DETENTION, DISENFRANCHISEMENT, AND DOCTRINAL INTEGRATION

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"[T]he vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison people because they are different from other men."[1]

ABSTRACT

On any given day, approximately 2.3 million individuals are incarcerated, many of whom are eligible voters and are disproportionately people of color.[2] *The majority of state and local governments do not affirmatively provide incarcerated voters with special accommodations to ensure that they are able to exercise their right to vote, leaving many effectively disenfranchised. What is the constitutional harm to these persons: Is the harm the denial of the right to vote, which society owes to every eligible citizen? Or the failure of the duty of care that the state owes to every prisoner in its charge? Is the constitutional harm the denial of Fourteenth Amendment*

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1. President Lyndon B. Johnson, Remarks on the Signing of the Voting Rights Act (Aug. 6, 1965).

2. Press Release, Wendy Sawyer & Peter Wagner, Mass Incarceration: The Whole Pie 2020, Prison Pol'y Initiative (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/Z7G2-FASF]; CHRIS UGGEN, RYAN LARSON, SARAH SHANNON & ARLETH PULIDO-NAVA, SENT'G PROJECT, LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 8 fig.1 (2020), https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/#III.%20Disenfranchisement%20in%202020 [https://perma.cc/8DTP-KNDC] (indicating that 25% of people in prison are disenfranchised).

equal protection? Or the imposition of Eighth Amendment cruel and unusual punishment? Or is it somewhere in between, or in some sense, all of these?

Controlling Supreme Court jurisprudence approaches this question through a limited standalone application of the Equal Protection Clause. This Article revisits the controlling interpretation of the right to vote in jails and develops an alternative interpretation that integrates the Due Process Clause and Equal Protection Clause to fully account for the liberty-based harms specific to incarcerated voters. At the core of the current interpretation lies a fundamental misconception that fails to recognize both the profundity and centrality of the right to vote and the inequalities between incarcerated and non-incarcerated individuals. For detainees, an interpretation integrating substantive due process and equal protection might clarify the contours of the state's obligation to ensure protection of this fundamental right.

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INTRODUCTION

Since the founding of the republic, the ability to vote and participate in the civic process has been central to one's ability to attain political equality

and what we understand today to be citizenship.[3] As described by Lyndon B. Johnson, who enacted the Voting Rights Act, "a man without a vote is a man without protection."[4] When citizens do not have the ability to vote, they are fundamentally deprived of any legal standing or protection, being unable to have a say in the laws and governments of the society in which they reside.[5]

The criminal legal system, however, has created its own form of tiered citizenship within society. Incarceration is understood to be the most common punitive consequence of a criminal conviction. Criminal incarceration places significant limitations on an individual's ability to meaningfully participate in public life as a full citizen—while imprisoned and well after release.[6] Employment opportunities become limited, the ability to access public or private housing is jeopardized, and parental rights may be strained either by way of debt accumulation or inability to maintain custody.[7] Such limitations are not typically regarded by law as the intended punishment that is tacked onto a criminal sentence, rather, they are what is commonly referred to as "collateral consequences."[8] As such, incarcerated people face consequences that are nothing short of societal exile.[9]

A conviction can also have the effect of divesting an individual of her citizenship. Felon disenfranchisement laws remain active in many states, restricting 2.27% of the eligible U.S. voting population from casting a ballot.[10] Beyond felon disenfranchisement, there is a significant group of

3. *See infra* Part III.

4. This quote is commonly attributed to Lyndon B. Johnson when he was Senate majority leader. *See, e.g.*, Wayne Kroger, *'A Man Without a Vote Is a Man Without Protection*,*'* INTELLIGENCER (July 20, 2015), https://www.theintell.com/article/20150720/opinion/307209788 [https://perma.cc/HG9Z-PT3U]. The original author of the comment is unknown.

5. Jesse Furman, Note, *Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice*, 106 YALE L.J. 1197, 1217 (1997) ("[I]t is clear that the right to vote is a central component, if not *the* central component, of democratic citizenship." (emphasis added)).

6. *E.g.*, Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281 (2004) (advancing three theories that explain the societal impact of mass incarceration on marginalized communities of color: (1) damage to social networks; (2) distortion of social norms; and (3) the destruction of social citizenship).

7. *E.g.*, Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 371–72 (2012).

8. Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634–36 (2006).

9. *See, e.g.*, MARC MAUER & VIRGINIA MCCALMONT, SENT'G PROJECT, A LIFETIME OF PUNISHMENT: THE IMPACT OF THE FELONY DRUG BAN ON WELFARE BENEFITS 1–3 (2013), https://www.sentencingproject.org/publications/a-lifetime-of-punishment-the-impact-of-the-felony-drug-ban-on-welfare-benefits [https://perma.cc/CA8J-LDHC]. *See generally* SENT'G PROJECT, PARENTS IN PRISON (2012), https://www.sentencingproject.org/publications/parents-in-prison [https://perma.cc/AJA7-3K54].

10. CHRIS UGGEN, RYAN LARSON, SARAH SHANNON & ARLETH PULIDO-NAVA, SENT'G PROJECT, LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION

eligible incarcerated voters who also lose voting privileges, not by virtue of any statute or legislative decision, but rather by the state's failure to provide the tools necessary for access. Here, I use the term "eligible incarcerated voters"[11] to describe individuals who are either (a) detained prior to trial, who are legally innocent, and have not been tried on the day of the election, compromising almost two-thirds of the entire jail population, or (b) the other third, which includes individuals who have been tried and are serving a sentence, but who are not themselves formally disenfranchised (such as those serving time for misdemeanor convictions or nondisqualifying felony convictions).[12] An eligible incarcerated voter's inability to vote is typically not a result of an affirmative denial, like felon disenfranchisement. Rather, it is an implicit denial that takes the form of state inaction, misinformation by correctional officers, strict facility policies for disseminating voter guides, or narrowly construed local voter identification and absentee ballot laws.[13]

Judges have recognized that there are limitations on the extent criminal incarceration can restrict a detainee's rights, ranging from the right to access media to the right to marriage.[14] That being said, the onus is typically placed on the detention facility to ensure that access to these rights are not

(2020), https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction [https://perma.cc/XT59-RSTX]. Although the focus of this Article is not the constitutionality of felon disenfranchisement, I briefly consider the foundation of an Eighth Amendment challenge in the context of disenfranchisement to demonstrate significant holes in the existing jail-voting doctrine. *See infra* Section III.C.

11. The term "jailed voter" is commonly used by scholars to encompass individuals who are eligible to vote but are incarcerated during the respective voting period. The term "jail" is not meant to signal the typical distinction between jails versus prisons, but instead simply to convey that the eligible voter is incarcerated. Similarly, the term "jail-voting doctrine" also reflects the commonly accepted description of the doctrine on the right to vote for individuals who are incarcerated. The terms "jail" and "incarceration" will be used interchangeably throughout this Article.

12. *See generally* NICOLE D. PORTER, SENT'G PROJECT, VOTING IN JAILS (2020), https://www.sentencingproject.org/publications/voting-in-jails [https://perma.cc/PQ6G-S3PS].

13. *E.g.*, ERIKA WOOD & RACHEL BLOOM, DE FACTO DISENFRANCHISEMENT 2 (2008) ("[I]nterviews with election officials in several states revealed that they often did not understand the difference between misdemeanors and felonies and improperly stated a person with a misdemeanor conviction was not eligible to vote."); *see also* Dana Paikowsky, *Jails As Polling Places: Living Up to the Obligation to Enfranchise the Voters We Jail*, 54 HARV. C.R.-C.L. L. REV. 829, 839 (2019) ("Surveys regularly find that people misunderstand how and when contact with the criminal justice system impacts voter eligibility. One recent survey in Colorado found that just over 40% of those surveyed mistakenly believed that people on probation, in pretrial detention, or serving sentences for misdemeanor convictions are not eligible to vote.").

14. *E.g.*, Skinner v. Oklahoma *ex rel*. Williamson, 316 U.S. 535, 541–43 (1942) (upholding the right not to be sterilized while incarcerated); Lee v. Washington, 390 U.S. 333, 333–34 (1968) (per curiam) (upholding freedom from racial segregation while incarcerated); Pell v. Procunier, 417 U.S. 817, 835 (1974) (upholding the right to access the media while incarcerated); Bounds v. Smith, 430 U.S. 817, 828 (1977) (upholding the right to maintain meaningful access to the courts while incarcerated); Turner v. Safley, 482 U.S. 78, 99–100 (1987) (upholding the right to marriage and access to some forms communication while incarcerated); O'Lone v. Estate of Shabazz, 482 U.S. 342, 348–50 (1987) (upholding the freedom to exercise religion while incarcerated).

unreasonably hampered when a right has been asserted. For instance, Justice Stevens, dissenting in *Bell v. Wolfish*, a case challenging the conditions of confinement for pretrial detainees,[15] raised a concern that certain limitations placed upon pretrial detainees, in particular those who are presumed innocent, could be excessive because such limitations could be seen as punitive.[16] Justice Stevens wrote, "The withdrawal of rights is itself among the most basic punishments that society can exact, for such a withdrawal qualifies the subject's *citizenship* and violates his dignity. Without question that kind of harm is an 'affirmative disability' that 'has historically been regarded as a punishment.' "[17]Justice Stevens' point was prescient, arguing that the only reason the legal system is permitted to incarcerate individuals—whether prior to trial or for punitive purposes—is because, even when incarcerated, those individuals retain the rights antecedent to citizenship.[18] Justice Stevens goes further to explain that incarceration acts as an "affirmative disability." The implication is that the only way in which incarcerated individuals are able to retain those rights of citizenship is if the state acknowledges the disability and provides access to those rights. The logic behind Justice Stevens' notion of incarceration as an affirmative disability would imply that when the state erects affirmative hurdles to citizenship by depriving someone of her liberty, the state either has an obligation to provide access to fundamental rights that the detainee retains or remove additional hurdles that prohibit access to the right when a deprivation is punitive. That concept can be applied directly to the case of eligible incarcerated voters.

In this Article, I argue that the harm to incarcerated voters has been miscategorized. The "harm" to the incarcerated voter is not the denial of the right to vote that society owes to every eligible citizen, although that is how we are inclined to think of it. Rather, the "harm" is the failure of the duty of care a state owes to every prisoner in its charge. Further, the *constitutional* harm to incarcerated voters is not simply the denial of the right to Equal Protection. Rather, it is the failure of the State to provide access to the right in violation of the Due Process Clause, and, perhaps the Eighth Amendment.

15. Bell v. Wolfish, 441 U.S. 520, 538–41 (1979) (holding that the mere fact that pretrial detainees are forced to experience prison conditions similar to that of convicted inmates did not constitute punishment).

16. *Id.* at 589–90 (Stevens, J., dissenting).

17. *Id.* (internal citations omitted) (emphasis added).

18. In a footnote, Justice Stevens cites directly to felon disenfranchisement as a prime example of punishment that limits fundamental rights tied to citizenship. Justice Stevens writes, "The classic example of the coincidence of punishment and the total deprivation of rights is voting." *Id.* at 590 n.22. Other examples include the right to marriage. *See Turner*, 482 U.S. at 89, 99 (reviewing not under strict scrutiny but rather inquiring whether the prison regulation impinging on incarcerated people's constitutional rights was "reasonably related to legitimate penological interest").

Current Supreme Court jurisprudence understands the harm in a vacuum, limited strictly to the Equal Protection Clause. The Supreme Court has already affirmed that those not formally disenfranchised have the right to vote in *O'Brien v. Skinner*.[19] This case is the final of three in what marks a five-year trilogy of jail-voting cases before the Supreme Court. But, within this doctrine, the Court seems to send conflicting signals by declining to overturn its earlier decision that failed to acknowledge vote denial in which incarcerated voters were unable to cast absentee ballots.[20] These cases, taken together, have created loopholes that allow states to ignore the duties they owe to their incarcerated voters. In this Article, I show how the existing jurisprudence is incomplete without incorporating these additional doctrines.

In the boarder scheme of voting rights cases, courts have tended to singularly apply the equal protection requirements when analyzing the harms to jailed voters. In other contexts, however, the Supreme Court has explicitly looked to the concept of doctrinal integration, combining multiple sources of analysis to address an unjust harm that disparately impacts a traditionally nonsuspect class.[21] Doctrinal integration has been applied to deprivations of fundamental rights, in both the criminal context and in the voting rights context.[22] A similar approach is needed in jail-based disenfranchisement cases, to allow for more accurate consideration of the constitutional harms suffered by incarcerated individuals.

This Article situates the lack of access to the vote suffered by incarcerated voters as a part of the U.S. history of suppressing the Black vote that lives on structurally through our criminal legal system. It then argues for an alternative interpretation of the right to vote in jails that makes clear that the current practice of failing to provide such voters with basic access to voting is unconstitutional.

Part I briefly discusses the history of voter suppression in the United States and shows how the lack of access for eligible incarcerated voters is a part of that broad history. Part II discusses the dominant understanding of the constitutional rights of incarcerated individuals when accessing the franchise while in custody and shows how that understanding incorrectly categorizes the harm. Part III introduces an "integrated" argument, invoking

19. O'Brien v. Skinner, 414 U.S. 524, 530–31 (1974) (holding that eligible voters cannot be affirmatively denied the right to vote while incarcerated).

20. McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 810 (1969) (declining to find a right to cast an absentee ballot).

21. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015); Strickland v. Washington, 466 U.S. 668 (1984); Bearden v. Georgia, 461 U.S. 660 (1983); Miranda v. Arizona, 384 U.S. 436 (1966); Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473 (2002) (analyzing abortion rights under equal protection and due process analysis).

22. *See infra* Part III.

the Equal Protection and Due Process clauses of the Fourteenth Amendment, and also considers the applicability of the Eighth Amendment in a liberty-based analysis.

The denial of an eligible, incarcerated voter's right to vote is a deprivation that cruelly removes access to participation in public life from this individual in a way that violates her equality, her liberty, and her right to be free of cruel punishment. The Court should consider incarceration as an affirmative hurdle the state has created in the face of the right to vote, a hurdle which it is obligated to affirmatively remove in order to ensure detainees retain their right to participate as citizens.

I. THE EVOLUTION OF VOTER SUPPRESSION: FROM JIM CROW TO JAILS

Voter suppression—in all its forms—has long defined the nature of American democracy as one of the many lasting wounds that has endured from the Jim Crow era. Although states no longer use poll taxes and literacy tests to suppress Black voting, many still implement regulations that disproportionately bar marginalized individuals from participating in elections as compared to white voters.[23] These efforts were further encouraged by the Supreme Court's 2013 ruling in *Shelby County v. Holder*, which struck down Section 4(b) of the Voting Rights Act, originally requiring certain states to obtain federal preclearance before implementing any changes to their voting laws or practices.[24] As a result, many viewed this decision as the Court effectively granting states license to remove provisions that increase voting accessibility as they see fit, such as online voting registration, early voting, and accessible polling locations.[25]

In the 2016 election, the first presidential election since *Shelby*, fourteen states implemented "strict" voter ID laws for the first time.[26] But even

23. Prior to the passage of the Voting Rights Act of 1965, many states adopted measures that were designed to deny nonwhite citizens the ability to vote. States such as Alabama, Georgia, Louisiana, Mississippi, and South Carolina designed "literacy tests" that were exclusively applied to Black voters in order to determine whether they could vote, and which were crafted and implemented in such a way as to "fail" such voters in order to deem them ineligible. Similarly, states applied poll taxes, which made families experiencing poverty, who were disproportionately Black, choose between voting and other necessities of life. *See generally* GILDA R. DANIELS, UNCOUNTED: THE CRISIS OF VOTER SUPPRESSION IN AMERICA (2020).

24. Shelby County v. Holder, 570 U.S. 529, 557 (2013).

25. Research shows that the states that subsequently enacted strict voting restrictions were the states with the highest turnout of Black voters in the 2008 election, not the states with the most cases of voter fraud. *See Election 2016: Restrictive Voting Laws by the Numbers*, BRENNAN CTR. FOR JUST. (Sept. 28, 2016), https://www.brennancenter.org/our-work/research-reports/election-2016-restrictive-voting-laws-numbers [https://perma.cc/6RNW-FZ6Y].

26. *See id.* The most common form of restriction now is the requirement of a photo ID, which studies have shown have a disproportionate racial impact. Nationally, up to 25% of Black citizens of

without explicit regulations, marginalized individuals more frequently face barriers to the ballot. A poll conducted by the Public Religion Research Institute found that 9% of Black and 9% of Hispanic respondents indicated that they or someone in their household were told that they lacked proper identification to vote, compared with 3% of white respondents.[27] Moreover, 10% of Black respondents and 11% of Hispanic respondents reported that they were incorrectly told they were not listed on voter rolls, more than double the percentage of white respondents.[28]

In 2020, deeply rooted racial tensions in voting became even more transparent. This past year, the Florida legislature sought to bar the re-enfranchisement of returning citizens by conditioning one's eligibility to cast a ballot on her ability to pay steep monetary fees after the completion of a felony sentence.[29] Additionally, in the face of a pandemic when many citizens feared in-person voting, Texas Governor Greg Abbott reduced the

voting age lack a government-issued photo ID, compared to only 8% of white citizens. *See Citizens Without Proof*, BRENNAN CTR. FOR JUST. (Nov. 28, 2006), https://www.brennancenter.org/our-work/research-reports/citizens-without-proof [https://perma.cc/W6T3-Y6AQ]. But many states selectively accept and exclude photo IDs in a discriminatory manner. For example, Texas allows concealed weapons permits for voting (predominantly held by white citizens) but does not accept student ID cards. *See* W. Gardner Selby, *Hillary Clinton Says You Can Vote in Texas with a Concealed-Weapon Permit, But Not a Student ID*, POLITIFACT (June 26, 2015), https://www.politifact.com/factchecks/2015/jun/26/hillary-clinton/hillary-clinton-says-you-can-vote-texas-concealed- [https://perma.cc/TH8L-LXAE]. And until its voter ID law was struck down in 2020, North Carolina prohibited public assistance IDs and state employee ID cards, which are disproportionately held by Black voters. *See* Editorial Board, *North Carolina's Voter ID Shenanigans*, WASH. POST (Jan. 31, 2016), https://www.washingtonpost.com/opinions/north-carolinas-voter-id-shenanigans/2016/01/31/7d9f1090-c563-11e5-a4aa-f25866ba0dc6_story.html [https://perma.cc/7HXY-LHB3]. Another example is Georgia's "exact match" voter ID law, which requires an individual's voting status to be suspended if the name on the driver's license or social security records does not exactly match the name the individual entered on the voter registration form. Of the 51,000 individuals that this law affected in the 2018 Georgia gubernatorial election, 80% were Black. *See* Sarina Vij, *Why Minority Voters Have a Lower Voter Turnout: An Analysis of Current Restrictions*, A.B.A. (June 25, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/why-minority-voters-have-a-lower-voter-turnout [https://perma.cc/4WPS-CCE4]. Analysts have since commented that this played a role in the outcome of the Georgia Governor's election, as the Black candidate Stacy Abrams lost by fewer than 55,000 votes. *See, e.g.*, *id.*; *see also Georgia Governor Election Results*, N.Y. TIMES (Jan. 28, 2019), https://www.nytimes.com/elections/results/georgia-governor?mtrref=www.google.com&assetType=REGIWALL [https://perma.cc/WYU8-JN3C]. Similarly, North Dakota's voter ID law requires a current and updated residential street address for a voter's ID to be recognized. *See* Terry Gross, *Republican Voter Suppression Efforts Are Targeting Minorities, Journalist Says*, NPR (Oct. 23, 2018), https://www.npr.org/2018/10/23/659784277/republican-voter-suppression-efforts-are-targeting-minorities-journalist-says [https://perma.cc/RL5A-YAFC].

27. Alex Vandermaas-Peeler, Daniel Cox, Molly Fisch-Friedman, Rob Griffin & Robert P. Jones, *American Democracy in Crisis: The Challenges of Voter Knowledge, Participation, and Polarization*, PUB. REGION RSCH. INST. (June 17, 2018), https://www.prri.org/research/American-democracy-in-crisis-voters-midterms-trump-election-2018 [https://perma.cc/E2WM-SQV4].

28. *Id.*

29. *See* Second Supplemental Expert Report of Daniel A. Smith at 15–16, Jones v. DeSantis, No. 4:19-cv-300 (N.D. Fla. Mar. 2, 2020) (citing a study indicating that more than 774,000 returning Florida citizens owe a legal financial obligation that could prohibit them from registering to vote).

number of ballot drop-boxes to one per county, which the plaintiffs argued placed an unreasonably onerous burden on Texas citizens.[30] Nevertheless, voter restrictions continued to be implemented, even with the back drop of nation-wide protests against police brutality and criminal justice reform after the deaths of George Floyd and Breonna Taylor, which are only the latest flashpoints in the over 200-year history of police violence targeting people of color.[31]

These voter restrictions are enhanced by the disproportionate rate at which historically oppressed groups are incarcerated, which adds an additional restriction or altogether bar one's ability to vote. Black Americans "are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, . . . they are more likely to experience lengthy prison sentences."[32] Black adults are 5.9 times as likely to be incarcerated than whites, and Hispanics are 3.1 times as likely.[33] As a result, approximately one in thirteen Black Americans of voting age are disenfranchised, more than four times the average of non-Black Americans.[34] In four states, that figure rises to more than one in five for Black Americans—Florida (21%), Kentucky (26%), Tennessee (21%), and Virginia (22%).[35]

The exclusion of eligible incarcerated voters from the voting population is especially costly in this day and age. In 2016, numerous elections across the country were determined by an incredibly slim margin of votes. For the 2016 presidential election, six states were decided by just 1.5 percentage points or less: Michigan was determined by 0.3% of the vote (13,080 votes); New Hampshire by 0.4% (2,701 votes); Wisconsin by 1% (27,257 votes); Pennsylvania by 1.2% (68,236 votes); Florida by 1.2% (114,455 votes) and

30. *See* Complaint at 2, Tex. League of United Latin Am. Citizens v. Abbott, 493 F. Supp. 3d 548 (W.D. Tex.) (No. 1:20CV1024), *vacated sub nom.* Tex. League of United Latin Am. Citizens v. Hughs (5th Cir. 2020).

31. *Cf.* Jonathan Capehart, *Opinion: John Lewis to Black Lives Matter Protesters: 'Give Until You Cannot Give Any More*,*'* WASH. POST (June 10, 2020), https://www.washingtonpost.com/opinions/2020/06/10/john-lewis-black-lives-matter-protesters-give-until-you-cannot-give-any-more [https://perma.cc/ME5F-FJFX] (discussing John Lewis's address to Black Lives Matter protesters).

32. SENT'G PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 1 (2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities [https://perma.cc/NYG2-EVWU]. This occurs not because Black individuals are more likely to commit crimes, but rather because they live in overpoliced communities. *See id*.

33. *See* E. ANN CARSON, U.S. DEP'T. OF JUSTICE, PRISONERS IN 2016, at 8 tbl.6 (2018).

34. CHRISTOPHER UGGEN, RYAN LARSON & SARAH SHANNON, SENT'G PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT 2016, at 3 (2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016 [https://perma.cc/LW4M-2E6E].

35. *Id.*

Minnesota by 1.5% (44,470 votes).[36] In 2020, two sates were decided by less than half a percentage point: Arizona was determined by 0.3% (10,457 votes); Georgia by 0.2% (11,779 votes).[37]

At the local and state level, elections can be even closer, with many being decided by less than a handful of votes. In 2012 and in 2016, a Vermont state house seat was determined by one vote. In a bizarre turn of events, the rematch swung by one vote in the opposite direction.[38] Likewise, a Vermont state senate Democratic primary was determined by a single vote out of more than 7,400 cast,[39] and a New Mexico state house seat was decided by two votes out of almost 14,000.[40]

In almost all of the above examples, the number of incarcerated marginalized voters far surpassed the margin by which the presidential election was decided, let alone the margin of each of the respective state and local elections. In Michigan, 64,000 citizens faced incarceration of some form, 17,000 of whom were imprisoned in local jails.[41] In New Hampshire, that figure was 5,300 and 2,100 respectively.[42] In Wisconsin, that figure was 41,000 and 13,000 respectively.[43] In Pennsylvania, that figure was 96,000 and 37,000 respectively.[44] It is not only conceivable, but highly probable, that had these incarcerated voters—voters who are disproportionately Black and members of other marginalized groups—been able to vote, the outcome of these elections would have been different, and the nature of our democracy far more representative.

Incarcerated voters face a different problem than simply ease of

36. David Catanese, *The 10 Closest States in the 2016 Election*, U.S. NEWS & WORLD REP. (Nov. 14, 2016), https://www.usnews.com/news/the-run-2016/articles/2016-11-14/the-10-closest-states-in-the-2016-election [https://perma.cc/T9K9-7WLJ].

37. *Full President Results*, POLITICO (Jan. 6, 2021), https://www.politico.com/2020-election/results [https://perma.cc/AXY8-EWEB].

38. Terri Hallenbeck, *After Second Recount, Ainsworth Defeats Buxton by One Vote*, SEVEN DAYS (Dec. 14, 2016), https://www.sevendaysvt.com/OffMessage/archives/2016/12/14/after-second-recount-ainsworth-defeats-buxton-by-one-vote [https://perma.cc/7AVU-2B6V].

39. Mark Johnson, *Brooks Beats Out Hill in Recount of Washington County Senate Race*, VTDIGGER (Aug. 27, 2016), https://vtdigger.org/2016/08/27/brooks-beats-hill-recount-washington-county-senate-race [https://perma.cc/ZA8L-HXAK].

40. *New Mexico 29th District State House Results: David Adkins Leads*, N.Y. TIMES (Aug. 1, 2017), https://www.nytimes.com/elections/2016/results/new-mexico-state-house-district-29 [https://perma.cc/CCP6-NNWD].

41. *Michigan Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/MI.html [https://perma.cc/J3TN-WUZ6].

42. *New Hampshire Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/NH.html [https://perma.cc/KQ84-GYRM].

43. *Wisconsin Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/WI.html [https://perma.cc/S8KS-2YXL].

44. *Pennsylvania Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/PA.html [https://perma.cc/4VPS-YS7B].

accessibility. Access to voter registration or voting ballots is often subverted for a number of reasons that go well beyond whatever can be attributed to the complexity of election policies.[45] For instance, an incarcerated individual may ask a correctional officer for information on obtaining an absentee ballot and may mistakenly be told he is not allowed to vote or may be provided inaccurate information regarding the process or his eligibility.[46] Other efforts to limit access appear less innocent and seem arguably intentional. In Apache County, Arizona, eligible incarcerated voters were mailed know-your-rights voter postcards by the Arizona Coalition to End Jail-Based Disenfranchisement.[47] Although the postcards were disseminated in compliance with the jail mail policy, correctional officers later confiscated all postcards on the premise that the flat postcards could not be inspected for contraband.[48] In Wisconsin, where identification is required to vote, jail ID cards are not an accepted form of identification, requiring those who are incarcerated to apply for a new ID or navigate a bureaucratic nightmare in an attempt to access personal belongings, such as a wallet that may have been confiscated upon being admitted into custody.[49]

Ultimately, equipping and accommodating penal institutions to provide voting access often becomes an afterthought, and the loss of the right to vote is almost impossible to remedy until it is too late.[50] Stone by stone, the fundamental pillar of an incarcerated voter's citizenship is removed.

II. THE DOMINANT INTERPRETATION

The controlling doctrine on the right to vote in jails is limited to three decisions that span only five years, beginning with *McDonald v. Board of Election Commissioners*, decided in 1969, and concluding with *O'Brien v. Skinner*, decided in 1974.[51] These three decisions confirm that eligible jailed

45. *See generally* WOOD & BLOOM, *supra* note 13; AM. C.L. UNION, VOTING WHILE INCARCERATED (2005), https://www.aclu.org/sites/default/files/pdfs/votingrights/votingwhileincarc_20051123.pdf [https://perma.cc/7VXY-HQVN]; SENT'G PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2014), https://www.sentencingproject.org/publications/felony-disenfranchisement-laws-in-the-united-states [https://perma.cc/CKK9-XZKQ].

46. WOOD & BLOOM, *supra* note 13, at 1.

47. *See* Madeleine Carlisle & Lissandra Villa, *Whether or Not You're Able to Vote in Jail May Come Down to Where You're Incarcerated*, TIME (Oct. 1, 2020), https://time.com/5895219/voting-jail-2020-election [https://perma.cc/L873-8P8W].

48. *Id.*

49. Matt Vasilogambros, *Many in Jail Can Vote, but Exercising That Right Isn't Easy*, PEW CHARITABLE TRS. (July 16, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/07/16/many-in-jail-can-vote-but-exercising-that-right-isnt-easy [https://perma.cc/3K5T-CA98].

50. Paikowsky, *supra* note 13, at 852 (discussing the difficulty incarcerated individuals face when trying to challenge the right to vote while in jail).

51. *See generally* O'Brien v. Skinner, 414 U.S. 524 (1974); Goosby v. Osser, 409 U.S. 512 (1973); McDonald v. Bd. Of Election Comm'rs, 394 U.S. 802 (1969).

voters have a protected right to vote while incarcerated but leave unanswered the question of whether the state must affirmatively provide access to ensure enjoyment of the right.

Fifty years after *O'Brien*, incarcerated voters continue to face hurdles and unequal access to the ballot. By first reviewing the origins of the jail-voting doctrine, I argue that recent lower court decisions expose shortcomings in the Supreme Court's doctrine that are rooted in the way the Court has conceptualized and framed the harm suffered by incarcerated voters.[52]

A. THE RIGHT TO VOTE IN JAIL

McDonald v. Board of Election Commissioners was the first Supreme Court case to address the constitutionality of regulating an eligible incarcerated voter's access to the franchise.[53] In this instance, a class of pretrial detainees who were held on bail sought to cast an absentee ballot, but were prohibited from doing so because they were physically present—though incarcerated—in the county where they were registered to vote and were therefore required to vote in-person.[54] The Illinois Election Code at issue created an exception to the in-county rule for four classes of individuals, including physically incapacitated voters.[55] Petitioners raised four claims: (i) that the statute violated the equal protection requirements of the Fourteenth Amendment because it predicated access to the franchise on one's ability to pay bond; (ii) that the state had an affirmative obligation to provide jailed voters with absentee ballots to prevent deprivation of their right to vote; (iii) that the statute violated the Fourteenth Amendment Equal Protection Clause because the law arbitrarily distinguished between multiple classes of voters; and (iv) that the Fourteenth Amendment Equal Protection Clause because the law arbitrarily distinguished between voters jailed outside versus within the county where they are registered to vote.[56]

52. *See, e.g.*, Mays v. LaRose, 951 F.3d 775, 783 (6th Cir. 2020) (denying arrestees' summary judgement motion and holding that the state's justifications for its facially discriminatory hospitalization exception outweighed the arrestees' voting rights); Johnson v. Prince George's Cnty. Bd. of Elections, No. 17-2867, 2018 U.S. Dist. LEXIS 32111, at *10–11 (D. Md. Feb. 27, 2018) (dismissing the case because the plaintiffs could not identify any affirmative regulations that burdened or prohibited an incarcerated voter's ability to vote); *see also infra* Section I.B.

53. *McDonald*, 394 U.S. at 809–11.

54. *Id.* at 803.

55. The Illinois statute made absentee voting available to "(1) those who are absent from the county of their residence for any reason whatever; (2) those who are 'physically incapacitated,' so long as they present an affidavit to that effect from a licensed physician; (3) those whose observance of a religious holiday precludes attendance at the polls; and (4) those who are serving as poll watchers in precincts other than their own on election day." *Id.* at 803–04.

56. *Id.* at 806, 808 n.7.

The *McDonald* Court walked a fine line between what amounted to a de facto denial versus an affirmative denial of the right to vote. Specifically, the Court noted that even though it was evident that petitioners would have been unable to vote in person on Election Day, there was nothing in the record to indicate that either the Illinois legislature intended to, nor did the statute itself, affirmatively deny incarcerated voters access to the franchise.[57] It seems patently obvious that without the ability to cast an absentee ballot, the pretrial detainees would be deprived of the right to vote. But, the Court pressed that absent statutory language affirmatively precluding pretrial detainees from voting, petitioners failed to demonstrate that they had been disenfranchised and analyzed only the petitioner's equal protection claims.[58]

The Supreme Court honed in on the petitioners' claim that the law failed equal protection requirements because it distinguished between medically incapacitated and judicially incapacitated voters.[59] In addressing this claim, the Court looked at whether a deprivation of a fundamental right occurred and whether the statute discriminated on the basis of race or class. First, the Court concluded that the harm suffered by the detainees did not implicate a fundamental right, narrowly categorizing the harm as lack of access to an absentee ballot as opposed to the general right to vote.[60] Second, because there was no indication of either form of discrimination on the record, the Court applied the less stringent rational basis standard of review.[61] Under

57. The Court recognized that "[o]n March 29, 1967, appellants made timely application for absentee ballots for the April 4 primary because of their physical inability to appear at the polls on that election day. The applications were accompanied by an affidavit from the warden of the Cook County jail attesting to that inability." *Id.* at 804 (footnote omitted). However, the Court goes on to say that "[f]aced as we are with a constitutional question, we cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting." *Id.* at 808 (footnote omitted). The Court speculated that the State could "possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own." *Id.* at 808 n.6.

58. *Id.* at 808 n.7.

59. The Court's only mention of the distinction between medically and judicially incapacitated voters was done in passing:

> Since there is nothing to show that a judicially incapacitated, pretrial detainee is absolutely prohibited from exercising the franchise, it seems quite reasonable for Illinois' Legislature to treat differently the physically handicapped, who must, after all, present affidavits from their physicians attesting to an absolute inability to appear personally at the polls in order to qualify for an absentee ballot.

Id. at 809.

60. *Id.* at 808. *See generally The Submerged Constitutional Right to an Absentee Ballot*, 72 MICH. L. REV. 157 (1973) (identifying a fault in the original pleadings that limited avenues of relief for petitioners).

61. *McDonald*, 394 U.S. at 807 ("Such an exacting approach is not necessary here, however, for two readily apparent reasons. First, the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race. Secondly, there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots.").

this deferential test, the Court found that the legislature's regulatory scheme was permissible for several reasons. Principally, a legislative remedy for one group is not necessarily discriminatory simply because it does not construct a remedy for all classes simultaneously; instead, legislatures are permitted to act in a piecemeal fashion.[62] In a 9-0 opinion, the Court ultimately held that eligible voters do not have a federal constitutional right to vote by absentee ballot and disregarded the other claims presented by petitioners.[63]

The precedent established by *McDonald* left a significant amount of ambiguity as to what constitutes vote denial for incarcerated voters.[64] Did *McDonald* empower states to affirmatively take steps to deny the right to vote simply because an individual is incarcerated? The two remaining cases in the trilogy, *Goosby v. Osser* and *O'Brien v. Skinner*, analyze this issue.

Four years after *McDonald*, the Court granted certiorari in *Goosby v. Osser*, a case challenging a Pennsylvania statute that affirmatively prohibited eligible voters "confined in a penal institution" from voting.[65] To demonstrate the confusion created by *McDonald*, it is interesting to note that the district court dismissed the case, holding that *McDonald* foreclosed any constitutional challenge on this matter, and the Third Circuit affirmed.[66] On appeal, in addition to asserting the standard equal protection argument, the *Goosby* petitioners claimed a violation of the Eighth Amendment, arguing that they were legally innocent pretrial detainees being punished without conviction, as well as violations of both the Fifteenth Amendment and the Fourteenth Amendment's Due Process Clause, on grounds that the statute discriminated based on race and class in denying voting rights.[67]

Ultimately, the Court did not reach a decision on the merits in *Goosby*, instead remanding the case back to the lower court.[68] Nonetheless, the record established in *Goosby* was incredibly rich and thorough. For example, the

62. *Id.* at 809 ("With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind'; and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked." (citation omitted)).

63. *Id.* at 810 ("Constitutional safeguards are not thereby offended simply because some prisoners, as a result, find voting more convenient than appellants.").

64. It is interesting to note that now, over fifty years after the precedent establish by *McDonald*, Cook County, Illinois, is the first and only jurisdiction to establish an on-site polling location. It was used for the first time in the 2020 election. Shawn Mulcahy, *Voting Behind Bars: Cook County's Huge Jail Becomes a First-Time Polling Precinct*, WASH. POST (Mar. 6, 2020), https://www.washingtonpost.com/politics/voting-behind-bars-cook-countys-huge-jail-becomes-a-first-time-polling-precinct/2020/03/05/5bf10fc0-581c-11ea-9000-f3cffee23036_story.html [https://perma.cc/73GF-8EVD].

65. Goosby v. Osser, 409 U.S. 512, 514–16, 521 (1973).

66. *Id.* at 514–16.

67. Brief for the Petitioners at 4–5, *Goosby*, 409 U.S. 512 (No. 71-6316).

68. *Goosby*, 409 U.S. at 522.

petitioners were able to demonstrate that the class of 2,000 eligible incarcerated voters were comprised solely of pretrial detainees who were predominantly indigent nonwhite voters unable to pay bail.[69] The depth of this record led the Supreme Court to agree with the *Goosby* petitioners in so much as "[p]etitioners' constitutional challenges to the Pennsylvania scheme are in sharp contrast" to the Illinois statutes in *McDonald*, and that the "complaint alleges a situation that *McDonald* itself suggested might make a different case."[70] But, as a result of the remand, the Court never had the opportunity to reach the Eighth Amendment or substantive due process claims raised.

A year after *Goosby*, the Court was presented with yet another jail-voting challenge—one resembling a similar factual scenario to *McDonald* but with a robust evidentiary record like *Goosby.* In *O'Brien v. Skinner*, petitioners were composed of two groups of eligible voters: pretrial detainees and individuals serving misdemeanor sentences.[71] Petitioners challenged a New York statute that permitted qualified voters to vote by absentee ballot if unable to vote in person, including individuals who had a "physical disability."[72]

There are several notable differences between *O'Brien* and the preceding jail-voting cases. First, *McDonald* and *Goosby* brought challenges only on behalf of pretrial detainees, but in *O'Brien* the class of voters included misdemeanants as well.[73] Second, likely due to the expanded class, the petitioners alleged violations only based on the Fourteenth Amendment's Equal Protection Clause for unequal treatment and the Due Process Clause for denial of the right to vote.[74] Lastly, unlike *McDonald*, the record demonstrated that eligible voters had taken further action beyond requesting absentee ballots to vindicate their right to vote.[75] For instance, petitioners had sought assistance from election officials to "establish a mobile voter registration unit at the County Jail pursuant to a program of mobile registration under way throughout New York State."[76] Petitioners even requested transportation to an "appropriate polling place for registration and voting," but were also denied this alternative.[77] Again, it is interesting to follow the impact *McDonald* initially had on lower courts: in the case of

69. Brief for the Petitioners, *supra* 67, at 3–4.
70. *Goosby*, 409 U.S. at 521–22.
71. O'Brien v. Skinner, 414 U.S. 524, 525 (1974).
72. *Id.* at 525–26.
73. *Id.* at 525.
74. Brief for Appellants at 2, *O'Brien*, 414 U.S. 524 (No. 72-1058).
75. *O'Brien*, 414 U.S. at 525–26.
76. Brief for Appellants, supra note 74, at 5.
77. *Id.*

O'Brien, the New York Court of Appeals held that the incarcerated voters did not fall within the definition of the statute's "physical disability" exception and therefore assumed that their inability to vote was a nonpunitive consequence of incarceration, not a legally imposed denial of the right.[78]

The underlying issue that there was no explicit law prohibiting the right to vote in *O'Brien* tracks closely to *McDonald*, but the Court applied heightened scrutiny this time around. Further, instead of overruling *McDonald*, which applied rational basis review, the Court distinguished the two cases.[79] In a 7-2 decision, the *O'Brien* Court stated that petitioners suffered from an absolute deprivation of the right to vote that was "wholly arbitrary" and found the denial of access unconstitutional.[80] But in the same breath, the Court reaffirmed *McDonald*, stating that " 'there [was] nothing in the record to show that appellants [were] in fact absolutely prohibited from voting by the State . . . . Essentially the Court's disposition of the claims in *McDonald* rested on failure of proof."[81] In other words, while the Court left the *O'Brien* petitioners with a victory on the books, it raised the burden (and the evidentiary bar) on eligible incarcerated voters to show that all alternative avenues to access the franchise must be attempted and barred before a suit can be filed.[82] By the time any eligible incarcerated voter is even able to bring such a claim, she will likely have already suffered the irreparable harm of being disenfranchised.[83]

McDonald and *O'Brien* fall at two extremes: the former defines what is tolerated by the law, and the latter bars what the law deems unconstitutional. Oftentimes, it is what is happening in the middle of the fringes that leaves thousands of eligible incarcerated voters disenfranchised. The inability to address those "in-the-middle" cases is a doctrinal limitation based on how the harm is conceptualized and defined. Next, I consider why redefining the harm is critical to understanding the flaws in the existing doctrinal interpretation.

78. *O'Brien*, 414 U.S. at 528 (quoting O'Brien v. Skinner, 291 N.E.2d 134, 136–37 (N.Y. 1972) ("The fact of incarceration imposes many other disabilities, some private, others public, of which voting is only one. Under the circumstances, and in view of the Legislature's failure to extend these absentee provisions to others similarly disadvantaged, it hardly seems plausible that petitioners' right to vote has been arbitrarily denied them. It is enough that these handicaps, then, are functions of attendant impracticalities or contingencies, not legal design.")).

79. *Id.* at 529.

80. *Id.* at 530 ("New York's election statutes, as construed by its highest court, discriminate between categories of qualified voters in a way that, as applied to pretrial detainees and misdemeanants, is wholly arbitrary.").

81. *Id.* at 529 (citations omitted).

82. *Id.* at 530.

83. *See supra* note 13 and accompanying text.

B. REDEFINING THE CONSTITUTIONAL HARM

The Supreme Court approached the challenges brought by incarcerated voters through a narrow lens: considering only the burden on the voter as opposed to the limitations created by the state. This result, however, was not for lack of pleadings. In the three cases discussed above, the petitioners alleged multiple constitutional violations beyond the Fourteenth Amendment Equal Protection Clause, such as violations to the Due Process Clause and the Eighth and Fifteenth Amendments.[84]

For instance, the petitioners in *O'Brien* argued that the state must "provide the means to protect" the fundamental right to vote.[85] The *O'Brien* petitioners justified this claim by analogizing the case at issue to a factually similar case, *Love v. Hughes*, in which the district court not only found the denial of the right to vote for detainees unconstitutional, but also affirmatively "ordered county election officials to furnish the detainees and misdemeanants with printed paper ballots and to furnish sufficient manpower to facilitate voting at the jails."[86] But the *O'Brien* Court remained silent as to any obligations states may have towards ensuring that eligible incarcerated voters had access to voting materials.[87] Instead, the current doctrine is ambiguous as to how onerous a state or local government can make jail-based voting and what measures, perhaps even seemingly futile, a detainee must take to demonstrate her inability to access the franchise. Again, the statutes at issue in *McDonald* and *O'Brien* were almost identical, but the difference between applying rational basis and strict scrutiny turned on the extraordinary efforts taken by detainees to exhaust all potential voting avenues to demonstrate absolute disenfranchisement.[88] This suggests that the burden is on detainees to demonstrate that they have completely exhausted all voting alternatives.[89]

84. *See generally O'Brien,* 414 U.S. 524 (declining to address additional claims raised by petitioners); Goosby v. Osser, 409 U.S. 512 (1973) (remanding the case back to the lower court and declining to rule on the merits). The *Goosby* petitioners also sought redress through the Fourteenth Amendment's Due Process Clause challenging the denial of the right to vote as punitive for pretrial detainees. *See supra* Brief for the Petitioners at 5, *Goosby*, 409 U.S. 512 (No. 71-6316).

85. Brief for Appellants at 19, 24–25, *O'Brien*, 414 U.S. 524 (No. 72-1058).

86. *Id*. at 24–25.

87. *See generally O'Brien*, 414 U.S. 524.

88. *Compare* McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 809 (1969), *with O'Brien*, 414 U.S. at 529.

89. Consider a scenario in which a correctional officer does not know whether or how the detainee can vote and does not affirmatively deny access to the right, but in failing to accurately respond to the inquiry, the detainee misses the opportunity to vote. Scenarios like this occur frequently and result in suppressed jail-voter turnout. *See, e.g.*, Long v. Pierce, No. 2:14-cv-00244, 2016 U.S. Dist. LEXIS 30716, at *5 (S.D. Ind. Mar. 10, 2016) (dismissing a claim against a jail official who verbally told an incarcerated voter he would get him the materials necessary to vote but never did). Unfortunately, the odds are stacked against detainees attempting to establish an actionable claim because the likelihood of properly

The doctrine creates a perennial loophole that allows states to craft voting regulations in a way that does not affirmatively deny incarcerated voters the right to access the franchise but makes it virtually impossible. This problem with the doctrine is foundational and has to do with how the harm occurring to incarcerated voters is conceptualized. The existing doctrine places the onus on voters to overcome any burdens on their own if they choose to exercise their right to vote. In doing so, the doctrine, perhaps unintentionally, or maliciously, creates an improper distinction between voters who presumptively create the circumstances that result in their inability to vote in-person on Election Day and those who find themselves unable to vote due to, seemingly, no fault of their own.

To further elaborate, many states go the extra length for voters who are unable to access in-person voting, such as by providing absentee exceptions for voters that are hospitalized, voters who are out of town for school, or voters in the military, and so forth.[90] The implicit common denominator between these groups of individuals is that they are all unable to vote in-person due to a benign reason. When given the opportunity to equalize the voting rights of incarcerated voters with hospitalized voters who have a physical or medical disability, the Supreme Court instead drew a line between these groups of individuals. In other words, the Court implied that incarcerated voters are less deserving of voting rights than voters with other limitations.

This line of interpretation became apparent in the dissenting opinion in *O'Brien*[91] and is seen in present day majority opinions in lower courts.[92] In *O'Brien*, Justice Blackmun's dissent draws a dangerous distinction between jailed voters and medically incapacitated voters.[93] His dissent, joined by Justice Rehnquist, invoked the idea that someone who is hospitalized is there not by her own doing, but by pure accident, whereas incarcerated petitioners are "in jail through their own doing."[94]

Interestingly, the line of cases that the dissent relies upon stems from *Rosario* v. *Rockefeller*, which upheld a New York statute requiring voters to

established standing is often correlated with whether or not the eligible voter is already assisted by outside counsel. *See* Paikowsky, *supra* note 13, at 858 (observing that standing seems difficult to establish in jail-voting cases and noting that much of the success of *O'Brien* rested in the fact that the petitioners had already been working with civil rights nonprofit organizations prior to filing).

90. Courts often emphasize the vast number of voting vehicles state residents have at their disposal, though they ignore the fact that not all residents can benefit from those voting mechanisms equally. *E.g.*, Brnovich v. Democratic Nat'l Comm., No. 19–1257, slip op. at 8 (U.S. July 1, 2021) (noting Arizona "generally makes it quite easy for residents to vote").

91. *O'Brien*, 414 U.S. at 535–37 (Blackmun, J., dissenting).

92. *See, e.g.*, Mays v. LaRose, 951 F.3d 775 (6th Cir. 2020).

93. *O'Brien*, 414 U.S. at 537 (Blackmun, J., dissenting).

94. *Id.*

register their party affiliation thirty days in advance of the general election to be eligible to vote in the subsequent primary election.[95] The Court's reasoning hinged on the fact that the regulation barred only those who voluntarily ignored the deadlines for declaring a party affiliation.[96] But the obvious distinction between *Rosario* and the petitioners in the jail-voting cases is that the individuals in *Rosario* were free to access information and free to make their own decisions. The dissenters fail to acknowledge this critical distinction.

Lower courts have since expanded upon the existing equal protection–based interpretation by leaning into the logic proposed by the *O'Brien* dissent and cementing the idea that incarcerated voters are not entitled to special accommodations beyond in-person voting. Specifically, in a 2020 case, *Mays v. LaRose*, the Sixth Circuit addressed a factually similar claim to those presented in *McDonald* and *O'Brien*, reviving the *O'Brien* dissenting interpretation of the right to vote in jails.[97] In *Mays*, an Ohio statutory exception allowed newly hospitalized individuals to submit an absentee ballot up until Election Day, whereas anyone else submitting an absentee ballot would be required to submit a ballot three days prior to Election Day.[98] The Sixth Circuit held that Ohio's disparate treatment of hospital-confined and jail-confined voters created a moderate burden for incarcerated petitioners, but did not violate equal protection and was justified by the State's interest in regulating the franchise.[99]

The *Mays* Court applied a new balancing test, known as the *Anderson-Burdick* test.[100] The *Anderson-Burdick* test weighs and balances the burden imposed on an individual's ability to access the right to vote against the state's interest in regulating the right.[101] If the burden is severe, then the government's interest is scrutinized at the strictest level.[102] If the burden is deemed not to be severe, then minimal scrutiny is applied.[103] Unlike the traditional equal protection analysis that was applied in *O'Brien* and its

95. Rosario v. Rockefeller, 410 U.S. 752, 758 (1973).

96. *Id.* ("Hence, if their plight can be characterized as disenfranchisement at all, it was not caused by § 186, but by their own failure to take timely steps to effect their enrollment.")

97. Mays v. LaRose, 951 F.3d 775, 780 (6th Cir. 2020).

98. *Id.*

99. *Id.* at 787–88 (discussing the numerous administrative steps the election board would be required to take in order to provide jailed voters with absentee ballots three days prior to an election).

100. *Id.* at 784.

101. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190–191 (2008) (holding that a balancing standard should govern in a voter ID challenge and should be applied on the basis of an individual's particular burden, rather than a broad group's burden, although disagreeing on how to apply the *Anderson-Burdick* test in this instance).

102. *Mays*, 951 F.3d at 784.

103. *Id.*

progeny, which makes an initial inquiry into whether a fundamental right is deprived, or a suspect class is implicated, the *Anderson-Burdick* analysis looks into the severity of the burden and applies a sliding scale of scrutiny.

The *Mays* court ultimately adopted the *Anderson-Burdick* framework, but it nevertheless acknowledged that its scope of applicability is unclear and may not be the best analysis to apply in such equal protection-based cases.[104] Although the court identified that detained voters faced a moderate burden, prompting intermediate scrutiny, the inquiry into the state's interest continued to mirror the traditional equal protection analysis applied in the jail-voting trilogy. For instance, in categorizing the petitioners' argument, the *Mays* court referred to the absentee exception as a "privilege."[105] By limiting the petitioners' constitutional challenge to equalize privileges afforded as opposed to a guaranteed right, the petitioners' burden was not considered so severe as to demand strict scrutiny, claiming alternative avenues to voting existed that were not exercised.[106] As a result, substantial deference was given to Ohio's legislature even though it failed to extend its remedial privileges beyond hospitalized citizens.[107]

The Sixth Circuit's opinion sheds light on the doctrinal misconception that jailed voters continue to face in litigation: the denial of one voting vehicle is not simply a denial of a single privilege, but rather, the denial of the right as a whole. This is because all other forms of voter participation (in-person, early voting, and so forth) are not practically achievable in jail

104. It is unclear whether the *Anderson-Burdick* test applies to disparate treatment equal protection cases. At least two circuit courts have held or implied that *Anderson-Burdick* should not apply to ballot initiative requirements because restrictions on the people's power to enact legislation against the will of the legislature (as distinct from political speech or voting for representatives) do not implicate the First Amendment. *See* Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1099–1100 (10th Cir. 2006) (en banc); Marijuana Pol'y Project v. United States, 304 F.3d 82, 85 (D.C. Cir. 2002). The Sixth Circuit recently questioned whether *Anderson-Burdick* applies to all voting-related cases beyond generally applicable restrictions associated with "election law." Daunt v. Benson, 956 F.3d 396, 423–24 (6th Cir. 2020) (Readler, J., concurring) (acknowledging that "*Anderson-Burdick* is a poor vehicle" for evaluating First Amendment challenges to public service qualification regulations); *Mays*, 951 F.3d at 783 n.4 (recognizing that applying *Anderson-Burdick* to equal protection claims "takes some legal gymnastics"). However, as the Court stated in *Thompson v. Dewine*, 959 F.3d 804 (6th Cir. 2020), until the Sixth Circuit takes up the question of *Anderson-Burdick*'s reach en banc, it will continue to apply the *Anderson-Budick* framework in First Amendment and equal protection claims. *Mays*, 951 F.3d at 783–84 n.4.

105. *Mays*, 951 F.3d at 791 (pointing out "[Ohio's] willingness to go further than many States in extending the absentee voting privileges" (citing McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 810–11 (1969)).

106. *See id.* at 786.

107. In identifying that the state met its burden in overcoming the moderate burden that jailed-voters face, the *Mays* court cited language from *McDonald* (which applied lower-level scrutiny) that relied on a line of cases showing significant deference to state interests. *Id.* at 791 ("That [Ohio] has not gone still further, as perhaps it might, should not render void its remedial legislation, which need not, as we have stated before, 'strike at all evils at the same time.' " (citing *McDonald*, 394 U.S. at 810–11)).

unless affirmatively provided by the state.[108] The reasoning presented by the *Mays* court faces a significant logical flaw[109]: if the right to vote by absentee ballot is a privilege, as *McDonald* indicates, then the court seems to be presuming that the only truly protected mode of voting is in-person voting.[110] On the other hand, it is conceivable that had the *Mays* petitioners asserted that they were denied the right to vote in person, the court likely would have responded in a similar manner—that there is no *general* right to vote through a particular avenue as long as alternative avenues were not precluded.[111] The existing interpretation places detained voters in a Catch-22: not only is the privilege of voting absentee not protected, but it also grants the state an excuse not to facilitate in-person voting. Either way, *Mays* demonstrates that

108. Voting rights litigator Dana Paikowsky suggests that by adjusting the balancing test according to the relief jailed plaintiffs are requesting, the plaintiffs would be more likely to surpass the otherwise high hurdles posed by traditionally applied levels of scrutiny. Paikowsky, *supra* note 13, at 858 ("This line of inquiry is useful even for jailed voters when they cannot demonstrate that a practice completely deprives them of access to the ballot. If plaintiffs can demonstrate how easy it is for states to provide minimal protections to enfranchise jailed voters, it will become harder for those states to argue they have compelling reasons to decline to provide those protections.").

109. The *Mays* court reasoned that jailed voters could have exercised their ability to use alternative voting methods, such as early voting, prior to their incarceration. *Mays*, 951 F.3d at 787 ("Plaintiffs could have avoided all that uncertainty by taking advantage of the opportunities Ohio provides to vote early. In this regard, the Plaintiffs are no more burdened than any other elector."). In its justification, the court included a quote from Justice Blackmun's dissent in *O'Brien*:

> The plight of detainees elicits concern, of course, for a detainee may not be guilty of the offense with which he is charged. Yet the statutes' effect upon him, although unfortunate, produces a situation no more critical than the situation of the voter, just as unfortunate, who on election day is away attending a funeral of a loved one in a distant State. These are inequalities, but they are the incidental inequalities of life, and I do not regard them as unconstitutional.

Id. at 786 (citing O'Brien v. Skinner, 414 U.S. 524, 537 (1974) (Blackmun, J., dissenting)). Again, we see an incongruent analogy. This time the court more explicitly compares a jailed voter's access to the franchise to that of a nonjailed voter. *Mays* attempts to draw upon the analogy for the sake of comparing the timing of one's incarceration to the unfortunate circumstance of an untimely death. *Id.* But the Sixth Circuit's analogy is based on the idea of the voter's choice and is therefore similar to comparing apples to oranges—the funeral attendee had a choice to forgo voting and attend a funeral, but a detainee does not have a choice of whether or not she remain incarcerated, which depends upon numerous socio-economic circumstances such as the ability to post bail. Simply because the *Mays* court omitted the preceding sentence in *O'Brien*, stating that "[t]he misdemeanants were in jail through their own doing," it does not make the value-laden judgmental tone of the *Mays* opinion any less obvious. *Id.* at 787; *O'Brien*, 414 U.S. at 537.

110. *Cf.* Tex. Democratic Party v. Abbott, 978 F.3d 168, 193 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1124 (2021) (questioning the precedential value of *McDonald* because the decision "predated the ratification of the Twenty-Sixth Amendment, which means it did not consider the potential . . . that the Amendment requires the same heightened analysis as *McDonald* stated applied to classifications on race and wealth"). This Article, however, does not address challenges raised based on the Twenty-Sixth Amendment due to the infrequency in which they are raised by litigators. In light of the COVID-19 pandemic, many states are moving towards mail-in ballots. At the time of writing, nine states as well as the District of Columbia will automatically mail ballots to voters. At this time, new policies are constantly developing. Juliette Love, Matt Stevens & Lazaro Gamio, *Where Americans Can Vote by Mail in the 2020 Elections*, N.Y. TIMES (Aug. 14, 2020), https://www.nytimes.com/interactive/2020/08/11/us/politics/vote-by-mail-us-states.html [https://perma.cc/NN2E-PEV3]. Whether this will apply to those incarcerated was unknown at the time this Article was drafted.

111. This Article does not analyze the Supreme Court's jurisprudence regarding whether in-person voting is the *only* protected form of voting. That issue is better suited for another article.

the *Anderson-Burdick* test continues to retain many of the same trappings of the traditional equal protection analysis and does not account for the liberty-based harms that jailed voters face, nor the fact that the state created the hurdles in voting by incarcerating the voter.[112]

Ultimately, the Supreme Court's current jail-voting doctrine consequently lends itself to equating jailed-voters as having the same uninhibited access to fundamental rights as nonjailed voters.[113] Although the existing doctrine equalizes the right to vote for incarcerated voters, it is bereft of any substantive analysis distinguishing the state-imposed barriers of incarceration and limitations jailed voters face when accessing the franchise.[114]

The following Part identifies a critical legal distinction between jailed voters and nonjailed voters and further introduces an alternative legal framework for analyzing jail-voting cases based on a reconceptualized categorization of the harm suffered by the incarcerated.

III. DOCTRINAL INTEGRATION IN JAIL-VOTING CASES

The right to vote in jails falls squarely at the intersection of the criminal legal system and voting rights. Jail-voting doctrine does not simply invoke principles of equality, but also liberty interests and concerns over the legal system's punitive measures because deprivations of the right to vote are a direct result of the state's restriction on one's liberty. When there is significant overlap between equality and liberty interests, the Supreme Court has demonstrated a willingness to combine multiple doctrines in order to

112. *Mays*, 951 F.3d at 792 (classifying Ohio's absentee ballot deadline as "nondiscriminatory," because "[a]ny elector may request an absentee ballot, so long as they deliver that request to the Board of Elections by noon, three days before Election Day."). Failure to acknowledge the difference between jailed and nonjailed voters ignores a fundamental premise governing prison law. *E.g.*, Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 921–22 (2009) (discussing the state's obligation to care for its detainees based on the "carceral burden" it has assumed by choosing incarceration as the primary mode of punishing individuals convicted of a crime).

113. Whether it is a traditional equal protection analysis, as applied by the Supreme Court, or the *Anderson-Burdick* test, as applied by the Sixth Circuit, the current interpretation of jail-voting doctrine remains a limited analysis that fails to realize the intersection of implicated detainee rights.

114. The *Mays* court acknowledges "that the federal Courts of Appeals have recognized, as a general matter, that '[p]risoners are not similarly situated to non-prisoners.' " *Mays*, 951 F.3d at 788 (citing Roller v. Gunn, 107 F.3d 227, 234 (4th Cir. 1997)). The court points this out to say that "at a minimum, Plaintiffs face an uphill battle to establish that jail-confined electors and hospital-confined electors are similarly situated. *Id*. (citing Bell v. Wolfish, 441 U.S. 520, 545 (1979) ("[S]imply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations.")). The court does not go out of its way, however, to list the similarities and differences between jailed and medically confined voters. Problematically, in the court's efforts to explain that jailed voters had alternative opportunities to access the franchise before the fact, it cites only cases of individuals who were not incarcerated. *See, e.g.*, Obama for Am. v. Husted, 697 F.3d 423 (6th Cir. 2012); Rosario v. Rockefeller, 410 U.S. 752 (1973).

develop a deeper understanding of the alleged harm.[115] This Part argues in favor of doctrinal integration and presents an alternative interpretation.

A. THE SUPREME COURT'S USE OF DOCTRINAL INTEGRATION

In many instances, the Supreme Court appears to have adopted an integrated equal protection analysis that incorporates various constitutional sources, often resulting in heightened scrutiny where normally minimal scrutiny would have been applied.[116] The Court does not explicitly endorse or explain when it applies doctrinal integration, but it often signifies the application with words such as "hybrid," "combined," "intertwined," or "integrated."[117] Scholars have referred to this doctrine by multiple names such as the fundamental rights-equal protection doctrine,[118] the equal dignity doctrine,[119] an anti-subordination doctrine,[120] stereoscopic rights,[121] or cumulative rights.[122]

At the most basic level, these labels all seek to explain that although most constitutional harms fall within a particular bucket that is then analyzed through a single doctrinal lens, occasionally, a constitutional issue will not fit neatly into a single category. As a result, the Court will incorporate multiple doctrines, which alone may not have revealed a constitutional harm, but taken together inform one another to unveil a cognizable injury.[123] The

115. *See infra* Section III.A.

116. *E.g.*, Gerald Gunther, *Foreword: In Search of Evolving Doctrine on A Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12–15 (1972); Karlan, *supra* note 21.

117. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 672 (2015) ("Rights implicit in liberty and rights secured by equal protection . . . may be instructive as to the meaning and reach of the other.").

118. *E.g.*, Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 574 (1998) (citing ROBERT H. BORK, THE TEMPTING OF AMERICA 72–73, 90–91 (1990)).

119. *E.g.*, Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16 (2015); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 (2011).

120. Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 174 (2015).

121. Karlan, *supra* note 21, at 474.

122. Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Right*s, 97 B.U. L. REV. 1309, 1310 (2017).

123. *See, e.g.*, *id.* at 1327 ("Commentators have termed this a 'hybrid rights' exception, based on Justice Scalia's suggestion that a free exercise claim that otherwise would not receive heightened scrutiny under *Smith II* does receive heightened scrutiny under a 'compelling interest' test in the 'hybrid situation' where another constitutional right is implicated by the state action."); Karlan, *supra* note 21, at 474 ("[T]his essay suggests that sometimes looking at an issue stereoscopically—through the lenses of both the due process clause and the equal protection clause—can have synergistic effects, producing results that neither clause might reach by itself."). Professor Michael Coenen has recently described how there are advantages and disadvantages to types of "combination analysis" of constitutional rights, including as to structural provisions that are beyond the scope of this Article. Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1068 (2016) ("In all of these cases, the Court has embraced (or at least tinkered with) forms of what I call 'combination analysis'—justifying judicial outcomes by reference to multiple clauses acting together, as opposed to individual clauses acting

effect of this form of cumulative analysis typically results in the Court applying strict scrutiny where it normally would have applied a lower standard of review.[124]

Dean Kerry Abrams and Professor Brandon Garrett identified various iterations of doctrinal readings, calling the broader category of this additive exercise "cumulative constitutional rights."[125] Abrams and Garrett identified three distinct categories of cumulative rights that explain the manner in which constitutional rights and cognizable harms interact: aggregate,[126] hybrid,[127] and intersectional.[128] Intersectional rights, specifically, are identified by the application of one or more doctrines to inform or enhance the Court's existing understanding of a constitutional harm.[129] This Article will focus on intersectional rights, and it will refer to this framework as doctrinal integration.[130]

1. Doctrinal Integration Applied

The term "intersectionality" encapsulates the concept that multiple causes resulting in a harm may not be independent of one another. If one cause were to be disentangled from the other, the harm that would occur may not be fully realized and would result in a diluted, or ineffective, claim.[131] This concept was developed by Kimberlé Chrenshaw to describe employment discrimination experienced by women of color.[132] The theory of intersectionality draws broader parallels to constitutional interpretation

alone.").

124. Abrams & Garrett, *supra* note 122, at 1327.

125. *See generally id.* at 1309–16 (discussing the ubiquity of cumulative constitutional rights).

126. Aggregate harm occurs when multiple acts, taken together, compound and amount to a "harm of constitutional magnitude," whereas individually, each act alone would not result in a cognizable harm. *Id.* at 1313.

127. Hybrid rights occur where a single act violates multiple constitutional provisions. Abrams and Garrett observed that hybrid rights do not ordinarily result in relief, because the Court already associates a specific level of scrutiny with each doctrine invoked. *Id.* at 1324.

128. *Id.* at 1313.

129. *Id.* at 1313–14.

130. I use the term "doctrinal integration" to convey the concept of intersectional rights throughout this Article.

131. The concept of intersectionality was first established by Kimberlé Crenshaw in the late 1980s as part of an ongoing dialogue in critical race theory. The term "intersectionality" was originally used as an analogy to reframe how courts understood the type of discrimination that was particular to women of color in the employment discrimination context. Traditional conventions framed discrimination as an either-or type of harm—either the harm occurred as a result of racial or gender discrimination, but not both. But the concept of intersectionality went beyond this and provided a more holistic way of understanding discrimination by conveying the impact that occurs when multiple forms of discrimination merge, resulting in a discrete type of harm that is specific not to Black individuals, not to women, but more precisely: Black women. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Anti-Racist Politics*, 1989 U. CHI. LEGAL F. 139, 139–40.

132. *Id.*

through doctrinal integration.[133] And although the Court rarely advertises its use of doctrinal integration,[134] its application can be easily identified in many instances.

One such example is the union of substantive due process and equal protection. Substantive due process protects fundamental rights from government intrusion, whereas the Equal Protection Clause prevents against discriminatory state action.[135] Abrams and Garrett observed that

> [t]hese rights may not exist independently as either enumerated rights or as due process protections, but once the government grants or denies them in a discriminatory manner it must justify its discrimination at the level of heightened scrutiny. In other words, under the fundamental rights equal protection doctrine, the discrimination augments the harm of governmental intrusion into or denial of a right.[136]

Rights protected under the fundamental rights-equal protection framework include the right to marry, the right to travel, the right to procreate, and the right to vote.[137]

On the right to vote, Professor Pamela Karlan describes how *Harper v. Virginia Board of Elections*[138]—a case considered as the high watermark of voting rights opinions—grounded the right to vote in both the Fourteenth Amendment's Equal Protection and in substantive due process through a stereoscopic approach.[139] The *Harper* Court held that poll taxes created distinctions on wealth that prohibited access to the franchise, and thus violated both the Equal Protection Clause and substantive due process.[140] This case would have come out differently, Karlan argues, had the Court applied a traditional equal protection analysis without consideration of the liberty interests at stake or the additional governmental intrusion taking place by way of the tax.[141]

Doctrinal integration also occurs in criminal procedure jurisprudence where the Fourth, Fifth, Sixth, or Eighth Amendments are integrated with

133. Abrams & Garrett, *supra* note 122.

134. *Id.* at 1337 ("*Obergefell* is relatively rare in its express embrace of an intersectional equal protection-due process approach.").

135. *Id.* at 1331–32.

136. *Id.* at 1332.

137. Abrams & Garrett, *supra* note 122, at 1332 n.98.

138. *See generally* Harper v. Va. State Bd. Of Elections, 383 U.S. 663 (1966).

139. Karlan, *supra* note 21, at 479.

140. *Harper*, 383 U.S. 663, overruled *Breedlove v. Suttles*, 302 U.S. 277, 283–84 (1937), in which the Court originally construed poll taxes, as applied equally to men and women alike, as not offending principles of equality calling it a "familiar and reasonable regulation."

141. Karlan, *supra* note 21, at 479 ("[I]t seems plausible that the interaction of ideas of liberty and equality was a key element . . . of the Court's initial decision to ratchet up the level of judicial review in cases like *Harper* and *Reynolds v. Sims* . . . .").

equal protection claims to create new constitutional standards.[142] Consider *Strickland v. Washington*, the seminal case guaranteeing the right to effective assistance of counsel.[143] While *Strickland* is grounded in Sixth Amendment principles, the opinion reaches beyond the plain text of the Amendment, which merely guarantees a right to counsel, not an effective one.[144] But by merging the Sixth Amendment with the Fourteenth Amendment's due process doctrine, *Strickland* resulted in a new constitutional standard.[145] Similarly, the commonly known *Batson* test, which prohibits peremptory challenges that exclude jurors solely on the basis of race, is also a product of doctrinal integration.[146] *Batson v. Kentucky* rested upon the Sixth Amendment's guarantee of a jury trial, but similar to *Strickland*, nothing in the Amendment guaranteed the process by which jurors are selected.[147] Again, the Court arrived at a new constitutional standard by reading the Sixth Amendment and the Fourteenth Amendment's Due Process Clause together.[148]

The Court has similarly been conscious of inequalities in wealth that may run counter to one's liberty interest, particularly as it impacts a detainee's access to courts or imposes fees and fines as a form of punishment. In *Bearden v. Georgia*, the Court held that the sentencing court could not revoke a defendant's probation for failure to pay a fine.[149] The *Bearden* Court applied what it called a "fundamental fairness" doctrine,[150] which in effect, was the Court integrating equal protection and due process.

Notably, *Bearden* relies heavily on another prominent yet controversial 1954 case: *Griffin v. Illinois*, the first in a line of cases that began applying doctrinal integration. *Griffin* held that granting appellate review only to defendants who were able to afford a trial transcript would effectively deny

142. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Strickland v. Washington, 466 U.S. 668 (1984); Abrams & Garrett, *supra* note 122, at 1345–46 ("The Supreme Court's well-known ruling in *Miranda* requiring police to give the famous warnings before proceeding with a custodial interrogation, lest the resulting confession statements be suppressed in-court, focused on the Fifth Amendment right to be free from compelled incrimination. Yet, the *Miranda* ruling has puzzled scholars and engendered real controversy because it regulates not compelled self-incrimination on the witness stand at trial, but a question of trial evidence and waiver during pretrial questioning by police."); *Id.* at 1318 (discussing the "standard governing ineffective assistance of counsel claims. Under *Strickland*, courts ask not whether each individual act or decision by a defendant's counsel was deficient, but instead whether all of the lawyer's errors, taken together, amounted to a constitutionally deficient performance").

143. *Strickland*, 466 U.S. 668.

144. Abrams & Garrett, *supra* note 122, at 1344; *see also* U.S. CONST. amend. VI.

145. Abrams & Garrett, *supra* note 122, at 1344.

146. *Id.*

147. Batson v. Kentucky, 476 U.S. 79, 83 (1986).

148. Abrams & Garrett, supra note 122, at 1344.

149. Bearden v. Georgia, 461 U.S. 660, 672–73 (1983).

150. *Id.*

the right to adequate and effective appellate review.[151] The Supreme Court, in a 5-4 decision, explained that "[t]here is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance."[152] The Court held that the monetary limitation violated both equal protection and due process.[153] This line of cases following *Griffin* paid considerable attention to the plight indigent defendants face within the criminal legal system and how their circumstances directly attach to their liberty interests.[154]

In the context of detainees, the Supreme Court seems to regularly incorporate substantive due process alongside other doctrines in which state intrusion, in the form of incarceration, results in unfair or unequal treatment. Different from an equal protection analysis, substantive due process helps guide the courts in understanding liberty-based limitations that detainees face in accessing fundamental rights.[155] Although not all instances of doctrinal integration create affirmative obligations on the government to provide access to a right, these cases taken together show a strong consensus that where the state creates a barrier—whether it is a tax, fine, or incarceration—it has an obligation to remove barriers prohibiting access to antecedent fundamental rights.

2. Doctrinal Integration Declined

Unsurprisingly, there is some hesitancy in embracing doctrinal integration. Some judges argue that constitutional clauses must be treated as separate and distinct, presuming that if overlap is required to create a cognizable harm, such an interpretative construct would be illegitimate.[156] Professor Michael Coenen identifies judicial restraint, among other concerns such as textual fidelity and doctrinal complexity, as the primary reason the Supreme Court may not, or should not, engage in some form of cumulative

151. Griffin v. Illinois, 351 U.S. 12 (1956).

152. *Id.* at 18.

153. *Id.*

154. *Bearden*, 461 U.S. at 664 ("This Court has long been sensitive to the treatment of indigents in our criminal justice system. Over a quarter-century ago, Justice Black declared that '[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.' *Griffin's* principle of 'equal justice,' which the Court applied there to strike down a state practice of granting appellate review only to persons able to afford a trial transcript, has been applied in numerous other contexts." (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion))).

155. See *infra* Section III.D for an analysis on due process-based integration in the context of jail-voting.

156. *E.g.*, Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 2, 92–93 (2018) (discussing Justice Thomas' conclusion in *Washington v. Davis* that Fourteenth Amendment analysis of due process and equal protection must remain separate).

constitutional analysis.[157] Even so, Coenen warns not to overstate these risks given that many of the combinations argued for (such as integrating the Equal Protection and Due Process clauses) "do not so much create new constitutional principles out of thin air as they merely take notice of and respond to genuine areas of textual convergence."[158]

Still, there are instances where the Court was presented with inviting circumstances to apply doctrinal integration but declined to do so. Professor Gerald Gunther observed several cases decided in 1972 in which the Court had the opportunity but refused to integrate due process and equal protection claims.[159] In *Lindsey v. Normet*, the petitioners were month-to-month tenants who refused to pay rent unless the landlord resolved certain housing code violations in the unit.[160] The petitioners argued that higher level scrutiny applied because the " 'need for decent shelter' and the 'right to retain peaceful possession of one's home' are fundamental interests which are particularly important to the poor and which may be trenched upon only after the State demonstrates some superior interest."[161] The Court refused to identify housing as a fundamental right and declined to apply heightened scrutiny, stating that while it did not "denigrate the importance of decent, safe, and sanitary housing," the Constitution does not "provide judicial remedies for every social and economic ill."[162] Similarly, Gunther notes that in *Richardson v. Belcher*[163] and *Jefferson v. Hackney*,[164] the Court "reiterated that allocations of welfare benefits are not subject to strict scrutiny."[165]

The Court likely did not apply doctrinal integration because, in each case, petitioners sought to establish a new fundamental right as opposed to framing their arguments as informing and developing the current interpretation of an existing fundamental right.[166] In other words, the common thread determining whether or not doctrinal integration may apply is whether a preexisting fundamental right has already been established, as

157. Coenen, *supra* note 123, at 1109–16.

158. *Id.* at 1110. Coenen indicates that the Constitution itself may have signals that hint toward a combination-friendly approach, such as the Necessary and Proper Clause which vests Congress with the power to make "all laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution." *Id.* at 1110–11; U.S. CONST. art. I, § 8.

159. Gunther, *supra* note 116, at 12–15.

160. Lindsey v. Normet, 405 U.S. 56, 58–59 (1972).

161. *Id.* at 73.

162. *Id.* at 74.

163. Richardson v. Belcher, 404 U.S. 78, 80–81 (1971).

164. Jefferson v. Hackney, 406 U.S. 535, 546 (1972).

165. Gunther, *supra* note 116, at 13.

166. Coenen, *supra* note 123, at 1109–16. There could have also been some political hesitancy in establishing constitutional rights in these cases given the amount of funding that would be required to protect housing rights, a task typically left to legislators to resolve rather than the courts.

the Supreme Court is often reluctant to establish new fundamental rights.

The Supreme Court has not articulated a bright line rule as to when it will or will not apply doctrinal integration. In fact, the closest explanation of any rule comes from the 2015 case *Obergefell v. Hodges*, in which the Court held that same-sex couples shared an equal and fundamental right to marriage.[167] The Court, speaking through Justice Kennedy, provided a powerful yet vague analysis of the intersectional rights at issue, stating:

> The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. . . . [O]ne Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.[168]

Professor Timothy Zick reads the Supreme Court's analysis as integrating the doctrines of equal protection and due process only when each Constitutional provision "adds something *distinctive* to the constitutional mix."[169] Based on the Court's perceived reactions to doctrinal integrations and scholars' observations, the next logical step is to address whether an additional constitutional provision could add something distinct to the existing interpretation.

B. LIBERTY-BASED RIGHTS: THE DISTINCTION BETWEEN INCARCERATED VOTERS AND NON-INCARCERATED VOTERS

Undoubtedly, eligible incarcerated voters have a right to vote in jails. States have taken this to mean that such voters do not have a right to access any particular avenue of voting and that the onus is on the detainee to assert and access her right to vote. This interpretation, however, is inconsistent with how the Supreme Court has previously viewed liberty-based claims, particularly for detainees, and for arguably lesser rights than the right to vote. The liberty-based framework allows courts to consider how the affected party may be differently situated than the more general group whose rights are protected by equal protection.

Consider first the government's role in contributing to the ultimate deprivation. The government has a monopoly over voting; it regulates where polling places are established and provides mechanisms for many citizens to vote prior to an election day or from afar. Although the government cannot be responsible for every restriction to a citizen's voting rights (for example, an individual's inability to access publicly available educational materials or

167. *Obergefell v. Hodges*, 576 U.S. 644 (2015).
168. *Id.* at 672.
169. Timothy Zick, *Rights Dynamism*, 19 U. PA. J. CONST. L. 791, 856 (2017) (emphasis added).

lack of transportation to vote in person), affirmative governmental restrictions remain commonplace (strict ID laws, address requirements, limiting voting times, felon laws).[170] Even so, many aspects of voting are dependent upon the government's coordination—creating polling stations, securing the voting machines, counting the votes, and so forth. In order to maintain the integrity of the process, voting necessarily requires governmental oversight and administration. As a result, the government is, at least in part, subject to an affirmative obligation to its citizens.

Voting laws are analyzed, however, as though the opposite were true. The Equal Protection Clause prevents the government from denying the right to vote as opposed to ensuring the government affirmatively provides access to the right.[171] Therefore, governmentally imposed restrictions that regulate the right to vote (and as a result limit access) often do not hinder access to the point that it deprives everyday citizens of the right to vote. For those not incarcerated, many restrictions that limit access to the right to vote may be trivial and usually will not be subject to review under heightened scrutiny.[172] But, for incarcerated citizens, the question is not whether the detainee theoretically has access to voting mechanisms; rather, it is whether the state has a duty not to impede access or to affirmatively provide the tools that make access feasible for those under its custody.

Consider next how the class of individuals affected by the government's affirmative obstruction are defined and uniquely distinguishable from nonjailed voters. Incarcerated voters are not simply "criminals."[173] Incarcerated voters are citizens who are particularly marginalized vis-à-vis

170. *Cf.* Brnovich v. Democratic Nat'l Comm., No. 19-1257, slip op. at 18–21 (U.S. July 1, 2021) (signaling to lower courts that states should be afforded significant latitude in the administration of their voting procedures).

171. This Article touches briefly upon positive and negative rights but does not intend to invoke the scholarship in its entirety. *See, e.g.*, Frederick Schauer, *Hohfeld's First Amendment*, 76 GEO. WASH. L. REV. 914, 915 (2008); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1325 (1984).

172. *E.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008) (upholding voter identification laws under rational basis review); Fidell v. Bd. of Elections, 343 F. Supp. 913, 916 (E.D.N.Y. 1972), *aff'd*, 409 U.S. 972 (1972) (applying rational basis review where the City of New York denied providing incarcerated eligible voters absentee ballots in a primary election because it would have cost the City an "inordinate amount of time, effort and expense").

173. The consequences of labeling incarcerated voters as criminals are not merely stigmatizing, but also go towards the narrative the law conveys about individuals who become incarcerated. Consider the rhetoric used by proponents and opponents of Florida's Amendment 4, which "restore[d] the voting rights of some felons." Jones v. Governor of Fla., 975 F.3d 1016, 1025 (11th Cir. 2020). Proponents referred to the incarcerated individuals as "returning citizens" to demonstrate the connection between the right to vote and citizenship, whereas opponents used terms like "felons" in order to convey some level of culpability that continues even after one has completed their sentence. *See* Appellants' Brief at 1, McCoy v. Desantis, No. 20-12304 (11th Cir. Oct. 21, 2020). *See generally* Brief of Defendants-Appellants, Jones v. Desantis, No. 20-12003 (11th Cir. June 19, 2020).

the government and state institutions even before they experience the physical limitation of incarceration. First, jailed voters are disproportionately low-income people of color. The use of incarceration, particularly for low-level nondangerous offenses, has been a way for political parties to suppress and control poor marginalized groups.[174] That culture of discrimination has permeated the everyday functions of the criminal legal system—from arrests[175] to prosecutorial directives.[176] Although there are variances, carceral populations are often a reflection of racial and wealth biases within greater society.[177] As a matter of racial justice, the disproportionate representation of low-income individuals of color in jails cannot be ignored.

Finally, once incarcerated, the ability to access information about the political process is severely limited. The educational materials that come into jails are controlled exclusively by the government.[178] The government also controls detainees' mobility around and outside of the jails, and therefore any means of transportation that could be used to access a voting center in person.[179] The use of absentee ballots is often restrained by advance application deadlines or limited windows of acceptance. While everyday citizens may, on average, face one or two of these restrictions, jailed voters face all of them simultaneously. The inability to access a single mode of voting that may be considered a privilege by law—and thus not afforded any form of judicial protection—such as absentee ballots, nevertheless has the effect of denying the right to vote to those incarcerated.

Like voting, the government also has a monopoly on detention. Not only is the government required to provide basic care and protection to those within its charge, but it also controls what information is passed in and outside of its walls.[180] It is foreseeable that on an election day, there will be thousands of eligible voters incarcerated. And so, although substantive due process liberty-based rights are often viewed in the negative, there are

174. *E.g.*, Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235, 1255–56 (2016) (identifying racialized criminal reform efforts and mass incarceration as a factor undermining successful civil rights efforts in the 1960s and 1970s).

175. *E.g.*, Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998).

176. *See, e.g.*, Zina Makar, *Unnecessary Incarceration*, 98 OR. L. REV. 607, 649–53 (2020).

177. *See supra* Part I.

178. For example, in a July 2020 survey, the Arizona Coalition to End Jail-Based Disenfranchisement identified that only one of Arizona's fifteen counties provides information on voting procedures to its detainees. ARIZ. COALITION TO END JAIL-BASED DISENFRANCHISEMENT, UNLOCK THE VOTE ARIZONA 7–17 (2020).

179. *E.g.*, Nicole Lewis & Aviva Shen, *Unlocking the Vote in Jails*, MARSHALL PROJECT (Oct. 26, 2020, 5:45 AM), https://www.themarshallproject.org/2020/10/26/unlocking-the-vote-in-jails [https://perma.cc/ZDD3-HUQW]. Cook County is the only jail in the country that has a polling place within a jail. *Id.*

180. *E.g.*, *id.*

instances in which states have an affirmative obligation to provide detainees with access to the deprived right asserted. For example, in *Bounds v. Smith*, detainees alleged that they were denied access to the courts in violation of their Fourteenth Amendment due process rights by the State's failure to provide legal research facilities.[181] Justice Marshall, writing for the majority, explained:

> [O]ur decisions have consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts. It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them. States must forgo collection of docket fees otherwise payable to the treasury and expend funds for transcripts. State expenditures are necessary to pay lawyers for indigent defendants at trial . . . and in appeals as of right . . . .[182]

Similarly in *Farmer v. Brennan*, the Supreme Court unanimously held that a state can be liable under the Eighth Amendment when a correctional official shows a "deliberate indifference" to a substantial risk of harm to a detainee, thus imposing an affirmative duty to prevent such harms.[183] The Court recognized that prison officials have a heightened responsibility towards inmates that arises from the government "having stripped them of virtually every means of self-protection and foreclosed their access to outside aid."[184] Lower courts have since interpreted *Farmer* as placing a duty on the government to provide its detainees with basic medical care.[185]

The amount of state control leveraged over a jailed voter far exceeds that of a nonjailed voter. Yet this fact has gone unacknowledged in the existing doctrinal analysis.[186] Reasons for this could be as simple as the fact that equal protection requirements do not look beyond the plain text of a statute to consider whether a voter is actually denied the right to vote, a denial that could be more deeply rooted in a stigma associated with those in the criminal legal system, as implied by the dissenting Justices in *O'Brien*.[187]

181. Bounds v. Smith, 430 U.S. 817, 818 (1977).

182. *Id.* at 824–25 (citations omitted).

183. Farmer v. Brennan, 511 U.S. 825, 828–29 (1994).

184. *Id.* at 833.

185. *See, e.g.*, Scinto v. Stansberry, 841 F.3d 219, 225 (4th Cir. 2016) ("[T]he Eighth Amendment imposes a duty on prison officials to 'provide humane conditions of confinement . . . [and] ensure that inmates receive adequate food, clothing, shelter, and medical care.' "); O'Kane v. Keane, No. 97-2099, 1998 U.S. App. LEXIS 22302, at *3 (2d Cir. Apr. 6, 1998) ("The Eighth Amendment places restraints on prison officials and imposes a duty on them, *inter alia*, to 'ensure that inmates receive adequate . . . medical care.' "). To that end, a prison official's "deliberate indifference to serious medical needs of prisoners" constitutes "the unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment. *Farmer*, 511 U.S. at 834–35.

186. *See supra* Part I.

187. *See supra* notes 91–94 and accompanying text.

Ultimately, it is the state's involvement that controls a detainee's enjoyment of political participation and that distinction between jailed and nonjailed voters necessarily must carry some weight when assessing whether failure to provide access to the ballot in jails is a violation of the fundamental right to vote.

C. ADDRESSING THE APPLICABILITY OF THE EIGHTH AMENDMENT

As discussed above, the petitioners in *Goosby* raised an Eighth Amendment claim, advancing the argument that vote denial for pretrial detainees was punitive because such detainees were legally innocent.[188] The Eighth Amendment claim was never explored by the Supreme Court but is worth considering here because it touches upon a threshold issue concerning whether vote denial for eligible incarcerated voters is a collateral consequence or if it could be challenged on constitutional grounds as a form of punishment.[189]

Professor Michael Pinard provides a comprehensive definition of collateral consequences:

> Collateral consequences are the indirect consequences of criminal convictions. These consequences comprise a mixture of federal and state statutory and regulatory law, as well as local policies. Direct consequences include the duration of the jail or prison sentence imposed upon the defendant as well as, in some jurisdictions, the defendant's parole eligibility or imposition of fines. Collateral consequences, by contrast, are not part of the explicit punishment handed down by the court; they stem from the fact of conviction rather than from the sentence of the court.[190]

As Pinard's definition implies, most collateral consequences have little to do with the crime itself. Collateral consequences can impact an individual's eligibility for government benefits, including public housing, federal student aid, and public benefits programs, as well as create

188. *See supra* notes 65–72 and accompanying text.

189. This particular issue in the voting rights context uniquely impacts jailed voters as opposed to nonjailed voters. Lower courts remain split on whether due process or a quasi-Eighth Amendment framework applies when it comes to pretrial detainees. *See, e.g.*, Brandon L. Garrett & Lee Kovarsky, *Viral Injustice*, CALIF. L. REV. 117, 133–35 (2022). The issue of which to apply in this context is better suited for another article. Before the method of application can be determined, however, the central question of whether disenfranchisement, by way of incarceration, is intended to be a form of punishment remains to be answered by the Supreme Court. *See* discussion *supra* Section III.C. *But see* discussion *infra* notes 220–21 and accompanying text.

190. Pinard, *supra* note 8, at 634 (footnotes omitted); *see also* MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE § 2.66 (2018) ("If a consequence that imposes a disability or disqualification takes effect only by virtue of its inclusion in the judgment of conviction, it is a direct consequence. Consequences become 'collateral' when their scope and execution is effectively independent of the court-imposed sentence").

difficulties in obtaining employment and result in separation from family members, all of which are an unintended aspect of a sentence, but occur with great regularity.[191] Instead, collateral consequences function as a society-wide judgment about the social, economic, and political standing of an individual with a conviction.[192] Simply put, collateral consequences are just that—consequences that courts find legally tolerable. The complacent acceptance of collateral consequences has crept into residual indifference over a detainee's access to fundamental rights, including the right to vote.

The use of the carceral system to suppress political participation has long raised concerns about the criminal legal system serving as a mechanism for enforcing badges of slavery to strip marginalized individuals of their citizenship.[193] To this point, the Eighth Amendment has not proven to be an effective tool in challenging the impact incarceration has on citizens.[194] Although this can be attributed to the much-criticized development of Eighth Amendment jurisprudence,[195] in the jail-voting context, its lack of presence may have to do with the fact that the existing doctrine foreclosed this avenue of relief by limiting its development solely to the Fourteenth Amendment Equal Protection Clause.[196] To be clear, the Supreme Court has never applied Eighth Amendment doctrine when analyzing disenfranchisement or vote denial for nonfelons—it has never opined whether disenfranchisement is a collateral consequence as opposed to a form of punishment.[197] As a result, this unanswered distinction between collateral consequences and punishment limits Eighth Amendment challenges in this area.[198]

191. Pinard, *supra* note 8, at 634.

192. Ruth A. Moyer, *Avoiding "Magic Mirrors"—A Post*-Padilla *Congressional Solution to the 28 U.S.C. § 2254 "Custody" and "Collateral" Sanctions Dilemma*, 67 N.Y.U. ANN. SURV. AM. L. 753, 761 (2012).

193. *Cf.* Roberts, *supra* note 6, at 1291–93.

194. The Eighth Amendment does not provide for the most favorable precedent in protecting pretrial rights. *See, e.g.*, Class-Action Complaint for Declaratory and Injunctive Relief at 52–53, Thompson v. Alabama, 293 F. Supp. 3d 1313 (M.D. Ala. 2016) (No. 2:16-cv-783). *But see In re* C.P., 967 N.E.2d 729 (Ohio 2012). In 2012, the Supreme Court of Ohio found that mandatory life-long sex-offense registration for those convicted as juveniles violated the Eighth Amendment, demonstrating that this strategy is still viable in some cases. *In re* C.P., 967 N.E.2d 729.

195. *E.g.*, Garrett & Kovarsky, *supra* note 189, at 17–18 ("For challenges to non-criminal custody, the due process analysis actually separates into two categories. The first . . . requires a court to decide whether some detention condition amounts to punishment . . . . The second . . . analyze[s] *non-criminal custody* using *Gamble*'s Eighth Amendment framework . . . .").

196. *See supra* Part II.

197. In a recent opinion, the Eleventh Circuit categorized disenfranchisement as a form of punishment—deviating from the traditional categorization that many lower courts have accepted as regulatory. Jones v. Governor of Fla., 975 F.3d 1016 (11th Cir. 2020). Notwithstanding the heightened classification, *Jones* declined to apply heightened scrutiny and instead applied rational basis review. *Id.* at 1033.

198. Like the distinction between collateral consequences and punishment, it is important to note that the labels the Supreme Court attributes to a particular form of state action dictate the analysis that

Felon disenfranchisement has engendered a significant amount of debate between scholars, as many argue that disenfranchisement laws are not a collateral consequence, but rather are penal in effect.[199] Scholars have pointed to the doctrine of collateral consequences as a significant limiting factor in the pursuit of challenging disenfranchisement laws as unconstitutional. Professor Gabriel Chin likens the vast patchwork of collateral consequences to the antiquated concept of civil death that existed as punishment for criminal offenses in English common law.[200] The doctrine of civil death at that time saw a citizen convicted of a crime being stripped of her personhood before the law—the convicted individual was subsequently subject to restrictions on his freedoms, rights, and benefits, which were frequently permanent.[201]

The concept of civil death migrated to the United States where it was generally regarded as nonpunitive.[202] Courts saw these consequences as regulatory—policy choices made by legislatures and executives unassociated with the punishments judges ordered. Thus, courts did not feel obligated to impose limits on the bounds or implementations of individual restrictions that ultimately created the web of civil death. Because none of these losses were considered punitive, they were neither individually nor cumulatively evaluated for proportionality.[203] Voting rights scholars, including Karlan, argue that given our new understanding of racial justice and civil death, felony disenfranchisement could be challenged on Eighth Amendment grounds for disproportionality when applied to individuals

the Court applies, and as a result, the constitutional challenges that a claimant may use as a shield to protect herself. One such example is the categorization of pretrial detention. Because a pretrial detainee is legally innocent, her incarceration cannot serve a punitive purpose, but instead can only be mandated as a measure to prevent flight or danger to the community prior to trial. *See* Makar, *supra* note 176, at 641–45. As a result, pretrial detention is considered a form of regulatory detention as opposed to punitive detention. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 748 (1987) ("[T]he pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause."). Not only does it preclude a pretrial detainee from making challenges based on the Eighth Amendment, but challenges brought against one's conditions of confinement are reviewed with significant deference to the state's interests. Bell v. Wolfish, 441 U.S. 520, 539 (1979).

199. Karlan argues that the contemporary debate surrounding the increasing rejection of criminal disenfranchisement reflects "an underlying change both in how we conceive of the right to vote and in how we understand the fundamental nature of criminal disenfranchisement." Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1148, 1149 (2004). Karlan cites to a growing body of supporting scholarship. *Id.* at 1147–49, 1148 n.8.

200. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790, 1793–96 (2012).

201. *Id.* at 1799.

202. *Id.* at 1796.

203. *Id.* at 1806–08.

convicted of minor offenses.[204]

The Supreme Court's doctrine on disenfranchisement cautiously toes the line of intruding on the states' right to regulate the franchise,[205] and, as a result, fails to provide any clarity on where the line between constitutional harm and collateral consequence is drawn. Specifically, the Supreme Court had two opportunities to address disenfranchisement: *Richardson v. Ramirez*[206] and *Hunter v. Underwood*.[207] Each case applies a different mode of doctrinal interpretation.[208] The *Richardson* Court affirmed felon disenfranchisement and grounded its reasoning in a textualist reading of the Fourteenth Amendment, citing the phrase "other crimes" within Section 2 of the amendment as express permission to disenfranchise individuals with felony convictions.[209] Based on this logic, one might assume that a state would similarly be permitted to disenfranchise any individual convicted of a misdemeanor offense. But that has not been the case. In *Hunter*, the Supreme Court held an Alabama statute that disenfranchised misdemeanants was unconstitutional.[210] The Court's decision this time was not based on a textualist reading of the Constitution, but rather by finding discriminatory intent by the legislature to penalize individuals of color.[211]

The Supreme Court avoided the slippery slope of having to draw a line between felony and misdemeanor disenfranchisement by applying two different methods of interpretation.[212] Yet, in both instances, the Court was careful to avoid making any reference to disenfranchisement as either punishment or a collateral consequence.[213]

204. *See* Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1368 (2003).

205. *See* Hunter v. Underwood, 471 U.S. 222, 227, 232 (1985) (stating that "neutral state law that produces disproportionate effects along racial lines" are not automatically unconstitutional and discriminatory intent is required to invalidate a law).

206. Richardson v. Ramirez, 418 U.S. 24 (1974).

207. *Hunter*, 471 U.S. 222.

208. *Compare Richardson*, 418 U.S. at 53 (citing "convincing evidence of the historical understanding of the Fourteenth Amendment" as the basis for the Court's decision), *with Hunter*, 471 U.S. at 229 (citing "analysis of the evidence [that] demonstrates conclusively that § 182 was enacted with the intent of disenfranchising [B]lacks" as the basis for the Court's opinion). Neither case refers to disenfranchisement as a form of punishment, although scholarship debates that. For the purposes of this Article, I maintain that disenfranchisement is a form of punishment that is akin to denaturalization.

209. *See Richardson*, 418 U.S. at 54–56.

210. *Hunter*, 471 U.S. at 229–31.

211. *Id.*

212. *Compare Richardson*, 418 U.S. at 55 (avoiding addressing the public perception of "criminals"), *with Hunter*, 417 U.S. at 232–33 (addressing the public perception of those convicted of crimes because the record provided to the Court showed an intent to discriminate).

213. The closest the Court comes to acknowledging the punitive impact of disenfranchisement was in *Richardson.* Although *Richardson* did not explicitly classify disenfranchisement as punishment, the Court cited language from state statutes that were recorded by Congress as a requirement to admission into the Union, demonstrating the commonality of disenfranchisement statutes. *Richardson*, 418 U.S. at

There is one notable and telling omission in the line of precedent that the *Richardson* Court relies upon. Short of twenty years prior to *Richardson*, the Supreme Court made one passing reference to the potentially regulatory nature of disenfranchisement in *Trop v. Dulles*.[214] In *Trop*, the Supreme Court was presented with the question of whether a congressional statute authorizing the denationalization of a citizen convicted for wartime desertion was an unconstitutional form of punishment under the guise of a regulation.[215] Although the Supreme Court ruled that the statute at issue was unconstitutional and punitive in nature, the Court in dicta distinguished citizenship from disenfranchisement, calling the latter a "*nonpenal* exercise of the power to *regulate* the franchise."[216] If the Court had intended to limit any Eighth Amendment challenges to disenfranchisement, citing to *Trop* for such a proposition in *Richardson* would seem logical, but the Court omitted any reference to this case.

Trop was decided in 1958, several years prior to *Reynolds v. Sims* and *Harper*, the two seminal cases which expound upon the fundamental nature and centrality that the right to vote has to citizenship. Had the *Richardson* Court cited *Trop* for this proposition, it would have had to go through the motions of squaring the concept of disenfranchisement with citizenship, forcing it to analyze the right to vote in the context of its earlier precedent established in *Reynolds* and *Harper*.[217] Certainly, the *Richardson* Court could have cast aside the statement made in *Trop* as mere dicta.[218] But it is more likely, however, that prohibiting states from regulating their franchise through disenfranchisement would have been politically unpopular.[219] And so, it is conceivable that the Court was far too reluctant to strip states further

48–51. Those statutes explicitly refer to the deprivation of the right to vote as "punishment for [felony] crimes." *Id.* at 51. In fact, senators proposed amendments to prevent a discriminatory application of disenfranchisement by qualifying that such punishment can only occur as long as the application of the criminal law is "equally applicable to all the inhabitants of said State." *Id.* at 52. The contemporaneous statements by individual legislators signified Congress' understanding that disenfranchisement was intended to be a form of punishment when an individual is convicted of a certain crime. Many scholars have written extensively on the improper classification of felon disenfranchisement based on this history. *See, e.g.*, Karlan, *supra* note 199, at 1148 n.8.

214. Trop v. Dulles, 356 U.S. 86, 97 (1958).

215. *Id.*

216. *Id.* (emphasis added).

217. *Compare id.* at 96–97 (holding that revoking one's citizenship as punishment violated the Eighth Amendment's prohibition on cruel and unusual punishment), *with* Reynolds v. Sims, 377 U.S. 533, 554 (1964) (holding that the Equal Protection Clause protected the voters' right to equal state legislative representation), *and* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665 (1966) (holding that state-imposed poll taxes violated the Fourteenth Amendment because it denied voters access to the franchise based purely on wealth).

218. Courts often cite to the dicta in this case, giving it the illusion that it is controlling. *E.g.*, Johnson v. Bredesen, 624 F.3d 742, 753 (6th Cir. 2010) ("[I]n *Trop v. Dulles*, the Supreme Court expressly stated that felon disenfranchisement laws serve a regulatory, non-penal purpose.")

219. *See, e.g.*, *infra* note 271.

of the ability to regulate the franchise—a practice that the Court was already wary of engaging in.[220] This omission, however, leaves the door open to future challenges.

Even today, courts are typically unwilling to correct the classification of these consequences as civil regulations; most often courts find them to be legitimate exercises of state regulatory power and thus out of the Eighth Amendment's reach. Due in part to the Supreme Court's silence on disenfranchisement, litigation hurdles for disenfranchised detainees claiming Eighth Amendment violations remain. And lower courts frequently rely upon the dicta in *Trop* as justification for not reviewing disenfranchisement with heightened scrutiny.[221] This posture may change in light of the latest Eleventh Circuit ruling in *Jones v. Governor of Florida,* which affirms the constitutionality of enfranchising returning citizens upon completion of all outstanding financial obligations.[222] The dissent keenly identifies, however, that Florida itself treats disenfranchisement as a form of punishment, and argues that the majority improperly analyzed the financial limitation that has become a prerequisite to accessing a fundamental right.[223]

220. Baker v. Carr, 369 U.S. 186, 214–15 (1962) (discussing the Court's general reluctance to intervene in the state's ability to regulate the franchise). As Karlan has observed, nineteenth century judicial decisions are of limited value in any case because they reflect an obsolete conception of the right to vote. Karlan, *supra* note 199, at 1159 (quoting Johnson v. Governor of Fla., 353 F.3d 1287, 1302 n.16 (11th Cir. 2003), *vacated*, 337 F.3d 1163 (11th Cir. 2004)); *see also* George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of* Infamia, 46 UCLA L. REV. 1895, 1903 (1999) ("There are so many constitutional arguments against the disenfranchisement of felons that one can only wonder at the survival of the practice.").

221. *See, e.g.*, Bredesen, 624 F.3d at 753 ("Moreover, in *Trop v. Dulles*, the Supreme Court expressly stated that felon disenfranchisement laws serve a regulatory, non-penal purpose."); Simmons v. Galvin, 652 F. Supp. 2d 83, 93 (D. Mass. 2007), *aff'd in part, rev'd in part*, 575 F.3d 24 (1st Cir. 2009) ("Therefore, this court is guided by the dicta in *Trop* and concludes that in the United States felon disenfranchisement laws have traditionally been regarded as civil, regulatory measures rather than as punitive."); Green v. Bd. of Elections, 380 F.2d 445, 449 (2d Cir. 1967) (noting that in *Trop*, "the Chief Justice used statutes depriving felons of voting rights to illustrate what was *not* a penal law"); Thompson v. Alabama, 293 F. Supp. 3d 1313, 1329 (M.D. Ala. 2017) ("There is a long line of non-binding decisions, as Defendants point out, in which courts have rejected claims that felon-disenfranchisement laws transgress the Eighth Amendment's prohibition against cruel and unusual punishment . . . . These decisions rest principally on the U.S. Supreme Court's dicta in *Trop v. Dulles* and a historical perspective that disenfranchisement laws are non-penal regulations on voting eligibility." (citation omitted)); King v. City of Bos., No. 04-10156, 2004 U.S. Dist. LEXIS 8421, at *3 (D. Mass. May 13, 2004) ("[L]egislative intent determines whether a law is punitive or regulatory."); Kronlund v. Honstein, 327 F. Supp. 71, 74 (N.D. Ga. 1971) ("This Court rejects the plaintiff's argument that disenfranchisement is cruel and unusual punishment in violation of the Eighth Amendment. Although the disenfranchisement law serves to abridge the plaintiff's right to vote, the Supreme Court has held that disenfranchisement is a non-penal exercise of a State's power to regulate the vote and is not cruel and unusual punishment.").

222. Jones v. Governor of Fla., 975 F.3d 1016, 1035, 1049 (11th Cir. 2020).

223. The dissent notes:

> At times, the Supreme Court has characterized disenfranchisement as "a nonpenal exercise of the power to regulate the franchise." *Trop v. Dulles*, 356 U.S. 86, 96–97, 78 S. Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion). Florida acknowledges, however, that its disenfranchisement is punitive. *See* Appellants' Initial En Banc Br. at 3 ("Persons convicted of

The unsettled distinction between direct and collateral consequences in the voting context does not impact just those convicted of a felony. By refusing to classify disenfranchisement as punishment, anyone incarcerated is facially precluded from challenging voting accessibility on Eighth Amendment grounds. This classification is determinative of the avenues of relief, as the law differentiates between claims in which an individual is excessively punished, as opposed to being made to suffer an unfortunate, but unavoidable collateral consequence of her conviction.[224]

Further, the doctrine of collateral consequences attaches when individuals are serving felony or misdemeanor convictions.[225] The doctrine, however, does not attach simply based on the mere fact of incarceration, such as the incarceration of a pretrial detainee who is legally innocent and awaiting trial.[226] The logic behind the collateral consequence doctrine is to prevent individuals who are convicted and incarcerated from bringing challenges against the state for denying certain rights that are limited due to the punishment imposed. But what does that mean for pretrial detainees who were never intended to be punished? If limitations on the right to vote are not considered a collateral consequence for pretrial detainees, must it be considered punishment?

Based on this analysis, a potential fear in deviating from the current equal protection analysis might be that any other analysis could fracture the group of eligible incarcerated voters as a whole.[227] The Supreme Court has already equalized the right to vote for incarcerated voters, so if the deprivation of the right to vote would be considered punishment for a pretrial detainee, it must be considered the same for all other eligible incarcerated voters. If framed incorrectly, viewing the right to vote through an Eighth Amendment lens may have adverse effects on legally innocent eligible incarcerated voters and convicted eligible incarcerated voters.

> a felony in Florida are automatically disenfranchised *as part of the punishment for their crimes*."); *id.* at 4 ("[F]elon disenfranchisement, again, *is a punishment for felony conviction*."). Thus, as we explained in *Jones I*, Florida—contrary to *Griffin* and *Bearden*—"has chosen to continue to punish those felons who are genuinely unable to pay fees, fines, and restitution on account of their indigency, while re-enfranchising all other similarly situated felons who can afford to pay."

Id. at 1074–75 (Jordan, J., dissenting) (alteration in original).

224. *See supra* note 190 and accompanying text.

225. Pinard, *supra* note 8, at 634–35. Some collateral consequences are temporary, but others attach for the rest of postconviction life. These variations in collateral consequences differ from state to state.

226. *Id.*

227. It is not my intention to create a divide between legally innocent incarcerated voters and convicted incarcerated voters, but it is evident that pretrial detainees would have the strongest claim that the inability to access voting avenues is punitive and not within the scope of their pretrial detention. *Cf.* Jones v. Blanas, 393 F.3d 918, 933 (9th Cir. 2004) (contrasting conditions of confinement for regulatory detention and punitive detention, stating that "purgatory cannot be worse than hell").

Clearing up this distinction between collateral consequences and penal objective when comparing rights between legally innocent and convicted detainees may matter less when integrating doctrines.[228] Through an integrated lens, courts might be more willing to strike down collateral consequences when looking at their effects in concert, rather than as individual regulations.[229] Additionally, one particular benefit to pursuing Eighth Amendment arguments in the jail-voting context is that courts evaluate what constitutes cruel and unusual punishment by "the evolving standards of decency that mark the progress of a maturing society."[230] This conceit of the Eighth Amendment makes it particularly amenable to vindicating the rights of jailed voters as a matter of racial justice due to the growing national attention to both the problems of mass incarceration and continuing racially fueled disenfranchisement.

The underlying assumption that disenfranchisement is not punishment[231] does not reflect the reality of how local legislatures or courts view the purpose of disenfranchisement today. If courts viewed disenfranchisement as a form of punishment, challenges to de facto disenfranchisement would more likely be viewed under the strictest scrutiny. If that is the case, in order to avoid the punitive effects that are outside of the penological scope of one's incarceration, a punitive classification would also trigger an analogous duty of care, placing the burden on the state to take affirmative action.[232] But the classification of disenfranchisement has been a controversial issue for many years. Ultimately, the Eighth Amendment may or may not be worth integrating in this analysis but there is some overlap in these doctrines that is worth mentioning due to its relevance and centrality to a citizen's right to engage in political participation.

228. *Cf.* Rhodes v. Chapman, 452 U.S. 337, 346 (1981) ("No static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' ") (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

229. Professor Chin suggests that while individual collateral consequences remain regulatory, the interlocking web of collateral consequences—the new civil death—could rise to the level of punishment. Chin, *supra* note 203, at 1790–93. Chin makes sense of the Supreme Court's decisions in *Weems v. United States*, 217 U.S. 349 (1910) (overturning sentence in part because of extensive collateral consequences to the conviction), and *Trop v. Dulles*, 356 U.S. 86 (1958) (finding expatriation imposed by statute constituted cruel and unusual punishment in violation of the Eighth Amendment in part because of burdensome and systematic collateral consequences), through this lens of civil death—the destruction of the plaintiff's "legal personality" is a punishment the Eighth Amendment cannot bear. *See* Chin, *supra* note 200, at 1818, 1821. As Chin readily acknowledges, his argument is challenged by the historical acceptance of civil death in America as imposed by statute and not court punishment. But the sheer weight of modern collateral consequences impairs a person's legal personality in a way that may offend the Eighth Amendment. *See id.* at 1816–17, 1821.

230. *Trop*, 356 U.S. at 101.

231. *But see* Jones v. Governor of Fla., 975 F.3d 1016, 1032 (11th Cir. 2020).

232. *See* discussion *infra* Section III.D.1.

D. THE RIGHT TO ACCESS THE FRANCHISE

To be clear, the problem facing incarcerated voters is not the deprivation of the right to vote itself but the inability to access alternative voting methods that would permit enjoyment of the right to vote. The argument follows that if the government provides a citizen with a right, the government must either ensure that the right can be accessed or prevent obstructing access to the right. That relationship between the state and the individual is underscored when viewed in light of detainees. When it concerns access to basic necessities, incarcerated individuals are inherently dependent on the state.[233] Accessing the right to vote is no different.

The current interpretation of the doctrine places the burden on incarcerated voters to access the ballot, no matter the state-implemented barriers they face. The doctrine further assumes that incarcerated voters have a general right to vote in jails, but no right to any particular voting mechanism.[234] At bottom, this interpretation takes the simplest route to avoid confronting contradictions in other intersecting areas of the law, such as classifications between punishment and collateral consequences or rights and privileges.[235] But avoiding these difficult issues also allows the Court to provide a uniform response towards equalizing the right to vote for all eligible incarcerated voters.

That said, there could be a real fear that an alternative interpretation may result in bifurcating which eligible incarcerated voters get relief. There was already potential for this to occur in the jail-voting trilogy when some pretrial detainees claimed a due process-equal protection violation based on the fact that their inability to access the ballot was caused by the arbitrary imposition of money bail. For background, distinctions within the class of pretrial detainees arise between those who are incarcerated due to an inability to pay a monetary bond and those who were denied bail. In this instance, pretrial petitioners with bail sought to mirror their arguments after the rulings in the "*Griffin-Harper*" category of cases.[236] In this narrow context, the *Griffin-Harper* line would defend the claim that the pretrial detainee's deprivation of the right to vote is analogous to a poll tax or a fine imposed by the state.[237] Framing the limitation of incarceration solely around the

233. *See supra* Section III.B.
234. *See supra* Part II.
235. *See supra* notes 220–31 and accompanying text.
236. *E.g.*, Brief for Appellants at 21–22, O'Brien v. Skinner, 414 U.S. 524 (1974) (No. 72-1058) (noting how litigators raised arguments specific to pretrial detainees that were unable to vote because they could not afford to post bond and remained incarcerated on election day, citing to *Harper* as authority for this argument).
237. *Id.*

inability to afford bond as opposed to those who were remanded or as opposed to other eligible incarcerated voters would improperly facture the legal status among all eligible incarcerated voters and place the import of rights on a rather arbitrary and narrow scheme.[238]

Of course, the deprivation of the right to vote based on the inability to pay is a concerning problem. But the issue that *Griffin* and *Harper* may more broadly (and accurately) be addressing, is that when the government creates an obstacle, monetary or not, it cannot deprive individuals of fundamental rights that have already been guaranteed.

Thus, it is not to say that an alternative integrated interpretation would create more harm than good, but that the way in which such an argument is framed is critical. If done with little regard for all eligible voters, bifurcated results could occur. So the question is: if a *Griffin-Harper* analysis is not appropriate, what exactly does a more uniform integrated analysis look like?

1. Liberty-Based Doctrinal Integration

An equal protection-based analysis, also referred to by scholars as an equality-based dignity claim, is one in which a group—whether previously defined or not—is denied a right that other groups enjoy.[239] When a group claims it has been discriminated against—that a right is not being granted equally—the Equal Protection Clause may be triggered. Professor Karlan explains that when faced with such a challenge, courts can either "level up" by granting that right to all groups or "level down" by denying that right to all groups.[240]

As a threshold matter, the Court has already "leveled up" in the case of jail-voting rights. It did so in *O'Brien* when it ruled that eligible voters have a right to vote, equal to any other eligible voter, while in jail.[241] But as seen in *Mays*, leveling-up does not solve the more discrete problem created by the

238. The Eleventh Circuit analyzed this issue and rejected the argument, labeling fines associated with convictions a form of punishment. Although I do not believe the court's analysis would extend to pretrial bonds, the logic advanced by the court demonstrates the tricky nature of equalizing a doctrine for a group of individuals who are categorized by legal status as opposed to their physical status. Jones v. Governor of Fla., 975 F.3d 1016 (11th Cir. 2020).

239. *See, e.g.*, Yoshino, *supra* note 119, at 749.

240. *See* Karlan, *supra* note 21, at 491 (noting that there are few instances of leveling down when a fundamental right is involved). Professor Yoshino, however, warns that because application of the heightened scrutiny standard typically results in overturning congressional-made law, adding more protected classes would increase the ground on which the Court is forced to play an active role in policy. As a result, even identifying cognizable groups that should receive rational basis analysis opens the court up to the very slippery slope of parsing identities (for example, religion). Instead, courts believe that Congress is better suited to draw lines in its policy choices, rather than the court having to explain the distinctions it draws every time. Yoshino, *supra* note 119, at 751, 755, 787, 797–98. Moreover, an equality-based lens is prone to coming off as an appeal for special rights. *Cf. id.* at 794.

241. O'Brien v. Skinner, 414 U.S. 524 (1974).

jail-voting trilogy: what to do when deprivation of access becomes deprivation of the right for a particularized group?

Equality in the abstract is not what incarcerated voters seek. The fundamental problem with the existing jail-voting doctrine is not that incarcerated and non-incarcerated voters must be treated as equals, but that jailed-voters must be recognized as inherently unequal in their ability to access the franchise for the discrete time they are incarcerated. The existing doctrine does nothing to impose obligations on detention facilities to ensure or even moderately assist in the facilitation of voting.[242] Local officials are therefore free to create their own, often scant, scaffolding of a process for incarcerated voters with little to no oversight or symmetry.[243] As a result, the haphazard incompleteness of jail-voting provisions of state and local laws is precisely what allows officials to dodge constitutional accountability.[244]

An equality-based interpretation only acknowledges when something needs to be made equal, but it does not give the affected individual the tools to achieve equality.[245] Nonetheless, that does not foreclose the ability to consider an alternative interpretation. Scholars analyzing integrated doctrines consistently reinforce the concept that the Equal Protection and Due Process clauses were drafted to address distinct issues necessitating doctrinal integration.[246]

A liberty-based claim could help break this conceptual barrier for courts analyzing vote denial cases in the detention context. In contrast to the equality-based dignity claims, the liberty-based dignity claims that the Court has more recently gravitated to, primarily through the Due Process Clause, assess rights as accorded to individuals rather than groups.[247] Liberty-based claims, therefore, can be disassociated from a single group identity, thereby increasing their political appeal.[248] This has the dual benefits of deescalating current societal battles around identity politics and of protecting civil rights from slippery slope arguments that arise when the court is forced to define groups, as discussed above.[249] Specifically, this argument skirts the leveling

242. *See* discussion *supra* Part II.

243. Paikowsky, *supra* note 13, at 830–32, 838–42.

244. The continuing effects of this legal paradigm are on display in *Barnhart v. Gladieux*, No. 1:17-CV-124, 2019 U.S. Dist. LEXIS 57205, at *18–19 (N.D. Ind. Apr. 3, 2019), in which a district court dismissed claims brought by eligible jailed voters for failure to demonstrate that the voters took affirmative steps to exercise their right to vote by attempting to obtain absentee ballots.

245. This Article takes a superficial look at positive and negative rights and does not claim to dive deep into the long history and scholarship on this issue. *See supra* Section III.B for further discussion.

246. Karlan, *supra* note 21, at 475–76 (summarizing the various schools of thought regarding the aims of the Equal Protection and Due Process clauses).

247. *See, e.g.*, Yoshino, *supra* note 119, at 784–85.

248. *Id.*

249. Justice O'Connor's concurrence in *Lawrence v. Texas*, 539 U.S. 558, 581–84 (2003)

up or down pitfall of equality-based claims because these claims are rooted in the proposition that denial of a fundamental right to someone, regardless of her identity, is a due process violation.[250] Whereas the Court feels it must avoid the political role of delineating groups and their rights in equality-based claims, liberty-based claims are more comfortably within the Court's institutional competence.[251] Therefore, by relying on more overtly liberty-based arguments, the Court is still able to do the same work of equalizing.

Scholars, such as Professor Kenji Yoshino, have found support in and identified Eighth Amendment jurisprudence as a precursor to the current formation and acceptance of liberty-based claims.[252] For example, Yoshino cites to arguments against cruel and unusual punishment that have been used to bar capital punishment for juveniles and those ruled mentally incapacitated, as well as life sentences for juveniles who did not commit murder.[253] Yoshino acknowledges that these arguments, centered around the proposition that a certain class of defendants should receive protections, initially appear more akin to equality-based claims. He explains, however, that is not the case:

> They do not ask for similarly situated individuals to be treated similarly in the manner of the equal protection rubric, but for differently situated individuals to be treated differently in the manner of the free exercise rubric.
>
> Viewed through the free exercise lens . . . [they] begin to look more recognizably like liberty-based dignity claims. The idea . . . is that certain groups receive exemptions from laws of general applicability because of the injustice of general application.[254]

A liberty-based claim, therefore, may be able to more fully capture the

(O'Connor, J., concurring) provides insight in the fatal flaw of a stand-alone equal protection analysis. In *Lawrence*, the Court considered whether a Texas statute that criminalized same-sex intercourse violated due process and equal protection. The majority ruled that it violated due process. Although Justice O'Connor agreed in the outcome, she believed that the statute was unconstitutional on equal protection grounds because the law treated same-sex couples differently from different-sex couples. The majority saw the shortsightedness of this logic and specifically stated:

> Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.
>
> Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are *linked* in important respects, and a decision on the latter point advances both interests.

Id. at 575 (emphasis added). As an aside, this is perhaps another instance in which the court was signaling the importance of doctrinal integration by using language that conjoins both equal protection and due process.

250. *See, e.g.*, Yoshino, *supra* note 119, at 784.

251. *Id.*

252. *See, e.g.*, *id.* at 791–92.

253. *Id.* at 791.

254. *Id.*

idea that in order to underscore the distinction between incarcerated voters and non-incarcerated voters, those detained will need to be treated differently. Framed this way, a liberty-based claim conveys that the state owes an affirmative duty to all eligible incarcerated voters, enabling their access to the right to vote.[255]

Affirmative obligations are often described by scholars as "positive rights" which are commonly applied in the criminal context.[256] For example, the Sixth Amendment right to a criminal jury trial, being a positive right, cannot exist unless the government ensured it by means of establishing the procedures and mechanisms for its access.[257] Without the claim for the State to provide such a right, it is utterly meaningless. Likewise, the Sixth Amendment right to counsel requires some form of governmental obligation in the case of indigent defendants who cannot afford legal counsel.[258] Those accepting a plea also have a positive right to be informed of some collateral consequences under the Sixth Amendment.[259] Similarly, and as discussed above, the Eighth Amendment places an obligation on the State to provide basic medical care for its detainees.[260]

The Supreme Court has never explicitly stated that these affirmative obligations arise from a cumulative rights analysis, but the cases read as though they necessarily rest upon the liberty interest owed to detainees. Specifically, in the context of duty of care cases, the Supreme Court has recognized that incarcerated persons have substantive rights under the Due Process Clause. In *Youngberg v. Romeo*, a case involving a person involuntarily committed to an asylum, the Court stated the following:

> The mere fact that [the plaintiff] has been committed under proper procedures does not deprive him of all substantive liberty interests under the Fourteenth Amendment.

255. Instead of reverting to the existing interpretation or focusing on a particular subset of eligible jailed voters (convicted voters versus pretrial detainees), a court instead may look at the broader picture and study the nexus between the regulations that are incident to incarceration and measures being taken to ensure access to a fundamental right. For instance, because the purpose of pretrial detention may only be to ensure that the individual does not flee or pose a danger to the community, additional infringements on the individual's constitutional rights are only appropriate if they are narrowly tailored to meet the government's interest of preventing flight or danger to the community. But that does not have to have the effect of alienating convicted, yet eligible, voters where the penological goal, similarly, is not to disenfranchise.

256. *See supra* note 171 and accompanying text.

257. *See supra* notes 142–57.

258. *See supra* notes 145–57.

259. Padilla v. Kentucky, 559 U.S. 356, 374 (2010) ("[C]ounsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.")

260. Farmer v. Brennan, 511 U.S. 825, 832 (1994).

> . . . In the past, this Court has noted that the right to personal security constitutes a "historic liberty interest" protected substantively by the Due Process Clause. And that right is not extinguished by lawful confinement, even for penal purposes.[261]

Although the individual was not incarcerated punitively (rendering the Eighth Amendment inapplicable), the Court nevertheless found that when a person is incarcerated or institutionalized, the State has "a duty to provide certain services and care."[262] The Court later stated that this affirmative duty of care on the part of the State arises from "the limitation which [the State] has imposed on [an individual's] freedom to act on his own behalf."[263] These affirmative obligations provided by the State do not simply arise without recognizing the liberty interest inherent in someone who is not free to act without the assistance of the State.

Like hospitalized voters who have a physical disability, the Eighth Amendment also treats detainees as if they too have an affirmative disability.[264] For example, the duty of care that the State owes to its prisoners arises from Eighth Amendment doctrine.[265] The Court noted the following in *Farmer v. Brennan*:

> In its prohibition of "cruel and unusual punishments," the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must "take reasonable measures to guarantee the safety of the inmates."[266]

When incarceration is couched in terms of an affirmative disability, the Eighth Amendment could inform a liberty-based analysis, providing context to the severity of the harm faced by eligible incarcerated voters.

261. Youngberg v. Romeo, 457 U.S. 307, 315 (1982) (citations omitted).

262. *Id.* at 317.

263. DeShaney v. Winnebago Cnty. Dept. of Soc. Servs., 489 U.S. 189, 200 (1989) (declining to place a duty to act on the state because the harm stemmed from private action).

264. *Farmer*, 511 U.S. at 832–33; Bell v. Wolfish, 441 U.S. 520, 589–90 (1979) (Stevens, J., dissenting).

265. *See* discussion *supra* Section III.D.1.

266. *Farmer*, 511 U.S. at 832 (citations omitted); *see also* Helling v. McKinney, 509 U.S. 25, 33–34 (1993) (noting the Eighth Amendment protects against both current and future harm to inmates); West v. Atkins, 487 U.S. 42, 57 (1988) (holding that the duty to provide inmates with essential medical care was "placed on the State by the Eighth Amendment"). *See generally* Estelle v. Gamble, 429 U.S. 97 (1976) (laying out the "deliberate indifference" standard for evaluating Eighth Amendment claims).

2. Barriers to an Alternative Interpretation Addressed

One difficulty in pursuing this analysis is that the doctrinal focus in voting law has always been on the Equal Protection Clause. This, however, seems like an easy hurdle to overcome, as cases such as *Harper* that applied heightened scrutiny for a nonsuspect class relied jointly on equal protection and due process grounds.[267] The Due Process Clause is arguably the cornerstone that highlighted the inequality of a poll tax posed on voters unable to pay.[268] Similarly, and as discussed above, the Supreme Court is not unfamiliar with applying liberty-based analysis when detainees' rights are involved, recognizing that this group of individuals is particularly vulnerable and reliant on state action to facilitate access to fundamental rights.[269] To that end, there are likely other, more palatable litigation vehicles that could be used to challenge voter access for those incarcerated, including pursuing constitutional torts or First Amendment challenges.[270] Yet, these avenues, while likely to be accepted, only provide a mirage of equality. They do nothing to enforce an affirmative obligation on the State to provide access to those who cannot themselves obtain access meaningfully. These remedies ultimately never capture the gravity of the constitutional harm.

A second concern is that under the existing doctrine, hurdles to ballot access within jails have been legitimized. Courts have accepted the rationale that administrative limitations prevent the government from distributing absentee ballots too close to election day, or that security risks are too grave to establish polling centers in jails for day-of voting.[271] Instead of making accommodations to a politically unpopular group of its citizens, the State hides behind a veneer of what some refer to as "logistical and administrative difficulties."[272] Certainly, it is true that incarceration imposes many restrictions on an individual's access to rights,[273] but it does not impose any

267. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 669–670 (1966).

268. Karlan, *supra* note 21, at 491.

269. *See, e.g.*, *Farmer*, 511 U.S. at 832; Bounds v. Smith, 430 U.S. 817, 824–25 (1977); Griffin v. Illinois, 351 U.S. 12, 13, 18–19 (1956).

270. The Campaign Legal Center has been actively pursuing litigation on behalf of eligible incarcerated voters in these areas.

271. *E.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202–03 (2008).

272. Opening Brief of the Sec'y of State of Ohio at 5, Mays v. LaRose, 951 F.3d 775 (6th Cir. 2020) (No. 19-4112). This issue is not specific to voting rights but applies to many other contexts in which we see interests diverging based on race or poverty. Professor Derrick Bell argued Black citizens achieve equality only when it suits the interests of whites to afford them that equality, desegregation in schools being the prime example. Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980); *see, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

273. Price v. Johnston, 334 U.S. 266, 285 (1948) ("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.").

restrictions on affirmative steps a state must take to ensure equality.[274]

Consider an alternative argument, one that applies the same logic but replaces incarcerated voters, the politically unpopular, with a more sympathetic group: low-income students seeking a basic education.

A few months after *Mays*, the Sixth Circuit heard another case, *Gary B. v. Whitmer*.[275] The Sixth Circuit was asked this time to identify a new fundamental right: the right to literacy. Plaintiffs were students at several of Detroit's worst performing schools, which included poor classroom conditions, that amounted to "missing or unqualified teachers, physically dangerous facilities, and inadequate books and materials."[276] These schools were almost exclusively attended by "low-income children of color."[277] Plaintiffs alleged that, together, these conditions deprive the students of a "basic minimum education" (one that provides a chance at foundational literacy).[278]

In a groundbreaking decision,[279] the Sixth Circuit, ruling on due process grounds, found that plaintiffs had a fundamental right to a basic minimum education.[280] Specifically, the court held that the historical prevalence and significance of education in the United States "demonstrates a substantial relationship between access to education and access to economic and political power, one in which race-based restrictions on education have been used to subjugate African Americans and other people of color."[281] This prevalence and significance, the court reasoned, "establishes that education has held paramount importance in American history and tradition, such that the denial of education has long been viewed as a particularly serious injustice."[282] The court further pointed out that "every meaningful interaction between a citizen and the state is predicated on a minimum level of literacy, meaning that access to literacy is necessary to access our political

274. Bell v. Wolfish, 441 U.S. 520, 589–90 (1979) (Stevens, J., dissenting) (responding to Chief Justice Rehnquist's blanket assertion that "detainees may be subjected to the 'withdrawal or limitation' of fundamental rights").

275. Gary B. v. Whitmer, 957 F.3d 616, 620–21 (6th Cir.), *reh'g en banc granted, opinion vacated*, 958 F.3d 1216 (6th Cir. 2020).

276. *Id.* at 620.

277. *Id.* at 620–21, 661.

278. *Id.* at 631.

279. Although this opinion has been vacated, it is less important to note for its precedential value, and more for the strategic lawyering that occurred at the pleading stage. By reframing the constitutional harm that occurred, litigators were able to trigger additional doctrinal sources that could better realize the rights at issue. *Id.* at 629–30.

280. *Id.* at 662.

281. *Id.* at 648.

282. *Id.*

process."[283] Based on this, the court understood that the right to a basic education is implicit in the concept of ordered liberty.[284] From the history of education to the history of voting rights in our nation, the two areas of the law could not track a more similar pattern.

Moreover, like voting rights cases that were initially decided as standalone equal protection claims, education too was decided on equal protection grounds, even though it is often forgotten that *Brown v. Board of Education* was also litigated as a due process case.[285] In addition to the claim for minimum education, the plaintiffs argued that when the State compels individuals to obtain a primary education, that restriction on one's liberty triggers a duty by the State to provide a minimum level of that which the State demands one obtain.[286] Plaintiffs in *Gary B.* relied on *Youngberg* for the proposition that the State owes a duty of care to those whose liberty it restricts.[287] Although the Sixth Circuit ultimately dismissed this claim because the plaintiffs failed to provide sufficient factual allegations regarding "the extent or nature of the restraint on their liberty," the Court left the door open and seemed to agree with the reliance on *Youngberg*.[288] Nonetheless, the logic is almost parallel, but for the fact that one scenario has to do with providing positive rights to a very sympathetic group, whereas the other has to do with affirmatively clearing a path of entry to the political process for those deemed by society as less worthy.[289]

Gary B. is a pivotal example of legal interpretation that developed from a standalone doctrinal reading to an integrated analysis. The reason for this is in the pleadings. Noted many times over by the Sixth Circuit, the Supreme Court has held there is no fundamental right to a general education.[290] Such cases that made their way up to the Supreme Court, however, never plead for a basic minimum right—the idea that there must be some threshold that the State has to meet in order to ensure that deprivation of access does not become deprivation of the very right that the State requires one to obtain.

In the context of jail-voting rights, most pleadings fail to claim a basic

283. *Id.* at 649.

284. *Id.* at 642, 649.

285. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.").

286. Brief of Appellants at 38, Gary B. v. Whitmer, 957 F.3d 616 (6th Cir. 2020), *reh'g en banc granted, opinion vacated*, 958 F.3d 1216 (6th Cir. 2020) (No. 18-1855).

287. *Id.* at 36–40.

288. *Gary B*., 957 F.3d at 638, 640.

289. *See supra* note 271.

290. *See generally* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (declining to find education as a right either explicitly or implicitly protected by the Constitution).

minimum right of access to the ballot. The existing doctrinal scaffolding established by the Supreme Court's equal protection analysis can still be further developed. Though it is ironic, yet not surprising, that the Sixth Circuit blamed incarcerated voters for not taking the steps to access early voting ballots prior to their incarceration, when a few months later it addressed how important it was for states to provide minimum standards of education such that these individuals could engage in the political process.[291] The difference stems from the stigma with which incarcerated voters are viewed by courts and society at large. The hypocrisy is enough to demonstrate the need for a right to access the ballot, not just the right to vote in the abstract. Integrating substantive due process and addressing the applicability of the Eighth Amendment would act to shield incarcerated voters from state indifference that has historically left politically vulnerable and marginalized citizens disenfranchised.

CONCLUSION

The carceral system maintains historical structures that were created to discriminate. One of the few ways to remove those discriminatory structures is through political participation. Limiting political participation to those who do not suffer from the very discrimination that is stripping disenfranchised citizens of their liberty is yet another form of systemic suppression. Political participation is essential to thwart discriminatory structures and essential to the democratic process. Without access to the political process, the right to enjoy it is meaningless.

By understanding the often-fruitless lengths incarcerated voters go to in order to exercise the right to vote, it becomes apparent that the hurdles they have to clear are undeniably higher than that which the state would ever dare ask of any non-incarcerated voter. This Article presents a novel alternative interpretation to the right to vote in jails and continues a conversation on developing positive rights for detainees.

291. *Compare* Mays v. LaRose, 951 F.3d 775, 792 (6th Cir. 2020), *with Gary B.*, 957 F.3d at 642.