nation's all-too-frequent failure to conform to the norms of equality, autonomy, and democratic governance, the principles of the American political ethos have survived—attesting to just how fundamental they are to how we, as Americans, define ourselves and our goals. Even those among the most oppressed in America often frame their struggles in the terms of the dominant political ethos: witness the repetition of Jefferson's description of American ideals by Martin Luther King, Jr., in his momentous "I have a dream" address delivered at the Lincoln Memorial.¹⁸⁴ King evokes his aspirational vision of America by focusing on the essential feature of the American identity, its Jeffersonian political ethos:

So I say to you, my friends, that even though we must face the difficulties of today and tomorrow, I still have a dream. It is a dream deeply rooted in the American dream that one day this nation will rise up and live out the true meaning of its creed—we hold these truths to be self-evident, that all men are created equal.¹⁸⁵

Even among those Americans for whom the promise of the self-evident truths has not been met, the political ethos that defines the American

almost all of the contemporary new states [The United States] was not only a new nation, it was a new society, much less bound to the customs and values of the past than any nation of Europe." *Id.* at 94.

¹⁸² The "conscience collective" is the ethical and moral code that members of a society as a collectivity hold as sacred. See Emile Durkheim, *The Division of Labor in Society* 79-80 (George Simpson trans., 1933).

¹⁸³ Of course, others might emphasize different aspects of the American experience in defining the American identity. One possibility is that we are defined by the myth of the frontier. See generally, e.g., Richard Slotkin, *Regeneration Through Violence: The Mythology of the American Frontier, 1600-1860* (1973) (detailing myth of the frontier and how it affected American life). Alternatively, our national identity may be primarily based on a Protestant work ethic that supported the economic system of capitalism. Cf. generally Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Talcott Parsons trans., 1958) (examining relationship between Protestant religious theology and economic forms of rationalized modern culture). While accepting the importance of these and other aspects of American culture, one may still find that the political ethos is held sacred, if not foremost among the variety of American traditions.

Each of the possibilities discussed so far highlights that identity is inherently built on a history or set of traditions. To claim an identity, one needs a recognizable past that one can use to find meaning in the present. See Gerda Lerner, *The Creation of Feminist Consciousness: From the Middle Ages to Eighteen-Seventy* 274 (1993) (analyzing how lack of a useable past has long prevented women from claiming a "consciousness").

¹⁸⁴ See Martin Luther King, Jr., *Address in Washington, D.C. (Aug. 28, 1963)*, reprinted in *We Have A Dream: African-American Visions of Freedom* 167 (Diana Wells ed., 1993).

¹⁸⁵ *Id.* at 170.

creed also defines their aspirations and dreams.

By invoking Jefferson's Declaration, King employs rhetoric to persuasive effect. He appeals to the essential principles of the American identity—i.e., “the true meaning of [the American] creed.”¹⁸⁶ Such rhetoric is persuasive precisely because it speaks to how Americans define their identities and their normative visions.¹⁸⁷ Appealing to our identities—often through sacred traditions and texts—motivates us to action, demanding that we shape our future conduct in accordance with a certain proposed conception of that tradition. While we may never come to a consensus as to exactly what the principles of individual freedom, equality, tolerance, and democratic governance mean and require of us,¹⁸⁸ the vast majority of us may still agree that these basic concepts are morally necessary to the life of the people.¹⁸⁹ We are moved to action when offered a conception of these principles that resonates with how we best conceive of our own identities.¹⁹⁰ Rhetoric, such as King's, can connect to our identities and persuade us, moving us to fight to live up to the normative commitments we have made.

The extent to which the American identity rests on its political ethos is highlighted by the notion of the American civil religion.¹⁹¹ The sacred moral values and ideals of the American identity are not constructed on a religious teleology—that is, theory of purpose in the universe—that places primary emphasis on the relationship between humanity and a

¹⁸⁶ *Id.*

¹⁸⁷ See Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. Rev. 961, 966-73 (1992) (examining relationship between persuasive argument and identity).

¹⁸⁸ “Being an American may mean, among other things, this: agreeing to disagree about what justice is.” Christopher L. Eisgruber, *Disagreeable People*, 43 Stan. L. Rev. 275, 297 (1990). Here, Professor Eisgruber links what it is to be an “American” to a political ethos—one concerned with justice as well as a process of factional political discourse. Conflict is thus inherently part of the American identity. See also Eisgruber, *supra* note 187, at 990-92 (arguing that conflict is continually present in the American identity).

Of course, in any modern society there are those who reject the essential aspects of the national identity. There have always been members of the American community who reject the basic concepts of the political ethos, from the monarchists of the revolutionary period to modern anarchists or communists. The American response has often been to stifle critical voices, highlighting the danger of unanimity in liberal society. Such voices should not be silenced, but rather should be listened to attentively and learned from in the spirit of diversity and inclusion.

¹⁸⁹ Diverse people may agree that a “concept”—such as equality—is just and necessary, yet disagree about what the concept requires because they hold differing “conceptions” (or versions) of what the concept means. See Ronald Dworkin, *Taking Rights Seriously* 134-36 (1977) (distinguishing “concepts” and “conceptions”).

¹⁹⁰ See Eisgruber, *supra* note 187, at 971 (“Perhaps there is some aspect of human nature that makes us strive to act in a manner consistent with our best conception of our identity. . . . [A]ppeals to identity can be a powerful means for persuading people to act . . .”).

¹⁹¹ On the American “civil religion” generally, see Robert Bellah, *Civil Religion in America*, in *Beyond Belief: Essays on Religion in a Post-Traditional World* 168 (1970).

supreme being. Rather, the sacred beliefs are civil, relating mainly to the relationship among members of the human race, and between them and their form of government.¹⁹² Individual rights, equality, autonomy, and related values serve as the central tenets of the religion; its texts are, among others, the Declaration of Independence, the Constitution, the Gettysburg Address, and, of course, King's oration at the Lincoln Memorial.¹⁹³

Elections are the liturgies of the American civil religion; they provide the rituals of public worship through which the essential tenets of the political ethos are expressed and absorbed. They occur as highly symbolic events—repeatedly enacted at clearly determined times, in set locations, with arcane formulaic procedures—that serve to “reaffirm[] at regular intervals the collective sentiments and the collective ideas which make [a society's] unity and its personality.”¹⁹⁴ It is through participation in the ritualistic event that the bonds of a collective identity are regenerated and strengthened, bolstering the sense of commonality and community, despite the inherent factionalism of political contests. Based on the participants' shared identification with the political ethos, elections operate as a forum for the communication and fulfillment of attachment.

The significance of ritualistic electoral events stems primarily from the nature of elections as a central institution in our society, an institution which reflects and symbolizes values, ideals, and meanings essential to the American identity. Elections, as institution and institutional practice, operate continuously to project the cultural values of the political ethos held sacred by generations of Americans. Elections express, among other things, various strands of the American identity's political ethos. While the conveyed meanings and ideas will be interpreted differently by

¹⁹² “Religion” is thus best understood as “(1) a system of symbols which acts (2) to establish powerful, pervasive, and long-lasting moods and motivations in men (3) by formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that (5) the moods and motivations seem uniquely realistic.” C. Geertz, *supra* note 174, at 90.

¹⁹³ For instance, Sanford Levinson discusses the role of the Constitution in the American civil religion. See S. Levinson, *supra* note 179, at 9-17. Others have pursued related projects, examining the Constitution as a religious text. See generally, e.g., Thomas C. Grey, *The Constitution as Scripture*, 37 *Stan. L. Rev.* 1 (1984) (presenting analysis and critique of use of religious interpretive methodologies to understand constitutional interpretation).

¹⁹⁴ Emile Durkheim, *The Elementary Forms of the Religious Life* 427 (Joseph W. Swain trans., 1947) (describing necessity of ritual in every society). Durkheim continues by noting: [T]his moral remaking cannot be achieved except by the means of reunions, assemblies and meetings where the individuals, being closely united to one another, reaffirm in common their common sentiments; hence come ceremonies which do not differ from regular religious ceremonies, either in their object, the results which they produce, or the processes employed to attain these results.

Id.

people, we can isolate a few broad categorical concepts that are found in the expressive nature of elections.

First, elections reflect notions of autonomy: they are the official practices by which self-government takes effect. Citizens may often determine their political objectives and directions outside of elections, but elections are the institutional structures through which these decisions are gauged and empowered. In other words, elections make possible and communicate the dream of government by "We the People."¹⁹⁵ Second, the ideal of "equality" is furthered because, in theory, every citizen who votes has an equal say in determining the outcome of an election.¹⁹⁶ Under the philosophy of "one person, one vote,"¹⁹⁷ no voting citizen's views are to be given greater value than another's; citizens who exercise their right to vote may come to see themselves as partaking of an equal share of power and influence. Third, the concept of American "democracy"—majority rule tempered by individual rights—is implicated by the expressive aspect of elections and voting. When one votes, one celebrates popular sovereignty¹⁹⁸ while simultaneously exercising a fundamental individual right whose essence is perceived as removed from the battles of politics. The voter makes her own electoral choices freely,¹⁹⁹ and she knows that whatever the outcome of the present election, she will have another opportunity; her ability to vote is a right. Democratic governance, equality, and autonomy, among other concepts, are fundamental to the American identity, and voting serves to regenerate and strengthen them.

These values are then internalized by the participants, who come to identify with them and affirm their sense of membership in the commu-

¹⁹⁵ U.S. Const. pmbl.

¹⁹⁶ In practice, of course, each citizen may not truly have an equal vote on account of districting or other voting schemes, which may dilute the impact of various voters' influence. For an egregious example of such districting, see *Wesberry v. Sanders*, 376 U.S. 1, 2-4 (1964) (striking down Georgia congressional districting scheme in which some districts had more than twice the population of others).

¹⁹⁷ *Gray v. Sanders*, 372 U.S. 368, 381 (1963); see also *id.* at 382 (Stewart, J., concurring) ("Within a given constituency, there can be room for but a single constitutional rule—one voter, one vote.").

¹⁹⁸ Cf. Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness As a Procedural Safeguard Against Partisan Gerrymandering*, 9 *Yale L. & Pol'y Rev.* 301, 315 (1991) (arguing that voting is "a means to affirm the philosophy of popular sovereignty").

¹⁹⁹ But see *Burdick v. Takushi*, 112 S. Ct. 2059 (1992). In *Burdick*, the Court held that Hawaii's refusal to allow write-in voting was constitutional, primarily because Hawaii's candidate ballot access laws were otherwise liberal, requiring only 15 to 25 signatures to gain entry onto the officially printed ballot. *Id.* at 2064. However, the effective result of *Burdick* is to limit free voter choice, for now individuals can only "choose" among candidates who are on the officially printed ballot, who thus already have a group of supporters. To the extent that the individual's choice of candidates depends on others, her freedom of choice is impinged.

nity and the collective self-consciousness.²⁰⁰ For the vast majority of the citizenry, elections may be the primary forums for involvement and interaction with the political ethos, furthering the values and commitments inherent in that ethos.²⁰¹ Elections—as symbolic, institutional embodiments of that ethos—may be aspired to by members of society who wish to interact with the central institutions and affirm their sense of membership.²⁰² Through interactive engagement with those institutions, the members “hear” or receive the values those institutions signify. When these values are among the most important to how a society defines itself, as the political ethos is to American society, the interaction will foster the individual’s identification with her society and hence create or affirm the sense of membership.²⁰³ The shared experience of involvement with the core of the American identity contributes to the sense of belonging and inclusion among those who participate. Individuals thus aspire to create a meaningful community of shared self-consciousness, and work to achieve this desire through elections.

Although any one election is a specific and temporally limited entity, electoral participation fosters community beyond temporal limitations. When one votes, one participates in a continuous experiment in democratic liberty that has been engaged in by a multitude of past generations, and that will be a fundamental part of the lives of future generations, instilling the participants with the values of the political ethos. The voter thus builds a transcendent community with the traditions and members of the American past, present, and future. This community exists across the boundaries of time—trans-temporally—incorporating those current inhabitants of the society into a larger association comprising several generations of Americans who, at various moments in the American experience, either engaged the central institutions or aspired to do so. The present participant becomes part of a history, and that history becomes a part of her.

Voting encourages active internalization of the political ethos by the members of society, whereas internalization of values and meanings may otherwise tend to be achieved more passively. The definitive features of a political identity may be internalized in a variety of ways, most of which do not depend on the individual’s choosing to participate. Through edu-

²⁰⁰ The ability to partake of the “other” via participation is the subject of Lucien Levy-Bruhl’s “law of participation.” See Lucien Levy-Bruhl, *How Natives Think* 76-104 (Lilian A. Clare trans., 1925).

²⁰¹ Cf. B. Ackerman, *supra* note 57, at 231 (“The political domain simply does not dominate our moral consciousness as it did for the Revolutionary generation.”).

²⁰² On how individuals seek to incorporate themselves into the central institutions of society through interaction therein, thus creating the sense of membership, see E. Shils, *Center*, *supra* note 171, at 7-8.

²⁰³ See Shils, *An Idea*, *supra* note 171, at 257.

cational systems, the media, and social milieux, aspects of the collective self-consciousness are projected onto more or less passive individuals. Yet voting is considerably more active in that one must choose to participate: in the United States, voting is not legally mandated (as it is in some countries by compulsory voting laws²⁰⁴). Moreover, in elections one takes active steps—registering, going to the polling place, and casting one's vote—to internalize the values of the political ethos. Indeed, an election is perhaps the singular institution created by government that provides a forum for meaningful interaction of huge masses of citizens with each other and with the symbols of our political values and ideals. On account of this singularity, access to elections via the right to vote is particularly important for affirmation of the political ethos at the heart of the American identity.

The very fact of being enfranchised, distinct from the act of voting, may have a constitutive effect on one's sense of membership and the corresponding dignity which that implies. Having the right to vote has taken on a symbolic significance in modern America as a state of inclusion in which individuals are structurally recognized as valued members.²⁰⁵ As individuals are enfranchised, they are given symbolic social legitimacy. Hence, in the struggle for African-American equality and women's liberation, extension of the right to vote was among the primary demands.²⁰⁶ The struggle was not just for the right to shape government instrumentally; the goal was societal recognition of the full citizenship and equality of African-Americans and women.²⁰⁷ They sought perma-

²⁰⁴ Many countries, including Italy, Belgium, and Australia, require voting as a matter of law. See R. Teixeira, *supra* note 132, at 14.

²⁰⁵ See Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 Mich. L. Rev. 1077, 1085 (1991) ("Electoral politics awakened blacks to their humanity, their heritage, and their potential, as citizens, to participate equally in democratic self-government.") (emphasis omitted).

²⁰⁶ For example, in the Seneca Falls Women's Rights Convention of 1848, one of the most significant events in the American women's movement, the platform adopted by the participants made its first demand the extension of the right to vote:

The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world.

He has never permitted her to exercise her inalienable right to the elective franchise.

He has compelled her to submit to laws, in the formation of which she had no voice.

Declaration of Sentiments, Women's Rights Convention, Seneca Falls, N.Y., July 19, 1848, quoted in *History of Woman Suffrage* 70 (Elizabeth Cady Stanton et al. eds., 1881). With regard to African-Americans, see Martin Luther King, Jr., *Civil Right No. 1—The Right to Vote*, N.Y. Times, Mar. 14, 1965, § 6 (Magazine), at 26 (arguing that protecting right to vote is first step toward racial justice).

²⁰⁷ See Ivor Crewe, *Electoral Participation, in Democracy at the Polls: A Comparative Study of Competitive National Elections* 216, 216 (David Butler et al. eds., 1981) ("[The right

nent membership in a politically defined society and inclusion in the collective self-consciousness.

This broad constitutive quality of the right to vote, elections, and the participatory act of voting is vital to understanding expressive voting. A conception of the vote as expressive places a high value on how identities are affected and transformed by the two-way, interactive communication between individuals and society. But it must not be forgotten that the idea of expressive voting also comprehends the instrumental value of the vote as a method of directing government. Elections on an institutional level do contribute to the shaping and steering of our policies. The right to vote is the strategic tool by which this guidance is made legitimate. Indeed, one may attribute the constitutive quality of voting in part to the aura of power and authority surrounding the vote and elections.²⁰⁸ Without some power to affect and shape government, it is unlikely that voting could have such a strong constitutive impact.

Yet, as this Part has argued, the vote is more than an instrumentality for pursuing political ends; it is an identity-shaping social institution and practice by which society expresses its political ethos and the voter both expresses her attachment to and affirms her membership in the community. The right to vote is the citizenry's primary route to the central institutions of the American identity and the motivating aspirations that commitment to that identity entails. Voting—the participatory act—is the constitutive and sacred ritual by which the collective self-consciousness is fortified.

III

REVISITING THE RIGHT-TO-VOTE JURISPRUDENCE: EXPRESSIVE VOTING APPLIED

Part I demonstrated that an instrumentalist conception of voting links the value of the right to vote to the voter's capacity to use the ballot as a tool for pursuing political objectives.²⁰⁹ The Supreme Court's ver-

to vote] became the symbol of citizenship itself: the right to participate in public affairs in general.”); see also David Morgan, *Suffragists and Democrats: The Politics of Woman Suffrage in America* 10-12 (1972) (arguing that among reasons women sought right to vote was liberation from outdated notions of female inequality that resulted in psychic domination).

²⁰⁸ As a central institution, elections may tend to maintain their authoritative force from the exalted status conferred on their symbols of power by ruling elites. See generally Geertz, *supra* note 171, at 122-25 (discussing “charisma” of centers).

Although elections are participatory, inviting the masses to participate, they also are fundamentally tied to ruling elites—rulers, political parties, governmental bureaucracies, and so forth—and the symbols of authority. Indeed, even the ruling elites themselves constitute an “audience” for the signifying, symbolic institution of elections. They, too, are recipients of messages evoked who may be shaped and affirmed by the experience.

²⁰⁹ See notes 157-65 and accompanying text *supra*.

sion of instrumentalism, the instrumental power approach, prioritizes the existence of a primary stake in the outcome and the maintenance of a politically "intelligent" electorate over all other qualities as the relevant bases for determining who is capable of voting instrumentally and on what basis, and thus whose vote is constitutionally protected.²¹⁰ In addition, the Court generally favors quasi-content neutrality (although at least appearing to abandon that stance in the case of ex-felons), as long as the political ends pursued by the voter are narrowly defined to further choices among policy options.²¹¹ However, in taking a strictly instrumentalist view of voting, the Court's approach is incoherent when applied to today's modern electorate and fails to capture the diversity of values that may be served by voting.

In contrast, the expressive conception of the vote discussed above treats the right to vote as valuable on a number of different levels. First, it recognizes that the vote is instrumentally valuable as a vehicle for expressing and communicating political ideas to shape the direction of government.²¹² But unlike the instrumental power approach, the expressive approach expands the scope of political ideas deemed relevant to include broad, abstract political sentiments in addition to more narrow policy options.²¹³ Second, the expressive approach also values the right to vote for constitutive reasons. On account of the significance of both elections and the right to vote to the aspirations of the American identity, voting can be viewed as a meaningful social act by which the identity of the voter is shaped and transformed, building in particular a sense of membership in the larger collectivity and its political culture.²¹⁴ Thus, according to the notion of expressive voting, the right to vote is valuable for both instrumental and constitutive reasons.

As a consequence of the expressive conception's broader view of voting's values, several aspects of the Supreme Court's enfranchisement jurisprudence may be called into question. Past conclusions reached under the instrumental power approach of the Court may, in some instances, fail to protect important instrumental and constitutive values of the right to vote. This Part offers a brief examination of how the expressive approach to voting would affect the major components of the instrumental power approach, namely intelligence and interest requirements. Additionally, the special case of disenfranchised ex-felons is reconsidered.²¹⁵

²¹⁰ See notes 42-50, 59-97 and accompanying text *supra*.

²¹¹ See notes 98-124 and accompanying text *supra*.

²¹² See notes 157-58 and accompanying text *supra*.

²¹³ See notes 159-65 and accompanying text *supra*.

²¹⁴ See notes 166-208 and accompanying text *supra*.

²¹⁵ No separate analysis of the instrumental power approach's emphasis on narrow political ends is offered here. By its very terms, the expressive approach encompasses both broad and

In exploring these issues, the expressive approach asks what impositions the requirements place on both the instrumental and the constitutive values served by the right to vote. This Part concludes that an expressive approach would lead to invalidation or, at least, substantial reformulation of each of the major aspects of the Court's current enfranchisement jurisprudence.²¹⁶

A. Disenfranchisement in Pursuit of an Intelligent Electorate

The jurisprudence of enfranchisement has well established the validity of state disenfranchisement laws formulated to further the state's interest in achieving and maintaining an intelligent, educated electorate.²¹⁷ This point is highlighted by the two cases discussed in Part I, *Lassiter v. Northampton Election Board*,²¹⁸ where the Court upheld the constitutionality of literacy tests as a method of insuring an intelligent electorate, and *Harper v. Virginia Board of Elections*,²¹⁹ where the Court found the state's interest in maintaining an intelligent electorate to be compelling (but invalidated the particular statute at issue for overinclusiveness). Under the instrumental power approach, restrictions such as those in *Lassiter* and *Harper* make sense because they help to ensure an electorate capable of defining their political ends in an informed manner.²²⁰ Unintelligent voters presumably lack the capacity to understand political issues and the intricacies of policy plans and options "up for grabs" in any election. Where a voter is not sufficiently knowledgeable or informed, there is no reason under the instrumental power approach to require that she be allowed to participate.

Under an expressive conception of the right to vote, however, there are several reasons to reject intelligence-based standards; such criteria fail to satisfy both the instrumentalist and constitutive features that the expressive conception finds valuable. When viewed from that conception's expansive instrumentalist vantage point, intelligence requirements are unnecessary infringements on the right to vote. First, with regard to narrow instrumentalist uses of the vote, intelligence requirements tend to be vastly overbroad, excluding voters with a high awareness of the issues and including many who lack such awareness. An illiterate person, for example, may become aware of the issues through daily conversation and

narrow instrumentalism. See notes 157-65 and accompanying text *supra*.

²¹⁶ This conclusion excludes those restrictions on the franchise which this Note has already explicitly accepted as necessary limits on the electorate—citizenship, residency, and cognitive capacity. See notes 51-58 and accompanying text *supra*.

²¹⁷ See notes 59-77 and accompanying text *supra*.

²¹⁸ 360 U.S. 45 (1959).

²¹⁹ 383 U.S. 663 (1966).

²²⁰ See notes 59-77 and accompanying text *supra* (analyzing how intelligence requirements fit into instrumental power theory).

interaction with others,²²¹ as well as through radio and television, and may have the ability to recognize the letters of the name of her preferred candidate, while a literate voter may simply have ignored the entire campaign. Second, the instrumental power approach's confined conception of legitimate political goals—namely, narrow policy options—excludes voters protected under the expressive conception's broader version of instrumentalism. Those whom the state might characterize as unintelligent may still have generalized political notions and the ability to know that they want "change" because they are dissatisfied with the current state of political affairs. Even without understanding the intricate details of various policies, individuals are capable of understanding that their needs are not being met by the present political regime. And the ability to express that understanding at the polls is protected by the instrumental prong of the expressive voting approach.

Under the constitutive prong of the expressive voting approach, states' interest in maintaining an intelligent electorate similarly fails as grounds for disenfranchising residents of the jurisdiction. Even assuming that a chosen measure correlates accurately with intelligence, a focus on intelligence only considers the likely procedural basis of a particular vote: is the choice likely to be made with deliberation and careful consideration of the relevant issues? This inquiry ignores the participatory aspect of voting—the extent to which value is derived from the act of voting itself. Intelligence and information have little relevance to whether one may derive a strong sense of membership through voting. Indeed, it may be the unintelligent or illiterate voter who needs most to affirm membership in society, as she may find herself otherwise marginalized and excluded from the central institutions and practices of society. There may be few opportunities to engage and interact with the essential political ethos for such an individual; she is likely to be removed from the educational system, the print media, and entertainment, and may have difficulty finding success in a meaningful and financially rewarding career. This type of voter may seek to participate precisely because it affirms her membership in and her value to society: it may be one of the few times she finds herself with an equal voice and equal respect.

Thus, the expressive approach to voting would not allow for arguments supporting denial of the right to vote in the interest of an intelligent electorate, for such claims correspond to neither the broad instrumental nor the constitutive features of the expressive conception of voting. As a result, states could no longer claim to have a legitimate,

²²¹ A considerable amount of the political information obtained by any voter comes from social interaction with family members, colleagues at work, friends, and neighbors. See Huckfeldt & Sprague, *supra* note 143, at 1198-20.

much less compelling, interest in maintaining or promoting an intelligent or knowledgeable electorate.

B. Interest or Stake Requirements for the Franchise

In several instances the Court has looked kindly on interest-based restrictions on the franchise.²²² Mandating that the voter have a direct stake in the outcome of the election as one primarily affected by the decisions of the governmental unit in question, interest requirements are intended to assure a motivated and informed electorate. Without being directly affected, the voter will not vote instrumentally in an informed manner; that is, without some stake, the voter will have no incentive to research the alternatives and determine what policy choices best correspond to her political will. Unmotivated and unaffected, such a voter can only distort the electoral results by frustrating the attainment of interested voters' preferred policy choices.

Limiting the franchise to directly interested voters is difficult to reconcile with the broad instrumentalist perspective of the expressive approach. Resident voters who are not "primarily interested"—those who live in the relevant geographical area yet are not the direct beneficiaries of the governmental unit's policy decisions—may still have generalized political notions that resonate with the particular electoral context. Consider again *Kramer v. Union Free School District No. 15*,²²³ where the plaintiff challenged a state law restricting eligibility to vote in school district elections to owners or lessees of taxable real property within the district and to parents or guardians of children who attended district schools.²²⁴ Under the expressive conception's expansive version of instrumentalism, if the plaintiff in *Kramer* had generalized political notions that were relevant, then his vote would serve instrumental purposes, and thus he would have had to be enfranchised. In the case of the school district elections, the plaintiff, as a member of the community, might have had generalized notions of the "common good," independent of any particular policy choices, which would have given him an "interest" in the elections, even if the policies adopted by the school board directly affected only the school children's education. This is true because education plays a particularly important role in furthering the common good, in which every member of the community has a stake. However, the stake is only an indirect one for most, as only students feel the direct effect of the board's decisions on how to shape the curriculum and the

²²² See the discussion of interest requirements at notes 78-97 and accompanying text *supra*.

²²³ 395 U.S. 621 (1969). For a discussion of *Kramer*, see notes 80-91 and accompanying text *supra*.

²²⁴ See *Kramer*, 395 U.S. at 622-25.

quality of the teachers. Indeed, this was one of the linchpins of the decision in *Brown v. Board of Education*,²²⁵ where the Court noted the special role of the educational system and its ability to affect the good of the entire community.²²⁶ Because of this special role, the entirety of the community is interested, though many only indirectly, in the outcome. Therefore, each resident of that jurisdiction would have some generalized stake and hence a voice worthy of respect under a broad instrumentalist view of voting.

When considered under the first prong of the expressive theory of voting, notions of stake and interest continue to be relevant, but the sphere of people who hold a stake or interest is considerably larger. Their interests do not have to be direct but can be of a more generalized nature. The plaintiff in *Kramer* would not be directly affected by the curriculum decisions of the school, but only indirectly affected by the eventual results of such decisions in creating an educated citizenry, which in turn advances the common good. Even recognizing the larger field of instrumentalist concerns, the expressive theory's instrumentalist prong would nonetheless mandate a case-by-case analysis of whether there are any relevant generalized notions to pursue in the particular electoral arena. In theory, notions of the common good might not be relevant in some elections; for instance, if the governmental entity involved does not deal with the allocation of common resources or decisions that shape the economic, social, or political environment of the community.²²⁷

The second, constitutive prong of the expressive voting approach would focus on whether participation in the particular election could have a transformative or affirmative effect on the identity of the individual as a member of the community. In federal elections, it is easy to see how an individual may be affected by the experience. Such elections are often exalted by the people, established as political focal points for their attention and energy. In general, these are the elections that gain considerable news coverage and analysis, as well as those that are emphasized in historical study and in the process of general political education. As citizens, we hear about, debate, and vote in federal elections the most; as students, we study mainly presidential elections and the workings of the federal government—rather than focusing on state elections and govern-

²²⁵ 347 U.S. 483 (1954).

²²⁶ See *id.* at 493 (claiming that education "is the very foundation of good citizenship").

²²⁷ In practice, it may be that any governmental election indirectly affects all residents, for, invariably, the function of any governmental entity will be to take actions that affect the distribution of resources or the economic state of the unit. Yet there are too many governmental functions to rule out entirely the possibility that the common good is not even indirectly affected.

ment—in learning the American political ethos. Consequently, such elections may invoke a sense of community, both a “current” community of citizens who are attuned to or affected by the present election, and a trans-temporal community of Americans who come to represent the values and principles of the American identity. Moreover, federal elections evoke the national government and its symbols, such as the Constitution and the Congress—embodiments of the political ethos at the heart of the American identity. Voting in federal elections is paradigmatic of the identity-shaping influence that inheres in electoral participation. For this reason, citizens have a constitutive interest, or stake, in federal elections sufficient to guarantee protection of their right to vote.

As the governmental unit for which the election is held becomes smaller and more specialized, the constitutive aspect of participation would appear to lessen. Water storage district elections, for example, where the primary governmental function of the political unit is the establishment of electricity rates, would seem less likely as a general matter to be a means of shaping identity and affirming membership in the collective self-consciousness of the community. The number of participants is considerably smaller, and certainly the amount of attention the electorate focuses on such elections is minimal. While statewide elections would count as having important constitutive aspects—mainly on account of their size and the amount of public attention devoted to them—as the governmental function becomes more specialized and local, the electorate will tend to deem it of less import. Hence, eligible voters will generally turn out less, and find fewer constitutive influences in the act of participation.

Recognition of this general phenomenon does not, however, end our inquiry. Because identity formation inherently affects a subjective sense of self, the constitutive prong of the expressive voting analysis must also consider the individual’s point of view and whether the election in question has constitutive value for her. An inquiry into the individual’s subjective state is warranted because different people will choose diverse arenas for meaningful participation. It is imaginable that some may find participating in local elections a greater constitutive experience than federal elections. For example, one might expect small, geographically compact minorities that are virtually unrecognizable in federal or statewide elections to be more sensitive to the experience of self-exertion and empowerment on the local level. Marginalized in the power arena of the national government because of their size, such groups may have real influence in the smaller electorates of local elections. At that level, the democratic ideals of the American political ethos may be more easily realized for some voters, and hence the constitutive influence readily felt. For groups in the electorate such as these, electoral participation on the

local level can be subjectively meaningful and identity-shaping and therefore may deserve constitutional protection.

Yet, hinging enfranchisement on subjective meanings threatens to raise considerable administrative hurdles. Gauging the subjective desires and sentiments of individual members of the citizenry to determine political or constitutive stake is not a quickly or easily accomplished task, especially in sizable electorates. Objective factors, such as direct interest based on clearly definable parental status for school board elections, may be simple for governmental bureaucracies to administer and apply, whereas determining the existence of subjective meanings for each voter would be time consuming and likely to involve inquiry into elusive and amorphous aspects of identity and character on an individualized basis.²²⁸

This concern, however, can be overstated, exaggerating the necessity for complex administrative inquiry. First, the size of the electorate will be more manageable than imagined, for a specialized governmental unit's possible voting population is limited to residents of the geographical area covered by the governmental unit;²²⁹ this problem is less troublesome if the electoral bureaucracies have to investigate only those members of the electorate who register to vote. Second, and most significant, to discover who is subjectively interested in a local or specialized governmental election, the administrative bodies may succeed by the simple policy of liberal registration laws allowing all residents of the jurisdiction to register upon their own initiative, which should successfully winnow out those without a subjective interest for whom electoral participation in the particular arena is not meaningful. Those who register to vote should have a subjective interest that has motivated them to place their names on the official rolls, while those who fail to register either do not find the experience instrumentally or constitutively valuable. If the electoral participation is subjectively meaningful to the individual, she can be trusted to register to vote. Liberal registration laws may work as a suitable method of "inquiring" into subjective meaningfulness.²³⁰ This is considerably easier to administer than the current system, which, under Supreme Court doctrine, may necessitate a further inquiry beyond verification of the registration lists into whether the registered individual meets objective interest requirements. The open-door registration scheme actually

²²⁸ The Court has made clear that an interest upon which enfranchisement is conditioned must be "objective" not "subjective." See *Kramer*, 395 U.S. at 631.

²²⁹ For a discussion of the role of residency requirements in limiting the franchise, see notes 54-57 and accompanying text *supra*.

²³⁰ The administrative procedure would still include verification of registered voters' residencies. While this poses some administrative burden, it is no different from any other election.

entails less administrative difficulty, and it captures the inherently subjective constitutive feature of the election in question.

An expressive conception of voting does not obviate the need for an interest analysis; rather, it reformulates it to encompass a larger range of instrumental and constitutive concerns. Broad notions relating to the common good of a community can serve as a sufficient interest to guarantee the right to vote. Likewise, the subjective state of mind of the individual may warrant her entry into the electorate for a specialized governmental election that affects the political unit in which she resides. Because it is ultimately the individual who should choose whether or not to benefit from the identity-shaping experience, the expressive approach to voting leaves open the doors to the electorate.

C. Neutrality or Discrimination? Reexamining the Disenfranchisement of Ex-Felons

The Supreme Court's instrumental power approach in enfranchisement cases generally takes what this Note has termed a quasi-content neutral stance toward competing conceptions of the political good that can be expressed through the ballot.²³¹ The Court will not allow a state to disenfranchise a class of citizens otherwise eligible to vote merely because the state mistrusts the substantive ends those citizens might wish to pursue.²³² It has said, for instance, that "[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible,"²³³ and it has overturned state efforts to insure that groups are impressed with local viewpoints before being allowed to vote.²³⁴

As discussed earlier, however, the Court appears to have strayed from this stance in the case of ex-felons,²³⁵ whom it ruled may constitutionally be disenfranchised.²³⁶ The Court claimed to rely on a strict textual analysis of two provisions of the fourteenth amendment;²³⁷ yet, as others have argued,²³⁸ this approach is clearly contrary to precedent and

²³¹ See notes 98-108 and accompanying text *supra*.

²³² See *id.*

²³³ *Carrington v. Rash*, 380 U.S. 89, 94 (1965).

²³⁴ See *Dunn v. Blumstein*, 405 U.S. 330, 355 (1972) ("Tennessee's hopes for voters with a 'common interest in all matters pertaining to [the community's] government' is impermissible. . . . '[D]ifferences of opinion' may not be the basis for excluding any group or person from the franchise.") (citations omitted); see also notes 100-08 and accompanying text *supra*.

²³⁵ See notes 109-24 and accompanying text *supra*.

²³⁶ See *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974).

²³⁷ See notes 109-15 and accompanying text *supra* (discussing stated reasoning of Supreme Court in *Richardson*).

²³⁸ See note 117 *supra*.

rests on peculiarly faulty reasoning,²³⁹ raising questions as to what was truly leading the Court to accept ex-felons' disenfranchisement. One likely possibility is that the Court was persuaded by the state's asserted rationale: the prevention of subversive voting by individuals with a criminal history.²⁴⁰ If so, then the Court in this case diverged from quasi-content neutrality toward content discrimination.

An expressive conception of voting would remain true to the Court's general insistence on neutrality.²⁴¹ Under the expressive voting analysis, ex-felons' disenfranchisement would not be available solely on account of mistrust of subversive voting; instead we must look to the two prongs of the expressive approach. The broad instrumentalist prong of the expressive voting analysis asks whether the individuals in question have instrumentalist desires (broad or narrow) to pursue via the ballot box. There is no reason to suspect that ex-felons generally lack political ends to further by voting. As adult residents of political units and as members of families and communities, they should have numerous concerns and desires about the direction of government, for it will inevitably affect them, directly and indirectly. Because of the large size and diverse composition of the class of ex-felons, an infinite variety of political, instrumental interests may motivate ex-felons to participate.²⁴² Virtually all who fall into the class of ex-felons will have either broad or narrow political objectives in some contexts that could be pursued in a variety of elections by exercising the right to vote.

Considered constitutively, the grounds for disenfranchising individuals on account of their criminal histories are minimal or nonexistent. If the act of voting is understood as the type of activity that builds ties to and respect for the American society, then it should be encouraged for those who have exhibited illegal, deviant behavior in the past. By voting, those with criminal histories may create the very type of relationship with society that deters illegal behavior. Although protecting the right to vote obviously will not rid society of crime, electoral participation may help to incorporate criminal offenders into the collective self-conscious-

²³⁹ See note 119 *supra*.

²⁴⁰ *Richardson*, 418 U.S. at 78-82 (Marshall, J., dissenting).

²⁴¹ By its very terms, the expressive voting analysis rejects the "quasi" of "quasi-content neutrality," the Court's restriction of content neutrality to those pursuing narrow political ends such as policy options. Expressive voting's broad instrumental aspect replaces the instrumental power approach's more limited view of proper political ends.

²⁴² The fear that ex-felons will vote subversively is an instrumentalist argument, but one without persuasive effect. Cf. Note, *supra* note 116, at 1302-03 (arguing that there is no evidence to support notion of ex-felons voting subversively). The class of ex-felons is too diverse to come together and vote as a bloc on the narrow basis of their status as criminal offenders. Moreover, persons convicted of crimes are not necessarily so overwhelmed by criminality as to prioritize criminal ends over every other political, economic, and social issue.

ness. Allowing ex-felons to vote under an expressive voting approach may be the quintessential example of using law as a positive force in the lives of members of the community. In this way, the law enables a society to create those civil and emotional bonds that may lead one away from socially unacceptable patterns of behavior. There may be no group in society with a greater need to find the political ethos and be affected by its influences, establishing common bonds of community and citizenship.

Thus, an expressive conception of voting would reject the disenfranchisement of ex-felons. Taking neutrality seriously, an expressive voting approach would continue the Supreme Court's general trend of refusing state efforts to exclude from the franchise groups of people out of fear of how those groups might vote. Because ex-felons will have instrumental and constitutive uses for the vote, they should have the opportunity to exercise it.

CONCLUSION

In American constitutional law, the right to vote has long been conceived as solely an instrument for pursuing narrow political ends. This is evident in the jurisprudence of the Supreme Court, which allows states to deny the right to vote to citizens who are not perceived to have narrow instrumental reasons for voting. Yet, as argued here, the right to vote can be viewed as more than an instrument. In the United States, voting has symbolic value and provides an institutionalized and ritualistic means of practicing the central principles of the political ethos at the core of the American identity. Voting is a participatory exercise that can have a meaningful identity-shaping effect on the voter. When conceptualized in this way, the right to vote finds inadequate protection under the Court's current jurisprudence. The expressive approach, by promoting meaningful participatory experiences, would result in a positive jurisprudence of both instrumental and constitutive values.