

## Felon Re-Enfranchisement and the Problem of “Lost” Rights

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**ABSTRACT.** By conditioning the restoration of political rights on financial repayment, states have prevented hundreds of thousands of citizens with felony convictions from participating politically—profoundly altering the shape of the American electorate. Courts have upheld the practice by treating restoration as an exercise of legislative grace to nonmembers of the political community. Critics argue that the practice conditions political participation on wealth status and is therefore subject to heightened review.

This Essay traces the disagreement back to an overlooked first-order question: how should the juridical status of a disenfranchised citizen’s “lost” rights be understood? The conventional position assumes that disenfranchisement casts a citizen outside the democratic community, thereby voiding all constitutional claims to political participation. But for doctrinal and democratic-theoretical reasons, disenfranchisement is better understood as the subordination—not the revocation—of political rights and interests, just as punishment suppresses but does not eliminate an individual’s constitutional interests in physical liberty or other civil liberties. From this it follows that disenfranchised citizens retain a stake in political inclusion that cannot be conditioned on wealth status.

Redescribing the disenfranchisement-to-restoration process in this way aligns with the Supreme Court’s reading of Section 2 of the Fourteenth Amendment in *Richardson v. Ramirez* and sharpens the constitutional symmetry between financially conditioned restoration and the paradigmatic poll tax. By framing re-enfranchisement as a constitutional default and drawing attention to disenfranchised citizens’ enduring claim to political presence, this account may also be of use in popular restoration efforts outside the courts.

### INTRODUCTION

American criminal punishment has long involved the denial of participation in political life. A convicted citizen can “lose” their right to vote, hold political office, or serve on a jury for a specified sentencing period—or permanently. Just as the Supreme Court has recognized few substantive constitutional constraints on a state legislature’s choice to impose life sentences of imprisonment or

otherwise extensive prison stays, so too has the Court interpreted Section 2 of the Fourteenth Amendment in *Richardson v. Ramirez* to authorize the permanent disenfranchisement of citizens convicted of felonies.<sup>1</sup>

In recent years, state electorates have mobilized for restoration options to reverse the longstanding exclusion of minority communities from political participation.<sup>2</sup> But legislatures, courts, and agencies have drastically limited this expansion by fashioning restoration laws that condition eligibility on the full repayment of legal financial obligations. While estimates vary, at least eleven states statutorily name unpaid obligations as a barrier to voting-rights restoration, though recent research suggests that nearly every state incorporates financial-repayment conditions into its restoration administrative procedures.<sup>3</sup> Of recent notoriety, Florida's move to read a financial-repayment condition into a state amendment disqualified nearly 900,000 individuals with previous felony convictions from voting in the November 2020 election<sup>4</sup> — a policy upheld as

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1. See 418 U.S. 24, 56 (1974) (holding that penal disenfranchisement statutes — including those imposing “permanent” disenfranchisement — are constitutionally permitted under Section 2 of the Fourteenth Amendment); cf. U.S. CONST. amend. XIV, § 2 (“But when the right to vote at any election . . . is denied to any of the male inhabitants of such State . . . except for participation in rebellion, or other crime, the basis of representation therein shall be reduced . . .” (emphasis added)).
  2. See, e.g., S.B. 310, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (enacted) (restoring the right to serve on a jury for those who have completed the terms of their sentences); A.B. 5823, 218th Leg., Reg. Sess. (N.J. 2019) (enacted) (restoring the right to vote to citizens with indictable offense (felony) convictions upon release from prison).
  3. The eleven states are Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Tennessee, Virginia, and Wyoming. *Felon Voting Rights*, NAT'L CONF. ST. LEGISLATURES (June 28, 2021), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/WPN3-8S4K>]. Thirty-six states have enacted statutes linking voting-rights restoration to the completion of a term of incarceration. *Id.*; see, e.g., A.C.A. 6, 2019–2020 Leg., Reg. Sess. (Cal. 2020) (proposing an amendment to the state constitution establishing that “[a]n elector disqualified from voting while serving a state or federal prison term . . . shall have their right to vote restored upon completion of their prison term”). Three jurisdictions — the District of Columbia, Maine, and Vermont — never strip felons of their voting rights (though incarcerated felons are ineligible to serve on juries). See NAT'L CONF. ST. LEGISLATURES, *supra*. But a survey of statutes alone fails to capture the full range of state administrative regulations and policies that impose barriers to restoration on the basis of unpaid obligations without considering an individual's ability to pay. See Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 57–77 (2019) (determining that forty-eight states and the District of Columbia authorize such policies). Similarly, many states condition the restoration of jury-service rights on criminal-debt repayment. See Restoration of Rts. Project, *State-by-State Guides*, COLLATERAL CONSEQUENCES RES. CTR., <https://ccresourcecenter.org/restoration-2> [<https://perma.cc/S35N-SSL4>].
  4. See Michael Morse, *The Future of Felon Disenfranchisement Reform: Evidence from the Campaign to Restore Voting Rights in Florida*, 109 CALIF. L. REV. 1143, 1183–92 (2021) (estimating the scope of the impact of the fines-and-fees requirement in Florida by marshaling state clerical records,

constitutional by the Eleventh Circuit sitting en banc in September 2020.<sup>5</sup> Perhaps in response to electoral shifts and the green light from lower federal courts upholding similar policies, state lawmakers across the country continue to embed fine-, court-fee-, and restitution-repayment requirements in restoration proposals.<sup>6</sup> An Iowa legislator sponsoring one such proposal even declared that “this is no poll tax” because “federal courts in other parts of the country have upheld requirements requiring restitution payments.”<sup>7</sup>

This Essay describes how disagreements over the constitutionality of these restoration schemes flow from a submerged, though outcome-controlling, question of constitutional coverage: does disenfranchisement void a citizen’s political rights and interests, such that political-rights claims are unavailable when objecting to restoration schemes? These would include *Harper v. Virginia State Board of Elections*-styled poll-tax claims,<sup>8</sup> Twenty-Fourth Amendment poll-tax claims,<sup>9</sup> and access-to-political-process claims shaped around *Bullock v. Carter* and *Lubin v. Panish*.<sup>10</sup>

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and estimating that seventy-seven percent of people with felony convictions who initially registered to vote following the amendment remain ineligible to vote because of an outstanding debt); Chris Uggen, Ryan Larson, Sarah Shannon & Arleth Pulido-Nava, *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, SENT’G PROJECT (Oct. 30, 2020), <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction> [<https://perma.cc/R55G-U7TV>] (estimating that almost 900,000 Floridians have completed their sentences but remain ineligible to vote due to outstanding legal financial obligations).

5. *Jones v. Governor of Fla.*, 975 F.3d 1016, 1025 (11th Cir. 2020).
6. See, e.g., H.F. 818, 89th Gen. Assemb., Reg. Sess. (Iowa 2021) (requiring that voting rights not be restored to felons until they have “paid all pecuniary damages owed to a natural person”); S.B. 118, 2021 Leg., Reg. Sess. (Ala. 2021) (restoring voting rights to some formerly incarcerated individuals only after they have paid victim restitution fees, fines, and court costs or complied with an approved payment plan).
7. Stephen Gruber-Miller, *Iowa House Unanimously Passes Constitutional Amendment*, DES MOINES REG. (Mar. 24, 2021, 9:02 PM), <https://www.desmoinesregister.com/story/news/politics/2021/03/24/iowa-house-passes-proposed-amendment-state-constitution-restoring-felon-voting-rights-resolution-11/6990253002> [<https://perma.cc/SF63-XJ74>].
8. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (striking down Virginia’s poll tax under the Equal Protection Clause); see also *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (holding that when a state legislature decides to fill school boards through elections, it cannot condition the vote on property ownership); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (striking down a state law giving only “property taxpayers” the right to vote in elections to approve the issuance of revenue bonds).
9. U.S. CONST. amend. XXIV, § 1 (“The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.”).
10. *Bullock v. Carter*, 405 U.S. 134 (1972) (invalidating significant candidate filing fees under the Fourteenth Amendment); *Lubin v. Panish*, 415 U.S. 709 (1974) (holding that a state may not

The conventional understanding of a disenfranchised citizen's "lost" rights – which I will call the *expulsion* account – answers this question in the affirmative. If disenfranchisement is understood to expel a person from the political community, then that person vacates all cognizable rights and interests predicated upon political standing. In turn, the imposition of wealth criteria would not – indeed, could not – deprive disenfranchised citizens of any rights or interests. Of course, legislative decisions to (re)open the political community to non-rights holders must be nonarbitrary and avoid presumptively illegitimate classifications of race or gender. But so long as states avoid these general constraints, they can restore rights along criteria like the satisfying of fees that would otherwise be presumptively unconstitutional if applied to political-rights holders inside the political community.

However, this account breaks down if disenfranchisement falls short of outright revocation – an alternative view I will call *subordination*. Rather than conceptualizing disenfranchisement as the withdrawal of a political right and its associated interests, we should instead understand it as the legitimate state suppression of a right's exercise in a manner that preserves the underlying claim to the right. In other words, a disenfranchised citizen's political rights and interests are subordinated to the state's interest in punishment, but are not dislodged in some deeper metaphysical sense. At the level of democratic theory, this understanding is consistent with treating disenfranchised citizens as continued, albeit diminished, members of the political community. If a residuum of political standing is left intact, such that disenfranchised citizens occupy an intermediate position between noncitizens and enfranchised citizens, then disenfranchisement does not remove a citizen from the political order and restoration is not analytically – nor, this Essay argues, constitutionally – analogous to gaining political entry for the first time.

How we represent the relationship between a disenfranchised citizen and the body politic therefore determines the availability of political-rights claims and whether financial conditions should be understood as poll taxes. But the expulsion assumption that disenfranchisement severs a citizen's political connection, such that political-rights protections have nothing to say about restoration, has been promoted by every court to review these schemes.<sup>11</sup> Scholars have also tended to accept it, reasoning that a wealth-based punishment theory should be the focus of litigation efforts because disenfranchised citizens lack political

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prevent an indigent candidate from running for office on the basis of an inability to pay filing fees).

n. See *infra* Part I.

rights.<sup>12</sup> But there are strong reasons to doubt the assumption, as the following consideration of the issue from general principles should prompt.

Simply put, what is the condition of political membership that disenfranchised citizens—by virtue of having been disenfranchised—supposedly fail to meet? Some democratic theorists have sought to overcome the legitimacy problems inherent to political boundary-setting<sup>13</sup> by embracing all individuals with a functional stake in political decision-making.<sup>14</sup> This view is reflected in past moments of American history where noncitizen residents have voted in local elections.<sup>15</sup> Others define membership as de jure citizenship status out of

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12. There have only been a few works on wealth-based restoration, with a 2019 article from Professor Beth A. Colgan being the most influential. See Colgan, *supra* note 3. But Colgan grounds her constitutional argument in wealth-based punishment precedents, assuming away the possibility that voting-rights claims can fashion an adequate challenge because “once lost upon conviction, access to the franchise no longer constitutes a fundamental right that triggers strict scrutiny.” *Id.* at 89 & n.167 (“In this Article, I do not relitigate *Ramirez’s* shortcomings, however, taking as a starting point the premise that lawmakers can restrict the right to vote in response to a felony conviction and that, once such a restriction occurs, the right to vote is no longer fundamental for people so convicted.”). This Essay, however, aims to carve out a political-rights-based critique of financially conditioned restoration that remains compatible with *Richardson*. See *infra* Sections II.A & II.B. Because a wealth-based punishment critique based in *Bearden v. Georgia* also requires a showing of deprivation, it too must grapple with the expulsion assumption that disenfranchised citizens lack deprivable participatory interests. The political-rights and *Bearden*-based theories end up being two sides of the same coin. See *infra* Section III.C. For additional scholarship on financially conditioned restoration, see Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PA. ST. L. REV. 349 (2012); and Morse, *supra* note 4.
  13. The classic “boundary problem” of political theory stipulates that a democratic community’s self-determined decisions cannot themselves justify how the community has been drawn. See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 207 (1989) (“[W]e cannot solve the problem of the proper scope and domain of democratic units from within democratic theory.”); JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 243-47 (1976) (observing that all democracies are constituted through unjustified exclusions); Frederick G. Whelan, *Prologue: Democratic Theory and the Boundary Problem*, 25 NOMOS 13, 13-15 (1983) (describing the intractability of the boundary problem).
  14. See, e.g., Tom Theuns, *Pluralist Democracy and Non-Ideal Democratic Legitimacy: Against Functional and Global Solutions to the Boundary Problem in Democratic Theory*, 8 DEMOCRATIC THEORY 23, 24, 26-31 (2021) (“If there is an independent standard that allows one to calculate the appropriate membership of a putative demos, then the boundary problem collapses—which persons to include and which persons to exclude from a democratic body, such views argue, can be objectively determined and therefore need not be subject to a democratic procedure to be legitimate.”); Robert E. Goodin, *Enfranchising All Affected Interests, and Its Alternatives*, 35 PHIL. & PUB. AFFS. 35, 40-68 (2007); Cristina M. Rodríguez, *Noncitizen Voting and the Extra-constitutional Construction of the Polity*, 8 INT’L J. CONST. L. 30, 30-32 (2010).
  15. See Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1400-04 (1993); see also *Stewart v. Foster*, 2 Binn. 110, 118 (1809) (“[A]liens of a certain description, who from length of residence, and payment of taxes, might be supposed to have a common interest with the other inhabitants,

concern that the functional approach lacks an internal limit and would ever expand the demos.<sup>16</sup> Without additional specification, both views would count disenfranchised citizens as continued members. One might attempt to draw a more restrictive line by requiring *actual* political participation, though this quickly unravels when one observes, in light of sobering rates of voter turnout and registration,<sup>17</sup> that the “use it or lose it” view would exclude broad swaths of the electorate. Perhaps membership should be defined by stacking *de jure* citizenship with some notion of future legal eligibility, so as to sweep in eligible-but-nonregistered adult citizens as well as adolescent citizens (after all, I doubt we are prepared to say that adolescents are outside the coverage of political-rights protections, in a manner permitting states to selectively enfranchise seventeen-year-olds along wealth criteria). But if prospective eligibility ties a citizen into the political community, doesn’t a disenfranchised citizen in a state like Florida, where the repayment of \$100 might alone be the barrier to re-enfranchisement, exhibit such a potential, and might they therefore have a claim to the protections of membership? Without additional justification, the move to relegate disenfranchised citizens to the outsider position quickly proves conclusory.

My argument in support of the subordination account proceeds in three stages. Part I outlines the two competing theories of “lost” political rights. Part II observes that both theories comport with the *Richardson* Court’s interpretation of Section 2 of the Fourteenth Amendment. It then criticizes the expulsion view from two angles. First, expulsion diverges from the typical form of the interaction between individual rights and punishment. Second, understanding convicted citizens to exist beyond the political community undermines the democratic justification for punishment. Part III then assesses the constitutionality of

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were [in the view of the legislature] indulged with the right of voting.”); *Spragins v. Houghton*, 3 Ill. 377, 397 (1840) (“To determine . . . the qualification of an elector in this state, it would seem to be wholly unnecessary to enquire whether the elector was a citizen of the United States.”). This is not to say early suffrage regimes included anyone with a functional stake; well-known exclusions along dimensions of class and gender help explain, in part, the move toward a citizenship requirement. See Raskin, *supra*, at 1404 (describing how property qualifications filtered out noncitizens “generally deemed unworthy of the ballot” and were thus ideologically consistent with early alien suffrage but that, once property qualifications were abolished, citizenship requirements became more salient).

16. See, e.g., David Miller, *Democracy’s Domain*, 37 PHIL. & PUB. AFFS. 201, 228 (2009); cf. Mark E. Warren, *The All Affected Interests Principle in Democratic Theory and Practice* 4-6 (June 1, 2017) (unpublished manuscript), [http://aei.pitt.edu/93142/1/Warren\\_-\\_All\\_Affected\\_Interests\\_Principle.pdf](http://aei.pitt.edu/93142/1/Warren_-_All_Affected_Interests_Principle.pdf) [<https://perma.cc/MGA2-ZFTC>] (summarizing objections to the functional approach and responding to them).
17. See Drew Desilver, *In Past Elections, U.S. Trailed Most Developed Countries in Voter Turnout*, PEW RSCH. CTR. (Nov. 3, 2020), <https://www.pewresearch.org/fact-tank/2020/11/03/in-past-elections-u-s-trailed-most-developed-countries-in-voter-turnout> [<https://perma.cc/3XMB-UWZX>].

financially conditioned restoration from the perspective of the subordination account. Because restoration along wealth lines makes poorer disenfranchised citizens worse off for dignitary and instrumental reasons, it imposes constitutional harm cognizable under *Harper* and other wealth-antidiscrimination precedents. Ultimately, a deeper recognition of disenfranchised citizens’ continued place in the political community can bolster future litigation challenges and add a constitutional cast to popular calls for legislative reform.

## I. TWO ACCOUNTS OF DISENFRANCHISEMENT

This Part describes the expulsion and subordination views and their implied models of democratic citizenship. Because both conceptual maps fit the surface phenomenon of lost access to the ballot or jury box, the distinction may seem strangely metaphorical. Crucially, however, the level of constitutional scrutiny applied to restoration schemes turns on whether restored rights are framed as new statutory entitlements to an excludable outsider, or instead reflect the lifting of deprivation and reversion to a member’s constitutional baseline of equal standing.

### A. *Beyond the Political Boundary: Disenfranchisement as Expulsion*

The expulsion view adopted by lower courts assumes that a citizen’s place in the political compact becomes obsolete at the moment of conviction. Rights are “lost” or, as Judge Friendly once put it, “abandoned.”<sup>18</sup> Implicit here is the notion that a felony conviction expels the citizen beyond the bounds of the democratic body, such that from the moment of conviction onward, the citizen assumes the constitutional position of a noncitizen with respect to political participation. This view rests upon a classical Lockean social-contract model, on which law-breaking short-circuits mutual consent between citizens—the essential condition of state organization—and therefore withdraws the law-breaker from the compact.<sup>19</sup> Since at least the 1960s, lower courts have rejected constitutional

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18. See *Green v. Bd. of Elections*, 380 F.2d 445, 451 (2d Cir. 1967) (describing how criminal wrongdoers “have abandoned the right to participate in further administering the compact”). Many courts have since quoted *Green* when referring to the right as “abandoned.” See, e.g., *Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986).

19. See *Green*, 380 F.2d at 451 (quoting JOHN LOCKE, *The Second Treatise: An Essay Concerning the True Original, Extent, and End of Civil Government*, in *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 138 (Ian Shapiro ed., Yale Univ. Press 2003) (1690)) (“The early exclusion of felons from the franchise by many states could well have rested on Locke’s concept, so influential at the time, that by entering into society every man ‘authorizes the society . . . to make laws for him’ . . .”); A. John Simmons, “*Denisons*” and “*Aliens*”: *Locke’s Problem of Political Consent*, 24 *SOC. THEORY & PRAC.* 161, 161 (1998) (“‘The only way’ one can

challenges to disenfranchisement statutes on the basis that a convicted person's "interest in retaining his right to vote is constitutionally distinguishable from the 'right to vote' claims of individuals who are not felons,"<sup>20</sup> or that the right "is not 'fundamental.'"<sup>21</sup>

In more recent years, lower courts have rejected poll-tax and political-process challenges to financially conditioned restoration schemes by extending the loaded property metaphors of "loss" and "abandonment." This move positions disenfranchised citizens as excludable outsiders seeking political entry—a starting point that makes political-rights claims nonstarters. As described by the Sixth Circuit, "[h]aving *lost* their voting rights, Plaintiffs lack any fundamental interest to assert."<sup>22</sup> Every court to review challenges to financially conditioned restoration has embraced the same logic.<sup>23</sup> "Losing" is meant literally and conceptualized as a discrete event in time. From this vantage point, restoration appears only to provide a "mere statutory benefit" to those who qualify,<sup>24</sup> much like the grant of a new license, and simply *withholds* that benefit from those who do not qualify—an omission lacking constitutional dimension given the assumed absence of political rights.

In other words, disenfranchised citizens unable to pay back their financial obligations remain in the same *ex ante* constitutional position, made no worse off by the extension of the benefit to others, and selective restoration takes on a

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lose one's 'natural liberty' and be 'subjected to the political power of another' is by giving one's 'own consent' to enter a body politic." (quoting LOCKE, *supra*, at 141-42)).

20. *Williams v. Taylor*, 677 F.2d 510, 514 (5th Cir. 1982); *see also, e.g., Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978) (determining that the Constitution "grants to the states a realm of discretion in the disenfranchisement and re-enfranchisement of felons which the states do not possess with respect to limiting the franchise of other citizens").
21. *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983); *see also, e.g., Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986) (describing felons' voting rights as "not fundamental"); *Green*, 380 F.2d at 451 (same).
22. *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010); *see id.* at 751 ("The [restoration] provisions do not disenfranchise them or anyone else, poor or otherwise . . . [because] Tennessee's indisputably constitutional disenfranchisement statute accomplished that.>").
23. *See Jones v. Governor of Fla.*, 975 F.3d 1016, 1029 (11th Cir. 2020) ("If the right of felons to vote were fundamental, every law that distinguished between different groups of felons in granting or denying access to the franchise would be subject to 'exact[ing] judicial scrutiny.'" (citing *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628 (1969))); *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) ("What plaintiffs are really complaining about is the denial of the statutory benefit of re-enfranchisement that Arizona confers upon certain felons. This is not a fundamental right; it is a mere benefit that . . . Arizona can choose to withhold entirely."); *Madison v. State*, 163 P.3d 757, 768 (Wash. 2007) ("*Richardson* dictates that we hold that the right to vote is not fundamental for convicted felons.>").
24. *See Johnson*, 624 F.3d at 746, 749 (describing restoration as a "mere statutory benefit" (quotations omitted)); *Harvey*, 605 F.3d at 1079 (same).



“Pareto efficiency”-like quality.<sup>25</sup> It thus becomes a question of political entry subject to few constitutional constraints,<sup>26</sup> akin to Congress’s legislative discretion to favor certain classes of noncitizens – including economically favored classes – over others in the naturalization process.<sup>27</sup>

*B. Inside the Political Boundary: Disenfranchisement as Subordination*

Objecting to financially conditioned restoration schemes, dissenting judges have started from the opposite premise: that political rights are inalienable and immutable. For instance, Chief Justice Alexander of the Washington Supreme Court remarked that “felons can be deprived of the right to vote, notwithstanding its fundamental nature,” but that “voting remains a fundamental right.”<sup>28</sup> Judge Jordan of the Eleventh Circuit in *Jones v. Governor of Florida* similarly described how “the state’s ability to deprive someone of a profoundly important interest does not change the nature of the right”<sup>29</sup> – a position echoed by dissenters in other cases<sup>30</sup> and by Justices Sotomayor, Ginsburg, and Kagan in their dissent from the denial of an application to vacate the stay in *Jones*.<sup>31</sup> These

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25. See *Pareto Efficiency*, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100306253> [<https://perma.cc/U22D-LSHK>] (“In economic theory, an alteration in the allocation of resources is said to be Pareto efficient when it leaves at least one person better off and nobody worse off.”).
26. A restoration statute could still run afoul of constitutional constraints independent of political rights. Namely, a statute classifying eligibility on the basis of race would be subject to strict scrutiny under the Fourteenth Amendment. See *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (holding that Section 2 does not “permit the purposeful racial discrimination . . . which otherwise violates § 1 of the Fourteenth Amendment”).
27. Noncitizens can become citizens, and thereby obtain political rights, through a naturalization process adjudicated by U.S. Citizenship and Immigration Services. There is, of course, no constitutional right to naturalization, though Congress has established an elaborate statutory scheme involving threshold eligibility requirements, discretionary determinations, and the imposition of various fee payments. See 8 U.S.C. § 1427 (2018); see also *USCIS Policy Manual: Discretionary Analysis*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 2021), <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8> [<https://perma.cc/8AGH-ZC8D>] (describing the scope of agency discretionary determinations).
28. *Madison*, 163 P.3d at 780 (Alexander, J., dissenting).
29. 975 F.3d 1016, 1078 (11th Cir. 2020) (Jordan, J., dissenting) (citing *Jones v. Governor of Fla.*, 950 F.3d 795, 823 (11th Cir. 2020)).
30. See *Johnson v. Bredesen*, 624 F.3d 742, 758 (6th Cir. 2010) (Moore, J., dissenting) (describing a financially conditioned scheme as burdening a “fundamental right”); cf. *Griffin v. Pate*, 884 N.W.2d 182, 207–09 (Iowa 2016) (Hecht, J., dissenting) (positing that “criminal offenders” challenging the constitutionality of a disenfranchisement statute are asserting a “fundamental right”).
31. In dissent from a denial of the *Jones* plaintiffs’ application to the Supreme Court to vacate the stay imposed prior to the Eleventh Circuit’s en banc decision, Justice Sotomayor likewise

arguments run in the right direction, though they fall short of offering a theory of how a right can be both deprived under Section 2 and at once unchanged. This view also sits at an impasse opposite the expulsion account, which begins from the premise that disenfranchisement *does* change a political right with respect to a particular individual by eliminating it from the field of analysis.

Both majority and dissenting accounts operate through binary absolutes: either a disenfranchised right is erased wholesale by virtue of criminal wrongdoing or it remains unchanged. But this flat, undifferentiated picture – in which a disenfranchised citizen is either on equal footing with enfranchised citizens or else outside the political community – overlooks the range of gradations across which citizenship and subordination exist in both law and social life. As a descriptive matter, American law sometimes disaggregates the rights of citizenship and confers them in partial arrangements. For instance, “noncitizen national” legal status, as provided for in the Immigration and Nationality Act, affords passport privileges but withholds the right to vote in federal elections and the right to serve on a jury.<sup>32</sup> Compare this to the form of citizenship in U.S. territories, where citizens – including previous state residents who have since moved to territories – can serve on juries but cannot vote for the President or Vice President.<sup>33</sup> And adolescent citizens, of course, lack the rights of political exercise but retain other citizenship protections. This is not to say these liminal forms are all worthy of celebration. A double-edged sword, our model allows for the incremental extension of new rights to vulnerable classes, but can also rationalize contradictory and inequality-laden partial arrangements that might otherwise tend toward full enfranchisement over time if citizenship were an all-or-nothing

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observed that the restoration scheme “implicates the fundamental political right to vote,” but did not provide further analysis on the merits of the case. *Raysor v. DeSantis*, 140 S. Ct. 2600, 2600 (2020) (Sotomayor, J., joined by Ginsburg & Kagan, JJ., dissenting).

32. See Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 *FORDHAM L. REV.* 1673, 1676 (2017) (locating “U.S. national” status between citizenship and noncitizenship); *U.S. Citizen v. U.S. National: Differences*, U.S. IMMIGR. (2021), <https://www.usimmigration.org/articles/u-s-citizen-vs-u-s-national-what-is-the-difference> [<https://perma.cc/9KY7-B7Z9>] (“Anyone born in the unincorporated territories of Puerto Rico (starting in 1917), U.S. Virgin Islands (starting in 1927), or Guam (starting in 1950), is also a U.S. citizen. Someone born in the unincorporated territories of American Samoa or Swains Island, however, is not a U.S. citizen by right of territorial birth but is a U.S. national. Individuals born in Guam between 1898 and 1950, in Puerto Rico between 1898 and 1917, in the US Virgin Islands between 1917 and 1927, or in the Philippines between 1898 and 1946, would also be a U.S. national but not a U.S. citizen, unless citizenship was inherited from his or her parents.” (emphasis omitted)).
33. The right to vote for the President attaches when a citizen moves from a territory to a state. See *Igartua de la Rosa v. United States*, 32 F.3d 8, 10-11 (1st Cir. 1994), *cert denied*, 115 S. Ct. 1426 (1995) (holding that the Uniformed and Overseas Citizen Absentee Voting Act does not extend to former state residents who have moved to U.S. territories but does extend to those who have moved to another country).

affair. Bracketing these considerations, the point here is that the graduated citizenship form finds many historical and contemporary precedents in American law.

Working with such a model instead of an all-or-nothing view of democratic citizenship, the subordination account holds that disenfranchisement shifts a citizen’s political standing into a lower tier below that of enfranchised citizens, but that this falls short of all-out expulsion from political life. This view can be translated into the parlance of constitutional rights in at least two ways. First, we might say that the state has affirmative authority to override a fundamental political right after conviction, thereby preventing the right’s exercise, but that the fundamental right continues to exist (albeit in a dormant and unexpressed state). Second, and paralleling the above explanation of a convicted citizen’s diminution in political standing, we might say that disenfranchisement strips away the fundamental status of a right, but that this leaves important participatory interests in place rather than creating a constitutional vacuum. In the wealth-discrimination context, the Court has at times recognized “fundamental interests” as an intermediate category between substantive fundamental rights and conventional interests.<sup>34</sup> We might thus represent a disenfranchised citizen’s pared-down claim to political exercise as akin to a fundamental interest, which does not independently enjoy constitutional protection like a fundamental right, but may still warrant closer scrutiny when a wealth classification or some other form of discriminatory treatment is involved.<sup>35</sup> The argument in Parts II and III proceeds through the first description of the subordination account, though the second description—in combination with a more extensive analysis of the wealth-discrimination line of equal protection than will be offered here—can lead to the same conclusion.

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34. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 114-16 (1996) (listing recognized “fundamental interest[s],” including “the establishment and dissolution of the marital relationship” but not including “bankruptcy discharge” (quotations and citations omitted)); Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397, 414-20 (2019) (identifying additional occasions where the Court has “insisted on equality as to wealth . . . when substantial individual interests were at stake”); cf. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 100 n.59 (1973) (Marshall, J., dissenting) (observing how treating “fundamental interests” and “fundamental rights” as equivalent concepts would “render the established concept of fundamental interests in the context of equal protection analysis superfluous, for the substantive constitutional right itself requires that this Court strictly scrutinize any asserted state interest for restricting or denying access to any particular guaranteed right”).

35. See *infra* Section III.A (describing the two-dimensional wealth-equality principle reflected in *Griffin v. Illinois* and its progeny).

## II. FAVORING SUBORDINATION

This Part advances the subordination account of the disenfranchisement-to-restoration process through a series of doctrinal and normative arguments. Section II.A first describes why *Richardson* is compatible with both subordination and expulsion. In *Richardson*, the Court said only that permanent disenfranchisement does not require a compelling state interest, implying that the practice is subject to rational-basis review. But given the penal setting in question, this lesser standard remains consistent with the continued presence of the right. Surveying other rights domains, Section II.B argues that the Court's rights jurisprudence reflects a subordination structure. Fundamental rights and interests are often overridden by sweeping penological interests but are never formally withdrawn. For instance, a convicted individual's physical liberty, speech, and privacy interests are deprived in the course of incarceration subject to a watered-down standard of review, but remain cognizable sources of constitutional protection in certain circumstances. Political rights should be no different. Finally, Section II.C argues that the move to equate conviction with political expulsion is incompatible with the democratic foundations of punishment.

### A. Squaring the Subordination Account with *Richardson*

In *Richardson*, the Court reviewed a California constitutional provision and related statutes imposing permanent disenfranchisement for individuals convicted of "infamous crime[s]."<sup>36</sup> The litigants seeking re-enfranchisement had completed their prison sentences but were denied voting registration by the county clerk on the basis of their convictions. Upholding the constitutionality of the California scheme, the Court rested its analysis on Section 2 of the Fourteenth Amendment, which stipulates that a state's share of seats in Congress should be reduced by the degree the state violates voting rights, except for instances where the state denies voting rights on account of "rebellion, or other crime."<sup>37</sup> The Court interpreted the "other crime" exception as an "affirmative

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36. *Richardson v. Ramirez*, 418 U.S. 24, 27 (1974) (quoting CAL. CONST. art. II, § 1 (repealed 1972) ("[N]o person convicted of any infamous crime . . . shall ever exercise the privileges of an elector.")).

37. See U.S. CONST. amend. XIV, § 2 ("But when the right to vote at any election . . . is denied to any of the male inhabitants of such State, . . . except for participation in rebellion, or other crime, the basis of representation therein shall be reduced . . . ." (emphasis added)); see also Richard W. Bourne, *Richardson v. Ramirez: A Motion to Reconsider*, 42 VAL. U. L. REV. 1, 1-3 (2007) (analyzing Section 2).

sanction” for states to “indefinitely disenfranchise[]” felons.<sup>38</sup> Given California’s authority sourced in Section 2, the Court rejected the view that “a compelling state interest must be found to justify exclusion” from the franchise.<sup>39</sup>

The Court’s exegesis of Section 2’s legislative history, as well as its textual and structural reading of the “rebellion, or other crime” exception, is questionable on multiple fronts – weaknesses that Justice Marshall’s dissent chronicles in detail.<sup>40</sup> More generally, the use of Section 2 to justify the scale and racialized form of modern felon disenfranchisement is shot through with irony, given the racial-equality commitments animating the Fourteenth Amendment.<sup>41</sup> There may thus be good reason to reconsider the constitutionality of permanent disenfranchisement, however unlikely such a move from the Court may be.<sup>42</sup> But this

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38. *Richardson*, 418 U.S. at 54.

39. *Id.* at 33, 36; *see also id.* at 56 (“We therefore hold that the Supreme Court of California erred in concluding that California may no longer, consistent with the Equal Protection Clause of the Fourteenth Amendment, exclude from the franchise convicted felons who have completed their sentences and paroles.”).

40. *See id.* at 73-75 (Marshall, J., dissenting). Justice Marshall noted the thin legislative-historical evidence available for interpreting “other crime.” *See id.* at 73 (“[T]he proposed § 2 went to a joint committee containing only the phrase ‘participating in rebellion’ and emerged with ‘or other crime’ inexplicably tacked on.”). Professor Richard W. Bourne, in analyzing the corpus of floor debates, observes that these debates “were similarly unilluminating, with absolutely no discussion of why the phrases had been added to the proposed amendment with virtually no discussion of its meaning.” Bourne, *supra* note 37, at 6 n.23.

41. *See* Bourne, *supra* note 37, at 1-6.

42. An Eighth Amendment Cruel and Unusual Punishment analysis offers the most obvious angle from which to reconsider the constitutionality of permanent disenfranchisement, though the Court would need to recognize that disenfranchisement is punishment such that the Eighth Amendment would apply. *See Trop v. Dulles*, 356 U.S. 86, 96-97 (1958) (plurality opinion) (“Because the purpose of the statute disenfranchising the convicted felon is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.”); *Harmelin v. Michigan*, 501 U.S. 957, 983 (1991) (Scalia, J.) (“The disenfranchisement of a citizen . . . is not an unusual punishment” (quoting *Barker v. People*, 20 Johns. 457, 459 (N.Y. Sup. Ct. 1823))).

Assuming this were to change, the Court has often taken state consensus as a powerful proxy for evolving standards of decency. *See Trop*, 356 U.S. at 101. There seems to be an emerging consensus among the states that *permanent* disenfranchisement constitutes an excessive sanction. But whether there is consensus turns on how the question is framed: does the fact that nearly every state disenfranchises convicted felons for *some* amount of time suggest strong consensus? Or does the fact that only thirteen states disenfranchise felons indefinitely suggest that *permanent* disenfranchisement has become a minority position? Challenges to felon disenfranchisement laws under an Eighth Amendment theory have failed, with courts usually basing their reasoning on the first characterization. *See, e.g., El-Amin v. McDonnell*, No. 3:12-cv-00538-JAG, 2013 WL 1193357, at \*7 (E.D. Va. Mar. 22, 2013) (concluding that “a consensus persists among legislatures throughout the country that felon disenfranchisement remains a prudent regulation of the franchise”). For general treatment of the question, see Pamela S.

Essay does not seek to relitigate *Richardson*, which clearly established that states can permanently prevent citizens from voting – and, to the extent political rights are presumed to travel together – from serving on a jury or running for office. Just like the expulsion view, the subordination account comports with this authority.

That a state can impose a lifelong deprivation of a political right tells us little about how we should conceptualize the transformation of the underlying right or its holder’s juridical status. The *Richardson* Court did not, for instance, draw upon Judge Friendly’s description of “abandoned” rights, or otherwise suggest that it was the absence of a constitutional interest on the side of the disenfranchised citizen that rendered a compelling interest unnecessary. To the contrary, *Richardson*’s description of the Section 2 “affirmative sanction” is best read as having obviated the state’s need for *articulating* a compelling interest in any particular case of disenfranchisement (i.e., Section 2 functions like a universal trump for the state to override a political right in the penal context). But this only speaks to the state’s burden of justification, not to the right’s existence as such, and is thus compatible with the subordination view that the right continues to inhere. For additional reasons described in Section II.B, we should reject the negative inference that the lack of a compelling state interest necessarily indicates the absence of a right.

### *B. Subordination as a Transsubstantive Principle*

Subordination more closely reflects rights jurisprudence in neighboring substantive domains. For instance, even though states are constitutionally permitted to impose life imprisonment, an individual’s interest in physical liberty still remains constitutionally relevant throughout their incarceration. If it were voided at the moment of conviction and thereafter removed from the constitutional field, as the expulsion model assumes with respect to participatory interests, the Court’s *Williams-Tate-Bearden* line of wealth-based incarceration cases would be difficult to rationalize.<sup>43</sup> In *Williams v. Illinois*, the Court held that incarcerating someone beyond the statutory maximum because they have not paid fines or

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

43. Judge Jordan’s dissent in *Jones*, as well as Chief Justice Alexander’s dissent in *Madison*, briefly draw this parallel. See *Jones v. Governor of Fla.*, 975 F.3d 1016, 1078 (11th Cir. 2020) (Jordan, J., dissenting) (“To the same extent that felons are not entitled to vote, the plaintiffs in *Williams*, *Tate*, and *Bearden* were no longer entitled to their liberty due to their convictions. . . . [But] the state could not rely on the plaintiffs’ wealth in deciding whether to deprive them of liberty.”); *Madison v. State*, 163 P.3d 757, 779-80 (Wash. 2007) (Alexander, C.J., dissenting).

court fees violates the Equal Protection Clause.<sup>44</sup> A year later in *Tate v. Short*, the Court held that states are prohibited from incarcerating a person under a fine-only statute on the basis of that person being unable to pay the prescribed fine.<sup>45</sup> And twelve years after that, the Court integrated these precedents in *Bearden v. Georgia*, holding that a probationer “who has made sufficient bona fide efforts to pay” cannot be reincarcerated on the basis of not having met a financial term of probation.<sup>46</sup>

Though the Court has only addressed wealth-based incarceration on these three occasions, the line suggests the general principle that inability to pay cannot serve as the sole cause of an individual’s incarceration absent a compelling state interest. One might still strain to distinguish situations of *entering* or *reentering* incarceration (i.e., having probation revoked solely because of an unpaid obligation) from situations of *continued* incarceration (i.e., having probation or commutation denied solely because of an unpaid obligation). The latter litigation posture would seem to arise only rarely, though lower courts applying *Bearden* in the context of pretrial bail – which resembles such a posture when bail is imposed as a condition of release – have recognized the principle’s applicability.<sup>47</sup> In any case, the thrust of the *Bearden* principle stems from the fundamental value of physical liberty *full stop*, not some brick-and-mortar-bound theory that the freedom runs only up to the prison gate but that, once someone is inside, *Bearden* loses all relevance. And just as prisoners retain a cognizable interest in physical liberty throughout their incarceration, disenfranchised citizens retain an interest in political exercise notwithstanding the lawful suspension of participation upon conviction.

Relatedly, the *Richardson* Court’s application of rational-basis review to the California scheme should not give way to the inference that disenfranchised citizens’ political rights and interests are obsolete on the logic of expulsion. In the incarceration context, the state need not present a compelling interest to deprive individuals in the state’s custody of their civil liberties even though, as the Court described in *Turner v. Safley*, “prison walls do not form a barrier separating

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44. 399 U.S. 235, 240-41 (1970).

45. 401 U.S. 395, 398-99 (1971).

46. 461 U.S. 660, 672 (1983).

47. See, e.g., *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) (noting that “[t]he incarceration of those who cannot [afford bond], without meaningful consideration of other possible alternatives,” violates the Fourteenth Amendment); *ODonnell v. Harris County*, 251 F. Supp. 3d 1052, 1137 (S.D. Tex. 2017), *aff’d in part, rev’d in part, vacated in part*, 892 F.3d 147 (5th Cir. 2018). In *Walker v. City of Calhoun*, 901 F.3d 1245, 1261 (11th Cir. 2018), the majority upheld a law imposing forty-eight hours of pretrial detention for indigent defendants, reasoning that this length of time was not an “absolute deprivation” of physical liberty. But it recognized that a *Bearden* claim could have obtained at some point after forty-eight hours of wealth-driven disparity.

inmates from the protections of the Constitution.”<sup>48</sup> Under the test set out in *Turner*, prison regulations need only bear a rational relation to a legitimate state interest to override the First and Fourth Amendment speech and privacy rights implicated in incarceration.<sup>49</sup> But these rights, rather than being vitiated entirely, still constrain the state in recognized ways even though their applications are narrowed.<sup>50</sup> Indeed, the *Turner* reasonableness burden of justification for overriding a right results from the exigencies of prison security and courts’ institutional limitations in reviewing penal standards, not the belief that a punished person’s rights have been relegated out of view.<sup>51</sup> The subordination reading of *Richardson* therefore approximates the structure of civil liberties under *Turner*.

In response to the *Bearden* and *Turner* analogies, one might suggest a distinction along which civil liberties are suppressible but unyielding, while political rights are open to being fully withdrawn.<sup>52</sup> This difference may be explained by the fact that civil liberties are universal, while political rights are only owed to those constituting the political community.<sup>53</sup> But I see no obvious reason why the more limited size of the rights-holding population, without some additional

48. 482 U.S. 78, 84 (1987).

49. See *id.* at 89 (“[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”).

50. *Turner* expressly recognized the continued juridical force of individual rights. For instance, the second *Turner* factor considers whether “other avenues’ remain available for the exercise of the asserted right.” *Id.* at 90 (quoting *Jones v. N.C. Prisoners’ Union*, 433 U.S. 119, 131 (1977)). And lower courts have vindicated prisoners’ speech rights under the *Turner* standard. See, e.g., *Hayes v. Idaho Corr. Ctr.*, 849 F.3d 1204, 1208 (9th Cir. 2017) (recognizing a prisoner’s First Amendment right to be present when his or her civil legal mail is opened); *Merrweather v. Zamora*, 569 F.3d 307, 317 (6th Cir. 2009) (“[W]e have held that improperly opening a prisoner’s mail does implicate at least the First Amendment.”); *Jones v. Brown*, 461 F.3d 353, 359 (3d Cir. 2006) (holding that “opening legal mail outside the presence of the addressee inmate interferes with protected communications . . . and accordingly impinges upon the inmate’s right to freedom of speech”); *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995) (recognizing the First Amendment right of prisoners to “send and receive mail”).

51. See *Turner*, 482 U.S. at 89–91.

52. Professor Akhil Amar characterizes the civil/political distinction as follows:

[Political rights] were rights of members of the polity—call them First-Class Citizens—whereas [civil rights] belonged to all (free) members of the larger society. Alien men and single white women circa 1800 typically could speak, print, worship, enter into contracts, hold personal property in their own name, sue and be sued, and exercise sundry other civil rights, but typically could not vote, hold public office, or serve on juries. These last three were political rights, reserved for First-Class Citizens.

AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 48 (1998).

53. See *id.*; see also *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (“The Fourteenth Amendment to the [C]onstitution is not confined to the protection of citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction . . .”).



point of contrast, makes political rights uniquely voidable. In response, one might attempt to identify civil liberties with a primordial or prepolitical quality in the vein of classical liberal theories of natural rights, as if civil liberties flow from personhood while political rights originate in and remain conditioned on state recognition. Without straying into the questionable metaphysical foundations of this distinction between “Man” and “Citizen,”<sup>54</sup> it is worth observing that the Court has long appreciated the interplay between civil liberties and political rights. The Court elided the notion of a prepolitical realm as early as *Yick Wo v. Hopkins* by reasoning that voting was “not regarded strictly as a natural right” but was still “preservative of all rights.”<sup>55</sup> It has subsequently linked them in other ways, recognizing that the right to vote mediates the speech and associational rights at the heart of the First Amendment,<sup>56</sup> which are preserved through conviction, just as the right to serve on a jury is continuous with the Sixth Amendment’s underlying liberty interests in procedural fairness.<sup>57</sup> This is all to say that I see no reason why physical liberty, speech, or privacy rights are

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54. Judith Shklar, for instance, argued that these two identities should in theory converge, to the extent intrinsic human value is vindicated only through political inclusion. See JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUESTION FOR INCLUSION* 37-40 (1991) (“[N]atural-rights theory makes it very difficult to find good reasons for excluding anyone from full political membership in a modern republic.”).
55. *Yick Wo*, 118 U.S. at 370 (“Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights.”); see also *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (“Other rights, even the most basic, are illusory if the right to vote is undermined.” (quoting *Reynolds v. Sims*, 377 U.S. 533, 560 (1964))).
56. See *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974) (“The right to vote derives from the right of association that is at the core of the First Amendment, protected from state infringement by the Fourteenth Amendment.” (quoting *Storer v. Brown*, 415 U.S. 724, 756 (1974) (Brennan, J., dissenting))); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966) (observing that “[i]t is argued that the right to vote in state elections is implicit . . . by reason of the First Amendment,” but that “[w]e do not stop to canvass the relation between voting and political expression” because the Equal Protection Clause analysis “is enough”).
57. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 134 (1994) (“The diverse and representative character of the jury must be maintained ‘partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.’” (quoting *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975)); see also Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 210 (1995) (“[O]ne remarkable feature of the most recent cases is the incorporation of Sixth Amendment rhetoric into equal protection reasoning.”); Barbara Allen Babcock, *A Place in the Palladium: Women’s Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1153-54 (1993) (“[The Court] imported its concerns for the jury as a representative organ of the community into the allusive and diffused equal protection doctrine.”). Whether impartiality and procedural fairness vindicate negative autonomy on the model of civil liberties like speech and privacy, or are instead claims to positive assistance, is a value-laden question. See Joseph Blocher, *Right to and Not to*, 100 CALIF. L. REV. 761, 763, 779-80 (2012).

somehow deeper than, and should therefore survive conviction in a categorically different manner from, the right to vote or serve on a jury.

Finally, the Court's prohibition on the revocation of citizenship undercuts the contemporary relevance of this civil/political distinction.<sup>58</sup> In *Trop v. Dulles*, the Court characterized revocation as “the total destruction of the individual's status in organized society” that “destroys for the individual the political existence that was centuries in the development.”<sup>59</sup> Chief Justice Warren's majority opinion recognized the foundational status of political recognition and belonging, even invoking Arendt's phrase “the right to have rights” to describe how a stateless person “is at the sufferance of the community in which he happens to find himself.”<sup>60</sup> Of course, political existence regards more than the ability to exercise the franchise; at bottom, it is the security of the passport, with or without political exercise, that protects against the grave dangers of statelessness. But the Court's deeper insight regarding the dependency of civil and social guarantees on political recognition hollows out any belief in the conceptual or normative priority of civil liberties—a belief I take to be animating any civil/political distinction along which political rights are characterized as thinner and more yielding.

### C. Salvaging the Social-Contractual Justification for Punishment

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58. See *Afroyim v. Rusk*, 387 U.S. 253, 266–67, 267 n.23 (1967) (holding denaturalization unconstitutional under the Citizenship Clause of the Fourteenth Amendment except in cases of illegal procurement); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (holding revocation of citizenship as punishment for a crime unconstitutional under the Eighth Amendment); *Osborn v. Bank of the U.S.*, 22 U.S. 738, 827 (1824) (“[The naturalized citizen] becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.”).

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

60. *Id.* at 101–02 (using the phrase but not attributing it to Arendt); see also HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 298 (1951) (“[Our] new situation, in which ‘humanity’ has in effect assumed the role formerly ascribed to nature or history, would mean . . . that the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself. It is by no means certain whether this is possible. . . . [F]or the time being, a sphere that is above the nations does not exist.”); Stephanie DeGooyer, *The Right . . .*, in STEPHANIE DEGOOYER, ALASTAIR HUNT, LIDA MAXWELL & SAMUEL MOYN, *THE RIGHT TO HAVE RIGHTS* 21, 23 (2018) (“The citizens of nation-states can take the privilege of the ‘right to have rights’ for granted, but those who have been stripped of their citizenship know that such a right is not enough to recover their loss.”).

In light of *Trop*, previous commentators have recognized the obvious paradox of permitting disenfranchisement but prohibiting the punishment of citizenship revocation, to the extent it is the exercise of political rights that gives content to citizenship.<sup>61</sup> Though possible physical exclusion from the border resulting from the loss of a passport implicates different, and practically more severe, risks than the loss of the franchise alone, revocation and the expulsion approach to disenfranchisement share a logic: both negate a person’s political existence by severing their connection to the political community. But the subordination account holds that the disenfranchised citizen formally remains a member of the political community, even though his or her political standing has been reduced through punishment. This alternative creates analytical separation between revocation and disenfranchisement, and therefore brings some resolution – albeit perhaps an unsatisfyingly formalistic one – to the fundamental tension between *Trop* and *Richardson*.

Put differently, recognizing a disenfranchised citizen’s residual connection to the demos is necessary for salvaging the democratic legitimacy of punishment. A democratic community is justified in punishing one of its members precisely because that member takes part in the constitution of its rules and social institutions, such that the individual commits to abiding by the law and authorizes their own punishment upon transgression. But this contractarian justification can only support a punishment, whether it be incarceration or some other criminal penalty, to the extent the punished citizen remains inside the political order’s nexus of mutual consent.<sup>62</sup> In turn, if a citizen’s democratic claim is nullified at the moment of conviction, the subsequent punishment cannot be normatively sustained *as it ensues* by reference to democratic principles.<sup>63</sup> One may still

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61. See Jesse Furman, Note, *Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice*, 106 YALE L.J. 1197, 1198 (1997) (observing how “the Court has failed to close the syllogistic circle”); Corey Brettschneider, *A Democratic Theory of Punishment: The Trop Principle*, 70 U. TORONTO L.J. 141, 141 (2020) (“[P]unishment cannot undercut its own rationale, meaning that if citizenship is the basis for legal punishment, then punishment cannot strip those subject to it of the rights necessary to the kind of citizenship fundamental in a democracy.”).

62. See Brettschneider, *supra* note 61, at 148-49 (“[A] democracy cannot institutionally respond to crime in a way that undercuts its very basis for legitimate punishment.”); *cf.* *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting), *overruled in part by Afroyim v. Rusk*, 387 U.S. 253 (1967) (“[T]his Government was born of its citizens, it maintains itself in a continuing relationship with them, and, in my judgment, it is without power to sever the relationship that gives rise to its existence.”).

63. This account varies in a critical respect from the classical Lockean story as styled in Judge Friendly’s *Green* opinion. See *supra* notes 18-19 and accompanying text. In a limited sense, a political community can decide through legitimate democratic procedures that complete political withdrawal is an appropriate consequence for criminal wrongdoing. The problem, however, is that once a particular citizen – who may have participated in or otherwise authorized

eschew the social-contractual bases of the criminal law by relying upon alternative theories of punishment like deterrence or retributivism (i.e., that punishment exists to incentivize compliance with the law or to reciprocate suffering for moral, not democratic, reasons). The relative merits of these theories are beyond the scope of this Essay, though it is worth noting that deterrence and retributivist accounts, without social-contractual constraints, have difficulty explaining our criminal law as it is, or barring forms of punishment we intuitively reject.<sup>64</sup> At minimum, we should recognize the theoretical tradeoffs at stake in the expulsion approach to disenfranchisement.

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These arguments provide various angles into the problems with the expulsion account, and some may be more compelling than others. The point is that courts and commentators should question the expulsion view and its host of demanding assumptions. Disenfranchised citizens retain constitutionally regarded claims to political participation, justifiably suppressed on the basis of the state's "affirmative sanction" but nonetheless available to object to the introduction of arbitrary wealth criteria.

### III. THE SYMMETRY TO POLL TAXES

Once the expulsion assumption is rejected, the ways in which financially conditioned restoration violates *Harper* and other political-equality protections become clear. Section III.A first outlines the Court's general wealth-equality principles before evaluating the elements of a *Harper* violation. It then raises the possibility that *Harper* prohibits the conditioning of an individual's political participation on financial payment regardless of that individual's political membership or lack thereof, such that acceptance of the expulsion view should still lead

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this decision at  $t_1$  — is convicted and their democratic standing nullified at  $t_2$ , that citizen cannot be said to remain in a democratic relationship with the state when it imposes punishment at  $t_3$ . Some form of democratic connection must extend beyond conviction if the punishment is to be underwritten by consent rather than unmediated force.

64. See Brettschneider, *supra* note 61, at 149 (“[T]he problem with retributivism as an argument . . . is that it regards the state as an agent of pure morality . . . rather than as a democratic institution that must be responsive to all its constituents.”); Claire Finkelstein, *Punishment as Contract*, 8 OHIO ST. J. CRIM. L. 319, 326-30 (2011) (arguing that a contractarian approach “combines the social aim of deterrence with an individualized approach to the justification for imposing punishment on a particular agent, thus providing the criminal with an argument for his own punishment that *he* can accept”). See generally PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* (2008) (providing arguments against both deterrence and retributivist accounts).

to a constitutional violation. Bracketing this reading, Section III.B offers two ways to characterize the constitutional deprivation from the standpoint of the subordination account. A disenfranchised citizen unable to repay their obligations experiences a dignitary violation when their already diminished political status is further subordinated. Relatedly, excluded disenfranchised citizens are made instrumentally worse off in light of the relational, group-based nature of political exercise. Section III.C then uses this explanation to reinforce the theory that financially conditioned restoration amounts to unconstitutional punishment.

#### A. Clarifying Wealth-Equality Principles

Beginning with *Griffin v. Illinois* and working its way through *Harper* and into other domains, the Warren Court brought concerns over class discrimination into the fold of equal protection.<sup>65</sup> In *Griffin* itself, the Court held that for-purchase trial transcripts needed to be provided for free to indigent defendants because they were critical to the exercise of appellate review – even though a state “is not required by the Federal Constitution to provide appellate courts or a right to appellate review.”<sup>66</sup> One plausible reading of *Griffin* conceives of appellate review and, more narrowly, the access to a trial transcript, as statutory benefits, reflecting a rule that the government cannot make access to positive benefits available to wealthier individuals without also providing access to poorer individuals.

Such a rule, which seems to approximate a disparate-effects theory of wealth discrimination,<sup>67</sup> has since been rejected by the Court. In *Boddie v. Connecticut*, the Court used a due-process theory to strike down the imposition of filing fees upon an indigent couple in a divorce proceeding, reading *Griffin* not as a disparate-effects case but a due-process one: even though access to an appeal is not constitutionally required, the creation of the appeal option reduced the quality of process at the trial stage, such that the absence of an appeal would render the overall process inadequate for indigent defendants.<sup>68</sup> Over the course of related cases, broadly defined as the fundamental-rights strand of equal protection, the

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65. See Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 2, 5 (2018); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 266 (1991); Joshua M. Feinzig, *A Unified Constitutional View of Financial Punishment: Synthesizing the Excessive Fines Clause and Bearden-Based Protections*, 38 YALE L. & POL’Y REV. 444, 455-65 (2020).

66. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

67. See Klarman, *supra* note 65, at 266.

68. 401 U.S. 371, 380-83 (1971); see Klarman, *supra* note 65, at 266 (arguing that the Court was concerned with the “virtually limitless reach” of a disparate-impact standard, given how most social policies have disparate effects along wealth lines).

Court struck down wealth-inflected schemes, including those conditioning voting,<sup>69</sup> marriage,<sup>70</sup> physical liberty from incarceration,<sup>71</sup> and the appeal of the termination of parental rights<sup>72</sup> on the ability to make a financial payment. Of course, contrary to race or gender classifications, wealth-based distinctions do not alone generate strict or heightened scrutiny; instead, the *Rodriguez* rational-basis rule permits states to exchange benefits implicating *non-fundamental* interests—like relative improvement in schooling quality, as the Court took to be at issue in *Rodriguez*—for financial payment.<sup>73</sup> What can be gleaned across these cases is thus a two-dimensional, hybrid principle: states cannot deprive individuals of rights and interests recognized as fundamental on the basis of inability to pay, but can differentially provide benefits when less-significant interests are at stake.<sup>74</sup>

In *Harper* specifically, the Court held that access to the franchise cannot be conditioned on financial payment, striking down Virginia’s state poll tax under the Equal Protection Clause and barring the states from “mak[ing] the affluence of the voter or payment of any fee an electoral standard.”<sup>75</sup> Litigants and dissenting judges in the restoration cases have invoked *Harper* as well as *Kramer* and *Cipriano*, where the Court cited *Harper* in striking down statutory schemes that expanded voting into regulatory domains (where voting was not constitutionally required) on the basis of property status.<sup>76</sup> Similarly, Twenty-Fourth

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69. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 629 (1969); *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969). While *Harper* cited *Griffin*, *Kramer* and *Cipriano* did not.

70. *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978).

71. See *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970); *Tate v. Short*, 401 U.S. 395, 397-98 (1971); *Bearden v. Georgia*, 461 U.S. 660, 661-62 (1983).

72. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 110-21 (1996) (leveraging the “*Griffin*-line cases” to strike down the imposition of court-fee payments for accessing appellate review in a parental-rights-termination proceeding).

73. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18-20, 29 (1973) (“[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny . . .”).

74. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 790-91 (2011) (“In guaranteeing these rights [across the fundamental-rights strand], the Court vindicated the rights of the poor even when it was ultimately unwilling to take the more far-reaching step of granting heightened scrutiny to wealth-based classifications.”). Outside the wealth-discrimination context, the *Obergefell* majority opinion authored by Justice Kennedy reflects an “equal dignity” principle underwritten by mutually reinforcing due-process and equal-protection theories. See Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 19-23 (2015).

75. 383 U.S. 663, 666 (1966).

76. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

Amendment claims have been mounted on the theory that all wealth-based mechanisms keeping citizens from voting are unconstitutional.<sup>77</sup> But court majorities have rejected these claims by reasoning that the petitioners in *Harper*, *Kramer*, and *Cipriano* possessed a fundamental right to participate politically.<sup>78</sup>

In response, litigants and dissenting judges have argued that fundamental rights were not at stake in *Bullock* and *Lubin*,<sup>79</sup> which held that economic requirements could not be used to filter out indigent candidates even though running for office was not a “fundamental right.”<sup>80</sup> But the Court in *Bullock* and *Lubin* viewed candidacy barriers as narrowing the field of electoral options, which implicated the fundamental rights of voters by sowing “disparit[ies] in voting power based on wealth.”<sup>81</sup> In *Lubin*, the Court also recognized that standing for an election – though not a right as such – still implicated the indigent candidate’s own “important interest in the continued availability of political opportunity.”<sup>82</sup> But on the expulsion view, political nonmembers could not be the target of a poll tax or otherwise harmed by wealth-driven electoral distortions, for they lack a

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77. U.S. CONST. amend. XXIV, § 1 (“The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.”).
78. See, e.g., *Madison v. State*, 163 P.3d 757, 770 (Wash. 2007) (“[T]he poll tax in *Harper* applied to all Virginia citizens, individuals who possessed a fundamental right to vote under the United States Constitution. Convicted felons, on the other hand, no longer possess that fundamental right as a direct result of their decisions to commit a felony.”); *Johnson v. Bredesen*, 624 F.3d 742, 751 (6th Cir. 2010) (“Plaintiffs possess no right to vote and, consequently, have no cognizable Twenty-Fourth Amendment claim.”); *Harvey v. Brewer*, 605 F.3d 1067, 1080 (9th Cir. 2010) (“Having lost their right to vote, they now have no cognizable Twenty-Fourth Amendment claim until their voting rights are restored.”).
79. *Bullock v. Carter*, 405 U.S. 134, 142-49 (1972) (invalidating significant candidate filing fees); *Lubin v. Panish*, 415 U.S. 709, 718 (1974) (holding that a state may not bar an indigent candidate from running for office on the basis of unpaid fees).
80. See, e.g., *Madison*, 163 P.3d at 779-81 (Alexander, C.J., dissenting); En Banc Response Brief of Plaintiffs-Appellees at 19-20, *Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020) (No. 20-12003) (“Even though candidates in *Bullock* had no ‘fundamental’ right to appear on the ballot, the Court applied heightened scrutiny because the system ‘f[ell] with unequal weight’ due to ‘economic status’ and because the plaintiff-candidates had ‘affirmatively alleged that they were unable, not simply unwilling, to pay the assessed fee.’” (quoting *Bullock*, 405 U.S. at 142-46)).
81. See *Bullock*, 405 U.S. at 143-44 (“[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.”); *id.* at 144 (characterizing the barriers as an “exclusionary mechanism on voters”) (emphasis added); *Lubin*, 415 U.S. at 716 (“[T]he voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed . . .”).
82. *Lubin*, 415 U.S. at 716.

threshold connection to the political community and therefore have no cognizable rights or interests.

Before proceeding, it is worth pausing to consider the possibility that these protections are universally applicable, such that no person of any juridical category—whether it be enfranchised citizens, disenfranchised citizens, adolescent citizens, or noncitizen residents—can be precluded from participation solely on account of a payment. In other words, wealth is an illegitimate organizing principle by which to constitute the demos, and *Harper* constrains both the conferral of entry at the political boundary itself (i.e., a state cannot selectively open up voting to seventeen-year-olds or noncitizen residents through the use of wealth tests) as well as the more familiar kinds of wealth-based exclusions that differentiate eligible citizen voters already inside the political community. While the Court in *Harper* referenced the individual dignitary interests at stake when someone is barred from participating on account of their indigency, it emphasized how the use of wealth as a voting qualification erodes the democratic legitimacy of electoral processes.<sup>83</sup> With respect to these institutional interests, it is difficult to see a meaningful difference between the use of wealth criteria to expand the electorate and the use of the same criteria to narrow the electorate. Wealth criteria regulating political entry—just like rules inflating the political community along problematically ideological dimensions (like a rule conferring voting rights to nonmembers who promise to vote for a particular party)—distort election outcomes along arbitrary lines. Regardless of the targeted individual's underlying connection to the body politic or lack thereof, financial conditions degrade a political community's shared interests in electoral integrity, and are therefore infected with an illegitimate purpose unbecoming of a democracy.

But setting aside this reading of *Harper*, I proceed on the assumption that political-equality protections only extend to individuals with a predicate connection. As established in Part II, disenfranchised citizens possess political membership and are therefore within the field of constitutional coverage. The next

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83. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding that a state violates the Equal Protection Clause “whenever it makes the affluence of the voter or payment of any fee an electoral standard” because “[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax”). The Court likened the “invidiously discriminat[ory]” quality of the poll tax to the prohibition on military member voting struck down the prior Term in *Carrington v. Rash*, where the Court set forth additional institutional considerations. See 380 U.S. 89, 94 (1965) (“Fencing out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. The exercise of rights so vital to the maintenance of democratic institutions cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.” (quotations omitted)); see also *Cipriano v. City of Houma*, 395 U.S. 701, 706 (quoting the “fencing out” passage from *Carrington*).



Section explains how financially conditioned restoration amounts to a deprivation of the participatory rights and interests preserved through disenfranchisement.

*B. Constitutional Harms of Financially Conditioned Restoration*

Political rights are not dislodged in the way one might lose or abandon property. They instead continue to inhere in disenfranchised citizens, just as they inhered in the petitioners in *Harper*. The Section 2 “affirmative sanction,” as interpreted in *Richardson*, lowers the state’s burden of justification for overriding a right and preventing its exercise. But the introduction of a financial condition separating a disenfranchised citizen from political exercise pumps the justificatory burden back up – at that point, the state has embraced an electoral standard barring exercise on the basis of affluence, which is presumptively unconstitutional under *Harper* and its progeny. It remains at least theoretically possible for states to develop compelling reasons for conditioning the franchise on the repayment of fines and fees, however unlikely this may be.<sup>84</sup> But courts should not accept states’ assertions that the future political participation of disenfranchised citizens is devoid of constitutional dimension.

Because political exercise vindicates individual dignitary interests when considered individualistically, and instrumental group interests in electoral power when considered in the aggregate, the harms of the constitutional deprivation faced by indigent disenfranchised citizens can be expressed in multiple ways.<sup>85</sup> From a dignitary standpoint, indigent disenfranchised citizens incur a second-

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84. *Harper* made clear that electoral standards based in wealth are arbitrary. See *supra* note 83 and accompanying text; see also *Jones v. Governor of Fla.*, 950 F.3d 795, 811 (11th Cir. 2020), *rev’d en banc*, 975 F.3d 1016, 1029 (11th Cir. 2020) (“The problem with the incentive-collections theory is that it relies on the notion that the destitute would only, with the prospect of being able to vote, begin to scratch and claw for every penny, ignoring the far more powerful incentives that already exist for them—like putting food on the table . . .”).

85. See *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960) (characterizing petitioners’ complaint regarding the redefining of Tuskegee’s boundaries as “depriv[ing] them of their votes *and the consequent advantages that the ballot affords*” (emphasis added)); Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 925-28 (1998); Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 883-84 (1995). The instrumental quality of political exercise was not lost on the ratifiers of the Fifteenth Amendment, who understood racial political equality in notably group-based terms—contrasting with the more individualistic, dignitary rationale for civil rights animating the Fourteenth Amendment. See Amar & Brownstein, *supra*, at 928-55. Nor was this fact lost on the ratifiers of the Nineteenth Amendment, who viewed women’s likely tendency to exercise political rights differently from their male counterparts as the Amendment’s *raison d’être* (in other words, virtual representation was internally contradictory and therefore inadequate precisely because women’s political preferences were thought to *diverge* from those of their counterparts). See *id.* at 959-61.

order form of political marginalization – their already-diminished status is further subordinated vis-à-vis disenfranchised citizens who can afford to repay obligations – when participation opportunities are differentially afforded.

From an instrumental standpoint, financially conditioned restoration may further disadvantage indigent disenfranchised citizens. When citizens are disenfranchised, political power is redistributed away from them. But they could still be made worse off with respect to having their political preferences reflected in legislative outcomes depending on who else is excluded from – or later re-included within – political participation. Restoring political privileges on a selective basis, especially along a salient cleavage like wealth or class status, can therefore worsen the electoral consequences of disenfranchisement for indigent disenfranchised citizens at the group level. This is not to say that, as an empirical matter, nonindigent and indigent disenfranchised citizens necessarily have diverging preferences (this proposition is almost certainly context specific).<sup>86</sup> The point is that, as an analytical matter, financially conditioned restoration can never be an isolated, one-sided “statutory benefit” without constitutional implication and as permitted under the Court’s more recent readings of *Griffin*.<sup>87</sup> It also has a negative, exclusionary underside because it redistributes political power – and power is a zero-sum game.

### C. Bridging Poll Taxes with Unconstitutional Punishment

Before concluding, it is worth briefly explaining how the subordination account can shore up the punishment-based criticism of financially conditioned restoration schemes.<sup>88</sup> In *Bearden v. Georgia*, the Court held that the punitive deprivation of a fundamental right or liberty – namely, but not exclusively, physical liberty from incarceration – cannot be imposed solely on account of an individual’s inability to afford a financial payment.<sup>89</sup> But as with political-rights claims, courts have rejected *Bearden* challenges by reasoning that disenfranchised

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86. That said, there is no reason to believe that ex-felons typically vote the same way, such that indigent ex-felons would be made better off by the enfranchisement of nonindigent ex-felons. See Ernest Drucker & Ricardo Barreras, *Studies of Voting Behavior and Felony Disenfranchisement Among Individuals in the Criminal Justice System in New York, Connecticut, and Ohio*, SENT’G PROJECT 5-9 (Sept. 2005), [https://www.prisonpolicy.org/scans/sp/fd\\_studiesvotingbehavior.pdf](https://www.prisonpolicy.org/scans/sp/fd_studiesvotingbehavior.pdf) [<https://perma.cc/6RZT-RCLN>].

87. See *supra* Section I.A (describing how court majorities have treated restoration as a “Pareto-efficient” benefit that makes beneficiaries better off without making anyone else worse off); *supra* Section III.A (describing *Griffin* and its progeny).

88. See *supra* note 12 and accompanying text.

89. 461 U.S. 660, 672 (1983).

citizens lack deprivable political rights.<sup>90</sup> So too, they have framed disenfranchisement as a discrete moment where rights are vacated, rather than an active and ongoing dynamic between the state and the disenfranchised citizen. This casts disenfranchisement and restoration as discontinuous state actions, and all cases of disenfranchisement—regardless of their relative length—as equivalent punishments. For instance, the Eleventh Circuit found that Florida’s restoration scheme “do[es] not impose *additional punishment*” upon indigent disenfranchised citizens in violation of *Bearden*; by contrast, the scheme “would resemble *Bearden* if Florida left the right to vote intact upon conviction but then revoked the franchise from any felons who could not pay their fines and restitution.”<sup>91</sup>

But from the subordination angle and in light of the relational, instrumental character of political rights, these rationales break down. Disenfranchised citizens continue to possess deprivable rights. And if political rights channel political power, then the longer someone is disenfranchised, the longer they are sapped of electoral influence and the more severe the deprivation becomes. It follows that once an individual’s disenfranchisement takes on a poverty valence because the state has introduced a financial consideration, the ongoing suppression of the right shifts in kind, from one legitimately based in the Section 2 “affirmative sanction” and its related Lockean principles to another illegitimately tying the deprivation to wealth. At that inflection point, the disenfranchised citizen incurs the deprivation of a right on the basis of inability to pay, registering a violation under *Bearden*.<sup>92</sup>

## CONCLUSION

Far from merely extending the status quo of disenfranchisement, financially conditioned restoration intensifies the exclusion of poorer disenfranchised citizens in a manner that registers constitutionally. As courts continue to consider challenges to the practice, with the disenfranchisement of hundreds of thousands hanging in the balance, they should engage the first-order question of what disenfranchisement actually does to political rights—rather than simply accept that rights are “lost” and therefore *a priori* outside the field of constitutional

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90. See *Johnson v. Bredesen*, 624 F.3d 742, 749-50 (6th Cir. 2010) (“Tennessee’s re-enfranchisement conditions . . . merely relate to the restoration of a civil right to which Plaintiffs have no legal claim . . .”).

91. *Jones v. Governor of Fla.*, 975 F.3d 1016, 1032 (2020).

92. A *Bearden* violation still requires that disenfranchisement qualify as *punishment* rather than the nonpunitive regulation of elections. Professor Beth Colgan has compellingly argued that felon disenfranchisement is necessarily punitive, such that the *Bearden* standard remains applicable. See Colgan, *supra* note 3, at 120-38. The *Harper*-based approach does not require this threshold showing.

analysis. This is a framing choice, a function of the way in which a disenfranchised citizen is characterized vis-à-vis the political boundary and its associated juridical categories.

Beyond this litigation context, how we understand a disenfranchised citizen's political connection speaks to broader visions of democratic belonging and distributive justice.<sup>93</sup> Ultimately, a disenfranchised citizen can be imagined outside the realm of the political community, or treated as a continued member whose fate remains tied to the community's own.

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93. Cf. Bernard E. Harcourt, *The Invisibility of the Prison in Democratic Theory: A Problem of "Virtual Democracy,"* 23 GOOD SOC'Y 6, 8-9, 12 (2014) (arguing that the problems of mass incarceration long went unrecognized in the study of political science and democratic theory because punished individuals were assumed to be beyond the demos and were, therefore, irrelevant to issues of political equality and distributive justice); Albert W. Dzur, *Repellent Institutions and the Absentee Public: Grounding Opinion in Responsibility for Punishment,* in POPULAR PUNISHMENT: ON THE NORMATIVE SIGNIFICANCE OF PUBLIC OPINION 207 (Jesper Ryberg & Julian V. Roberts eds., 2014) (observing that there is an "invisibility of the problem of punishment" (emphasis omitted)).