

# VOTING AS EXCLUSION

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*This Essay considers two prevalent narratives about voting. In one narrative, voting expresses the civic virtue of the voter. In another, voting is an expression of inclusion in our political community's circle of membership. I argue that although both narratives are true, and important, there is a third narrative that shadows them both. In this third narrative, voting affirms the exclusion of millions of people from our political community. The stories we tell about voting are incomplete and, sometimes, harmful.*

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## INTRODUCTION

There are narratives implicit in discourse and rhetoric about voting and elections: stories about heroes and villains, conflicts and overcoming, setbacks and progress.<sup>1</sup> Narratives can be built around metaphors, like the nativist image of immigration as an invasion by foreign enemies.<sup>2</sup> Law is, among other things, what Professor James Boyd White calls “a system of constitutive rhetoric: a set of resources for claiming, resisting, and declaring significance.”<sup>3</sup> Among those resources are implicit narratives—stories—that carry moral and ethical messages: messages about what is right and wrong, the things we value, and the things that threaten what we value.<sup>4</sup>

Narratives also influence the way that we construct legal rights and protections. As Professor Robin West observes, for example, tort law’s causation requirement invites storytelling: “[W]e decide who caused what, basically, by reciting contrasting stories” and judging which one seems most compelling.<sup>5</sup> Likewise, “the mitigation stage of a sentencing hearing” invites the construction of narratives to serve as a way to justify the scope of the rights and liabilities the judge will impose.<sup>6</sup>

If narratives are part of legal argument, they are also implicitly part of judges’ decisions. As Professor Linda Edwards explains, in the case of Yaser Esam Hamdi, the U.S. citizen who fought for the Taliban, judicial opinions

1. The approach this Essay takes is inspired by many insightful analyses of the role that narratives play in law. *See generally, e.g.*, GREG GRANDIN, *THE END OF THE MYTH: FROM THE FRONTIER TO THE BORDER WALL IN THE MIND OF AMERICA* (2019) (discussing the narrative of the frontier in U.S. history); HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006) (discussing narratives of immigration); AUSTIN SARAT & WILLIAM L.F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER & MEANING IN THE LEGAL PROCESS* (1995) (exploring narratives of law in the power struggles between divorce lawyers and their clients); Kevin R. Johnson, “*Melting Pot*” or “*Ring of Fire*”? *Assimilation and the Mexican-American Experience*, 85 CALIF. L. REV. 1259 (1997); Catherine Powell & Camille Gear Rich, *The “Welfare Queen” Goes to the Polls: Race-Based Fractures in Gender Politics and Opportunities for Intersectional Coalitions*, 108 GEO. L.J. 105 (2020). *See also* JENNIFER R. MERCIECA, *FOUNDING FICTIONS* 3–4 (2010) (explaining a “rhetorical history” of narratives of American politics and government); JAMES BOYD WHITE, *THE LEGAL IMAGINATION* 243 (abridged ed. 1985) (“[A] fundamental distinction can be drawn between the mind that tells a story and the mind that gives reasons . . . .”); Robert Cover, *Nomos and Narrative*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 95, 95–96 (Martha Minow et al. eds., 1995) (“No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”).

2. *See* Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1597–98 (2011); *see also* Lisa A. Flores, *Constructing Rhetorical Borders: Peons, Illegal Aliens, and Competing Narratives of Immigration*, 20 CRITICAL STUD. MEDIA COMMUN 362, 362–63 (2003).

3. JAMES BOYD WHITE, *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 205 (1985). For a survey of the meanings of the word “rhetoric,” *see* PETER GOODRICH, *LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS* 85–88 (1987). I like Professor Mercieca’s definition: “attempts to influence others through symbols.” MERCIECA, *supra* note 1, at 3.

4. On the norms implicit in narratives, *see* WAYNE C. BOOTH, *THE COMPANY WE KEEP: AN ETHICS OF FICTION* 142–53 (1988).

5. ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* 419 (1993).

6. *Id.*

were driven by implicit narratives of redemptive violence, on the one hand, and on the other hand, narratives of the Founders' struggle to secure freedoms.<sup>7</sup>

This Essay discusses some of the narratives implicit in our rhetoric about voting and elections. One narrative describes the act of voting as an act of civic virtue. In this narrative, citizens who vote demonstrate their engagement with their communities and their support for those communities and for the American national community. Sometimes, citizens must overcome barriers to vote, and, when they do, we praise them for their diligence—their civic virtue—or even their heroism. Part I will explore this narrative.

The second narrative is consistent with the first, and they are sometimes told together. In this narrative, voting is all about inclusion. There is a constant struggle between citizens who want to vote and people who want to prevent them from voting. The heroes of this story are the voters, to be sure, but also the activists who struggle against voter suppression and other forms of exclusion to protect the right to vote. Part II will explore this narrative and its downsides.

The narrative of voting-as-virtue and the narrative of voting-as-inclusion are both true and important. But, they each have a dark side, and they each overlook important things. Part III will explore a different narrative: one about how voting can function as an instrument of exclusion. It is a celebration of who belongs and, thus, perversely, a celebration of who does not belong. Voting and the rituals that go with it are ways that American society delineates who belongs and who does not. In the usual telling of the narrative about voting and exclusion, the focus is on the walls that keep people from voting; in this more radical narrative, voting itself is the wall.

## I. VOTING AS VIRTUE

### A. *Virtuous Voting*

Voting has long been associated with civic virtue.<sup>8</sup> Many of our stories about voting are premised on the idea that voting is a demonstration of active and engaged citizenship, a way of being a *good citizen*.<sup>9</sup> This section tracks

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7. Linda H. Edwards, *Where Do the Prophets Stand?: Hamdi, Myth, and the Master's Tools*, 13 CONN. PUB. INT. L.J. 43, 61–63 (2013).

8. Professor Lawrence Blum defines civic virtue as qualities that appropriately engage with a society's civic order or its "public modes of life." Lawrence Blum, *Race, National Ideals, and Civic Virtue*, 33 SOC. THEORY & PRAC. 533, 533–34 (2007). For Blum, this involves both upholding good institutions and the ability to recognize, and do something about, institutions that fail to live up to a society's ideals. *See id.* at 534–35.

9. *See* Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 895 (1998) (arguing that "democratic theory demands . . . engaged, informed voters who carefully reason through political arguments").

some of the narratives through which society gives meaning to the act of voting and connects voting to ideas about voters' virtue.<sup>10</sup>

First, I want to make clear that I am not disagreeing with these narratives: voting really *is* a virtuous act.<sup>11</sup> Regardless of whom one votes for, voting does not just *symbolize* or *signal*<sup>12</sup> the voter's willingness to contribute to society—in a small way, it *demonstrates* it. Voters perform an important civic function, comparable to the functions civil servants perform.<sup>13</sup> It is a job that needs to be done for our democracy to continue working.

Voting is also altruistic: it is an act of caring for others. Voters have little reason to hope that their votes will benefit them directly; it is much more realistic for them to hope that their votes will, by empowering good leaders, benefit the community in general. Voting also contributes to community more broadly by making the elections process effective. Elections, and democracy itself, could not work if everyone stayed home. By voting, we are *doing our part*. In this sense, voting is *neighborly*.<sup>14</sup>

Voting also makes a statement about the basic legitimacy and promise of our democracy. By voting, we not only take a stand either for or against specific political ideas but also for the principle that it is worth caring about political ideas enough to participate in our democratic system. Even those who vote while holding their noses are affirming the idea that their community matters, control of elected office affects the welfare of their neighbors, and people should not decline their role in trying to make government better. In this way, we expose ourselves; the "I voted" sticker is a refutation of cynicism about our political system and an affirmation of a commitment to our neighbors.<sup>15</sup>

If voting has a deep expressive significance, so too does our discourse about voting and the rituals associated with elections. During election season, Americans share thoughts of civil rights heroes who risked and sacrificed so much for voting rights and remember courageous Black Americans whom white supremacists murdered for trying to exercise their right to vote.<sup>16</sup> On Election Day, people make pilgrimages and wait in long

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10. For an argument that the U.S. Supreme Court has unduly focused its voting rights jurisprudence on supposed harms to individual voters' dignity rather than harms to the general public's interest in seeing elections reflect the will of the electorate, see generally James A. Gardner, *The Dignity of Voters—A Dissent*, 64 U. MIAMI L. REV. 435 (2010).

11. *But see* JASON BRENNAN, *THE ETHICS OF VOTING* 3–5 (rev. ed. 2012) (arguing that there is no moral responsibility to vote and that many citizens should refrain from voting).

12. *See generally* R. Emre Aytimur et al., *Voting as a Signaling Device*, 55 ECON. THEORY 753 (2014).

13. *See* Gardner, *supra* note 10, at 455–56.

14. Voting is literally neighborly: the closer the community, the more likely people will vote. *See* Aytimur et al., *supra* note 12, at 755.

15. *See* JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 26 (1991) (arguing that voting's most valuable benefit is that it expresses the feeling of fulfilling one's duty to society and oneself).

16. *See, e.g.*, Jason Byrne, *The 1920 Election Day Massacre: Remembering the Voters of Ocoee Who Were Slaughtered for Being Black*, MILWAUKEE INDEP. (Nov. 2, 2020), <http://www.milwaukeeindependent.com/syndicated/1920-election-day-massacre-remembering-voters-ocoe-slaughtered-black/> [<https://perma.cc/TXC5-CNX7>].

lines to put their “I voted” sticker on the gravestone of Susan B. Anthony.<sup>17</sup> As religious studies scholar Jordan Conley writes, these “devotional offerings” help commemorate sufferings and hopes in ways similar to offerings at religious shrines.<sup>18</sup>

We tell stories not only about our predecessors but also about our contemporaries. We also praise citizens who have to endure difficult conditions to vote. One person wrote to the *Boston Globe* during the November 2020 election: “I applaud all the voters willing to stand in line for hours during a pandemic to cast their votes. Despite all of the Republican attempts to stop citizens from voting, Americans are persevering. They have become the new front-line heroes.”<sup>19</sup>

Civic officials have even given awards for voters’ heroism. Rhode Island’s Secretary of State created a “Heroic Voter Award” and bestowed it on two “South Kingston octogenarians”: “Mrs. Hofinger waited three hours to finish voting after the machine she was using broke down and a repairman was called. Given the alternative of leaving and losing her vote altogether, she stayed put. Mr. Hofinger pitched in by bringing his wife lunch, flowers and a book to read.”<sup>20</sup>

Sometimes voters are even called heroes just for showing up. A press release from Rock the Vote noted, “Young Voters Are the Heroes of 2018.”<sup>21</sup> Maybe it was their youth that made them heroes, since voting for the first time is a sort of induction into the community of those committed to the civic virtue the rest of us admire. Thus, a CNN video shows a line of voters erupting into applause when one of them announces, “Yo! We got somebody here votin’ today for the first time!”<sup>22</sup> We do not just welcome new voters; we are proud of them.

It may seem obvious that our cultural narratives should emphasize voting as a praiseworthy act of civic virtue. Still, it is curious how voting is singled out above other acts of civic virtue. Citizens contribute to the common good and the health of our democracy in many ways, ranging from paying taxes to

17. See *Susan B. Anthony’s Headstone Gets Plastic Shield for Voter Stickers*, PBS NEWS HOUR (Oct. 26, 2020, 3:54 PM), <https://www.pbs.org/newshour/nation/susan-b-anthonys-headstone-gets-shield-from-voter-stickers> [<https://perma.cc/G8V3-8BKN>].

18. See Jordan Conley, *Voting, Votive, Devotion: “I Voted” Stickers and Ritualization at Susan B. Anthony’s Grave*, J. FEMINIST STUD. IN RELIGION, no. 2, 2020, at 43, 56–57.

19. See Pamela Haran, Letter to the Editor, *Now the Very Act of Voting Has Become Heroic*, BOSTON GLOBE (Oct. 15, 2020, 7:15 AM), <https://www.bostonglobe.com/2020/10/15/opinion/now-very-act-voting-has-become-heroic/> [<https://perma.cc/98G5-LE4N>].

20. Editorial, *Heroic Voters*, PROVIDENCE J., Nov. 26, 1996. The editorial wryly notes, “Mr. Langevin might earn the award himself next time by pushing transformation of the state’s balky voting procedures into a system that works as it should.” *Id.*

21. Press Release, Rock the Vote, *Young Voters Are the Heroes of 2018* (Nov. 8, 2018), <https://www.rockthevote.org/young-voters-are-the-heroes-of-2018/> [<https://perma.cc/6ML7-B99U>].

22. Kelsie Smith, *People Are Literally Dancing in the Streets as They Wait to Vote*, CNN, at 0:58 (Oct. 27, 2020, 3:56 PM), <https://www.cnn.com/2020/10/26/us/people-dance-while-waiting-to-vote/index.html> [<https://perma.cc/NR2D-DY3V>]. The dancing was part of an organized campaign called “Joy to the Polls,” which aimed to bring a celebratory spirit to those waiting in line in the hopes of encouraging them to stay in line. *Id.*

serving on juries. Indeed, Professor Jim Gardner argues that “voter” can be understood as a temporary civic office comparable to that of juror.<sup>23</sup> But we do not seem to tell each other stories about heroic taxpayers—people who stayed up all night finishing their taxes because they were so committed to doing their part. Or heroic jurors, who crossed mudslides to get to the courtroom. I have heard a number of people groan about jury service and taxes; I have never heard anyone groan about voting. It has a sacredness not afforded to other acts of civic virtue.

Voting occupies a special place in our conception of civic responsibility. We are supposed to feel proud of it in ways we do not feel proud of other civic acts. But this special power can be used to harm.

### *B. Disenfranchisement as a Denial of Virtue*

The association between voting and civic virtue may be valid, but its flipside is a damaging narrative in which people who do not vote are lacking in virtue. The association between voting and civic virtue makes disenfranchisement demeaning in a special way. And it denies disenfranchised people the opportunity to demonstrate their civic virtue, which in turn reinforces the same myths that justify their disenfranchisement. Once voting is understood as an expression of civic virtue, voter suppression becomes not only a denial of rights but also an insult to the people it targets. Being excluded from voting feels like and is, in a meaningful, expressive sense, like experiencing a denial of one’s citizenship and one’s membership in the political community. As the following discussion will explain, people who are excluded from voting through measures that make voting more burdensome are sometimes accused of lacking civic virtue because they do not succeed in overcoming those burdens. This, in turn, justifies the voter-suppression tactics: after all, if they had cared more and worked harder, their votes could have counted. In this way, voting-as-virtue serves both to justify voter suppression and to maximize its demeaning social implications.

Laws that barred women from voting denied them—among many other things—the ability to express their civic engagement and the way they valued their national community.<sup>24</sup> Those laws not only denied women the ability to participate actively in their democracy but also denied women the opportunity to demonstrate that they valued it. Perversely, those laws were justified with claims that women lacked the very capacities that anti-suffrage laws prevented them from expressing.<sup>25</sup> Women were excluded from the vote for the same reason that immigrant women, particularly immigrant

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23. Gardner sees voters and jurors as being similar because both play a key function in governance. But, neither is entitled to strong individual rights; rather, voters and jurors are only entitled to the rights that facilitate the effective performance of their necessary roles. *See* Gardner, *supra* note 10, at 457.

24. *See* Ortiz, *supra* note 9, at 907–09.

25. MARTHA GARDNER, *THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870–1965*, at 255 (2005).

women of color, were often excluded from citizenship itself: they were thought to lack “the qualities of a citizen.” Suffrage could help undermine that stigma.<sup>26</sup>

Likewise, one of the many abhorrent aspects of denying the vote to Black people, Native Americans, and others was the way it was justified: by referencing qualities those excluded people supposedly lacked.<sup>27</sup> The excluded had to fight against “a representative democracy that falsely ascribed personal deficiencies to them, in order to treat them as lesser beings than ‘We the People.’”<sup>28</sup>

To counter these narratives, it was necessary to assert that Black people and women possessed sufficient civic virtue to deserve the vote. Thus, in the debates over whether to give Black people the right to vote after the Civil War, supporters argued that Black people “had earned the right to vote by their participation in Union armies during the war.”<sup>29</sup> And in debates over women’s suffrage, supporters argued that women were morally superior to men, possessing a sympathy to humanitarian concerns that men lacked.<sup>30</sup> On either side of the debate, the civic virtue of those excluded from voting takes on great importance.

Today, too, the association between voting and civic virtue can be weaponized against nonvoters. The most basic argument for disenfranchising felons is that there is a “need for a minimum of civic virtue among the individuals who participate in the political process” and that felons lack that minimum civic virtue.<sup>31</sup> As Professor Pamela S. Karlan puts it, “the central traditional nonpenal justification for felon disenfranchisement” is “the claim that ex-offenders should not be permitted to vote because they lack the qualities of mind or character voters ought to possess.”<sup>32</sup> Professor Karlan writes that this claim has been undermined as American law developed, particularly as the U.S. Supreme Court came to reject literacy tests and other franchises designed to promote intelligent or responsible

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26. See JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN’S L.J. 103, 113 (1994) (“By claiming the right to vote, last century’s feminists hoped to acquire a symbol that could erode the notion that females were somehow not as human as males.”).

27. SHKLAR, *supra* note 15, at 28. American Indians were not considered citizens and not counted for purposes of apportionment until the Indian Citizenship Act of 1924. See Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)). But some states barred Indians from voting until as late as 1962; Utah was the last state to remove these barriers. See Peter Dunphy, *The State of Native American Voting Rights*, BRENNAN CTR. FOR JUST. (Mar. 13, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/state-native-american-voting-rights> [<https://perma.cc/J3PG-PLL2>].

28. SHKLAR, *supra* note 15, at 38.

29. Vikram David Amar and Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 932 (1998).

30. *Id.* at 960; see also *id.* at 967 (“Most arguments in favor of woman suffrage described the distinct voice of women as essentially a voice of altruism . . .”).

31. Matt S. Whitt, *Felon Disenfranchisement and Democratic Legitimacy*, 43 SOC. THEORY & PRAC. 283, 287 (2017) (attributing this justification of felon disenfranchisement to republican theories of citizenship and criticizing the idea that felons lack civic virtue).

32. Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1152 (2004).

voting.<sup>33</sup> Indeed, it is now unlawful to require individual voters to prove that they “possess good moral character.”<sup>34</sup> But it is not unconstitutional to ban felons from voting because of their supposed lack of moral character.<sup>35</sup>

So the law creates a vicious circle: because felons are thought to lack moral character, they are excluded from one of the practices by which Americans regularly demonstrate their moral character for their neighbors.

Implicit attacks on the moral character of those who are excluded also tend to accompany voter suppression. As Professor Ming H. Chen and Hunter Knapp write, Asian and Latino voters who are naturalized U.S. citizens face both formal barriers to voting, including voter-ID laws and voter-challenge laws, and informal barriers, like language-access obstacles or naturalization backlogs.<sup>36</sup> These barriers are frequently justified with paranoid claims about voter fraud like President Donald J. Trump’s lies about millions of immigrants illegally voting in 2016.<sup>37</sup> Trump portrayed immigrants as lawless and lacking in respect for U.S. democracy—in other words, lacking in civic virtue—to justify voter-suppression tactics.<sup>38</sup>

Other officials impugn the civic virtue of the excluded on different grounds. A longtime local-government official in Rochester, New York, wrote, “My accumulated observations lead me to conclude that the main reason for low voter participation today is that people are lazy or simply don’t care.”<sup>39</sup> Even if this were true, what justifies the implication that lazy people’s votes should not be counted? Every community contains lazy people, and they have just as much right to a say in their democracy as people with other flaws. If we do not disenfranchise obnoxious people, arrogant people, ignorant people, and workaholics, I cannot imagine why we would disenfranchise the lazy.

But, of course, accusations of “laziness” are often about more than laziness; the civic virtue that “lazy” voters supposedly lack is a heavily politicized conception of civic virtue. Pennsylvania State Representative Daryl Metcalfe, who sponsored a voter-ID law, explained his view this way in 2012:

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33. *Id.* at 1153.

34. *See* 52 U.S.C. § 10501 (providing that citizens cannot be denied the right to vote because of “failure to comply with any test or device” and defining “test or device” to mean “any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class”).

35. Karlan, *supra* note 32, at 1152.

36. Ming H. Chen & Hunter Knapp, *The Political (Mis)representation of Immigrants in Voting*, 92 U. COLO. L. REV. 715, 724 (2021).

37. *See id.* at 725.

38. *See id.* at 725–38.

39. Paul E. Hanev, Opinion, *Apathy and Laziness Also Cause Low Voter Turnout*, ROCHESTER CITY NEWSPAPER (Aug. 7, 2018), <https://www.rochestercitynewspaper.com/rochester/apathy-and-laziness-also-cause-low-voter-turnout/Content?oid=7502472> [<https://perma.cc/R76P-DH58>].

I don't believe any legitimate voter that actually wants to exercise that right and takes on the according responsibility that goes with that right to secure their photo ID will be disenfranchised. As [then-presidential candidate] Mitt Romney said, 47% of the people that are living off the public dole, living off their neighbors' hard work, and we have a lot of people out there that are too lazy to get up and get out there and get the ID they need. If individuals are too lazy, the state can't fix that.<sup>40</sup>

It is important to notice the phrase “legitimate voter,” which prompts the question of which voters are illegitimate.<sup>41</sup> Apparently, it includes those who are not “too lazy”—those with civic virtue. A lot of ideas come bundled in this package, including Metcalfe's eagerness to associate “illegitimate” voters with the 47 percent who, Mitt Romney said, pay no income taxes.<sup>42</sup> Romney went on to associate not paying income taxes with a failure to take personal responsibility, saying, “I'll never convince them that they should take personal responsibility and care for their lives.”<sup>43</sup> He also made clear that the allegedly lazy people would not be included in the political community he, as president, would feel obligated to care about. In his words: “And so my job is is [sic] not to worry about those people.”<sup>44</sup>

Not far underneath all of these ideas about nonvoters' supposed lack of civic enthusiasm, or just general laziness, are racist ideas about Black people. For example, in 2013, a Republican county precinct chairman in North Carolina said the following of his state's voter-ID law: “If it hurts the whites so be it. If it hurts a bunch of lazy blacks that want the government to give them everything, so be it.”<sup>45</sup> There is a close association between the naked racism of this comment and its ideas about who lacks the civic virtue that makes them a suitable member of our national political community.

As Professor Carol Anderson writes: “[F]ar too many policymakers believe that the right to vote is something to be earned—after, perhaps, paying a modern-day poll tax, or walking miles to the nearest polling station, or standing in line for hours to cast a ballot.”<sup>46</sup> Voter suppression is justified,

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40. PADemocrats, *Rep Daryl Metcalfe Says People Without Proper ID to Vote Are Lazy*, YOUTUBE, at 0:52 (Sept. 19, 2012), <https://www.youtube.com/watch?v=MsUGD8oEujk> [<https://perma.cc/EW6N-AFLP>], quoted in Andrew Cohen, *Why Pennsylvania's Vote Suppressors Can Never Win*, ATLANTIC (Sept. 25, 2012), <https://www.theatlantic.com/national/archive/2012/09/why-pennsylvanias-vote-suppressors-can-never-win/262809/> [<https://perma.cc/56FW-L2DM>].

41. The host introduced the phrase “legitimate voter,” and Metcalfe picked it up. See PADemocrats, *supra* note 40, at 0:47.

42. See Molly Moorhead, *Mitt Romney Says 47 Percent of Americans Pay No Income Tax*, POLITIFACT (Sept. 18, 2012), <https://www.politifact.com/factchecks/2012/sep/18/mitt-romney/romney-says-47-percent-americans-pay-no-income-tax/> [<https://perma.cc/93AL-62N7>].

43. *Id.*

44. *Id.*

45. Adam Gabbatt, *Republican Activist Resigns After 'Lazy Blacks' Remark in Daily Show Interview*, GUARDIAN (Oct. 25, 2013, 3:17 PM), <https://www.theguardian.com/world/2013/oct/25/republican-lazy-blacks-voter-id-daily-show> [<https://perma.cc/PV3U-TCMW>].

46. CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 195 (2019).

in part, by the alignment between voter-suppression requirements and the moral idea that voting is a test of civic virtue. If voting is a test of civic virtue, then those who cannot overcome hurdles to vote are, in some sense, failing. The idea that heroic acts of voting reveal heroic personal character implies that some acts of not voting must represent failures of personal character. In this sense, to praise voters as heroic is to accept that a kind of sorting has happened, in which the heroic were separated from the nonheroic, perhaps even the weak and contemptible. It is the implicit metaphor of the test that is the problem with this narrative. Voting should not be a test of anything except which box one wishes to check on the ballot.

### C. *Virtue v. Equality*

When we speak of a “right” to vote, implicit in the word “right” is the idea that it applies equally to everyone. Thus, Justice Ruth Bader Ginsburg wrote: “The grand aim of the [Voting Rights] Act is to secure to all in our polity *equal* citizenship stature, a voice in our democracy undiluted by race.”<sup>47</sup> And Professor Joseph Fishkin writes that, ideally, “by allowing individuals to vote, the polity includes them in the circle of full and equal citizens.”<sup>48</sup> Elections should be, in the words of Professor Emilee Booth Chapman, “special moments of mass participation that manifest the equal political authority of all citizens.”<sup>49</sup>

Atticus Finch famously says of the courtroom that “there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president.”<sup>50</sup> He is forgetting the ballot box, which, in a thriving democracy, would have the same equalizing effect.<sup>51</sup>

We remember civil rights activists and the women who fought for suffrage, not to pretend that their work is complete but rather to affirm that their struggles are more central to the meaning of our democracy than the struggles of those who fought against them. By using Election Day to remember those who fought for equality, we affirm that equality is central to the meaning of our democracy.

The voting-as-equality narrative, however, conflicts with the narrative of voting-as-virtue. People are never equal in virtue.

One key premise in the voting-as-virtue narrative is that the right to vote is something that can be earned or deserved. Certainly, this idea has appeal. There would be a special outrage, for example, in disenfranchising someone

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47. *Shelby Cnty. v. Holder*, 570 U.S. 529, 592 (2013) (Ginsburg, J., dissenting) (emphasis added).

48. Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 *IND. L.J.* 1289, 1296 (2011).

49. Emilee Booth Chapman, *The Distinctive Value of Elections and the Case for Compulsory Voting*, 63 *AM. J. POL. SCI.* 101, 101 (2019).

50. HARPER LEE, *TO KILL A MOCKINGBIRD* 218 (1960) (for those with other editions, the quoted text is at the end of chapter 20).

51. Atticus was wrong about many things. See generally A. B. Ayers, *The Half-Virtuous Integrity of Atticus Finch*, 86 *MISS. L.J.* 33 (2017).

like the late U.S. Representative John Lewis, who fought so hard for civil rights, including the right to vote. He earned his vote in a way that few of us have. The same moral intuition supports a campaign called “Count Every Hero,” which works to ensure that servicemembers’ votes are counted.<sup>52</sup> People who risk their lives for their country by serving in the military may not have more of a right to vote than the rest of us, but there would be something especially inappropriate about denying them the right to vote.

The danger here is creating what Professor Jennifer M. Chacón calls “supercitizens.”<sup>53</sup> She points out that political rhetoric around immigration creates “supercitizen immigrants.”<sup>54</sup> The common idea that some people “deserve” citizenship (through civic virtue) reinforces a “good immigrant” versus “bad immigrant” dichotomy, in which “worthy” subjects, like the so-called “DREAMers,” are seen as worthy of citizenship and serve as a contrast that shows others to be unworthy.<sup>55</sup>

People like Representative John Lewis can play a similar role in debates about voting. Almost anyone will seem to be lazy, and lacking in civic virtue, if Lewis is the standard to which we hold individuals. But, the principle Lewis fought for was that voting rights should not have to be earned through extraordinary virtue; rather, they should be given in recognition of fundamental equality, something no one has to earn. The idea of good voters and less-good voters contradicts the ideal of equality. Yes, some people are better than others, but that judgment has no more of a place in the voting booth than it does in the courtroom. Everyone’s vote should count, whether the individual casting the vote is virtuous or not.

## II. VOTING AS INCLUSION

Another problem with the voting-as-virtue narrative, true and important though it may be, is that it focuses on individuals. Elections are a collective project that tests our democracy and government. Virtue narratives obscure that crucial fact.

When we shift the focus of the narrative from individual voters to the collective project of democracy, one of the most obvious stories that needs telling is how voting includes people in our political community. Voting defines and expands the boundaries of membership. It is one of the ways that “we” accomplish inclusion. This narrative, then, is about the conflict between inclusion and the powerful forces that try to undermine it.

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52. COUNT EVERY HERO, <https://counteveryhero.org/> [<https://perma.cc/CS3P-BJKA>] (last visited Sept. 17, 2021).

53. Jennifer M. Chacón, *Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions*, 52 U.C. DAVIS L. REV. 1, 73, 75 (2018).

54. *Id.* at 73.

55. *Id.* at 71–74.

*A. Voter Suppression as a Denial of Membership*

When we talk about voting, we help construct the meaning of our democracy and national identity.<sup>56</sup> Ideally, Election Day should bring us together; voting should be what political theorist Judith Shklar describes as an “affirmation of belonging.”<sup>57</sup> And Professor Karlan writes that voting is a manifestation of “civic inclusion: ‘a sense of connectedness to the community and of equal political dignity.’”<sup>58</sup>

To be sure, voting is also supposed to create political power.<sup>59</sup> But that should not minimize its affective significance. Voting brings us closer to our community. An “I voted” sticker, Jordan Conley writes, “is a memento, yes, but also a continuation of the vote and/or the state of voting. In this sense, the sticker serves . . . to identify us as members of a broader community of voters.”<sup>60</sup> Voting is an affirmation of belonging.

If voting is an affirmation of one’s belonging in a community, then voter suppression is a denial of one’s status as a community member, or someone who belongs. In *Reynolds v. Sims*,<sup>61</sup> the U.S. Supreme Court said, “To the extent that a citizen’s right to vote is debased, he is that much less a citizen.”<sup>62</sup> The idea of being “less a citizen” is troubling not only because of the exclusion it suggests but also because, as discussed above, citizenship is associated with civic virtue. Excluded voters, then, are not only treated like nonmembers but also treated as if they do not *deserve* membership.

For example, disenfranchised felons who have served their time are often not eligible for restoration of the right to vote, and, even if they are eligible, they may face multiple, and sometimes insurmountable, bureaucratic barriers to regaining their right.<sup>63</sup> These harms and their implications are significant because they amount to the right to share a national identity with one’s fellow citizens. And when voting is the mechanism for denying membership, the

56. See generally Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

57. SHKLAR, *supra* note 15, at 26 (citing KIM EZRA SHEINBAUM, BEYOND THE ELECTORAL CONNECTION 10, 126 (1984)).

58. Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1710 (1993) (quoting Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 180 (1989)).

59. Elections are supposed to help create inclusion in the real world; it is a common idea that once minority groups are able to participate in elections, they will receive fairer treatment. See Theodore J. Davis, Jr., *The “Politics of Inclusion” Revisited: The Implications for Politics in Black and White America*, 39 W.J. BLACK STUD. 223, 224–25 (2015).

60. Conley, *supra* note 18, at 56.

61. 377 U.S. 533 (1964).

62. *Id.* at 567. For a useful critique of the Court’s later extensions of *Reynolds*, see Gardner, *supra* note 10, at 452. Professor Gardner argues that the right not to have one’s vote diluted by other people’s improper votes, if such a right exists, is a “second-order” right, meaning that it protects arrangements of power that happen to effectively promote the better functioning of our democracy rather than protecting fundamental human dignity. *Id.* As such, it can and should be limited to those cases where it actually promotes the better functioning of our democracy. *Id.*

63. See, e.g., ANDERSON, *supra* note 46, at 134–36.

implication quickly follows that they lack civic virtue—that they *deserve* to be excluded.

One person who had been disenfranchised for a felony conviction expressed the way it felt to be subjected to exclusionary measures in words that neatly encapsulate the idea of civic virtue: “I’m trying to be a citizen, I’m trying to do everything I’m supposed to.”<sup>64</sup> He felt he deserved to vote, and this made his exclusion feel particularly unjust: “Yet I can’t participate in the most important thing that we Americans hold dear, I can’t vote.”<sup>65</sup> The specifics of the 2016 election, with so much at stake, made this worse: “It made me feel, I guess, for the first time, not American.”<sup>66</sup> Voter suppression communicates to its targets that they are not full members of the political community.

This often affirms patterns of discrimination that are already rampant. Photo-ID laws, and the elimination of early voting and same-day registration, disproportionately affect people of color.<sup>67</sup> Native Americans, too, have been the objects of extreme voter-suppression measures.<sup>68</sup> Voter-ID laws in states that require physical addresses for IDs forced Native Americans to find a physical address in only a few weeks if they wanted their votes to count.<sup>69</sup> This is not civic virtue; this is requiring citizens to jump through meaningless hoops simply to have their votes counted. When nationwide studies show that nonwhite voters wait in line to vote approximately twice as long as white voters,<sup>70</sup> the harm is not just the inconvenience they suffer; rather, it is the message about who is valued more.

For transgender people, too, voter-ID laws require triumph over significant bureaucratic obstacles before they can vote.<sup>71</sup> Even for trans people like me, who live in states without restrictive voter-ID laws, voting can be an affirmation of difference rather than inclusion. My transition is still in process, and, as of this writing, I have not yet changed my name on any

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64. Rebecca C. Lewis, *State Legislature May Restore Voting Rights to Parolees*, CITY & STATE NEW YORK (Jan. 27, 2021), <https://www.cityandstateny.com/policy/2021/01/state-legislature-may-restore-voting-rights-to-parolees/175241/> [<https://perma.cc/R37Y-GS6W>].

65. *Id.*

66. *Id.*

67. See Danielle Lang & J. Gerald Hebert, *A Post-Shelby Strategy: Exposing Discriminatory Intent in Voting Rights Litigation*, 127 YALE L.J.F. 779, 783–84 (2018).

68. See Patty Ferguson-Bohnee, *How the Native American Vote Continues to Be Suppressed*, AM. BAR ASS’N (Feb. 9, 2020), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/voting-rights/how-the-native-american-vote-continues-to-be-suppressed/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/how-the-native-american-vote-continues-to-be-suppressed/) [<https://perma.cc/MXF4-C3Q3>].

69. See ANDERSON, *supra* note 46, at 195.

70. See Stephen Pettigrew, *The Racial Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials*, 132 POL. SCI. Q. 527, 527 (2017).

71. See the helpful but intimidating checklist at NAT’L CTR. TRANSGENDER EQUAL., VOTING WHILE TRANS, <https://www.transequality.org/sites/default/files/docs/resources/voting%20while%20trans.pdf> [<https://perma.cc/5SUH-38TZ>] (last visited Sept. 17, 2021); see also Scottie Andrew, *Why Some Transgender Voters Have an Even Bigger Challenge to Casting Their Ballots*, CNN (Oct. 13, 2020, 12:31 PM), <https://www.cnn.com/2020/10/13/politics/transgender-voter-suppression-2020-election-trnd/index.html> [<https://perma.cc/EC83-ZNQC>].

government documents.<sup>72</sup> So, before I voted in 2020, I had to sign a ballot register affirming that my legal name is not my real name. In other words, I had to affirm to the government that I am not who I say I am.

Here, we bump up against the limits of the voting-as-virtue narrative: I overcame a little obstacle to vote, which I suppose demonstrates my commitment to voting, but it did not feel like expressing civic virtue. I had to affirm something that felt deeply untrue, which I experienced more as a violation of integrity than as an act of civic altruism. The civic-virtue story emphasizes the accomplishment, rather than the damage; but, sometimes, the damage is more important.

I do not offer these comments as a catalogue of the groups subject to voter suppression or the ways in which voter suppression harms the people it affects. My point is only to establish that one of the harms of voter suppression is an expressive harm: the affirming of a person's status as a semi-citizen, second-class citizen, or marginalized outsider.

And, as discussed above, the voting-as-virtue narrative also infects the exclusion narrative with damaging implications. The idea of virtue in voting makes it possible to blame the victims of voter suppression for their own exclusion. Once one believes that voting is an expression of civic virtue, it becomes easier to justify voter suppression by casting aspersions on the civic virtue of the people whose votes are suppressed. The extreme version of this tendency is to see would-be voters not merely as lazy but as threats.

#### *B. The Paranoid Version: Voting as Victory over Inclusion*

Narratives about struggles for inclusion can be told in a different way, with the moral valence flipped. In both versions of the narrative, there are people struggling to vote and people struggling to prevent them from voting, but in the flipped version, it is the would-be voters who are the villains. In its more extreme manifestations, this is a paranoid story in which exclusionary tactics are necessary to protect "us" from hostile forces always on the move: perpetrators of voter fraud, noncitizens who want to vote illegally, or voting machine companies carrying out the plan of some dead Venezuelan dictator.<sup>73</sup>

When Professor Richard Hofstadter described the "paranoid style" in American politics, he identified the feeling that hostile forces are "directed against a nation, a culture, a way of life."<sup>74</sup> This is a familiar description to anyone who remembers 2020's tales of imaginary fraudsters, noncitizen

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72. See generally Austin A. Baker & J. Remy Green, *There Is No Such Thing as a "Legal Name": A Strange, Shared Delusion*, 53 COLUM. HUM. RTS. L. REV. (forthcoming 2021).

73. See Hansi Lo Wang, *Immigration Hard-Liner Files Reveal 40-Year Bid Behind Trump's Census Obsession*, NPR (Feb. 15, 2021, 5:01 AM), <https://www.npr.org/2021/02/15/967783477/immigration-hard-liner-files-reveal-40-year-bid-behind-trumps-census-obsession> [<https://perma.cc/2N64-9D5D>] (describing the history of the Federation for American Immigration Reform's efforts to prevent counting noncitizens in apportionment, in the context of its founder's white-supremacist ideology).

74. RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 3–4 (Vintage Books 2008).

voters, and foreign conspirators. In paranoid narratives about voting, voting is inclusion, and that is precisely why it must be suppressed.

As is well known, President Trump and his allies spread false stories of widespread voter fraud in the 2020 election and did the same after the 2016 election to explain how he lost the popular vote.<sup>75</sup> These lies<sup>76</sup> serve a purpose: to limit inclusion by limiting voting.

The attack on the U.S. Capitol on January 6, 2021—in which violent Trumpists attempted to prevent the counting of Electoral College votes—was driven by conspiracy theories about the election and the supposed effects of votes that should have been suppressed. Indeed, the attack was itself an attempt to suppress the counting of those votes, and it was driven by narratives that valorized the suppression of inclusion through the suppression of voting.

Dishonest elected officials and pundits had argued vehemently in the run-up to the attack that the 2020 presidential election was rigged.<sup>77</sup> Trump addressed the crowd before it attacked the Capitol, saying that if the Electoral College count took place “[y]ou will have an illegitimate president, that’s what you’ll have,”<sup>78</sup> and “[i]f you don’t fight like hell, you’re not going to have a country anymore.”<sup>79</sup>

The premise of the paranoid narrative and its expressions, including Trump’s warning that “you’re not going to have a country anymore,”<sup>80</sup> is that

75. See Robert Farley, *Trump’s Bogus Voter Fraud Claims*, FACTCHECK (Oct. 19, 2016), <https://www.factcheck.org/2016/10/trumps-bogus-voter-fraud-claims/> [<https://perma.cc/W43X-P9TG>]. For a compilation of Trump’s tweets about voter fraud, see TRUMP TWITTER ARCHIVE, <https://www.thetrumparchive.com/archive/account/rogerjstonejr/Wiki/tfff?searchbox=%22Voter+fraud%22> [<https://perma.cc/WJ3P-2K5J>] (last visited Sept. 17, 2021).

76. See *Tex. Democratic Party v. Abbott*, 461 F. Supp. 3d 406, 417 (W.D. Tex. 2020) (“[T]he evidence has shown that there is no widespread voter fraud.”), *vacated and remanded on other grounds*, 978 F.3d 168, 174 (5th Cir. 2020); see also *Donald J. Trump for President, Inc. v. Bullock*, 491 F.3d 814, 822 (D. Mont. 2020) (“Central to some of the Plaintiffs’ claims is the contention that the upcoming election, both nationally and in Montana, will fall prey to widespread voter fraud. The evidence suggests, however, that this allegation, specifically in Montana, is a fiction. When pressed during the hearing in this matter, the Plaintiffs were compelled to concede that they cannot point to a single instance of voter fraud in Montana in any election during the last 20 years.”); *Veasey v. Abbott*, 888 F.3d 792, 815 n.13 (5th Cir. 2018) (Graves, J., concurring in part) (“Given its apparent lack of interest in guarding against ‘voter fraud’ wherever it may arise, it seems more accurate to say that Texas, having itself stoked the fires of voter fraud in the mind of its electorate, now purports to have a genuine interest in increasing public confidence in the firefighters.”).

77. See Dan Barry et al., “*Our President Wants Us Here*”: *The Mob That Stormed the Capitol*, N.Y. TIMES (May 28, 2021), <https://www.nytimes.com/2021/01/09/us/capitol-rioters.html> [<https://perma.cc/TS6E-CWQ8>].

78. Dan Zak, *The Grand Finale of the Trump Show: America Watches Farce Devolve to Horror*, WASH. POST (Jan. 7, 2021, 9:33 AM), [https://www.washingtonpost.com/lifestyle/style/trump-show-grand-finale-capitol-riot/2021/01/07/c23e4934-5035-11eb-83e3-322644d82356\\_story.html](https://www.washingtonpost.com/lifestyle/style/trump-show-grand-finale-capitol-riot/2021/01/07/c23e4934-5035-11eb-83e3-322644d82356_story.html) [<https://perma.cc/46Q5-S67S>].

79. Karoun Demirjian et al., *Inside the Capitol Siege: How Barricaded Lawmakers and Aides Sounded Urgent Pleas for Help as Police Lost Control*, WASH. POST (Jan. 10, 2021, 12:07 AM), [https://www.washingtonpost.com/politics/inside-capitol-siege/2021/01/09/e3ad3274-5283-11eb-bda4-615aefd0555\\_story.html](https://www.washingtonpost.com/politics/inside-capitol-siege/2021/01/09/e3ad3274-5283-11eb-bda4-615aefd0555_story.html) [<https://perma.cc/54L7-AH2K>].

80. *Id.*

not all Americans are truly American. If “you” will not have your country, someone else will, and even if they are citizens, they are not true Americans. The Claremont Institute, a right-wing think tank which purports to provide an intellectual basis for Trumpism,<sup>81</sup> makes this claim explicit, asserting that “most people living in the United States today—certainly more than half—are not Americans in any meaningful sense of the term” because, even if they are “technically” citizens, they “do not believe in, live by, or even like the principles, traditions, and ideals that until recently defined America as a nation and as a people.”<sup>82</sup> Once one sees one’s neighbors as non-Americans, exclusion from voting must seem greatly desirable.

And indeed, the January 6 attackers were quite clear about who was taking away “their” country. Members of the mob repeatedly called Black members of the Capitol Police the n-word,<sup>83</sup> and another man wandered through the halls of the Capitol with a Confederate flag, the symbol of racist treason that the Confederate army never managed to bring into the U.S. Capitol.<sup>84</sup> For a scholar of African-American Studies like Daniel Black, it was easy to see that “that’s what [January 6] was really about—who are the true Americans? Those who stormed the Capitol believed they are. And from the way they were handled, it seems that many—but not all—police authorities agreed.”<sup>85</sup>

Efforts to limit inclusion by limiting voting invoke familiar metaphors. Professors Catherine Powell and Camille Gear Rich observe that the racist narrative of the “welfare queen” has, in recent years, begun to overlap with paranoid narratives about voter fraud.<sup>86</sup> Both involve supposed fraudsters plotting to exploit an overly generous and trusting government. And both narratives portray Black women as seeking to undermine American democracy and government. Deploying the welfare-queen narrative in the election context is a tactic to claim that “American democracy is fragile and that the right to vote is a scarce commodity that must be secured from those that would steal this right and upset the proper democratic order.”<sup>87</sup> Professors Powell and Rich write that these narratives turn cries for inclusion into threats: on the one hand, “demands for social safety nets and reproductive freedom for poor women” and, on the other hand, “the so-called

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81. See Glenn Ellmers, “Conservatism” Is No Longer Enough, AM. MIND (Mar. 24, 2021), <https://americanmind.org/salvo/why-the-claremont-institute-is-not-conservative-and-you-shouldnt-be-either/> [<https://perma.cc/9LBX-ZW5N>] (“Claremont was one of the very few serious institutions on the right to make an intellectual case for Trumpism.”).

82. *Id.*

83. See Nick Niedzwiadek, *Capitol Police Officer Says Jan. 6 Rioters Used N-word Against Him, Others*, POLITICO (July 27, 2021, 11:29 AM), <https://www.politico.com/news/2021/07/27/capitol-police-racial-slurs-500846> [<https://perma.cc/5S3G-RKCX>].

84. See Maria Cramer, *Confederate Flag an Unnerving Sight in Capitol*, N.Y. TIMES (Jan. 14, 2021), <https://www.nytimes.com/2021/01/09/us/politics/confederate-flag-capitol.html> [<https://perma.cc/7TL2-8BYW>].

85. Daniel Black, *The Capitol Attack Was White Supremacy, Plain and Simple*, CNN (Jan. 10, 2021, 11:27 AM), <https://www.cnn.com/2021/01/10/opinions/capitol-attack-white-supremacy-daniel-black/index.html> [<https://perma.cc/8GV2-J4PY>].

86. See Powell & Rich, *supra* note 1, at 109.

87. *Id.* at 110.

voter-fraudster's demand for easy, open, and simple ways to exercise the franchise."<sup>88</sup>

What the paranoid narrative suggests we need, then, is exclusion, not inclusion. It is the forces of exclusion that defend our democracy, not those who work to ensure that marginalized people are included.

Paranoid perversions of the inclusion narrative should not dissuade us from affirming and enacting it. Voting is an affirmation of belonging, and it is important to affirm that all members of our community count. Like the voting-as-virtue narrative, the voting-as-inclusion narrative should remain part of our understanding of voting. But it is not the whole story.

### III. VOTING AS EXCLUSION

On Election Day, even as many votes are suppressed, we celebrate the aspiration to include our fellow citizens in the political community, as we should. However, not everyone is invited to this party. Election rituals symbolize the ideal of equal inclusion of everyone who belongs, but, in this sense, they also solidify the line between the citizens who belong and the noncitizens who do not. Election narratives about voter exclusion are premised on the ideal of equal inclusion for some but also on a commitment to excluding others. There is a sadder story behind narratives of voting-as-inclusion—one in which voting is an affirmation of *exclusion*. It does not have to be this way.

It is natural to express the harm of denying voting rights as a denial of membership and belonging. A voter who is barred from voting by voter-ID laws says, understandably, "I feel like I'm not wanted in this state."<sup>89</sup> Voting and citizenship are closely associated, and so a denial of the vote amounts to a denial of citizenship—a denial of social membership and belonging. Professor Carol Anderson tells the story of a Black veteran whose Veterans Administration ID card was rejected under Texas's new photo-ID laws because it had no photo of him. "I wasn't a citizen no more," he said.<sup>90</sup> This is a powerful expression of pain and exclusion. But the choice of metaphor has other implications.

If being treated like a noncitizen is painful, what does that say about how we treat noncitizens? Is being treated like a noncitizen painful or harmful only for those people who are entitled to expect being treated like citizens? Or is it just painful to be a noncitizen?

#### *A. Voting as Citizenship: An Affirmation of Exclusion*

When we exclude individuals from citizenship or voting, we exclude them not only from a legal privilege but also from a social status. The word "citizenship" refers to a form of both legal and social inclusion and

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88. *Id.* at 113.

89. ANDERSON, *supra* note 46, at 45.

90. *Id.* at 44.

membership.<sup>91</sup> This kind of “citizenship” is an interpersonal and emotional state of being included in and connected to the community.<sup>92</sup> Thus, one Deferred Action for Childhood Arrivals (DACA) recipient interviewed by Professor Chacón said that citizenship was important to him because “the main thing” was “being accepted.”<sup>93</sup>

Voting, too, is a form of social membership, as well as a legal right.<sup>94</sup> As such, it is valuable in ways that go far beyond the power to fractionally influence an election. In Professor Shklar’s words: “The deepest impulse for demanding the suffrage arises from the recognition that it is the characteristic, the identifying, feature of democratic citizenship in America, not a means to other ends.”<sup>95</sup> But if voting is a celebration of citizenship, it is a celebration to which many of our neighbors are not invited.<sup>96</sup>

One group excluded from the circle of citizenship, voting, and membership is noncitizens. There are approximately twenty-four million noncitizens in the United States.<sup>97</sup> Noncitizens pay taxes, live in American communities, and participate in society. But it would be a crime for any of them to vote in a federal election.<sup>98</sup> Around twenty-one million more people in the United States are naturalized citizens, meaning that they were barred from voting at some point in their lives.<sup>99</sup> One in seven U.S. residents has experienced voting ineligibility based on their citizenship status.<sup>100</sup> Moreover, one quarter of all children in the United States have at least one foreign-born parent.<sup>101</sup>

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91. See LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 18 (2006); ALLAN COLBERN & S. KARTHICK RAMAKRISHNAN, *CITIZENSHIP REIMAGINED: A NEW FRAMEWORK FOR STATE RIGHTS IN THE UNITED STATES* 37 (2021) (reviewing political scientists’ conceptions of citizenship and concluding that “we conceptualize citizenship most broadly as a kind of membership”).

92. The word citizenship can “evoke the affective elements of identification and solidarity that people maintain with others in the wider world.” BOSNIAK, *supra* note 91, at 20.

93. Chacón, *supra* note 53, at 57.

94. See COLBERN & RAMAKRISHNAN, *supra* note 91, at 40–41.

95. SHKLAR, *supra* note 15, at 56.

96. See Chacón, *supra* note 53, at 75–76 (“Citizenship has been more accessible and less exclusive than in many other societies, but it has also been a tool of racial exclusion and racial privilege, and, relatedly (albeit in distinctive ways) a tool of conquest.”) (footnote omitted).

97. See Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/> [<https://perma.cc/F6KT-7BDG>].

98. See 18 U.S.C. § 611 (codifying the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 216(a), 110 Stat. 3009, 3009–572).

99. See Budiman, *supra* note 97.

100. See *id.*; Jeanne Batalova et al., *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL’Y INST. (Feb. 11, 2021), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Demographic,%20Educational,%20and%20Linguistic%20Characteristics> [<https://perma.cc/8TZJ-5CS8>].

101. See *Part of Us: A Data-Driven Look at Children of Immigrants*, URB. INST. (Mar. 14, 2019), <https://www.urban.org/features/part-us-data-driven-look-children-immigrants> [<https://perma.cc/DWA5-X8LZ>].

Thus, the number of people with personal experiences of noncitizenship is very large. Although noncitizens are often overlooked in legal and political theory, as well as in everyday political discourse, they are a permanent feature of our communities and our national identity.<sup>102</sup> No narrative can claim to fairly represent U.S. national identity if it excludes noncitizens.

Professor Linda Bosniak says citizenship is “hard on the outside and soft on the inside,” by which she means that the idea of citizenship conveys “democratic belonging or inclusion, yet this inclusion is usually premised on a conception of a community that is bounded and exclusive.”<sup>103</sup> When we equate voting with citizenship and citizenship with belonging, we are endorsing an exclusive conception of community, one that assumes noncitizens are incapable of belonging.

Whether or not exclusion is necessary for community identity, American community identity has long derived meaning from its exclusiveness. Professor Judith Shklar argues that the exclusiveness of the right to vote made it precious to white American men, serving as an affirmation of full citizenship precisely because so many were denied it.<sup>104</sup> It functioned to distance the citizen and voter “from his inferiors, especially slaves and women.”<sup>105</sup> The exclusion of others from the vote “defined its importance for the white male, because it distinguished him from the majority of his degraded inferiors.”<sup>106</sup>

Today, the exclusiveness of citizenship is a key part of the meaning of the rituals of voting. Just as voting helped define the white male’s standing in society by contrasting him with his “inferiors,” the specter of the noncitizen has long helped give meaning to others’ struggle for the right to vote. “Shall we be citizens in war, and aliens in peace?” asked Frederick Douglass, talking about voting rights.<sup>107</sup> The word “aliens” in this sentence gets its force from the assumption that aliens are outsiders. I want to be clear that I am not criticizing the way Douglass phrased this: he was *right* to express the thought that Black citizens deserved to be treated like insiders rather than outsiders. But I do want to insist that statements like Douglass’s pick out *two* problems, not one: (1) the problem that Black people are disenfranchised and (2) the problem that noncitizens are assumed to be a subordinated and socially inferior group.

When we allow voting to serve as an affirmation of exclusion, the virtue narrative makes that exclusion more damaging. Associating citizenship and

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102. See generally TENDAYI BLOOM, *NONCITIZENISM: RECOGNISING NONCITIZEN CAPABILITIES IN A WORLD OF CITIZENS* 26 (2017) (“Noncitizenship is more than an absence of citizenship. It can be a mode of engagement with a State in its own right . . . . [I]n order to take seriously the equal moral worth of every human, a liberal theoretical framework and political reality must take account of this noncitizen relationship.”).

103. BOSNIAK, *supra* note 91, at 1, 4. See generally AMY L. BRANDZEL, *AGAINST CITIZENSHIP: THE VIOLENCE OF THE NORMATIVE* (Piya Chatterjee ed., 2016).

104. See SHKLAR, *supra* note 15, at 27.

105. *Id.*

106. *Id.* at 49.

107. See *id.* at 52.

voting with civic virtue carries an inevitable implication that noncitizens must lack civic virtue, that they cannot belong in our communities, and that they are not our equals.

Citizenship and civic virtue have long been associated. As Professor Chacón writes: “[C]itizenship itself [has been] increasingly treated as a measure of merit.”<sup>108</sup> On *The Wire*, Detective Lester Freamon, looking through photos to find someone who might inform on a criminal gang, stops at one picture, saying: “She looks like a *citizen*, right?”<sup>109</sup> The word “citizen” evidently means “someone who cares about doing the right thing for her community.” This idea goes back to Aristotle, for whom citizenship meant “the process of democratic self-government” and “the practice of active engagement in the life of the political community.”<sup>110</sup>

Of course, “citizenship” in this sense does not refer to a legal status. Rather, “citizenship” in Detective Freamon’s sense is what Professor Bosniak calls “active citizenship”—the old Aristotelian kind.<sup>111</sup> The word “citizenship” here describes a social quality, not a legal one, and it has moral and evaluative aspects: one can be good or bad at being a citizen in the social sense. In the legal sense, one either is or is not a citizen.

One need not be a citizen in the legal sense to be a good citizen in the social sense. The assumption that only citizens can have civic virtue is wrong. Noncitizens work to make their communities, including their political communities, better in countless ways. Indeed, the specific kind of civic virtue Detective Freamon calls “citizenship” is often found in noncitizens, which is one of the most-often-offered justifications for “sanctuary” policies: police departments know that noncitizens can and do serve as valuable sources of information for law enforcement officials.<sup>112</sup> They courageously risk their own safety to keep their communities safe. More broadly, Professor Chacón’s research makes clear that noncitizens often see themselves as actively engaged in their communities and with good reason: they participate in politics, they organize to support their neighbors, and they are integrated into political society in all the ways an Aristotelian citizen of distinguished civic virtue should be.<sup>113</sup> Noncitizens can be good citizens.

### B. *The Story of Voting-as-Exclusion Is Not Necessary*

Many people would say that there is nothing wrong with excluding noncitizens from voting and, at least to some extent, from membership in the political community. Isn’t that the whole point of having citizenship?

108. Chacón, *supra* note 53, at 55.

109. *The Wire: Lessons*, HBO, <https://www.hbo.com/the-wire/season-01/8-lessons/synopsis> [<https://perma.cc/4L8A-4Q52>] (last visited Sept. 17, 2021) (emphasis added).

110. BOSNIAK, *supra* note 91, at 19.

111. *See id.*; *see also* MERCIECA, *supra* note 1, at 1–3.

112. *See* Ava Ayers, *Missing Immigrants in the Rhetoric of Sanctuary*, 2021 WIS. L. REV. 473, 506.

113. For discussion of more pernicious ideas about the virtue of noncitizens, *see generally* MADELINE Y. HSU, *THE GOOD IMMIGRANTS: HOW THE YELLOW PERIL BECAME THE MODEL MINORITY* (2015).

It really isn't. Consider Professor Michael Walzer's influential argument that a political community cannot define itself without the ability to exclude nonmembers because the identities of nations and other political communities are formed, in part, by their decisions about whom to exclude.<sup>114</sup> Without the power to exclude, "there could not be *communities of character*, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life."<sup>115</sup>

Professor Walzer's idea that a community must exclude others to define itself is just wrong. To be sure, a community cannot define itself as including all of humanity, so community identity requires the existence of nonmembers. But there need not be *involuntary* nonmembers. There are many cohesive, well-defined communities that anyone can join. Think of fandoms: loyal followings, people who meet for conventions. Anyone can be a Trekkie. Or consider churches. Many religious communities are open to all, and, surely, they have a "special commitment to one another and some special sense of their common life."<sup>116</sup>

To be sure, one cannot join a fandom, or most churches, without holding certain beliefs or wanting to participate in certain practices. But that is similar to membership in a national community: you have to journey to the United States and want to live here and become a member of this community. Many of the communities with the strongest identities have voluntary membership that is open to all.

And although it is necessary to exclude noncitizens from citizenship (even I can admit the conceptual necessity there), it is hardly necessary to exclude them from a sense of social belonging. They cannot be citizens, but they can be neighbors. And they can be members: members of social networks (I mean the real life kind), members of local communities, members of our national community, participants in civic life. In fact, noncitizens *are* all of these things. It is only in our obstinate insistence on equating citizenship with belonging that we deny noncitizens membership.

Nor is it legally necessary for noncitizens to be excluded from voting, as scholars like Jamin Raskin and Ron Hayduk have argued.<sup>117</sup> In fact, noncitizens have had voting rights in various states throughout U.S. history and can vote in various local elections, even today.<sup>118</sup> To undermine pernicious narratives about noncitizens, their lack of civic virtue, and their supposed nonmembership in our communities, allowing noncitizens to vote might be the easiest answer.

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114. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 62 (1983).

115. *Id.*

116. *Id.*

117. See generally RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES (2006); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993).

118. See HAYDUK, *supra* note 117, at 15, 87.

## CONCLUSION

I will close with three suggestions about how we might make our narratives better account for the negative effects of the voting-as-virtue narrative and the fact that voting reinforces exclusion.

First, we should be careful how we speak about voting and civic virtue. Praise civic virtue, sure, but not in terms of citizenship. The word “citizenship” is often used to mean “member of a community” or “good member of a community.” The reverse implication is that noncitizens are not members or good members of a community. Try “neighbors,” “residents,” “constituents,” or “community members.” Resist the temptation to praise civic virtue in the language of citizenship.

Second, never tell the story of a voter’s heroism without also telling the story of the collective failure that made it necessary.

Third, look to valorize forms of civic virtue other than voting. Election Day is a festival of pride and celebration of those who contribute to their communities, but there are many other ways of contributing to a community. For example, we keep the justice system running when we answer the call to jury service, but the normal social reaction to this is complaint, not celebration. (Jurors do at least usually get a “thank you” from most judges.) Taxpaying, without which our political community would collapse overnight, is the occasion of anti-celebrations like “Tax Freedom Day,” on which the conservative Tax Foundation asks Americans to feel that they have been unfree for the preceding months because they have reached the day on which the yearly tax burden of the average taxpayer (who pays much more in taxes than the median taxpayer) is finally paid off.<sup>119</sup> We could instead use April 15, the day income taxes are usually due, to celebrate our collective decision to keep our democracy up and running for another year and to put our money where our mouths are.

And we could celebrate less formal kinds of civic virtue too. Democracy depends on activism. It depends on constituents educating themselves about policy issues and letting their elected officials know their views. Stories about heroic voters could at least mention the other heroes on whom our political community depends for its vitality—many of whom are members, and good members, of our communities but not citizens.

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119. See Erica York et al., *Tax Freedom Day 2019 Is April 16th*, TAX FOUND. (Apr. 10, 2019), <https://taxfoundation.org/publications/tax-freedom-day/> [<https://perma.cc/M7AT-GTK5>]; see also Paul Nightingale, *Why the Concept of a Tax Freedom Day Is Ridiculous*, GUARDIAN (May 30, 2013, 12:40 PM), <https://www.theguardian.com/science/political-science/2013/may/30/tax-freedom-day-ridiculous> [<https://perma.cc/3LZQ-FH3T>].