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KEYNOTE

CONSTRUCTING THE FRANCHISE: CITIZENSHIP RIGHTS VERSUS PRIVILEGES AND THEIR CONCOMITANT POLICIES

*Michelle D. Deardorff, Ph.D.**

I. INTRODUCTION

Access to the ballot has been a contentious issue in American politics since our very founding as a nation,[1] and for good reason. In a representative democracy, those who are empowered to elect the officials who will govern and rule are the very ones who determine which competing political value will be the basis for public policy. Over time, the nation has extended the franchise to groups regardless of gender,[2] race,[3] national origin,[4] native language,[5] literacy,[6] religion,[7] and property status.[8] The debates surrounding these decisions have been contentious and continue to

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1. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 363-67 (2000) (relating the evolution of the provision of suffrage throughout American history).

2. *See generally* ELLEN CAROL DUBOIS, WOMAN SUFFRAGE AND WOMEN'S RIGHTS (1998); ROSALYN TERBORG-PENN, AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850-1920 (1998); *and* MARY WALTON, A WOMAN'S CRUSADE: ALICE PAUL AND THE BATTLE FOR THE BALLOT (2010).

3. *See generally* RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT (2004); CHRISTOPHER MALONE, BETWEEN FREEDOM AND BONDAGE: RACE, PARTY, AND VOTING RIGHTS IN THE ANTEBELLUM SOUTH (2008) (analyzing the extension and retraction of the right to vote to African Americans between the founding of the United States and the Civil War); *and* Richard J. Timpone, *The Voting Rights Act and Electoral Empowerment: The Case of Mississippi*, 78 SOC. SCI. Q. No.1 (Mar.) 177-85 (1997).

4. IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (see specifically chapters 2 and 3, which examine how citizenship's construction by "whiteness" impacted the determination of voting privileges for immigrants from differing national origins as our immigration policy and domestic fears changed over time).

5. KEYSSAR, *supra* note 1, at 145, 260, 267; *see* Katzenbach v. Morgan, 384 U.S. 641 (1966).

6. KEYSSAR, *supra* note 1, at 141-46.

7. *Id.* at 85-87; DAVID SEHAT, THE MYTH OF AMERICAN RELIGIOUS FREEDOM 27 (2011) (looking at religious barrier to elections, civil rights, and enfranchisement based on religion).

8. KEYSSAR, *supra* note 1, at 340-48.

be so well into the twenty-first century.[9] One reason for these battles is the inherent conflict within American political thought over the relationship between suffrage and citizenship.[10]

This essay focuses on the current questions surrounding the issue of access to the ballot through the lens of the debate as to whether voting is a right or a privilege of citizenship. I suggest that we have at least two models of this relationship and that the arguments we have relative to voting policies are actually over a deeper theoretical conflict over right versus privilege. The construction of the franchise in the public debate has an immense impact on the types of voting policies that seem appropriate to the general public. A person who believes that voting is a right secured by citizenship or residency in a democratic nation would argue that access to the ballot is fundamental and should be strongly protected both by the Constitution and through statutory law.[11] For these individuals, any barrier to the ballot—be it an identification card, complicated registration processes, or the potential of losing the vote—is a badge of "second-class citizenship" and a threat to democracy.[12] On the other hand, individuals who assume that voting is a privilege, which only certain citizens should exercise as a reward for their civic virtue or community investment, will believe that barriers to the franchise are appropriate.[13] These advocates will support such policies as necessary to prevent potential fraud and to ensure that only the most committed and well-informed individuals determine the nation's course.[14]

Using this framework of citizenship rights versus privileges, this essay begins with an analysis of this conflict within American political thought and with a definition of the competing positions. The second part of the essay is a brief exploration of the historic legal and political efforts to extend the franchise to white women and people of color, examining the justifications made on both sides of the debates. After the historic thesis has been demonstrated, the essay will move to the current debates over key voting issues, such as felony disenfranchisement and voting identification policies. Arguments made in the current debates will be examined to see if

9. André Blais, et al., *Deciding Who Has the Right to Vote: A Comparative Analysis of Election Laws*, 20 ELECTORAL STUD. (Mar.) 41-62 (2001).

10. Russell J. Dalton, *Citizenship Norms and the Expansion of Political Participation*, 56 POL. STUD. (Mar.) 76-98 (2008); Naila Kabeer, *Citizenship, Affiliation, and Exclusion: Perspectives from the South*, 33 IDS BULL. (Feb.) 1-15 (2002).

11. DUBOIS, *supra* note 2, at 30-42.

12. LANI GUNIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 35-37 (1991) ("The importance of this opportunity [the right to vote and elect representatives] derives from fundamental assumptions about representative democracy: that the government's authority depends on the consent of the governed and that the interests of those who are bound by governmental actions cannot be arbitrarily ignored in the legislative proves. But, this notion of 'opportunity' has been transformed into one of 'right' to empower a historically disenfranchised and politically despised group. The most notable example of institutional vindication of this right is the enactment of the Voting Rights Act.").

13. TERBORG-PENN, *supra* note 2, at 107-15.

14. *See* D.B. Gantz, *Should All Voters be Allowed to Vote?*, THE BLAZE, Feb. 14, 2014, www.theblaze.com/contributions/should-all-voters-be-allowed-to-vote/ (last visited Sept. 22, 2014).

the same historic assumptions and values are reflected in the policy justifications. If the political values underlying these contentious policy issues are revealed, the nation can begin debating the larger question of what is the nature of the vote—privilege or right—as opposed to focusing on specific policies which appear to advance partisan agendas on both sides of the aisle.

II. The Relationship Between Citizenship and the Franchise

Historically, few people at the beginning of our nation actually exercised the right to vote.[15] So, despite our inherent valuing of the right to vote within a representational democracy, we exercised a principle called "virtual representation."[16] This approach to democracy authorized a privileged individual, deemed "the citizen," to voice and protect the interests of the people who reside within the sphere "he" controlled—his wife, children, tenants, servants, employees, and slaves.[17] Only individuals who passed specific requirements for citizenship, including at times age, property, religious, race, and gender stipulations, were deemed citizens with voting and representative powers.[18] Behind this notion of virtual representation was the belief that these were the individuals with a financial investment and personal stake in the success of the new nation and as such they were exercising their power wisely and sedately.[19] The fear of many was that those without clear stakes in society, those without property or those alienated by contemporary policies, would use the power of citizenship and the right to vote to destroy the extant society and rebuild it in their own image and interest.[20] Those with education and the wisdom to rule disinterestedly, protecting the needs of the disenfranchised, could be trusted to represent the community. While historically private property or military service was seen as documenting personal independence, investment in the political community, and dedication to the common good, and thereby necessary for citizenship, these elements are no longer seen as currently necessary.[21] However, today we may create other proxies to represent this same investment in society.

15. Keyssar, *supra* note 1, at 7 (estimating that despite wide variation among the colonies only about 60% of white males could vote). The extension of the franchise for free blacks and property-holding women varied widely among the states, but the general tendency was an increased restriction of these rights after the Revolution, not an expansion. *Id.* at 54-60.

16. *See* Paul Langford, *Property and "Virtual Representation" in Eighteenth-Century England*, 31 Hist. J. 1, 83-115 (1988); *see also* Joan R. Gundersen, *Independence, Citizenship, and the American Revolution*, 13 Signs 1, 59-77 (1987) (discussing how much of the scholarship on virtual representation explores how the Founders dismissed this notion for themselves, but ignoring how other demographic groups were dependent upon it).

17. Linda Kerber, Toward an Intellectual History of Women 262 (1997).

18. *Id.* at 36-37.

19. Judith N. Shklar, American Citizenship 7-12 (1991); *see* William Blackstone, Commentaries on the Laws of England 165-66 [1765] (1978).

20. Linda K. Kerber, Women of the Republic: Intellect and Ideology in Revolutionary America 36 (1980).

21. Richard Bellamy, Citizenship: A Very Short Introduction 27, 54 (2008); Shklar, *supra* note 19, at 45.

Clearly, not all of those disregarded by this political structure of citizen agreed.[22] Early American history contains a clear record of the dispossessed seeking to apply the universal values articulated in the Declaration of Independence to themselves. For example, we have historical evidence of enslaved individuals who, drawing on the language of the Declaration of Independence and the philosophical claims inherent in the Lockean social contract, petitioned state legislatures to claim their own freedom.[23] Many female writers of the Revolutionary Age assumed their capacity for political thought and engagement,[24] and later in the nineteenth century, landowning women refused the right to vote declined to pay taxes based on the revolutionary maxim of "no taxation without representation."[25]

These two understandings of citizenship—one as a universal right that should be generally guaranteed regardless of race, gender, religion, or class, and the second which limits citizenship to those whom the power elite trust to exercise their authority wisely because of prior demonstrations of responsibility—have differing interpretations of the role of voting. The first vision constructs citizenship in a manner that respects voting as an inherent right all adult inhabitants possess.[26] The second articulation designs these attributes of citizenship to be a privilege, extended with caution and limited to the responsible.[27]

It is in our understanding of voting that the tension between the two constructions is most clear. As Richard Bellamy has stated,

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22. We have a long history of dissent in our nation and dissent over exclusion from full citizenship has long been protested. For instance, see the following poem in ALICE DUER MILLER, ARE WOMEN PEOPLE? A BOOK OF RHYMES FOR SUFFRAGE TIMES (1915), *in* "BELONG TO THE WORLD": WOMEN'S RIGHTS AND AMERICAN CONSTITUTIONAL CULTURE 181 (Sandra F. VanBurkleo, ed., 2001): "Father, what is a legislature? / A Representative body elected by the people of the state. / Are women people? / No, my son, criminals, lunatics, and women are not people. / Do legislators legislate for nothing? / Oh, no; they are paid a salary. / By whom? / By the people. / Are women people? / Of course, my son, just as much as men are."

23. In 1777, slaves submitted appeals before the Massachusetts legislature exhorting, "[y]our petitioners apprehend that they have, in common with all other men, a natural and unalienable right to that freedom, which the great Parent of the universe hath bestowed equally on all mankind, and which they have never forfeited by any compact or agreement whatever. But they were unjustly dragged by the cruel hand of power from their dearest friends . . . to be sold like beasts of burden." *Second Petition of Massachusetts Slaves*, *in* W. C. NELL, THE COLORED PATRIOTS OF THE AMERICAN REVOLUTION, WITH SKETCHES OF SEVERAL DISTINGUISHED COLORED PERSONS, *available at* http://www.docsouth.unc.edu/neh/nell/nell.html#nell13 (last visited Sept. 22, 2014).

24. KERBER, WOMEN OF THE REPUBLIC, *supra* note 20, at 37-38, 276-77; KERBER, TOWARD AN INTELLECTUAL HISTORY, *supra* note 17, at 292-93.

25. LINDA K. KERBER, *Wherever You Find Taxey There Votey Will Be Also" Representation and Taxes in the Nineteenth Century*, *in* NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 81-123 (1998).

26. The right to vote in a democracy is necessary for political participation. "The way in which political participation can be conceptualised [sic] as a right as well as an obligation underlines its importance to both liberal and republican traditions of citizenship. Together with civil rights, basic political rights form the core of the liberal tradition, guaranteeing the 'negative' freedom on individuals in the name of their autonomy[.]" RUTH LISTER, CITIZENSHIP: FEMINIST PERSPECTIVES 33 (1997).

27. J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 522-24 (1975) (noting how American citizenship was a movement away from traditional republican citizenship to a more liberal construction, but still maintaining the concern regarding personal interest as potentially destructive to the nation).

> Historically, citizenship has been linked to the privileges of membership of a particular kind of political community—one in which those who enjoy a certain status are entitled to participate on an equal basis with their fellow citizens in making the collective decisions that regulate social life. In other words, citizenship has gone hand in hand with political participation in some form of democracy—most especially, the right to vote.[28]

As noted above, participation in government is understood as a central part of citizenship in a democracy, but how voting relates to citizenship has been debated. For those who see voting as a right of citizenship, the expansion of the franchise is a prerequisite for full citizenship or "first-class citizenship," as many in the modern civil rights movement labeled it.[29] In a representative democracy, those who cannot vote cannot engage in self-governance and are therefore, by definition, oppressed. As Martin Luther King, Jr. stated in his 1957 speech "Give Us the Ballot, We Will Transform the South,"

> So long as I do not firmly and irrevocably possess the right to vote I do not possess myself. I cannot make up my mind—it is made up for me. I cannot live as a democratic citizen, observing the laws I have helped to enact—I can only submit to the edict of others.[30]

For representatives of this perspective, barriers to voting are a denial of basic citizenship. Because of the long, slow history of enfranchisement[31] and the numerous barriers historically placed before many groups to prevent them from voting,[32] it is hard for those who interpret voting as an inherent right to not perceive these barriers as deliberate attempts to control both the direction of democracy and the outcome of the ballot.[33]

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28. BELLAMY, *supra* note 21, at 1-2.

29. SHKLAR, *supra* note 19, at 17, 28-30.

30. Martin Luther King, Jr., *Give Us the Ballot, We Will Transform the South* (1957) (speech given before the Prayer Pilgrimage for Freedom on the steps of the Lincoln Memorial in Washington on May 17, 1957), *available at* http://www.pbs.org/pov/pov2008/election/wvote/king.html (last visited Sept. 22, 2014).

31. For instance, the right to vote was constitutionally guaranteed to men regardless of race or previous condition of servitude in the Fifteenth Amendment (1870) of the Constitution, but not enforced until the Voting Rights Act of 1965 (42 U.S.C. §§ 1973-1973bb-1). Much litigation occurred in the years after the passage of VRA to ensure access to the ballot for African-Americans and other people of color. For women of all racial backgrounds, the right to vote was not extended universally until the passage of the Nineteenth Amendment (1920) of the Constitution. The right to vote for citizens between the ages of 18-20 was not extended until the passage of the Twenty-sixth Amendment in 1971.

32. In addition to simple state laws limiting the franchise to specific demographic barriers (age, sex, race, property), techniques like poll taxes, literacy tests, grandfather clauses, property qualifications, racial, or religious tests, and violence against potential voters were used as barriers. KEYSSAR, *supra* note 1.

33. SHKLAR, *supra* note 19, at 14-17.

On the other hand, those who define voting as a responsibility and privilege of citizenship are concerned that those who do not exercise the vote in a deliberate and thoughtful manner will take the nation down dangerous paths.[34] There has been a history of fear that huge influx of immigrants,[35] newly freed people,[36] and uneducated women under the legal and economic control of their husbands, will vote in dangerous ways.[37] Controlling access to the ballot through linking this privilege to property, societal privilege, or literacy is a way of ensuring the status quo remains protected. These arguments can be observed in an 1890 American government textbook's articulation of why so many individuals believe the franchise should not be expanded to

> the great mass of ignorant voters, chiefly foreigners without experience in self-government, with no comprehension of American principles and traditions, and with little or no property to suffer from excessive taxation. Such people will naturally have slight compunctions about voting away other people's money; indeed, they are apt to think that "the Government" has got Aladdin's lamp hidden away somewhere in a burglar-proof safe, and could do pretty much everything that is wanted, if it only would. In the hands of demagogues such people may be dangerous, they are supposed to be especially accessible to humbug and bribes, and their votes have no doubt been used to sustain and perpetuate most flagrant abuses. We often hear it said that the only way to get good government is to deprive such people of their votes

34. Shklar quotes Chancellor Kent of New York, as making the following argument, which demonstrates this position: "The tendency of universal suffrage is to jeopardize the rights of property and the principles of liberty . . . there is a tendency in the poor to covet and to share the plunder of the rich . . . there is a tendency in ambitious and wicked men to inflame these combustible materials. The notion that every man that works a day on the road, or serves an idle hour in the militia is entitled as of right to an equal participation in the whole power of government . . . has no foundation in justice . . . Society is an association for the protection of property as well as of life, and the individual who contributes only one cent to the common stock, ought not to have the same power and influence . . . as he who contributes a thousand." *Id.* at 50.

35. KEYSSAR, *supra* note 1, at 83-85.

36. CLAUDE G. BOWERS, THE TRAGIC ERA 14-17 (1929) (noting opposition to black voting through mob violence and by the elite, he quotes General Sherman articulating a typical position, "My belief is that to force the enfranchised negroes as 'loyal' voters on the South will produce new riot and war and I fear Sumner, Wilson, and men of that school will force it on the government or prolong the war *ad infinitum* . . . . My Army will not fight in that war. The slaves are free, but not yet voters.").

37. Francis Parkman, *Some of the Reasons Against Woman Suffrage* [1888], *in* THE STRUGGLE FOR WOMEN'S RIGHTS 208 (George Klosko & Margaret G. Klosko, eds. 1999) ("If the better class of women flatter themselves that they can control the others, they are doomed to disappointment. They will be outvoted in their own kitchens, without reckoning the agglomerations of poverty, ignorance, and vice, that form a startling proportion of our city populations. It is here that the male vote alone threatens our system with its darkest perils. The female vote would enormously increase the evil, for it is often more numerous, always more impulsive and less subject to reason, and almost always devoid of the sense of responsibility . . . . Three fourths of them, when not urged by some pressing need or contagious passion, would be moved, not by principles, but by personal predilections.").

> and limit the suffrage to persons who have some property at stake.[38]

For proponents of this understanding of voting, there must be ways to ensure that those who vote are capable of rendering wise judgment and can contribute to governance. So, for instance, in the early twentieth century, many advocates of the expansion of the franchise still believed that an educational test of basic intelligence should be required of voters.[39]

III. Historical Disagreement Surrounding the Significance of the Vote: Right versus Privilege

A consequence of these competing understandings of the role of the franchise is manifest in their interpretations of democracy. For those who perceived the franchise as a right of citizenship, by necessity suffrage needs to be expanded as broadly as possible to guarantee that all impacted by a vote have the opportunity to cast a ballot. On the other hand, for those who perceive the vote as a privilege to be exercised by the relatively few who already have demonstrated their capacity to rule, the franchise should be limited and narrowed. In our own history of suffrage expansion, we have seen evidence of these perceptions and arguments. In this segment of the essay, we will look at the debates surrounding the women's suffrage movement and in the context of the passage of the Voting Rights Act of 1965.

A. *Women's Suffrage*

From its origination, the Constitution has provided limited protections for women. It has been the Court's interpretation of the Constitution that has evolved, rather than the explicit language of the text, allowing the expansion of basic citizenship protections to women. Although the original document made general references to "persons" and "citizens" without specifying gender, women of color and white women were generally not included as part of the understood meaning.[40] Two cases decided by the United States Supreme Court soon after the passage of the Fourteenth Amendment quickly determined that the Constitution still did not protect the rights of women. In 1873, the Court decided *Bradwell v. Illinois*,[41] holding the right to practice law was not connected to being a citizen of the United States.[42] Two years later, the Court in *Minor v. Happersett*[43] made it clear that citizenship does not necessarily mean the right to vote; the

38. John Fiske, Civil Government in the United States Considered with Some Reference to its Origins 133 (1890).

39. Frank Abbott Magruder, American Government in 1921: With a Consideration of the Problems of Democracy 361 (1921).

40. David Schultz, John R. Vile, & Michelle D. Deardorff, Constitutional Law in Contemporary America, Volume II: Civil Rights and Liberties 559 (2010).

41. Bradwell v. Illinois, 83 U.S. 130 (1873).

42. *Id.* at 130, 132-33, 139; DuBois, *supra* note 2, at 104-16.

43. Minor v. Happersett, 88 U.S. 162 (1875).

Court argued that the Fourteenth Amendment only protected rights that people already possessed, it did not create new ones.[44] The Court believed that states could extend additional citizenship rights to women, but the federal Constitution did not.[45]

Another case quickly followed the *Bradwell* decision in 1873. In these circumstances, Susan B. Anthony was arrested and charged with the unlawful exercise of the vote.[46] She argued that women could gain suffrage only by claiming the right to vote and exerting it. The law under which she was arrested had been written to prevent Southern whites from casting ballots multiple times in a single election.[47] Although she lost in the federal district court and was fined, she was unable to appeal the case to the United States Supreme Court because the judge would not imprison her upon her refusal to pay the fine;[48] consequently, she had no standing to appeal. This case demonstrates the lack of civil rights that women possessed in court.[49] For instance, the judge refused to allow Anthony to testify on her own behalf. After the presentations to the all-male jury, Judge Ward Hunt took out of his pocket a pre-prepared opinion in which he found her guilty.[50] Anthony did not challenge the established facts. She had voted. The purpose of her trial was not to establish guilt, but to guarantee conformity to the established order.[51] This case is probably best remembered for the famous exchange that occurred between Judge Hunt and Anthony at the time of her sentencing; it is in this exchange that we see Anthony clearly articulate the rights discourse inherent in her understanding of suffrage.

> The COURT: The prisoner will stand up. Has the prisoner anything to say why sentence should not be pronounced?
>
> Miss ANTHONY: Yes, your honor, I have many things to say; for in your ordered verdict of guilty, you have trampled underfoot every vital principle of our government. My natural rights, my civil rights, my political rights, are all alike ignored. Robbed of the fundamental privilege of citizenship, I am degraded from the status of a citizen to that of a subject; and not only myself individually, but all of my sex, are, by your honor's verdict, doomed to political subjection under this so-called Republican government.

44. *Id.* at 171; *see* N.E.H. HULL, THE WOMAN WHO DARED TO VOTE: THE TRIAL OF SUSAN B. ANTHONY 23 (2012).

45. Michelle D. Deardorff, *Women and the Constitution*, *in* ENCYCLOPEDIA OF THE SUPREME COURT 524-25 (David Schultz ed., 2005).

46. DUBOIS, *supra* note 2, at 129; HULL, *supra* note 44, at 101-02.

47. HULL, *supra* note 44, at 67-68, 123.

48. *Id.* at 177-78.

49. *Id.* at 130-59.

50. *Id.* at 149-50.

51. *Id.* at 155; DUBOIS, *supra* note 2, at 129.

Judge HUNT: The Court can not listen to a rehearsal of arguments the prisoner's counsel has already consumed three hours in presenting.

Miss ANTHONY: May it please your honor, I am not arguing the question, but simply stating the reasons why sentence can not, in justice, be pronounced against me. Your denial of my citizen's right to vote is the denial of my right of consent as one of the governed, the denial of my right of representation as one of the taxed, the denial of my right to a trial by a jury of my peers as an offender against law, therefore, the denial of my sacred rights to life, liberty, property, and—

Judge HUNT: The court can not allow the prisoner to go on.

Miss ANTHONY: But your honor will not deny me this one and only poor privilege of protest against this high-handed outrage upon my citizen's rights. May it please the Court to remember that since the day of my arrest last November, this is the first time that either myself or any person of my disfranchised class has been allowed a word of defense before judge or jury—

Judge HUNT: The prisoner must sit down; the Court can not allow it.

Miss ANTHONY: All my prosecutors, from the 8th Ward corner grocery politician, who entered the complaint, to the United States Marshal, Commissioner, District Attorney, District Judge, your honor on the bench, not one is my peer, but each and all are my political sovereigns; and had your honor submitted my case to the jury, as was clearly your duty, even then I should have had just cause of protest, for not one of those men was my peer; but, native or foreign, white or black, rich or poor, educated or ignorant, awake or asleep, sober or drunk, each and every man of them was my political superior; hence, in no sense, my peer. Even, under such circumstances, a commoner of England, tried before a jury of lords, would have far less cause to complain than should I, a woman, tried before a jury of men. Even my counsel, the Hon. Henry R. Selden, who has argued my cause so ably, so earnestly, so unanswerably before your honor, is my political sovereign. Precisely as no disfranchised person is entitled to sit upon a jury, and no woman is entitled to the franchise, so, none but a regularly admitted lawyer is allowed to practice in the courts, and no

> woman can gain admission to the bar—hence, jury, judge, counsel, must all be of the superior class.
>
> Judge HUNT: The Court must insist—the prisoner has been tried according to the established forms of law.
>
> Miss ANTHONY: Yes, your honor, but by forms of law all made by men, interpreted by men, administered by men, in favor of men, and against women; and hence, your honor's ordered verdict of guilty, against a United States citizen for the exercise of "that citizen's right to vote," simply because that citizen was a woman and not a man.[52]

For Susan B. Anthony and similar advocates, virtual citizenship was an exercise of tyranny over a subjected class; only a rights-based form of citizenship could transform an individual from subject to sovereign.

On the other hand, for those who disagreed and challenged the extension of the franchise for women, the focus was on the ways in which such extension would damage the Republic and destroy the female character.[53] The key concern for many was that women's independence from men in the voting realm would make her self-reliant instead of dependent on the citizenship of men.[54] As articulated below by Senator J. B. Sanford, the chairman of the Democratic Caucus of California in 1911, in stating his opposition to female suffrage, this independence was not only unfeminine, but threatening to the Republic.

> Suffrage is not a right. It is a privilege that may or may not be granted. Politics is no place for a women [sic] consequently the privilege should not be granted to her. The men are able to run the government and take care of the women. Do women have to vote in order to receive the protection of man? Why, men have gone to war, endured every privation and death itself in defense of woman. To man, woman is the dearest creature on earth, and there is no extreme to which he would not go for his mother or sister. By keeping woman in her exalted position man can be induced to do more for her than he could by having her mix up in affairs that will cause him to lose respect and regard for her. Woman does not have to vote to secure her rights. Man will go to any extreme to protect and elevate her now. As long as woman is woman and keeps her place she will get more protection and more consideration than man gets. When she abdicates

52. United States v. Susan B. Anthony (N.D.N.Y. 1873), *excerpted in* THE CONCISE HISTORY OF WOMAN SUFFRAGE, Doc. 34, 293-96 (Mari Jo Buhle & Paul Buhle eds., 1978).

53. See the essays in the section *Antis*, *in* THE STRUGGLE FOR WOMEN'S RIGHTS: THEORETICAL AND HISTORICAL SOURCES 195-272 (George Klosko & Margaret G. Klosko eds., 1998).

54. DUBOIS, *supra* note 2, at 37.

> her throne she throws down the scepter of her power and loses her influence.[55]

Within this language, we hear a call back to the notion of virtual representation and the ideal that women can depend on men to accurately represent her interests in policy and law. Instead of framing the discussion as if she is not worthy of the privilege, this legislator perceives her of abandoning a "higher" privilege of white womanhood[56] to be protected, as long as *she keeps her place*.[57] This argument does not reflect any interest or implication for the right to vote for women of color, and it is here we see a continuing danger of the privileges of citizenship model. As this model attempts to maintain power in the hands of the few and elite worthy of citizenship, maintaining the status quo, it may mask virulent assumptions of prejudice.

B. Voting Rights Act of 1965

After the passage of the Fifteenth Amendment, which extended the right to vote to all males regardless of race or previous condition of servitude, many states began to pursue their own means of limiting the franchise.[58] Within seven years of its passage, each Southern state's new constitution removed or created grounds for eradicating the political rights of its African-American citizens, including the right to vote.[59] To preclude federal constitutional protections from being implemented, new barriers to

55. J.B. SANFORD, ARGUMENT AGAINST SENATE CONSTITUTIONAL AMENDMENT NO. 8 (1911) (filed in California State Archives under "Secretary of State Election Papers, 1911 Special Edition"), *available at* http:// sfpl.org/pdf/libraries/main/sfhistory/suffrageagainst.pdf (last visited Sept. 22, 2014).

56. Because of the unique intersections of race and gender in the American polity, white women and black women faced very different legal realities in terms of legal status; the combine institutions of coverture and white supremacy (most obviously manifested through racialized slavery) resulted in a differing legal statuses for white women and women of color (free and enslaved lack women and Native American women). For discussions of these distinct statuses and experiences, consider as an introduction to this vast literature: PAULINE SCHLOESSER, THE FAIR SEX: WHITE WOMEN AND RACIAL PATRIARCHY IN THE EARLY AMERICAN REPUBLIC 53-82 (2002); TERBORG-PENN, *supra* note 2 (discussing the free women of color battle for the franchise at the turn of the twentieth century); JENNIFER L. MORGAN, LABORING WOMEN: REPRODUCTION AND GENDER IN NEW WORLD SLAVERY (2004) (discussing the unique experience of enslaved women).

57. This perspective on the "place" of white women has possibly most famously been stated by Justice Bradley in his concurrence in *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) in which he states, "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The Constitution of the family organization, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state, and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most states."

58. RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 121-48 (2004).

59. GARY MAY, BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY xi (2013).

the ballot were created by the states: literacy and comprehension tests, poll taxes, and property qualifications.[60] The passage of "grandfather" clauses insured that white males and their progeny who had been able to vote prior to 1867 would be exempt from these barriers to voting, preserving historical privileges of citizenship.[61] As a Jackson, Mississippi newspaper argued, "If every Negro in Mississippi was a graduate of Harvard, and had been elected as class orator . . . he would not be as well fitted to exercise the right of suffrage as the Anglo-Saxon farm laborer . . . whose cross "X" mark, like the broad arrow of Locksley, means force and intellect, and manhood—*virtus*."[62] The purpose of these laws, according to a white Mississippi official in 1890, was "to invest permanently the powers of government in the hands of the people who ought to have them—the white people."[63] This approach ensured that African Americans in many Southern communities, and other dispossessed groups throughout the United States, would not access the right to vote for 88 years, until the passage of the Voting Rights Act of 1965, or its subsequent amendments.[64]

While the understanding of voting as a privilege frequently was a mask for racism or sexism, some advocates argued that if such barriers applied equally to all, they could enhance the value of the electorate and the franchise. For instance, Booker T. Washington,[65] in his 1903 "Statement on Suffrage," contended,

> As a rule, I believe in universal free suffrage, but I believe that in the South we are confronted with peculiar conditions that justify the protection of the ballot in many of the States, for a while at least, either by an educational test, a property test, or by both combined; but whatever tests are required they should be made to apply with equal and exact justice to both races.[66]

This type of equity in application was rarely documented.[67]

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60. NEIL R. MCMILLEN, DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW 38-57 (1989).

61. CHARLES M. PAYNE, I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE 26 (1995).

62. LEON LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 223 (1998).

63. *Id.* at 224.

64. Michelle D. Deardorff, *Voting Rights Act of 1972, Voting Rights Act of 1975, and Voting Rights Act of 1985*, *in* CIVIL RIGHTS IN THE UNITED STATES, vol. II, 768-70 (Waldo E. Martin, Jr. & Patricia Sullivan eds., 1999).

65. Booker T. Washington (1856-1915) was an African-American leader who worked closely with white political leadership during Reconstruction and the early years of Jim Crow to ensure that African-Americans had some basic economic opportunities. Simultaneously, he quietly helped fund litigation to challenge state-level segregation laws. *See* LOUIS R. HARLAN, BOOKER T. WASHINGTON, vols. I-II (1972, 1983).

66. Quoted *in* THE MODERN AFRICAN AMERICAN POLITICAL THOUGHT READER: FROM DAVID WALKER TO BARACK OBAMA 96 (Angela Jones ed., 2013).

67. *See* ELLEN CAROL DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA (1999); TERBERG-PENN, *supra* note 2; VALELLY, *supra* note 3;

The Voting Rights Act of 1965 ("VRA")[68] was designed to strip from the states the power to pass additional limitations on the franchise, such as poll taxes and literacy tests. In section five of the Act, the Justice Department was given the power to review, or preclear, any changes made by states and counties to voting policies and procedures if that local or state government had been identified as having a racially restrictive policy at the time of the Voting Rights Act passage (the section of the law ruled unconstitutional in the 2013 decision of *Shelby County, Alabama v. Holder* was 4(b), which articulated the criteria identifying those governmental entities).[69] From its very origins, section five had been one of the most controversial portions of the law because of the intervention in arenas previously controlled by the state.[70]

Justifications to prevent the passage of the VRA and its extension of the franchise echo many of the values and concerns of those who had originally believed in virtual representation and who later recognize voting as a privilege, not as a right of citizenship. If it is not a right of citizenship, then it falls to local registrars, with their own cultural and individual biases and prejudices, to determine who should have the privilege of voting.[71] It is in this shifting of authority that the racial denial of the ballot was allowed to persist.[72]

In the debates around the extension of the protected voting rights to African Americans, the language of rights versus privilege still echoed. Allen J. Ellender, Senator from Louisiana, noted during the heart of the debate around the passage of the VRA that, "[t]he task of making it clear that one is not against voting rights, but only in favor of maintaining voting qualifications, is not always an easy one."[73] As the tide on explicit white supremacy turned at the bridge in Selma[74] and at the Democratic National

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and McMillen, *supra* note 60 (all documenting the histories of the limiting of the franchise through a wide variety of political and legal devices).

68. 42 U.S.C. §§ 1973–1973bb-1.

69. Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2631 (2013).

70. May, *supra* note 59, at 149-70.

71. Gordon A. Martin, Jr., Count Them One by One: Black Mississippians Fighting for the Right to Vote 179-98 (2010).

72. This approach of limiting federal extension of rights through seeking local implementation is limited to voting, but has been seen in other contexts. *See e.g.*, Ira Katznelson, When Affirmative Action was White (2006) (discussing the implementation of key New Deal elements like the G.I. Bill through local draft boards, thereby excluding the vast majority of southern black veterans from its benefits).

73. Keith M. Finley, Delaying the Dream: Southern Senators and the Fight Against Civil Rights 1938-1965 295 (2008).

74. Many scholars have noted that the violence reported by the national media when citizens marched from Selma, Alabama towards Montgomery was a turning point in national public opinion regarding the need or a federal voting rights enforcement statute. May, *supra* note 59, at 91-93.

Convention in Atlantic City,[75] the justifications surrounding voting began to shift towards a rights-based narrative.[76]

Stokely Carmichael (later known as Kwami Touri), a civil rights activist with the Student Nonviolent Coordinating Committee (SNCC) in a speech at Berkeley in 1966 clearly noted that for him and other activists this right to the franchise is inherent within citizenship. He stated:

> People ought to understand that: we were never fighting for the right to integrate, *we were fighting against white supremacy*. In order to understand white supremacy we must dismiss the fallacious notion that white people can give anybody his freedom. A man is born free. You may enslave a man after he is born free, and that is in fact what this country does. It enslaves blacks after they are born. The only thing white people can do is stop denying black people their freedom. I maintain that every civil rights bill in this country was passed for white people, not for black people . . . . I knew I could vote all the time and that it wasn't a privilege but my right. Every time I tried I was shot, killed or jailed, beaten or economically deprived. So someone had to write a bill to tell white people, "When a black man comes to vote, don't bother him." That bill was for white people.[77]

In this speech, Carmichael not only defines voting as a basic citizenship right, but explicitly challenges the privilege narrative of citizenship. In a similar fashion, Bob Moses, another SNCC leader in Mississippi, emphasized registering for the vote the poorest blacks in one of the poorest regions of the country. In the following discussion, he takes the privilege argument and applies it to SNCC's voter registration activities in the Deep South. He notes that those who use the idea that voting is a privilege are not applying that idea equally among poor blacks and poor whites:

> Now most of these people cannot read and write, and it forced us to make another policy decision. Our position, which we outlined to the Justice Department and which we

75. At the Mississippi Freedom Democratic Party's 1964 challenge of the segregationist all-white Mississippi delegation at the Democratic National Convention, Fannie Lou Hamer testified on national television in primetime about her experience living in Mississippi as a sharecropper and being denied the right to register to vote on the basis of her race. While no change was made in 1964, no subsequent delegations could be segregated and the millions who heard Hamer's testimony heard of the violence of voter suppression directly. *Testimony of Fannie Lou Hamer Before the Credentials Committee of the Democratic National Convention in Atlantic City, New Jersey*, Aug. 22, 1964, *available at* http://americanradioworks.publicradio.org/features/sayitplain/flhamer.html (last visited Sept. 22, 2014); JOHN DITTMER, LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI 351-52 (1994).

76. FINLEY, *supra* note 73, at 287-89.

77. STOKELY CARMICHAEL, *Berkeley Speech 1966*, *in* JONES, *supra* note 66, at 275-76.

> are psychologically trying to sell to the Negro community . . . is that: 1) white people who are illiterate do vote in almost every county in Mississippi; 2) most of these Negroes have not had the opportunity to get a decent education, so they have been denied equal protection under the laws and . . . the strenuous literacy test should not apply to them; 3) the country owes them either the right to vote as a literate or the right to learn how to read and write *now*. It cannot take the position that the illiterate cannot vote and still have these people, who have been denied an education and who express a desire to read and write, left illiterate; 4) we feel that they know the people who govern their daily lives—not only do they know them, in all probability they knew their papas and mamas—so they know the people who are running for office and whether this guy is a good guy or going to beat them over the head.[78]

In these examples, we can see how the claim of citizenship privilege *can* be used to mask virulent forms of racial and gender discrimination that our nation has rejected, but it has an independent claim that when equitable application of these barriers to the franchise result in no discernable bias, it may result in a more limited but engaged electorate. It is also clear that the argument that voting is a citizenship right with deep roots in our nation and has been a competing narrative to virtual citizenship from our very beginnings. The question remains if this narrative structure will assist us in analyzing and discussing the current debates underscoring our understanding of the franchise today.

IV. How These Competing Models of Citizenship Influence Current Debates on Voting Access

As demonstrated below, we have several current issues where the question of access to voting and how broadly these rights should be construed are discussed. One long-term limitation to voting has been the restriction of the franchise from those who are imprisoned or who are convicted felons.[79] A second area of recent debate has been the discussion surrounding the necessity of voter identification being presented at the election polls to prevent individual voter fraud.[80] In both cases, the debate is often heated and personal, with claims of racial and class bias being

78. James Forman, The Making of Black Revolutionaries 305-06 (1972).

79. Earnest Drucker, A Plague of Prisons (2013) (noting that currently 5.4 million Americans are disenfranchised due to a felony conviction).

80. Gantz, *supra* note 14.

presented,[81] and concerns about the viability of democracy in light of corrupt forces.[82] This essay asks whether a more theoretical discussion of the role of voting in citizenship can lead to a more productive debate.

A. *Felony Disenfranchisement*

One of the longest standing assumptions surrounding voting rights in the United States has been the citizenship penalties that convicted felons pay after the completion of their sentence.[83] The Bill of Rights protects them against cruel and unusual punishment,[84] and courts have found they retain rights such as the free exercise of religion,[85] albeit limited by the legitimate interests of the state. As a privilege of citizenship, it has long been assumed that the incarcerated forfeit voting opportunities in prison.[86] The question of what rights are not restored once the penalty is paid and the prisoner released, at least in terms of voting, has been given to the states to determine.[87]

A study of the floor debate around the 233 state constitutional conventions to determine if the explicit justifications for felony disenfranchisement reveals that the most prominent justification for such policies was the unfit character of felons to engage in the privilege of voting, as opposed to punishing crimes or preventing people who were likely to commit election fraud.[88] As Frank P. Straus of the Kentucky convention of 1890-1891 argued,

> the right to vote is a great right, and not only has the party who exercises it an interest in it, but every man holds it as a trust for the benefit of society at large; [therefore, if the] gentlemen here want to protect the purity of the ballot, if they want to throw safeguards around the exercise of this great right, which everybody has an interest in—not only the man who exercises it—we ought to establish it here as a general proposition in the Constitution that no man who is

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81. DRUCKER, *supra* note 79, at 138-39.

82. Those on one side of the issue are concerned about voter suppression and those on the opposite side are concerned by voter fraud. *See* Republic State Leadership Committee, *Democratic Misrepresentations on Voter Suppression*, Sept. 17, 2013, http://www.rslc.gop/democratic_misrepresentations_on_voter_suppression (last visited Sept. 22, 2014); *but see* John Wasik, *Voter Fraud: A Massive, Anti-Democratic Deception*, FORBES, Nov. 6, 2012, http://www.forbes.com/sites/johnwasik/2012/11/06/voter-fraud-a-massive-anti-democratic-deception/ (last visited Sept. 22, 2014).

83. KEYSSAR, *supra* note 1, at 358-61 (Table A.7: *Suffrage Exclusions for Criminal Offenses, 1790-1857*).

84. U.S. CONST. amend. VIII.

85. Cutter v. Wilkinson, 544 U.S. 709, 714, 719-20 (2005).

86. MAGRUDER, *supra* note 39, at 361.

87. Drucker, *supra* note 79, at 137 (noting that 48 states, all but Vermont, Maine, and Puerto Rico, preclude the right to vote for all imprisoned felons and then have various regulations post-incarceration).

88. John Dinan, *The Adoption of Criminal Disenfranchisement Provisions in the United States: Lessons from the State Constitutional Convention Debates*, 19 J. POL'Y HIST. 3, 285 (2007).

> guilty of felony, who has been compelled to serve his time in the State penitentiary, ought to be permitted to vote.[89]

Despite the clear articulation of voting privilege related to character test in the majority of these disenfranchisement debates, racism was still a motivating factor in many conventions. Mississippi, for instance, selected crimes for which the convicted could be disenfranchised based on what offenses the delegates to the constitutional convention believed blacks were more likely to commit than whites; crimes like rape and murder, which were believed to be equally committed by whites and blacks, were excluded from the disenfranchisement laws until the 1960s.[90]

In the current discussions surrounding felony disenfranchisement, can it be that once again we move beyond the notion of voting being a right of citizenship and instead find ourselves focusing on voting as a privilege of citizenship, but a privilege that some have abdicated because of a felonious past? We must exercise this intellectual position with caution, recognizing the many ways in which we have allowed our narrow definitions of the "worthy citizen" to serve as a mask for less virtuous purposes.

B. *Voter Identification Laws*

In more recent years, a new movement has emerged requiring state-certified identification to allow citizens seeking to cast a ballot to demonstrate their legitimacy.[91] As with many of the arguments surrounding voting since the mid-twentieth century, a key concern has been the potential impact of limiting citizenship rights, especially for people of color and the poor. Comments by a few state-level Republican officials about how the new voter identification laws would ensure victories for Republican candidates have only heightened the rhetoric and the fear of disenfranchisement.[92] Currently, the debate has been between those in favor of identification laws who warn against voter fraud[93] and political scientists

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89. *Id.* at 288.

90. Lynn Eisenberg, *States as Laboratories for Federal Reform: Case Studies in Felon Disenfranchisement Law*, 15 N.Y.U.J. LEGIS. & PUB. POL'Y 539, 544-45 (2012).

91. Wendy Underhill, *Voter Identification Requirements*, NATIONAL CONFERENCE OF STATE LEGISLATORS, Mar. 26, 2014, http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx (last visited Sept. 22, 2014).

92. For instance, Republican House Majority Leader Mike Turza, in a speech before the Republican State Committee in June 2012, gave a list of legislative accomplishments by the Republican-led legislature, stating, "Pro-Second Amendment? The Castle Doctrine, it's done. First pro-life legislation—abortion facility regulations—in 22 years, done. Voter ID, which is gonna allow Governor Romney to win the state of Pennsylvania, done." Kelly Cernetich, *Turzai: Voter ID Law Means Romney Can Win PA*, http://www.politicspa.com/turzai-voter-id-law-means-romney-can-win-pa/37153/ (last visited Sept. 22, 2014). In another example, Don Yelton, Republican precinct chair in Buncombe County, North Carolina stated he supported voter ID laws and other voting regulations because "the law is going to kick the democrats in the butt." Interview by Jon Stewart with Don Yelton, *The Daily Show*, Oct. 23, 2013, http://thedailyshow.cc.com/videos/dxhtvk/suppressing-the-vote (last visited Sept. 22, 2014).

93. John Fund, *Voter Fraud: We've Got Proof It's Easy*, NATIONAL REVIEW, Jan. 12, 2014, http://www.nationalreview.com/article/368234/voter-fraud-weve-got-proof-its-easy-john-fund/page/0/1 (last visited Sept. 22, 2014); *see* Kurt Hyde, *True the Vote Releases Evidence of 173 Cases of Alleged Interstate*

and others who are unable to identify these cases of fraud warranting such a policy, but find some evidence of voter suppression among the poor and elderly who are disproportionately people of color.[94] The discussion has been unproductive as both sides dig in their heels, and with the discontinuation of the pre-clearance requirements of the VRA based on the *Shelby County* decision, these laws will continue to be implemented and the debate as to their impact will continue unabated.

V. CONCLUSION

Within the recent Supreme Court decision surrounding the enforcement of the Voting Rights Act in *Shelby County*, we can see hints of this tension between voting as a privilege and voting as a right still emerging from the discussion. For those who define voting as inherent to the definition of a citizen, the protection of the right for individuals to vote and for communities to cooperate to make their voice heard must supersede or preclude any other private interest, including the independence of the state or an understanding of "states' rights." On the other hand, for those who see voting as a privilege, it is a privilege the state monitors and controls, albeit with the potential for abuse. For advocates of this perspective, the authority of the state to control access to this privilege is central to protecting the integrity of the vote, as well as to maintain the structure of federalism.

If we return to the traditional notion of voting as a privilege of citizenship, with those who have legislative power defining the privilege, the question must be asked: what would be defined as the valued qualities of citizenship?[95] In light of the clear demographic change in the United States, in which the attributes that had previously defined privilege in the country (propertied, white males) now become a minority population,[96] the

Voter Fraud, THE NEW AMERICAN, Aug. 15, 2013, http://www.thenewamerican.com/usnews/crime/item/16313-true-the-vote-releases-evidence-of-173-cases-of-alleged-interstate-voter-fraud (last visited Sept. 22, 2014); *see also* Bubba Atkinson, *This FACTUAL EVIDENCE of Voter Fraud in Ohio Should Change Democrats' Minds About Voter ID*, IJREVIEW, Dec. 2013, http://www.ijreview.com/2013/12/104139-evidence-voter-fraud-ohio-change-democrats-minds-voter-id/ (last visited Apr. 6, 2014). In this final essay, the language quoted from Fox News reporting that 17 individuals who were not citizens voted in the 2012 presidential election is telling: "The alleged crime would be a notable case of voter fraud in a key swing state. By law, only American citizens are allowed the privilege of casting ballots for the nation's leaders." *Id.*

94. BRENNAN CENTER FOR JUSTICE, POLICY BRIEF ON PROOF OF CITIZENSHIP (2006), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_38263.pdf (last visited Sept. 22, 2014); Keith G. Bentele & Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. ON POL. 4, 1088-1116 (2013); but consider M.V. Hood III & Charles S. Bullock, III, *Much Ado About Nothing? An Empirical Assessment of the Georgia Identification Statute*, 12 ST. POL. AND POL'Y Q. 4, 394-414 (2012) (finding no racial bias to the suppression).

95. I would like to thank Professor Angela Kupenda of Mississippi College School of Law for raising this intriguing question regarding white women at the initial presentation of this Keynote address. I would also like to acknowledge Professor Kareem U. Crayton at the University of North Carolina School of Law for suggesting the applicability of the Rawlsian veil of ignorance for this analysis.

96. William H. Frey, *Shift to a Majority-Minority Population in the US Happening Faster than Expected*, BROOKINGS, June 19, 2013, http://www.brookings.edu/blogs/up-front/posts/2013/06/19-US-majority-minority-population-census-frey (last visited Sept. 22, 2014).

question arises of who would be privileged in the future if we adopt this as our model of citizenship. John Rawls, in his 1971 classic *A Theory of Justice*, raises this query when he asks: how would a new social contract that attempts to maximize liberty and equality look? Rawls suggests the creation of a "veil of ignorance" behind which the creators of the new social contract stand as they construct a new system of governance, which will inevitably privilege some and harm others. He posits that these architects should not know "his place in society, his class position[,] or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like."[97] The purpose of the veil of ignorance is to ensure that any resulting values or principles decided by the architects are fair and just. As Rawls states, "[s]omehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage."[98]

If people determining the privilege of voting want to be certain that a privilege is being asserted in a way that benefits democracy by allowing the best voters to govern and not merely reinforce the powerful in retaining the status quo, we must be careful in our articulation of what attributes will be valued in voters. In Rawls' hypothetical schema, those who are making decisions regarding power cannot know their own individual situation (intelligence, fortune, class position, race, gender) to ensure the subsequent determinations are fair.

While these circumstances are impossible to replicate in society, the coming demographic shifts should give us all pause in asserting what qualities are essential for a legitimate voter. If we revert to voting as a privilege model, not voting as a right model, we legitimatize the notion that those in power determine who has a right—via the franchise—to determine policy, representative government, and the direction of the nation. This means the elite determine which voices to elevate and which to diminish. This may be a comforting notion for those identifying with the power elite currently, but may give pause in the fact that in many ways we are collectively behind a metaphorical veil of ignorance, waiting to observe the political implications of demographic change, as former majorities become statistical minorities. As in many aspects of American political life, our discussions have become polarized and fruitless. Instead of wrestling with the difficult concepts and competing priorities facing America, we have instead resorted to name-calling, fear, condescension, and sarcasm regarding policy choices. We no longer debate the ideas at stake but instead assume those who disagree with us are idiots.

How might this contested model of citizenship change the way we discuss and evaluate the notion of voting, barriers to voting, and protections for voters, if we framed our dialogue differently? Maybe the real issue we should be discussing is how we define the relationship between voting and

97. JOHN RAWLS, A THEORY OF JUSTICE 12 (1971).
98. *Id.* at 136, 136-42.

citizenship. If voting is a fundamental right, inherent to the notion of citizenship, then there should be no barriers to participation. As a country that values due process over crime control and tolerates guilty people going free rather than risk the innocent being punished, a nation that values the right to vote would tolerate the risk of fraud rather than prevent a legitimate voter from being disenfranchised. On the other hand, if we believe that voting is a privilege of citizenship that can only be practiced by those that can be trusted by society to govern and protect all, then barriers to participation are not only logical, but also necessary. However, adopters of this position must recognize the historic threat to democracy within its claims—the inherent support of the status quo and the contemporary power structure as well as the danger that it can mask invidious forms of prejudice and discrimination, concealed even from its own defenders.