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Tiered Personhood and the Excluded Voter

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INTRODUCTION

The United States Supreme Court's recent decisions on voting rights have endorsed the power of states to regulate the political participation process.[1] As late as the Court's opinions in *Shelby County v. Holder*[2] and *Arizona v. Inter-Tribal Council of Arizona*,[3] the Court has recognized (again) that the power to govern elections belongs primarily to the states and that supposed federal overreach concerning elections will not be tolerated.[4] There are those who believe this trend towards deference to states concerning elections ultimately protects the political process.[5] Others see this trend, along with the fact that

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1. At the outset, it is also worth noting that the recent discourse regarding immigrant rights and regulation also focuses on this same question of the appropriate sphere of control—state government or federal authority. The federal government has traditionally controlled the immigration power, yet, as scholar Margaret Hu has argued, states in this field have effectively commandeered this power, thus shifting not only the immigration debate but also core federalism principles. *See* Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535 (2012). These laws clearly attempt to redefine the community permitted within the boundaries of the United States (and points to the ideological drive behind these laws to exclude undocumented persons deemed "unworthy"). *See* Elizabeth Keyes, *Race and Immigration, Then and Now: How the Shift to 'Worthiness' Undermines the 1965 Immigration Law's Civil Rights Goals*, 57 HOW. L.J. 899, 928 (2014) (examining the effects of shifting immigration narratives on those deemed worthy verses those deemed unworthy). This same dynamic of exclusion of the unworthy from the American community animates voter exclusion among the citizenry of the United States. Indeed, Keyes herself points to felon disenfranchisement and its racial effects as representing the same dynamic. *See id*. Exploring, at least initially, how the voter suppression dilemma and the felon disenfranchisement dilemma are dual manifestations of this worthiness dynamic is a goal of this Essay.

2. 133 S. Ct. 2612, 2623 (2013).

3. 133 S. Ct. 2247, 2253 (2013).

4. See *id.* at 2272. (interpreting the Elections Clause, U.S. CONST. art. I, § 4, cl. 1, stating that states shall have power over elections subject to such revisions that Congress may make).

5. For example, Ilya Shapiro argued that the *Shelby County* decision "restore[d] the constitutional order" that had been disrupted by the Section 5 preclearance scheme. This was justified in his view because "there is no longer systemic racial disenfranchisement . . . ." *See* Ilya Shapiro, *Supreme Court Recognizes Jim Crow's Demise, Restores Constitutional Order,* SCOTUSBLOG (June 25,

some states have sought to heighten regulations on the franchise because of illusory concerns about fraud,[6] as hyper-regulation that will effectively exclude persons of lowest socioeconomic status[7] and persecuted racial caste.[8]

While this debate over the existence, extent, and appropriate response to what Daniel Tokaji and others have called "the New Vote Denial,"[9] rages, a separate discourse is taking place about another, explicit form of voter exclusion—the disenfranchisement of convicted felons. The felon disenfranchisement literature is extensive,[10] and it

2013, 7:51 PM), http://www.scotusblog.com/2013/06/supreme-court-recognizes-jim-crows-demise-restores-constitutional-order/.

6. On the fraud issue, see, for example, Richard Hasen, *The Fake Voter Fraud epidemic and the 2012 Election*, TPM (Aug. 21, 2012 4:30 AM), http://talkingpointsmemo.com/edblog/the-fake-voter-fraud-epidemic-and-the-2012-election. This matters in large part because the Supreme Court upheld Indiana's voter identification scheme in part because of the unsubstantiated claims of the government concerning the need to secure against voter fraud. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 196 (2008).

7. I have argued that voter identification may create entry barriers to voting for persons of lower socioeconomic status. *See* Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1040 (2009) [hereinafter Ellis, *Cost of the Vote*].

8. E. Earl Parson & Monique McLaughlin, *The Persistence of Racial Bias in Voting: Voter ID, The New Battleground for Pretextual Race Neutrality*, 8 J.L. SOC'Y 75, 103–04 (2007).

9. *See, e.g.*, Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006) (discussing the applicability of the Voting Rights Act to so-called second generation voter denial claims).

10. Indeed, the literature is quite extensive, and the vast majority of it critiques felon disenfranchisement laws from a variety of perspectives. *See generally* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (Oxford Univ. Press 2006); Jessie Allen, *Documentary Disenfranchisement*, 86 TUL. L. REV. 389 (2011); Regina Austin, *"The Shame of It All": Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173 (2004); Gabriel J. Chin, *Felon Disenfranchisement and Democracy in the Late Jim Crow Era*, 5 OHIO ST. J. CRIM. L. 329 (2007); Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259 (2004) [hereinafter Chin, *Reconstruction*]; John R. Cosgrove, *Four New Arguments Against the Constitutionality of Felony Disenfranchisement*, 26 T. JEFFERSON L. REV. 157 (2004); Alec C. Ewald, *An "Agenda for Demolition": The Fallacy and the Danger of the "Subversive Voting" Argument for Felony Disenfranchisement*, 36 COLUM. HUM. RTS. L. REV. 109 (2004); George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895 (1999); Richard L. Hasen, *The Uncertain Congressional Power to Ban State Felon Disenfranchisement Laws*, 49 HOW. L.J. 767 (2006); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147 (2004); Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 J. LEGAL STUD. 85 (2004); Eric J. Miller, *Foundering Democracy: Felony Disenfranchisement in the American Tradition of Voter Exclusion*, 19 NAT'L BLACK L.J. 32 (2005); J. Whyatt Mondesire, *Felon Disenfranchisement: The Modern Day Poll Tax*, 10 TEMP. POL. & CIV. RTS. L. REV. 435 (2001); *but see* Roger Clegg et al., *The Bullet and the Ballot? The Case for Felon Disenfranchisement Statutes*, 14 AM. U. J. GENDER SOC. POL'Y & L. 1 (2006) [hereinafter Clegg et al., *The Bullet and the Ballot*]; Roger Clegg et al., *The Case Against Felon Voting*, 2 U. ST. THOMAS J. L. & PUB. POL'Y 1 (2008); Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584 (2012); Jason Schall, *The Consistency of Felon Disenfranchisement with Citizenship Theory*, 22 HARV. BLACKLETTER L. J. 53 (2006).

has most recently and interestingly taken a turn towards inventing new theoretical frames for the problem[11] of ex-felon exclusion from the polity and looking at the cumulative effects of numerous regulations for recovering one's right to vote.[12] When either voter denial by effect or vote denial by express disenfranchisement are compared with the elevated status of corporations and those individuals who can aggregate substantial funds to control elections,[13] this contrast shows that in twenty-first century America, a new era of stratification and marginalization exists that complements neoliberal legal and social policies.[14]

Yet few scholars have looked at the collective effect of this hyper-regulation upon the expressly excluded and the excluded by the hyper-regulation's impact.[15] To my knowledge, no one has attempted to offer an account of this suppression based on anti-subordination principles. The contribution of this Essay will be to offer such an account to conceptualize the voter denial problem in both its express and implicit manifestations as one of political subordination intended to exclude certain persons from the political community. This Essay will deploy the concept of "tiered personhood" to accomplish these ends.

In *Citizens United and Tiered Personhood*,[16] I claimed that a function of the Court was to define the boundaries of legal personhood as a means to create a hierarchy of those "persons" able to exercise full political rights and those "persons" who possess less of an ability to do

11. *See, e.g.*, Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111, 115 (2013) (arguing that the right to vote should be analyzed as a First Amendment claim, and therefore felon disenfranchisement should be considered a form of viewpoint discrimination).

12. *See* Jessie Allen, *Documentary Disenfranchisement*, 86 TULANE L. REV. 389, 391 (2011) (analyzing how the cumulative and onerous requirements for restoration of voting rights effectively disenfranchise ex-felons).

13. This was the end result of *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

14. I suggest this in my article. Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 748–49 (2011) [hereinafter *Ellis, Tiered Personhood*] (arguing that re-enforced racial, gender, and class stratification may be the ultimate outcome of the post-*Citizens United* political order) (citing Steven Ramirez, *The Corporatocracy and Race and Gender: Inverse Convergence Theory*, CORPORATE JUSTICE BLOG (Jan. 31, 2010, 4:32 PM), http://corporatejusticeblog.blogspot.com/2010/01/corporatocracy-and-race-and-gender.html).

15. For an example of scholarship that looks at this issue from the perspective of African Americans and citizenship theory, see E. Earl Parson & Monique McLaughlin, *Citizenship in Name Only: The Coloring of Democracy while Redefining Rights, Liberties and Self Determination for the 21st Century*, 3 COLUM. J. RACE & L. 103, 105 (2013).

16. In particular, the article offered an account of the process the Court undertakes to determine which entities deserve full legal personhood. The article also demonstrated how this process creates privileges of class, status, and race. As a result, this privilege both re-enforces the granted status, and the status then re-enforces the process of creating new legal personhood statuses. Ellis, *Tiered Personhood*, *supra* note 14, at 731–36.

so.[17] This Essay will argue that the problems of virtual voter denial by hyper-regulation and literal voter denial by felon disenfranchisement are actually expressions of tiered personhood in a two-tiered guise. This dual voter denial represents the Court's (and privileged American society's) effort to exclude voters of lowest political castes from full participation in the political community based upon assumptions of unworthiness. Because this complex of voter denial removes the right to vote from this underclass of citizens, it creates a form of diminution of the underclass's status as citizens. Through this, the Court, the federal and state governments, and societal consensus favor the literal and virtual disenfranchisement of populations that are largely poor, and mostly of African and Latino descent.

This double-barreled political exclusion is an expression of the dynamic of tiered personhood in the American legal system. To analyze this claim, the Essay will, in Part I, offer an account of the tiered political personhood dynamic geared to this problem of political exclusion. It will then turn to examine how this dynamic directly affects the marginalization of the political underclass through the disparate treatment of felon disenfranchisement (in Part II) and the disparate impact of voter suppression (in Part III). Finally, in Part IV, it will propose a broad remedy for this effect—a communitarian re-conception of the meaning of the American political community geared toward an ideology of *inclusion* along with a federal constitutional standard of liberal access to the right to vote that broadly protects the political community of American citizens. This communitarian re-envisioning of the right to vote premised on the idea of tiered personhood—and the corollary idea that such subordination ought to be opposed by federal constitutional force—requires a longer explanation than a conventional scholarly proposal. The aim of this Essay is to introduce this idea.

Ultimately this Essay claims that tiered legal personhood animated by racial, class, and political subordination is an effective heuristic to address the problem of voter suppression, and that this account can encourage deeper law by pointing us to a communitarian vision of the right to vote. But to complete this task, the Essay must first explain tiered legal personhood.

17. *Id*. at 727–29 (describing the theoretical bases for the tiered personhood analysis). It is worth noting that I am not the only scholar to recognize that "personhood" lies at the heart of contemporary constitutional and political debates and the importance of theoreticians to engage these issues. *See, e.g.*, Saru Matambanadzo, *Embodying Vulnerability*, 20 DUKE J. L. & POL'Y, 45, 48 (2012) (outlining how personhood lies at the root of numerous contested legal matters).

I. TIERED PERSONHOOD AS A THEORY OF POLITICAL SUBORDINATION

The problem of tiered legal personhood has been intrinsic to the American legal structure. The basic legal questions of "what is a person?" and "what rights are intrinsic to one's status as a person?" have endured throughout American history. They lie at the heart of the cases that have defined the United States, including *Dred Scott v. Sanford*,[18] *Plessy v. Ferguson*,[19] *Brown v. Board of Education*,[20] and *Roe v. Wade*.[21] On a normative level, each one of these cases represents a decision about who qualified as a person within the American constitutional structure, and the extent to which they were (or were not) entitled to the full scope of legal personhood including the degree of legal rights to which they were entitled.

This dynamic of mediating the tiers of legal personhood animates the Court's jurisprudence in regards to fundamental rights. As I explained in *Citizens United and Tiered Personhood*, the Court engaged in making specific decisions about the legal personhood of natural (as distinguished from "artificial") persons through a process of framing, norm creation, and then categorization of the person and status to be analyzed.[22]

The first step the Court undertakes in this analysis is to frame the question as one involving the delineation of political or legal personhood status.[23] This framing question is one that exposes the ideological motivation to create issues and to expressly allocate rights without normative justification.[24] History has shown that this is often done to serve the end of establishing broad categories that separate persons with a greater bundle of rights from persons with fewer rights.[25] Such delineation, as a historical matter, served the purpose of subordinating

18. 60 U.S. 393 (1857).
19. 163 U.S. 537 (1896).
20. 347 U.S. 483 (1954).
21. 410 U.S. 113 (1973).
22. Ellis, *Tiered Personhood*, *supra* note 14.
23. *Id.* at 730.
24. This was often the case when one looks closely at the history of the major tiered personhood cases. For example, *Dred Scott* could have been decided on narrower grounds without reaching the overarching holdings related to the constitutional nonstatus of slaves. Similarly, *Brown* could have been decided on narrower grounds including *stare decisis* to allow the "separate but equal" doctrine to continue. And, as I argue at the conclusion of *Tiered Personhood*, the *Citizens United* decision could have also been disposed of on narrower statutory grounds, yet the Court decided to reach the broad constitutional issue and thus imply that the First Amendment rights that come with corporate personhood are on par with those First Amendment rights of natural persons. *See* Ellis, *Tiered Personhood*, *supra* note 14, at 749.
25. *See generally id.* at 731–36.

some groups to the superior status of other groups. This politically motivated judicial dynamic appears to define the scope of the meaning of tiered personhood.[26]

While the framing issue may expose the inherently ideological nature of the analysis, and may not always be present explicitly, the Court nonetheless will categorize the entity presenting the rights claim as a full legal person or a person who is, for some reason, deserving of fewer legal entitlements.[27] In this context, "the Court must engage in a process of determining the form of the entity seeking rights, and then decide whether that entity fits within or outside of the accepted or privileged norm for 'persons.'"[28] This question is ultimately about the Court's desire to use the determination to enforce social norms as to classes of human beings.

This is more clearly exemplified by a brief analysis of *Dred Scott*, *Plessy*, and *Brown*. The three cases were rooted in the idea that the privileges and power possessed by "whites" was the norm—that the legal privileges of Africans were defined relative to that norm. Accordingly, rights were allocated to Africans based upon the politics the Court sought to enforce at that particular time of history. For example, the Court in *Dred Scott* enforced the absolute exclusion of Africans from the status of privilege and re-enforced the era of slavery. In what is the high water mark of the Jim Crow era, citizenship status was allowed on illusionary "equal" terms in *Plessy*. The Court then, at the start of the civil rights revolution, recognized in *Brown* that African Americans ought to be given full personhood on the basis that the exclusion represented by segregation was the ultimate harm done to African Americans.[29] In each instance, the Court: (1) found a constitu-

26. Indeed, as I explained in *Tiered Personhood*:

> By defining a question to be an absolute issue about rights, as opposed to a question that is about the issue presented, the Court has often overreached to create doctrine that may or may not have been necessary at the time. This process seems to demonstrate the importance of framing a constitutional issue—and therefore raises the constitutional personhood question—rather than resolving the legal issue through a rule with lesser impact. It suggests that the Court in these 'personhood' cases chose to draw the line where it is, and draw conclusions of law that it was not necessarily obligated to decide.

Id. at 732. The end of this framing would appear to be to articulate, establish, and enforce broader social norms.

27. *See id.* at 732–36.

28. *Id.*

29. While this is the revolution proffered in *Brown*, this relativism of legal entitlement still effectively subordinated African Americans in a number of ways. The harm *Brown* sought to remedy was segregation rather than a complete end to white supremacy. Okianer Christian Dark, Lisa Crooms-Robinson, and Aderson B. Francois have argued that this fact effectively allows the continued maintenance of systemic structures that allow advantage to white persons while sub-

tional question related to the extent of rights due under the Constitution to African Americans; and then (2) allocated rights in proportion to the acceptable norm of personhood.[30]

The result of this process is the allocation of privilege to persons through the establishment of legal relations and the structuring of rights. Specifically, this dynamic of tiered personhood defines rights relative to heteronormative white supremacy and then allocates those rights based upon the establishment of a justification to accord those same rights to persons who are not white men. Such development of a gateway of access defines not only legal rights, but the ability to amass property, capital, and political influence as well.

It is this gate keeping function—the ability to separate those who are entitled to political power from those who are not so entitled—that lies at the heart of how the tiered political personhood dynamic serves to suppress voters from marginalized communities. It is to this dynamic of political suppression the Essay will now turn. It will analyze through this tiered personhood lens the explicit exclusion of felons and then the disparate impact of heightened voter regulation.

II. FELON DISENFRANCHISEMENT AND THE DEMOCRATIC PROCESS

Tiered legal personhood takes on a particular expression when it is used to interrogate law of political participation. It takes a straightforward expression: certain voters, because of their physical characteristics, are deemed as insufficiently worthy to participate in the political process.[31] This ideology was, as a historical matter, rooted in the ideology of citizenship that prevailed at the beginnings of the republic.[32]

ordinating persons of color. *See* Anderson Francois, *Column: Commemorating Brown at 60, Pursuing Our Unfinished Agenda*, NAT'L L. J., May 27, 2014, http://www.nationallawjournal.com/supremecourtbrief/id=1202656855679/Column:-Commemorating-Brown-at-60,-Pursuing-Our-Unfinished-Agenda?slreturn=20141120190642.

30. A similar narrative could be articulated about the status of other racial groups and of women in American society. *See* Ellis, *Tiered Personhood*, *supra* note 14, at 733–35. Indeed, this frame would also be appropriate for analysis of the evolution of the jurisprudential movement towards allowing same-sex marriage. I have made a brief comparative analysis of these issues in *Reviving the Dream: Equality and the Democratic Process in the Post-Civil rights Era*, MICH. ST. L. REV. (forthcoming 2015) (noting that the evolution of the hierarchy of rights to protect LBGTQ persons is expanding while at the same time the evolution narrows the protections for people of color).

31. *See, e.g.*, JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 5 (2d ed. 2007) (defining racial subordination as "a practice of systematic ethnic subordination justified by a theory of *racial difference* . . . .").

32. *See id*. at 676–77 (summarizing the history of excluding women, minorities, immigrants, and native persons from the core political rights of citizenship and its motivation in creating a society for "free white person[s].").

To the extent that there was a vision of citizenship in the early republic, that vision of citizenship included primarily white, wealthy land-owning men. By custom, which evolved into legal tradition and then statutory mandate, women were excluded from this political structure.[33] Similarly, enslaved Africans in America were excluded as well as Native Americans and others who, by definition, were not considered citizens of the United States. Each of these groups faced a long struggle in gaining their political rights through constitutional amendment and then the effective enforcement of that amendment by legal sanction and supervision. The political process granted certain voters full status while others had boundaries set before them and were excluded either directly or indirectly on the basis of their characteristics and status within the body politic. This Essay will now offer a brief tiered personhood account of this direct disenfranchisement dynamic.

A. Felon Disenfranchisement Prior to the Civil War

Felon disenfranchisement has been an inconsistently applied rule in the United States since before the beginning of the republic. States adopted felon disenfranchisement laws for differing reasons, and their applicability varied from state to state.[34] By the Civil War, over two dozen states maintained felon disenfranchisement laws.[35]

The American origins of the rule lie in the English common law notion of civil death.[36] Under English law, a defendant who is convicted of any of an enumerated list of felonies would suffer complete removal from any privileges that he or she would have been entitled to as a citizen.[37] In other words, those who were citizens would be, upon their conviction, relegated to the effective status of ex-citizen. As a former

33. *Id*.

34. *See, e.g.*, MANZA & UGGEN, *supra* note 10, at 41–44 (discussing the racial character of the development of felon disenfranchisement laws in New York, Mississippi, and South Carolina).

35. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 63 (2000).

36. KATHERINE IRENE PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA: HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES 27–29 (2d ed. 2013) (the idea of civil death was not new at the time of the colonies. The idea that society would cast out those who have committed serious crimes dates back to ancient Roman law, and then was adopted and adapted by other European nations as time went on. In English common law, 'civil death' was carried out in the form of attainder, which stripped a convicted person of property, and civil rights. This form of 'civil death' was expressly rejected in the adoption of the U.S. Constitution, yet similarities persist implicitly in how felons are treated today.).

37. *Id.*

citizen, these persons would not be entitled to political participation, including the right to vote as well as the right to hold public office, and the right to other privileges that membership in society would entail.[38] An offender would suffer this civil death permanently unless pardoned by the Crown.[39]

This notion of civil death migrated to the United States through felon disenfranchisement laws.[40] The first of these laws was created in the original thirteen colonies in the mid to late eighteenth century, although other research locates these laws starting at the beginning of the nineteenth century.[41] On the whole, these laws required that those who committed felonies would not be entitled to vote in any election.[42] The United States Constitution of 1787, and the amendments passed prior to the Civil War, made no mention of felon disenfranchisement or any other limits on the franchise.[43] Indeed, in the original U.S. Constitution, the states were left with the power to determine the qualifications of the electors in the elections for Representatives to the House of Representatives and the choice of electors who would decide the Presidency.[44] Thus, the determination of who would be recognized to vote was left to the states.

B. Race, the Reconstruction Amendments and the "Other Crimes" Exception to the Equal Protection Clause

By the time of the Civil War, a number of states had felon disenfranchisement laws.[45] It has been argued that in some areas, race did not play an explicit role in the life of felon disenfranchisement prior to the Civil War because of the existence of the chattel slavery system in

38. PIPPA HOLLOWAY, LIVING IN INFAMY: FELON DISFRANCHISEMENT AND THE HISTORY OF AMERICAN CITIZENSHIP 4–5 (2014) (if a person was convicted they would also be disqualified from court testimony and jury service as well. An individual who committed a crime would be labeled infamous, of which there were two kinds. *Infamia juris*, or "infamy of law," dealt with the punishment of the crime, with the more degrading and public the punishment, the more infamous the person. *Infamia facto*, or "infamy of fact," dealt with the crime itself, which violated the moral code of society, and subjected the individual to a loss in reputation and status among society).

39. *Id.*

40. Alec Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1060–63 [hereinafter Ewald, *Civil Death*].

41. *Id*. at 1063.

42. *Id*. at 1063–64.

43. *See* Richardson v. Ramirez, 418 U.S. 24, 48 (1974) (noting that while it was not mentioned in the Constitution, practices of this sort continued throughout American history).

44. See U.S. CONST. art. I, § 4, cl. 1.

45. *See* KEYSSAR, *supra* note 35, at 63.

the South.[46] However, even in states where slavery did not play a role, its influence on the national political perspective was palpable.[47] Because of slavery, political power was virtually non-existent for persons of African descent living in the United States.[48] Those freed persons living in non-slave states had the power to vote, but their numbers at the time did not amount to a substantial voting bloc.[49]

All of this changed with the passage of the Fourteenth Amendment. Section One of the Fourteenth Amendment first granted citizenship to all persons "born or naturalized" within the United States.[50] This effectively made all former slaves citizens within the terms of the Constitution. Section One also guaranteed that states would provide all citizens the "privileges and immunities" of citizenship, the equal protection of the laws, and the guarantee that due process would be granted to all citizens before they may be deprived of life, liberty, or property.[51]

The framers of the Fourteenth Amendment added a clause that was meant to ensure that the ex-Confederate States would guarantee that their recently enfranchised African American citizens would be able to vote. Section Two of the amendment requires that representation in elections be "apportioned among the several states," and mandates that to the extent the right to vote is denied to any male voters 21 or over, the basis of that state's representation in Congress "shall be reduced" by the ratio of the number of male citizens disenfranchised.[52] The exception to this rule was where citizens were disenfranchised for "participation in rebellion or other crime."[53] Thus, Section Two set forward the standards for apportioning representatives, which effectively amended Article I, Section 2, Clause 3 of the Constitution. More important for our purposes, Section Two provided the first voting rights protection in the Constitution. Congress added this section to ensure that the states would not purposefully seek to discriminate against the recently freed African American population.[54]

46. *See* Ewald, *Civil Death*, supra note 40, at 1064–65.

47. *Id*.

48. *See* DERRICK BELL, RACE RACISM AND AMERICAN LAW 345–49 (6th ed. 2008) (describing history of disenfranchisement in antebellum America).

49. *Id*.

50. U.S. CONST. amend. XIV, § 1.

51. *Id.*

52. U.S. CONST. amend. XIV, § 2.

53. *Id*.

54. BELL, *supra* note 48, at 49.

The Fifteenth Amendment went further than the general guarantees (and exceptions) of the Fourteenth Amendment. The Fifteenth Amendment went so far as to explicitly outlaw any denial of the right to vote on the basis of "race, color, or previous condition of servitude."[55] Arguably, what the Fourteenth Amendment stated in a general way, the Fifteenth Amendment stated with specificity—that the right to vote could not be abridged on the basis of race.[56] Indeed, Congress proposed the Fifteenth Amendment because it feared the terms of the Fourteenth Amendment could be circumvented.[57]

C. The Development of Felon Disenfranchisement Law to the Present

The right to vote continued to expand in its application beyond the Reconstruction Amendments. The Nineteenth Amendment eliminated discrimination in voting on the basis of sex in 1920.[58] The Twenty-Fourth Amendment and the Court in *Harper v. Virginia* eliminated the poll tax as a barrier to voting in 1964 and in 1966, respectively.[59] Passage of the Twenty-Sixth Amendment aligned the voting age with the age of majority in 1971.[60]

Along with this period of transformation in access to the ballot box came an even broader period of the constitutionalization of the law of politics. In particular, the Court during the 1960s, in broad and sweeping language, declared that the right to vote was a fundamental right.[61] The Court made this pronouncement in *Harper* and eliminated the poll tax relying on both due process and equal protection guarantees. Indeed, the Court went further and articulated this same principle in *Reynolds v. Sims*,[62] and enshrined the principle of "one person, one vote."[63] By 1970, the doctrine of equal protection assured access to the ballot box for most people. Yet, with the expansion of the right to vote by structural change, felon disenfranchisement laws continued to expand in the states between the time of Reconstruction and the present.

55. U.S. CONST. amend. XV.
56. *Id.*; *see also* ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM 112 (2004).
57. *See* KEYSSAR, supra note 35, at 94.
58. U.S. CONST. amend. XIX.
59. Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).
60. U.S. CONST. AMEND. XXVI, § 1.
61. *Harper*, 383 U.S. at 670.
62. Reynolds v. Sims, 377 U.S. 533 (1964).
63. *Id.* at 558 (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963)).

Indeed, in light of the liberation of access to the ballot box, California's felon disenfranchisement law was challenged in the early 1970s. The Supreme Court heard this challenge and issued an opinion in *Richardson v. Ramirez*[64] in 1974. There, in an opinion by then-Associate Justice William H. Rehnquist, the Court held that felon disenfranchisement laws were permissible under the Equal Protection Clause of the Constitution.[65]

The opinion examined the text and legislative history of Section Two of the Fourteenth Amendment and determined that the provisions permitted felon disenfranchisement laws and placed them outside of the purview of the Fourteenth Amendment.[66] The Court also relied on the fact that felon disenfranchisement laws were in place during the passage of the Fourteenth Amendment, and that those laws were not repealed at the time.[67] Moreover, the Court pointed to other jurisprudence in existence at the time, namely *Murphy v. Ramsey*[68] and *Davis v. Beason*,[69] to demonstrate that the Court had approved of exclusions of voters on the basis of their criminal activities.[70] Given this precedent and textual analysis, the Court upheld California's felon disenfranchisement laws.[71]

This is not to say that the Court has allowed all felon disenfranchisement laws of any form. Eleven years after *Ramirez*, the Court struck down Alabama's then-felon disenfranchisement law in the case of *Hunter v. Underwood*.[72] There, in an unanimous opinion delivered by Justice Rehnquist, the Court struck down Section 182 of the Alabama Constitution which disenfranchised individuals convicted of "any crime . . . involving moral turpitude."[73] These crimes included passing

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

65. *Id.* at 56.

66. *Id.* at 54–55.

67. *Id.* at 48.

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

69. Davis v. Beason, 133 U.S. 333 (1890).

70. *Richardson*, 418 U.S. at 53.

71. Professor Gabriel J. Chin has argued that the Fifteenth Amendment was effectively repealed on this basis. *See* Chin, *Reconstruction*, *supra* note 10. Chin contends that Section 2 failed to deter Ex-Confederate states from disenfranchising African Americans. Thus, Congress abandoned Section 2's indirect approach to a more direct approach that stated in clear terms that states cannot deprive citizens of the vote on the basis of race. As a result, Professor Chin argues that the Fifteenth Amendment impliedly repealed Section 2 of the Fourteenth Amendment. *See also* SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (1998) (summarizing Chin's argument and other approaches to Section 2 of the Fourteenth Amendment).

72. Hunter v. Underwood, 471 U.S. 222 (1985).

73. ALA. CONST. of 1901, art. VIII, § 182, *repealed by* ALA. CONST. of 1901 amend. 579.

bad checks and petty larceny, while more serious misdemeanors such as second-degree manslaughter, assaulting a law enforcement officer, and mailing pornography, were not included in the law.[74] The Court reasoned that the crimes included in the law were believed by the delegates to the 1901 Alabama Constitutional Convention to be crimes more frequently committed by African Americans as opposed to whites.[75] The Court also found that under this law, blacks would be 1.7 times more likely to be disenfranchised than whites for the commission of non-prison offenses.[76] The Court struck down the Alabama law on the basis of violating equal protection.[77]

Comparing these two cases leaves us with a line drawn by the Constitution itself concerning the availability of the franchise. *Hunter* shows us that felon disenfranchisement laws must comport to the basic strictures of the state action doctrine—that the state must provide the equal protection of its laws to all citizens and thus cannot discriminate on the basis of race.[78] Yet, aside from the existence of purposeful discrimination, the state is free to implement felon disenfranchisement laws.

As the Court reasoned, felon disenfranchisement stands as an exception to the laws subject to equal protection analysis.[79] *Ramirez* excludes felon disenfranchisement from the kinds of distinctions bebetween citizens, which may result in an equal protection violation. Thus, where distinctions on the basis of race, gender, national origin, or age may serve to violate the Equal Protection Clause, distinctions based upon felon status do not.

Ramirez rests upon a narrow textual and structural interpretation of the Constitution.[80] The *Ramirez* opinion seems to neglect prudential or policy considerations through formalizing an implicit exception to the doctrine of equal protection. Furthermore, the policies behind felon disenfranchisement have also been criticized and supported based on

74. Underwood v. Hunter, 730 F.2d 614, 630 n.13 (11th Cir. 1984), *aff'd*, 471 U.S. 222 (1985).

75. *Hunter*, 471 U.S. at 227.

76. *Id.* (quoting *Hunter*, 730 F.2d at 620).

77. *Id.* at 233.

78. *Id.*

79. Richardson v. Ramirez, 418 U.S. 24, 54–56 (1974).

80. Chin would argue that a broader interpretation would be more appropriate and that *Ramirez* is inconsistent with Section 2 of the Fourteenth Amendment as well as the Fifteenth Amendment when read together. *See supra* note 71.

the effects that disenfranchisement itself has on felons and on the African American community in particular.[81]

Put bluntly, the problem here is one where the "other crimes" clause of Section Two of the Fourteenth Amendment carves out a category of persons—convicted felons—who are not granted the protections of the Equal Protection Clause to the extent of voting. It is an ingrained inequity in the Constitution. It is an inequality that the Court has thought acceptable given its textual basis. And there appears to be an enduring political consensus concerning this doctrinal choice.[82] It is a manifestation of tiered personhood via the Court's decision in *Ramirez*, rendered based upon a narrowly focused doctrinal lens, that ignores underlying concerns for equality.

It then follows that if there is an exception to the Equal Protection Clause for states who wish to disenfranchise felons, then does the existence of that exception do violence to our underlying conception of equality imbedded within the constitutional framework? Moreover, we often assume that there is a core of political equality within the context of the Equal Protection Clause. What is that core and what does it stand for? How is that core illustrated by the exception: the other crimes exception to the Equal Protection Clause?

These observations suggest that there is a deeper political theory at work within the Equal Protection Clause of the Fourteenth Amendment. That political theory appears to be based on the idea that certain citizens are not worthy of participation in the franchise due to their prior history and moral trustworthiness because they have a criminal conviction. As suggested above, this theory correlates strongly with the ideology of exclusion of African Americans from the franchise and the desire to subjugate African Americans and minorities generally as a class that might possess political power in the United States.

To state the obvious: disenfranchisement concerning formerly incarcerated felons makes those felons unequal to other citizens within the political community. Those who can participate in the democratic process have the political power where those disenfranchised do not. Indeed, those who are disenfranchised are effectively at the mercy of those who can participate fully in the democratic process. Therefore, those who are disenfranchised do not have full status as equal citizens.

81. *See* Clegg et al., *The Bullet and the Ballot*, *supra* note 10, at 6. *See also* Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"*, 102 HARV. L. REV. 1300, 1315 (1989).

82. *See* MANZA & UGGEN, *supra* note 10, at 30–34.

And because they are precluded from participation within the political process, and at the mercy of those who may not care about them, disenfranchisement creates a permanent underclass of citizenry whose interests are not heard, and who are cycled in and out of a prison system with no hope of ever effectively reengaging with society. Presumably, this creates a problem of equal protection: to allow disablement based on felon status would create two sets of citizens—those with full political rights and those who do not have such rights.[83]

Thus, we have a political system that is built on a presumption that within the political participation context, an exception for those who commit "other crimes" is allowed. It is, to say the least, an irony when compared to the larger intent of the doctrine of equal protection. It is even more ironic when compared to the practices of most other democracies in the world where felon disenfranchisement does not exist. In the United States, the difference between the two classes of people is treated as a given within our constitutional structure even though without the textual exception endorsed in Section Two and *Ramirez*, this would constitute a violation of equal protection.

What is important to recognize here is that for purposes of voting, the Constitution sanctions the creation of a permanent, discrete minority whose rights are at the mercy of the majority empowered to perpetuate the laws of the country. Moreover, this discrete minority correlates strongly with racialized minorities—specifically, African American men—who have been disenfranchised by the whim and caprice of the majority.[84] This minority appears created by a choice that may be considered rational or irrational, as discussed above.

Put another way, one can consider the doctrine laid out in *Ramirez* as an expression of tiered personhood. Felons are considered lesser political persons in the eyes of constitutional law because of the long-held view that the state ought to have a choice to practice felon disen-

83. This points us directly to the problem created by *Ramirez*: that these claims are not effectively cognizable due to the existence of such disenfranchisement at the time of the creation of the Fourteenth Amendment. While Re and Re would see this as organic within the structure of the Fourteenth Amendment and thus deem *Ramirez* correct, Ewald would deem this interpretation, even if incorrect, as inconsistent with the evolution of our modern political norms. *Compare* Re & Re, *supra* note 10, at 1592–93 (showing that the authors of the reconstruction amendments endorsed criminal disenfranchisement), *with* Alec Ewald, *Escape from the "Devonian Amber": A Reply to Voting and Vice*, YALE J. ONLINE (Mar. 25, 2013) (arguing that such focus misses the larger scope of the evolution of the right to vote).

84. At least one commentator has analogized felon disenfranchisement laws with poll taxes. *See* Mondesire, *supra* note 10.

franchisement.[85] It appears to be a norm without any justification other than a thin historical correlation used to misinterpret the text and the idea of equal protection. Moreover, this view—that felons cannot participate in the franchise due to state action—is entirely premised on the idea that, their former punishment notwithstanding, no other factors aside from their conviction have changed to destroy their status as equal citizens. Thus, it would be a violation of an intuitive notion of equality to exclude them from the democratic process. Opponents to this view argue that upon conviction of a felony, a felon is not entitled to the same rights and privileges of other citizens.[86] Felons, by this view, do constitute a special class due to the magnitude of their harm against society.[87] They have, in essence, broken the social contract, and therefore should not enjoy the privileges of participating in democratic society.[88] Otherwise, to allow felons to participate fully and equally would threaten the erroneous belief of preserving "the purity of the ballot box."[89]

Thus, one's view about felon disenfranchisement ultimately depends on how one would classify a felon. It depends on whether one sees a felon through the lens of full equality or assumes that by virtue of committing a crime, the felon belongs, permanently, in a different class of citizens. Objections and rationalizations of felon disenfranchisement can ultimately be seen as falling within these two camps—one that apparently endorses a form of tiered personhood, and another that rejects it. But it is a sad reality that in the twenty-first century, convicted felons continue to form the single largest bloc of citizenry who are legally barred from participating in elections.[90]

III. HYPER-REGULATION OF THE DEMOCRATIC PROCESS

This Essay now turns to another dynamic of exclusion, the implicit exclusion that takes place due to the hyper-regulation of political participation. Unlike the express exclusion of the convicted felon from the political process, the dynamic that is at play here is one of privileging state regulation over the interests of voters burdened by significant

85. *Cf.* Richardson v. Ramirez, 418 U.S. 24, 53–56 (1974).

86. Clegg et al., *The Bullet and the Ballot*, *supra* note 10, at 17–18.

87. *Id.* at 18.

88. *See* Note, *supra* note 81, at 1304–07.

89. Keyssar, *supra* note 35, at 163 (quoting Washington v. State, 75 Ala. 582, 585 (1884)).

90. *See id. at* 308. It is worth noting, however, that there has been a substantial movement afoot to remedy, or at least mollify, the effects of this.

added regulation on the political process. Modern examples of this include most notably voter identification laws, but also includes gerrymandering, which is an issue not addressed in this Essay, but is an effort by the state to hold onto voting bloc power at the expense of voting bloc minorities.[91]

Yet, as I have argued elsewhere, these rules often have the effect of burdening the poor, particularly poor people of color, in the political process.[92] As advocates have argued, this creates a dynamic of exclusion that harkens back to the era of Jim Crow to the extent that it imposes cumulative burdens on the right to vote that fall disproportionately on the poor and minorities.[93] This dynamic also sends an expressive message about the right to vote that might appear to some as election integrity, but to others as a view that the political majority does not welcome their vote. Proponents of heightened election access would argue that these measures are necessary to promote election integrity and to allow the citizenry to have confidence in the process.[94]

The dynamic of tiered personhood is again at play in a way similar to the felon disenfranchisement forces described above. It is, in essence, privileging the majority with the power to define the rules of the political process without necessarily having to consider the burdens placed on the minority that would be adversely affected by these rules.[95] The majority is once again granted power and that power is reenforced by reference to those excluded, and the effects on the minority are—in this variation—ignored or rendered invisible. Rendering invisible the political underclass, which cannot afford the indirect costs of the heightened regulations, amounts to a kind of de-privileging that again creates a hierarchy of those who effectively have full rights and those who do not.

At the heart of this view is the idea that there is a utilitarian calculus driving the Court's view of the right to vote. The calculus places the

91. For the most recent issue concerning racial gerrymandering, see generally *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227 (M.D. Ala. 2013), *cert. granted*, 134 S. Ct. 2695 (Jun. 2, 2014).

92. *See* Ellis, *Cost of the Vote*, *supra* note 7.

93. *Id.*at 1041–44.

94. *Id.* at 1051.

95. This is an expression of the classic dilemma of the tyranny of the majority. For a classical discussion of this issue in American politics, see ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 239–42 (Henry Reeves trans., 1862). For a modern discussion rooted in advocacy for race conscious election law remedies, see generally LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994).

doctrinal concern in this field on the state's interest in efficient election administration and little emphasis on the need to insure open access to the franchise by all those who are eligible (despite any inefficiencies).[96]

This argument is premised on the notion that the right to vote is precisely that—a right. This right's allocation requires that the interest of voters, including voters who are potentially excluded from the franchise, should be the first motivating interest in thinking about the law and policy of election administration. The current approach ignores the disparate impact that correlates with communities of poverty, particularly those communities that are of color. And as a result, the disparate impact of a neutral law of general applicability replicates tiered personhood political exclusion.

Moreover, the risk of fraud that motivates those who seek to make voter identification laws more stringent lacks little if any evidentiary basis, yet creates a convenient justification and fearful climate for this hyper-regulation.[97] Indeed, it seems more accurate to say that legislators who are passing these laws are doing so on the basis of ideology rather than an accurate assessment of the risks and the benefits of implementing stringent voter identification laws.[98] Legislatures who are undertaking this change have failed to adequately undertake the utilitarian calculus that voting rights jurisprudence suggests is required. The voter's—specifically, the marginalized voter's interest—is rendered invisible, and that voter, to the extent that they cannot pay the cost of voting, is excluded from the franchise. This Essay will turn to both manifestations of this dynamic.

A. The Hyper-Regulatory Calculus behind Modern Voter Participation Jurisprudence

This discussion starts from a relatively simple premise: the right to vote is precisely that, a fundamental constitutional right, and there is broad consensus that each enfranchised American citizen possesses this right.[99] But the right to vote is a peculiar right for three reasons.

96. For an extended treatment of this idea, see Atiba R. Ellis, *A Price Too High: Efficiencies, Voter Suppression, and the Redefining of Citizenship*, 43 SW. L. REV. 549 (2014) [hereinafter Ellis, *Price Too High*].

97. Atiba R. Ellis, *The Meme of Voter Fraud*, 63 CATH. U. L. REV. 879 (2014) [hereinafter Ellis, *Voter Fraud*].

98. *Id*. at 911–13.

99. Scholars may ultimately contest whether the right to vote is truly treated as "fundamental." *See e.g.*, Joshua A. Douglas, *Is the Right to Vote Really Fundamental*, 18 CORNELL J. L. & PUB. POL'Y 143 (2009); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L.

First, the scope of the right to vote is not described in the Constitution, like the right to free speech, the right against self-incrimination, or the right to just compensation for a taking of property.[100] To the extent that the right to vote is defined in the original text of the Constitution, it is defined with reference to the qualifications for voting as dictated by the states.[101] At the same time, the Constitution, via the Elections Clause,[102] allocates power not only to the states to define voting regulations, but also to the federal government to provide oversight of those regulations.[103] Thus, the Constitution does not define the content of the right to vote, but it does set up a framework by which the right to vote may be regulated. Of course, implicit in this explanation is the second reason why the right to vote is distinguishable from other fundamental rights. Third, from the founding of the republic, the right to vote was defined by each state's legislative and administrative boundaries.[104] Thus, unlike these other rights, which are designed to protect the individual from intrusion into their personal sphere by governmental interference, the right to vote of each individual citizen does not become extant without the government's provision of a structure through which the vote might be cast.

This raises the question of to whom the right to vote belongs—to the individual citizen herself, or to the political community as a whole, or to some combination of the two.[105] The question often dictates the nature and extent to which one may both theorize about the right to vote and define exactly what kinds of rules ought to derive from those theories. This is a hotly debated tension, and seminal to understanding the right to vote problem.[106]

REV. 1663 (2001); Terry Smith, *Autonomy Versus Equality: Voting Rights Rediscovered*, 57 ALA. L. REV. 261 (2005). However, the Court has nonetheless made voting fundamental, at least rhetorically, in its jurisprudence. *See, e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966).

100. *Harper*, 383 U.S. at 665.

101. *Id.*

102. *See* U.S. CONST. art. I, § 4, cl. 1.

103. *See* Arizona v. Inter-Tribal Council of Ariz., 133 S. Ct. 2247, 2257 (2013).

104. Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 51 (1959).

105. Heather Gerken and Joseph Fishkin have both recently argued that the right to vote should be conceptualized as part individual and part communal. *See* Gerken, *supra* note 99, at 1668 (arguing that vote dilution claims are not satisfied by a highly individualistic approach to election law, but are better served by an aggregate rights approach using a strict scrutiny standard). *See also* Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289 (2011) (noting that the right to vote is invaluable to the individual voter while at the same time possessing components which are more appropriately collective in nature).

106. Ellis, *Cost of the Vote*, *supra* note 7, at 1030–36.

Beyond these theoretical considerations, however, the right to vote historically has been subject to the same kind of majoritarian dominance that sought to exclude "unworthy" voters. These lines were drawn to exclude certain voters specifically (disenfranchised felons, as we have seen earlier) and to make the entry costs on other potential voters so high as to make impossible their participation in the electorate.[107]

The property requirement represented the first of these barriers. To have standing in the political community, one had to have land in the community.[108] Having property was an indicator of ability and involvement in the community sufficient to be worthy of exercising the right to vote.[109] Thus, in the seventeenth and eighteenth centuries, this ability to demonstrate the power to purchase land or chattels (which, by the way, included people) marked status of citizenship.[110] This qualification standard privileged white, landed men as the primary holders of the franchise (though there is historical evidence that in some states, especially before the Civil War, free blacks were allowed the franchise as well).[111]

Over time, however, the American economy shifted from a land-based agrarian economy to one based on industry and the exchange of goods and the ability to earn a salary and invest one's capital. A population of people (again, mostly white) developed whose capital was not invested in land. So the nature of the prevailing economic indicator changed; but the idea that an economic entry barrier should exist to exercise the franchise remained.

Enter the poll tax. In the early to mid-eighteenth century, rather than have ownership of land be the entry requirement to voting, states developed the view that the ability to pay a tax was an appropriate measuring stick for who ought to be allowed the vote. One had to pay a tax and meet rigorous reporting requirements in order to be allowed to register and to vote on Election Day. The poll tax came about towards the mid-nineteenth century, and it endured until the mid-twentieth century.[112]

107. *See* KEYSSAR, *supra* note 35, at 61.
108. *See id.* at 5.
109. *Id.* at 1038.
110. *Id.*
111. *Id*.
112. KEYSSAR, *supra* note 35, at 111.

The poll tax requirement, however, was subject to manipulation. Governments across the ex-Confederate South chose the poll tax as the means to exclude African Americans from the vote. They supposed that most African Americans were poor, and thus the application of the poll tax would serve as an effective barrier to them voting.[113] Further, they realized that to the extent it had an effect on poor White voters, those voters would occasionally be granted reprieves, or the outright voter fraud of being allowed to vote though they did not pay the tax.[114] In this way, the Jim Crow south governments used the poll tax requirement to shape the scope of the right to vote.

The tax suffered a long demise due to another period of economic transformation—the Great Depression—which caused disaffection with this form of economic discrimination. Poll taxes fell in many states due to popular referenda or pressure on state governments.[115] Yet, the tax remained in several states. The groundswell of the Civil Rights movement of the 1950s and 1960s ultimately resulted in the Twenty-Fourth Amendment[116] and the Supreme Court decision in *Harper v. Virginia*.[117] These two pieces of constitutional law struck down the poll tax in federal and state elections respectively. In *Harper*, the Court's majority stated explicitly that the poll tax bore no rational relation to the ability to vote because it singled out wealth as a qualification for voting.[118] Thus, under *Harper*, an individual's right to vote cannot be denied on the basis that the individual is unable to pay for access to the ballot. Class barriers to the right to vote—a right that apparently belongs to the individual—are unacceptable.

Though this standard of individual rights would protect the voter from having to pay the government a tax or an expense to obtain access to the ballot, this standard does not prevent a balancing that would force the voter to have to pay an indirect cost of voting. The *Harper* constitutional standard does not apply where there is no express denial of the right to vote. Under a lower balancing test that applies to arguments of harm to the right to vote based solely upon the effect of a facially neutral governmental policy, the courts apply a utili-

113. *Id*. at 1043–44.
114. *Id*. at 1041.
115. *Id*. at 1043–44.
116. U.S. CONST. amend. XXIV.
117. Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).
118. *Id.* at 668 ("Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored.").

tarian approach to determine whether an election regulation is constitutional. In the seminal case of *Burdick v. Takushi*, the Court held that in analyzing vote denial claims where the law does not expressly delimit the voter's access:

> A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'[119]

This constitutional analysis has been used in *Crawford v. Marion County* to uphold voter identification laws.[120] Such laws have been rationalized on the basis that there is a risk that ineligible voters will overwhelm the electoral process and create a result not intended by the majority of eligible voters. It would follow, according to proponents, of voter id laws, if some voters are excluded because they lack proper identification this nonetheless benefits the democratic process because ineligible voters would also be excluded. Thus, incidental exclusion of some to allow the voice of the many to be heard is an acceptable loss.

This analysis ignores the fact that voter identification laws impose indirect costs—costs greater than that of the current regime of voter identification through various verifiable types of governmental or quasi-governmental documentation. Indirect costs are the transactional costs a voter has to expend to become eligible to vote, but the costs are not paid to the government since they are not costs associated with the actual casting of a ballot.[121] Those costs include the cost related to a person identifying him or herself, whether through obtaining a government-issued photographic identification card such as a driver's license, passport, employment card, or some other related type of card; proving one's citizenship; proving one's current address; proving one's location of birth; or other requirements that relate to this proof.[122]

Because the costs are so high to those of lowest socioeconomic status, the disincentive cannot be overcome simply by transforming one kind of indirect cost of voting into another indirect cost. The cost still remains, and for the voter who does not think that there is a bene-

119. Burdick v. Takushi, 504 U.S. 428, 434 (1992).
120. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 210–11 (2008).
121. Ellis, *Cost of the Vote*, *supra* note 7, at 1035.
122. *Id.*

fit to participating and who is, moreover, overwhelmed by the nature of the cost exacted, that person will be effectively excluded from the electorate because that person will choose not to vote.

As a result, the structure of the electoral system has the effect of excluding poor voters who are unable to afford the costs of participating even though the explicit rhetorical doctrinal view is that all voters may participate. This structural disenfranchisement, due to the complex interaction between the direct and indirect costs exacted upon voters for participation in the electoral system, effectively marginalizes and makes invisible those who cannot bear the cost of the vote.

B. The Shelby County Revolution: Crippling Race-Conscious Remedies

As a matter of neutral balancing, voter identification laws pose a cost to the political underclass. Where that class is disproportionately affected on the basis of race, the Voting Rights Act (VRA) served as a mechanism to provide a remedy for such harms. Because of this, one might look to the VRA, as we once looked to *Harper*, as a mechanism to include the person excluded on the basis of race into the franchise. We turn now to consider the VRA and how the recent decision in *Shelby County v. Holder* might be considered through the lens of tiered personhood.

The VRA served as a means to prevent disenfranchising activities like poll taxes and other forms of express vote suppression. A long line of literature exists concerning the two primary mechanisms by which this protection was provided under the VRA: First, Section 2 provided a general prohibition against laws that discriminated, either by effect or explicit intent, on the basis of race.[123] Second, Section 5 of the VRA required certain states with a history of discrimination in voting to submit their election laws to the Department of Justice for preclearance (or preapproval) in order to insure that those laws would not cause harm to the voting rights of minority voters.[124] Whether a state was subject to preclearance was determined by a formula set forth in Section 4(b) of the VRA.[125]

Shelby County ended Section 5 preclearance for the foreseeable future. In *Shelby County*, the Court declared Section 4(b) of the VRA un-

123. Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2619 (2013).
124. *Id.* at 2618–20.
125. *Id.* at 2618.

constitutional on the grounds that this provision did not reflect modern conditions in the South in regards for voting.[126] Chief Justice John Roberts' opinion for the majority reasoned that each state is due "equal sovereignty," that is each state has power to regulate matters left to the states, including voting, to the same extent as other states.[127] The opinion then reasoned that substantial justification was required to diminish this equal sovereignty. The Court went on to hold that "the conditions that originally justified [the preclearance measures that justified differing treatment of states] no longer characterize voting in the covered jurisdictions."[128] Roberts pointed to substantial progress in voter participation and the increase in minority-elected officials in the time from the passage of the act until now.[129] The Court reasoned that the Section 4(b) formula does not reflect this reality: "Coverage today is based on decades-old data and eradicated practices. . . . Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. There is no longer such a disparity."[130]

Justice Ginsburg dissented. She argued that the Court failed to give Congress adequate deference given its broad authority to legislate under the Fifteenth Amendment.[131] She also rejected the "equal sovereignty" claim of the majority since it was a doctrine that pertained to admission of new states into the United States.[132] Ginsburg also contested the majority's view that the racially discriminatory practices did not affect elections in either Shelby County or in the United States.[133] She recounted the evidence that Congress had amassed on modern voting discrimination as being sufficient for continued application of the coverage formula as reauthorized.[134]

By leaving it to Congress to create a new coverage formula,[135] the Court has rendered Section 5 ineffective. This relegates the ability for

126. *Id.* at 2631.
127. *Id.* at 2623.
128. *Id.* at 2618.
129. *Id.* at 2619.
130. *Id.* at 2627–28.
131. *Id.* at 2638.
132. *Id*. at 2649.
133. *Id.*
134. *Id.* at 2642–44, 2652.
135. In commenting in the immediate aftermath of *Shelby County*, I opined that because of "the hyper-partisan nature of national politics, it is difficult to imagine how the current Congress or any Congress elected in the foreseeable future would agree on a new coverage formula." Atiba R. Ellis, *Shelby County, AL v. Holder: The Crippling of the Voting Rights Act*, WVU COLL. OF LAW (June 28, 2013), http://law.wvu.edu/news/2013/6/28/ShelbyCounty-vs-Holder. At the time, the

plaintiffs to remedy voting rights to Section 2. Such plaintiffs would have to endure the costs and time-consuming efforts involved in private litigation. Moreover, such plaintiffs will have to endure the possibility of multiple elections passing while the claims go through the litigation process. The result will be that plaintiffs, even if ultimately successful on the merits, will face the possibility that their political interests will nonetheless suffer.

C. The Ideology of Voter Suppression: Post-racialism, Invisibility and the Myth of Fraud

An ideological thread that fits within the mold of tiered personhood runs between these apparently separate problems of modern voter suppression. This trend is that hyper-regulation of the vote in the name of exercising efficiency has the effect of stifling participation by the poor, particularly poor people of color, and thus re-enforcing the existence of a political underclass.

This begins with the balancing required by *Burdick*.[136] It renders invisible the voter who cannot bear the cost of the vote due to the costs required to authenticate a voter's identity. These voters are not expressly excluded, yet they do not have the means through the doctrine as it presently stands to make their voices heard. The exclusionary effect and the barriers created by these disincentives are ultimately a product of the hyper-regulation of the political process made possible by effectively placing the state's interest ahead of the interest of all the voters. In this sense, voters otherwise entitled to the exercise the right are dissuaded from voting. The *Burdick* decision is a catalyst for this process.

This process is re-enforced by the ultimate, but clearly false, justification for these laws—that rampant voter fraud is playing havoc with the process of voting. Certain policy and opinion leaders have argued—without facts—that there is a threat of voter fraud against which election infrastructure should be secured through the implementation of voter identification laws, curtailing early voting, and other methods of hyper-regulating the political process.[137] In other work, I

Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. (2014), had been proposed. It failed to be passed by the 113th Congress, and there is no evidence to suggest that the 114th Congress will entertain updating the Act. For the foreseeable future, the coverage formula is void, as is Section Five preclearance.

136. Burdick v. Takushi, 504 U.S. 428, 434 (1992).

137. Ellis, *Voter Fraud*, *supra* note 97, at 899–900.

related to voter fraud that is a belief that replicates and evolves by force of its compelling nature.[138] Its persistence justifies and fuels the voter suppression movement.

Moreover, *Shelby County* reinforces the trend towards more voter suppression by hyper-regulation in two disturbing ways. First, because the Court relied on the doctrine of "equal sovereignty" between the states as a doctrinal measure by which the constitutionality of Section 5 ought to be measured, it effectively endorsed the notion that states' "rights" should, in the federalism balance, be put ahead of the powers given the federal government under the Elections Clause and the Fifteenth Amendment to regulate the democratic process.[139] Thus, as a structural matter, the authority of the political branches to regulate the political process has been stifled due to this resurgence of state's rights ideology.

The second problem of *Shelby County* is that it represents the imposition of post-racial ideology. The opinion itself reasons, on the basis of a narrow (and incomplete) conception of racial progress in voting, that the South has changed, and therefore Congress should have changed the formula for deciding which states should be supervised to determine if they are discriminating on the basis of race.[140] This suggests that the heuristic for measuring racial voter suppression is that of the suppression that existed in 1965. The unspoken claim is that we live in a post-racial world, a world not dominated by American apartheid, and that is sufficient to show that Congress has overstepped its constitutional role.

As we have seen in our brief discussion of voter identification, this racial progressivity narrative is at odds with the nature of second-generation voter denial claims and the demographic reality of twenty-first century America. Both voter identification laws and felon disenfranchisement laws represent an enduring barrier to the franchise that falls disproportionately on racial minorities. These barriers have bred distrust concerning the electoral process, especially among minorities, despite the race-neutral rationale that these policies promote election integrity. This conflict has clearly created cynicism among some concerning the underlying integrity of the right to vote as it pertains to minorities.

138. *Id*. at 892.
139. Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2622–23 (2013).
140. *Id.* at 2625–26.

Put together, what we see is the effective tiering of legal rights (and the tiered legal personhood of those who hold those rights) based on ideological shifts. Those who are deemed unworthy through the fact of their criminal conviction are excluded from the political process expressly. Those who are deemed unworthy due to their class status (particularly where that status correlates with their racial status) are rendered invisible due to the cumulative burdens that hyper-regulation of the political process generates. And the remedies for these problems as they affect people of color are hamstrung based on an ideology of post-racialism.

IV. CONSTITUTIONALIZING THE RIGHT TO VOTE: A COMMUNITARIAN, ANTI-SUBORDINATIONIST PROPOSAL

This Essay has strived to show that the ideological roots of disenfranchisement represent a transformation of legal personhood akin to the creation of an entrenched underclass premised on excluding the unworthy voter from the franchise. As we have seen in the example of felon disenfranchisement, the legal and political culture of the United States made a judgment about the worthiness of persons convicted of a felony—a judgment of exclusion. This doctrinal exception to the doctrine of equal protection has endured, and the Supreme Court has validated it time and again. Similarly, the efforts to suppress the vote of poor and largely minority voters over the past decade have proceeded upon a similar assumption of unworthiness. Yet unlike the express exclusion of felons, the suppression of poor voters unable to afford the indirect cost of voting has happened through an ideology based upon the notion that those unable to pay for the vote should be excluded as unworthy.

The Court's doctrinal view is blind to this concern, and by rendering these persons invisible to the law, those motivated to suppress their participation have continued to attempt to do so. Ultimately, this dual modern-day tiered personhood problem is one of assumptions about the political underclass imbedded in the doctrine of the right to vote coupled with the ideology of post-racialism.

Tying these concerns together is the problem of majoritarian tyranny. From a jurisprudential standpoint, the dilemma comes down to a conception of the political community based upon the ideological beliefs of the majority concerning setting standards that insure that only worthy voters may participate in the political process. It is one of the core problems of the democratic process itself—how to address the

dilemma of when the majority crafts the democracy to benefit itself rather than allowing access even to a minority with which it disagrees, or as in the twin dilemma of voter suppression, with which it fails to identify.

Given this root of the problem, the bud of a solution must begin with remaking the American idea of the political community. If the argument of this Essay is to be believed, the American political community is one where an individual citizen must be able to pay to play. Moreover, despite the racialized effects that policies like felon disenfranchisement and hyper-regulation of the voting process have on racial and socioeconomic minorities in the United States, these barriers exist and the problems they exacerbate are only complicated and costly shields for problems that arguably do not exist. Inequality persists at the margins; this fact cuts against the progressive narrative about liberty, justice, and fairness for all that Americans trumpet about our democracy.

In short, we modern Americans proceed from the assumption that democracy and exclusivity not only can co-exist, but that they must co-exist in order to preserve the political community. We must uproot this assumption. We presume that an ideology of exclusion is the core means of preserving its existence, and thus our doctrine defers to such exclusion while ignoring the effects—real or perceived—of such targeting.

We must, as a theoretical step in the direction of overthrowing the jurisprudence of exclusion, articulate a political philosophy of inclusion and thus rewrite the account so that inclusion is seen as a more important democratic value than exclusion. This requires interrogating the core values of creating an "other" in our political community beyond the basic requirements of citizenship, age of majority, and residence in a particular political subdivision. These minimal requirements for the right to vote are related to the core purpose of a political community—tying its members together in a way that represents a common denominator of citizenship, belonging, rootedness, and connection with our neighbors to insure the status necessary to allow one to share collectively with others the responsibility for democratic governance. The question then becomes whether, and to what extent, does status as an ex-felon, inability to pay the indirect cost of voter access, or the other issues related to the dilemma of voter exclusion relate to these core values. I contend they are not related.

Ultimately, as a conceptual matter, I am arguing for a communal vision as to how to decide who does and who does not belong to the American political community premised on inclusiveness. Such a vision ought not to be tied to partisan assumptions or assumptions rooted in old discrimination based upon prior history or current wealth; it ought to represent a democratic value for all those who are free to move about the political community and have a voice in it. This is the normative component of my proposal. It follows from this normative view of elevating inclusiveness as the prime democratic value in the American political community that a doctrinal shift is necessary to protect the vulnerable political underclass as this transformation in our core assumptions takes place. Such a doctrinal shift would, nonetheless, be an expression of this core value and be a first step in manifesting that value in American political culture.

The doctrinal intervention I propose is this: the underlying structure of the right to vote must shift to favor the marginalized. Thus, I propose that a new constitutional federal standard—liberal access to the right to vote—should be created.[141] By liberal access,[142] I mean that the only delineation for the right to vote would be age, residency, and citizenship status, without any other requirements or limitations.[143] To achieve this standard, the government would be required to bear the burden of justifying regulations that might have a tendency of excluding any voter coupled with a showing of need based on evidence proffered by the government. This proposal would have to be implemented

141. Certainly, I am not the first person who has proposed a federal constitutional amendment relating to the right to vote. Moreover, Guy-Uriel Charles and Luis Fuentes-Roher have recognized in the VRA context that one model around which one might create a consensus around voting rights is a universalist position. *See* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, DUKE L. SCHOLARSHIP REPOSITORY 44 (2014), *available at* http://ssrn.com/abstract=2377470 (Indiana Legal Studies Research Paper No. 278). My proposal, however, is rooted in the communitarian vision I articulated above, as a means to counter the subordinationist ideological effects of the exclusion this essay has sought to articulate. In this sense, my proposal seeks to use race-conscious anti-subordination theory as a means to examine the problem, and then apply this progressive approach to implement a solution.

142. State constitutions have articulated the idea of liberal access to the electorate and may serve as a model for how to craft this doctrinal intervention. For an exploration of state constitutional right to vote doctrine, see Joshua A. Douglas, *The Right to Vote under State Constitutions*, 67 VAND. L. REV. 89 (2014).

143. But it is also worth acknowledging here that the fear of noncitizen voting often drives these concerns and thus forms a strawman against which the hyper-regulation of the electoral process is justified. *See* Ellis, *Voter Fraud*, *supra* note 97, at 900. This contributes to the larger ideology of exclusion both in relation to the political community domestically and in relation to the national community that includes all persons present in the United States. Exploring this intersection as illustrated, *supra* note 1, will be another component of the larger project contemplated here.

by constitutional amendment. But by doing so, it would root out the problems that devolve from ideologically driven decisions that have the effect of creating tiers of citizenship—those who may participate, those who are too burdened by the cost of voting to participate, and those who are excluded altogether.

From this proposal, it would follow that direct disenfranchising mechanisms—like felon disenfranchisement—should be limited to the period of imprisonment and other penal supervision (if it should exist at all) because no basis in evidence exists that a harm from felon voters after they re-enter society would result to the electoral system.[144] Indirect disenfranchising mechanisms—like voter identification laws—under the liberal standard, should be employed only after showing a substantial need justified through evidence proffered by the government (rather than a conclusory assertion of a "voter fraud" or other dilemma that lacks evidence). Alternatively, if such mechanisms are required, the government should bear the whole of the burden of implementing them. By this, I mean that the actual voter identification should be free, and the means of authentication (birth certificates, residency proof, etc.) should also be free and as easily available as possible to the voter. In these ways, the government would ultimately be required to affirmatively allow *all* citizens to vote unless there was a compelling reason based on evidence (rather than ideology) to prevent said citizen's voting.

CONCLUSION

I have argued for two major interventions in the American law of democracy: a clear articulation of inclusion as a democratic value within the American body politic coupled with a doctrinal innovation to-

144. Indeed, it is fair to question whether there is any harm at all in allowing felon voting. Two states in the United States allow it. *Felon Voting Rights*, NAT'L CONFERENCE OF STATE LEGISLATURES (July 15, 2014), http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx. One might argue that such exclusion during the period of punishment is, in essence, punishment due to a felon for the time they are under state supervision. But even that would suggest punishment based on status and not on criteria that merely reflect one's position in the political community. This raises the ultimate question of whether exclusion from the political community ought to be considered legitimate punishment in and of itself. While a more traditional American view on this would suggest that such exclusion, even if temporary, is necessary to give the notion of punishment meaning, one could also envision a communitarian view that would see exclusion of a convicted felon during their period of punishment as a missed opportunity to aid in the rehabilitation of such a person. I take no position on this issue as it lies beyond the scope of this Essay. I simply point out that it is another significant issue to be theorized and examined concerning the nature of the political community as part of the larger project contemplated here.

wards a right to vote grounded in truly liberal access to the ballot for all citizens. This ought to be grounded by a constitutional standard for election law changes that replaces the *Burdick* test to the extent that it will require the government to justify regulations that have a tendency to exclude voters with proof that there is a present need for the change. Without such a radical move at this moment in history, this twenty-first century form of tiered personhood—the normalized subordination in the democratic process of those who lie at the intersection of race and class—may become immovable. The result may be that, as at least one scholar has observed, the Second Reconstruction could be undone.[145] This period of history, as it relates to inclusion and exclusion, may be thought of as analogous with the Jim Crow era for its willingness to exclude otherwise eligible citizens from the political community on the basis of being part of the political underclass.

This Essay has provided an analysis of the problem we face and a mere sketch of a framework that would be necessary to reach the proposals suggested here. Further theoretical work will be necessary to articulate this political philosophy of inclusion as well as this legal standard of liberal access to the vote. The theoretical ought to be intertwined with the doctrinal so that the ultimate law reform that may result represents substantial equality in the way our procedures allow access to the polls for all citizens.

I realize that our biases against ex-felons, the poor, and minorities are deeply engrained. One might even claim that this proposed project is quixotic in nature. Yet, the American vision contains a promise of a government that is "of the people, by the people, for the people."[146] This deepest aspiration is not qualified by race, gender, class, or status. If we are serious about achieving this end, we must make the marginalized visible, and we must insure that their voices can weigh equally with all other voices in the body politic. This Essay attempts to point towards this end and to suggest a theoretical framework to uncover the subordination of the political underclass. Ultimately the development and implementation of this framework would serve to ensure that all citizens might be included in our democratic republic.

145. *See, e.g.*, Luis Fuentes-Rohwer, *Is this the Beginning of the End of the Second Reconstruction?*, FED. LAW., June 2012, at 54, 57.

146. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *in* ORATION AT GETTYSBURG 40 (Baker & Godwin eds., 1863).