

## **DILEMMAS OF REPRESENTATION, CITIZENSHIP, AND SEMI-CITIZENSHIP**

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### ABSTRACT

This Article takes up the question of “who counts?” with a three-part argument. The first part of the argument makes the case that citizenship in liberal democracies is subject to stresses caused by internal doctrinal conflict that result in the creation of semi-citizenship statuses that offer some individuals partial bundles of rights and semi-citizen statuses. Semi-citizenship is inevitable. The second part of the argument looks closely at how this affects the distribution of the political rights of citizenship: voting and representation. I make the argument that we ought not conflate voting and representation. Each is a distinct political right. People who cannot vote or do not vote are not necessarily entirely unrepresented. This is particularly evident if one takes seriously the trustee model of representation. The third part of the Article compares three different cases of semi-citizenship in which groups who are counted for the purposes of the census and legislative apportionment are not accorded the vote. I examine the cases of children, non-citizens, and felons, briefly illustrating how and why trusteeship serves the first two groups and fails the third. These conclusions bolster the case for treating trusteeship as a necessary component of a liberal democratic state and for treating it skeptically in circumstances in which the trusteeship is not clearly linked to the political capabilities of the population in question.

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## INTRODUCTION

To count and be counted is a fundamental task of liberal democratic states and their citizenries. Counting is shorthand for multifaceted dilemmas of representation. These dilemmas include the challenges of how states document and represent their populations, how individuals represent their own identities to the public, and how citizens' interests are represented in the process of democratic decision-making. When we ask who counts in a liberal democratic state, we are really asking who should be represented, how they should be represented, and are they represented in that way. Asking who does or does not count therefore raises overarching questions about the relationship of representation to the bona fides of any democracy. In this Article I respond to the challenge of asking who counts by examining the relationship between citizenship theory and representation. I make a two-pronged argument in which I first assert that all rights of citizenship, including representation, are accorded to people in differentiated bundles rather than being distributed to each member of the population in identical fashion. These bundles of differentiated rights in turn create semi-citizenships—political statuses that depart from full citizenship in any nation-state. We would, therefore, expect that every liberal democratic state will produce a set of possible routes for representation rather than one single unitary means for representing citizens' interests. Members of the population of any given nation-state will be represented using some or all parts of an arsenal of representation techniques. The second prong of the argument compares delegate and trustee style representation and pushes back against the assumption that representation is a unitary process whose only legitimate form is trusteeship.

## I. SEMI-CITIZENSHIP

We ask whether someone counts in politics because representation is among the fundamental rights that, as a complete bundle, compose liberal democratic citizenship. Calling the representativeness of a polity into question is tantamount to calling it undemocratic. But because both citizenship and representation come in many shapes and sizes, we need to be able to define each and understand their relationship to each other. As I have described elsewhere,<sup>1</sup> democratic citizenship is a political status that is gradient rather than binary. This means that rather than dividing a population into citizens and non-citizens, we accept the fact that citizenship exists on a continuum. People do not hold one uniform public status. Rather, semi-citizenships abound, offering slightly differentiated bundles of rights to various subsets of the population. Full citizenship is defined as the possession of all fundamental social, civil, and political rights along with legal nationality (the right to reside

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1. ELIZABETH F. COHEN, SEMI-CITIZENSHIP IN DEMOCRATIC POLITICS (2009).

and move freely in a country). But many people carry different versions of a basic rights bundle. People may possess some but not all of those fundamental rights. They may be missing an entire category of rights (for example, stateless persons have no legal nationality<sup>2</sup>) or they may have a weak version of one or more categories of rights (for example, newly arrived legal immigrants and temporary guests in the United States have only some social welfare rights associated with full citizenship<sup>3</sup>). Like any democratic right, representation can be parceled out in different degrees and forms. Any discussion of “who counts” will necessitate an inquiry into what it means to be represented, what are the range of acceptable forms and degrees of representation, whether everyone who ought to be represented is actually represented, and whether these differentiations of representation are justifiable.

## II. THE ORIGINS OF SEMI-CITIZENSHIP

To fully respond to these questions we must first understand the root explanation for the slicing up of citizenship’s component rights into semi-citizenships. In the United States and its peer nations, a liberal democratic state is responsible for defining and ensuring citizenship. The liberal democratic state marries three distinct logics or doctrines of membership: that of the state (administrative rationality and governmentality), that of liberalism (neutral egalitarian inclusiveness), and that of the *demos* (situated ethics). These logics of membership overlap at some points and conflict at others. It is the points of conflict and attempts to forge compromises in the context of doctrinal conflict that produce semi-citizenships, including, but not limited to, semi-citizenships in which some semi-citizens are not represented on the same terms as other semi-citizens and full citizens. Below I briefly introduce the three doctrines of membership.

States are subject to the demands of an administrative rationality that will constrain and contort the identities that individuals might choose in the absence of things like census boxes and human resources affirmative action questionnaires. In his Childress Lecture essay, “*Who Counts?*” “*Sez Who?*”, Professor Levinson cites the work of James Scott and Melissa Nobles as supporting the idea that the state is highly invested in counting and categorizing its population.<sup>4</sup> At root, their insights represent Foucauldian views of the state. Foucault treats the state as an extension of what he terms

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2. *Id.* at 146–47.

3. Jennifer B. Kinney & Elizabeth F. Cohen, *Multilevel Citizenship in a Federal State: The Case of Noncitizens’ Rights in the United States*, in *MULTILEVEL CITIZENSHIP* 70, 72–76 (Willem Maas ed., 2013).

4. Sanford Levinson, “*Who Counts?*” “*Sez Who?*”, 58 *ST. LOUIS U. L.J.* 937, 978–979 (2014).

“governmental” logic. He defines governmentality, using three related criteria, as:

1. The ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population, as its principle form of knowledge political economy, and as its essential technical means apparatuses of security.
2. . . . [T]he pre-eminence over all other forms (sovereignty, discipline, etc.) of this type of power which may be termed government, resulting on the one hand, in the formation of a whole series of specific governmental apparatuses, and, on the other, in the development of a whole complex of *savoirs*.
3. The process, or rather the result of the process, through which the state of justice of the Middle Ages, transformed into the administrative state during the fifteenth and sixteenth centuries, gradually becomes “governmentalized.”<sup>5</sup>

Governmentality brings scientific rationality to politics, creating a political rationality whose stated end is to secure and improve the circumstances of the population being governed. True to Foucauldian form, governmentality addresses itself to questions of how politics can be conducted to ensure public health, security, and stable power arrangements, among many things. As such, governmentality and states that realize governmental logic will administer citizenship rights with an eye to the security of the population rather than any particular normative philosophy, including, but not limited to, liberal or democratic theory.

All liberal democracies find their attempts to count and rationally categorize populations tempered by the strong commitment of their citizens to specific forms of government and ideologies, namely liberalism and democratic theory. In the case of the United States, this means that administrative rationality, liberal norms, and democratic norms are all competing with one another over the terrain of citizenship rights. Liberalism and democratic theory each stand in contrast to governmentality insofar as they are normative doctrines. Liberalism prioritizes egalitarian inclusiveness.<sup>6</sup> It is predicated on the intrinsic equality of all persons. Liberalism confers rights on

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5. Michel Foucault, *Governmentality*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* 87, 102–103 (Graham Burchell et al. eds., 1991). Foucault’s most extensive elaboration of the ideas of population and governmentality is contained in lectures he gave at the Collège de France. MICHEL FOUCAULT, *SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE 1977–1978* (Michel Senellart et al. eds., Graham Burchell trans., Palgrave Macmillan 2007) (2004) [hereinafter *LECTURES AT THE COLLÈGE DE FRANCE*]. See especially Lecture of Jan. 11, 1978, in *LECTURES AT THE COLLÈGE DE FRANCE*, *supra*, at 1; Lecture of Jan. 18, 1978, in *LECTURES AT THE COLLÈGE DE FRANCE*, *supra*, at 29; Lecture of Jan. 25, 1978, in *LECTURES AT THE COLLÈGE DE FRANCE*, *supra*, at 55.

6. Jeremy Waldron, *Liberalism, Political and Comprehensive*, in *HANDBOOK OF POLITICAL THEORY* 89, 89 (Gerald F. Gaus & Chandran Kukathas eds., 2004).

all autonomous individuals. Several influential contemporary critiques of the liberal state also assert that liberalism privileges the unitary insofar as it prioritizes equality, and hence they oppose ostensibly unitary political status with more diverse social identities.<sup>7</sup> Charles Taylor emphasizes the way in which liberalism leaves people homogenous.<sup>8</sup> Iris Young's theory of differentiated citizenship makes a related, but potentially more systemizing, effort to suggest that liberal impartiality operates on three dimensions.<sup>9</sup> It "denies the particularity of situations"; "master[s] or eliminate[s] heterogeneity"; and "reduc[es] the plurality of moral subjects to one subjectivity."<sup>10</sup> Young argues that the liberal state papers over inequalities generated via the oppression of identity groups. It does this by falsely asserting that the act of abstracting diverse individuals into citizens transforms their diversity into an identical public entity: the citizen. "[T]he ideal of impartiality in moral theory expresses a logic of identity that seeks to reduce differences to unity. The stances of detachment and dispassion that supposedly produce impartiality are attained only by abstracting from the particularities of situation, feeling, affiliation, and point of view."<sup>11</sup> Liberalism on its own does not seem to provide a basis for boundaries or distinguishing among differently entitled subjects.

In contrast, democratic norms are reliant on situated principles.<sup>12</sup> By its very nature, a *demos* must discriminate. It must develop a rule stating who is and is not included in the *demos* and then turn over enforcement of that rule to the state. Democratic rules about who receives the rights of citizenship will refer to the situated ethics produced by the people, traditions, and belief systems that compose a society.<sup>13</sup> This stands in stark contrast to liberalism's inclusive egalitarianism and administrative rationality's focus on security and efficiency. Robert Dahl describes the opposition between liberal egalitarian citizenship norms and democratic inclinations to draw situated boundaries using the *categorical* and *contingent* principles.<sup>14</sup> The categorical principle states: "Every person subject to a government and its laws has an unqualified right to be a member of the *demos* (i.e., a citizen)."<sup>15</sup> Robert Goodin has promoted a similar principle under the name of including "all affected

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7. See, e.g., IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 97 (1990).

8. Charles Taylor, *Hegel: History, and Politics*, in LIBERALISM AND ITS CRITICS, 177, 193 (Michael J. Sandel ed., New York Univ. Press 1984) (1975).

9. YOUNG, *supra* note 7, at 100–01.

10. *Id.* at 100.

11. *Id.* at 97.

12. COHEN, *supra* note 1, at 100–02.

13. *Id.*

14. ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 120, 122 (1989).

15. *Id.* at 124.

interests.”<sup>16</sup> The contingent principle states that “[o]nly persons who are qualified to govern, but all such persons, should be members of the demos (i.e., citizens).”<sup>17</sup> To resolve this conflict of values, Dahl tests the validity of a “modified categorical principle” that states that “[e]very adult subject to a government and its law must be presumed to be qualified as, and has an unqualified right to be, a member of the demos.”<sup>18</sup> Dahl resolves that inclusion must be based upon the following criterion: “The demos must include all adult members of the association except transients and persons proved to be mentally defective.”<sup>19</sup> He therefore flags maturity, capability, and a temporal relationship to the space associated with a given *demos* as the most significant indicators of citizenship.

Dahl’s theory seems to raise more questions than it answers and offers a reminder of the problems inherent in defining the boundaries of a gradient category such as citizenship. Indeed, the modified categorical principle of membership invites disputes related to boundary and threshold. How do we define fitness for citizenship? What is the line between adulthood and childhood? When does someone make the transition from being a foreigner to being a subject of the laws, and therefore to being a citizen? The contingent principle and its particularity carries with it the potential for myriad forms of partiality, both intended and unintended. Even its use to modify a categorical norm will impose some situated ethics on an otherwise liberal framework for citizenship. In so doing, the rights of citizenship will be subdivided, creating semi-citizenships.

Doctrinal competition is the reason that in any liberal democratic state there will not be one single version of a perfectly whole citizenship. Instead, there are many different semi-citizenships. The idea that there would be one single citizenship starts to seem very unlikely when one considers that not only are we trying to fit a whole bunch of very differently situated people into that mold, but the ideologies that go into defining the citizenship are in constant negotiations over who will have privacy and when, what “counts” as free speech, and when is the exact moment that a child or a foreign-born person becomes a citizen. All of the fundamental rights of citizenship can be sliced into constituent parts to create semi-citizenships.

The three-way doctrinal competition between administrative rationality, liberalism, and democratic situated ethics is of great consequence for how political rights, and particularly representation, will be defined and accorded in any liberal democratic state. Administrative rationality will emphasize

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16. Robert E. Goodin, *Enfranchising All Affected Interests, and Its Alternatives*, 35 PHIL. & PUB. AFF. 40, 48–51 (2007).

17. DAHL, *supra* note 14, at 124.

18. *Id.* at 127.

19. *Id.* at 129.

efficiency—in this view, representation only matters insofar as it relates to national security threats, contagion, or economic functioning. Liberalism seeks to be fair, egalitarian, and inclusive. Of the three doctrines, liberalism has the least interest in a complex system of representation. In fact, for the purposes of liberalism, it would be best if we were not invested in complex pictures of ourselves that call on various forms of difference. Better if we are all equally situated rational choosers interested in maximizing our liberty and self-interest.<sup>20</sup> Religion, race, gender, and so on just muddy things, particularly when they intersect with each other.<sup>21</sup> Inclusiveness is easiest when we can make a rule that all people are equal and equally entitled. Finally, democracy seeks us to follow our hearts and minds. Democracies need to know a lot about our identities. And because the *demos* is going to make decisions about the worth and standing of various facets of identity, it is also going to pose challenges to liberalism and the state, both of which I have described as fairly uninterested in the nuances of identity. As it turns out, our hearts and minds are neither efficient, like states, nor fair and inclusive like liberalism. Quite the contrary, as Professor Levinson shows us.<sup>22</sup> *Demos* exhibit myriad prejudices and forms of partiality. In turn, such prejudices and partiality create representation rules that directly contradict the mandates of administrative rationality and liberalism.

### III. REPRESENTATION

Semi-citizenships are the product of doctrinal conflict in liberal democratic states, and they take the form of memberships that offer people some but not all of the rights of citizenship. The rights of citizenship are generally recognized as falling into one of four categories. T.H. Marshall's widely cited definition of citizenship includes social rights, civil rights, and political rights.<sup>23</sup> To this I would add rights to place and free movement.<sup>24</sup> These rights are the essential elements of the democratic bundle that defines citizenship.<sup>25</sup> Representation is classified as a political right.<sup>26</sup> “*Who Counts?*” “*Sez Who?*” takes up the question of semi-citizenship as it pertains to the many facets of political rights and representation. The examples Professor Levinson introduces show the hallmark traits of doctrinal conflict and compromise. At

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20. A Kantian or Rawlsian system of representation would comport with this characterization of liberalism. JOHN RAWLS, *A THEORY OF JUSTICE* 60 (1971).

21. DARA Z. STROLOVITCH, *AFFIRMATIVE ADVOCACY: RACE, CLASS, AND GENDER IN INTEREST GROUP POLITICS* 46–48 (2007).

22. Levinson, *supra* note 4, at 945–46, 970–71.

23. T.H. MARSHALL, *Citizenship and Social Class*, in *CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT* 78 (1964).

24. COHEN, *supra* note 1, at 17, 145.

25. *Id.* at 6.

26. See MARSHALL, *supra* note 23; DAHL, *supra* note 14, at 28–30.

the heart of Levinson's essay is dismay about the fact that there are large numbers of persons in the United States who are counted in the census and included in apportionment figures that determine the number of Congressional seats a state will have but who cannot vote.<sup>27</sup> Let me restate this quandary in the terms of doctrinal conflict. The state, acting on governmental logic, is compelled to count every last person it can identify within its borders. This means that the census includes undocumented persons, resident aliens, and imprisoned felons, in addition to the modal full citizen population. By contrast, the *demos* has made rules for enfranchising people that generally exclude people without legal nationality and people who are incarcerated, among others.<sup>28</sup> This is not a problem for the purposes of administrative rationality, but it does violate liberal egalitarian norms that cannot justify exclusionary representation practices. Egalitarianism and ethical democracy dictate different answers about whether all persons subject to the law of the land ought to have a say in the making of those laws. This is a clear example of Dahl's categorical and contingent principles at play.

Districting rules, another example raised in "*Who Counts?*" "*Sez Who?*,"<sup>29</sup> are caught in a three-way tug of war between efficiency, fairness, and a historically exclusionary *demos*. Bureaucratically rational districts that maximize the efficient administration of territorial subunits are frequently altered by gerrymandering.<sup>30</sup> Gerrymandering, in turn, is imposed at times to improve the chances that minorities will receive adequate representation and at other times to accomplish the exact opposite.<sup>31</sup> In the former case gerrymandering is being used to improve the chances that representation will be accomplished in an egalitarian fashion. In the latter instance gerrymandering is being used to express the will of an inegalitarian *demos*. A third example of doctrinal conflict that results in a dilemma for representation rights crystallizes around voter identification. Identity papers begin as a means

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27. Levinson, *supra* note 4, at 947–57.

28. On the franchise rights of non-citizens, see RON HAYDUK, *DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES* 2 (2006); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1392–93 (1993). Most felons and many ex-felons are also presently disenfranchised. On felon disenfranchisement, see JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 7–8 (2006); BRENNAN CTR. FOR JUSTICE, *Criminal Disenfranchisement Laws Across the United States*, [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_48642.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_48642.pdf) (last visited Jan. 2, 2014).

29. Levison, *supra* note 4, at 954–55.

30. On the idea of a rational district and frequent gerrymandering of U.S. electoral districts, see Joseph E. Schwartzberg, *Reapportionment Gerrymanders and the Notion of "Compactness"*, 50 MINN. L. REV. 443, 443–44 (1966). On the reasons for gerrymandering, see Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 595, 598 (2002).

31. Issacharoff, *supra* note 30, at 597, 602–03.

for the state to document and monitor its population.<sup>32</sup> For the purposes of liberalism, however, they come to stand in for a uniform public status. A passport or a Social Security card is evidence of one's political standing in the eyes of the state. Yet at times the selective privileging of forms of identification to which subsets of the population have limited access has also been a means through which various forms of discrimination could be imposed. It is no wonder that in 2013 we find ourselves in an intense national wrangle about whether student IDs or gun licenses are valid ways of letting the government discern who among us is an eligible voter.<sup>33</sup> And it is equally unsurprising that our voter identification compromises have created groups of semi-citizens whose opportunity to vote is now in doubt.

These and other quandaries about who is represented in politics are essentially questions about who is accorded which kind of semi-citizenship and for what reasons. Any measure of how fully someone is accorded citizenship must take into account the degree to which that person is represented in politics. To assess the degree to which someone is represented is to assess the degree to which their views and interests "count" in the terms of democratic politics. This assessment requires an understanding of what constitutes representation. Representation itself is an essentially contested concept.<sup>34</sup> As Hanna Pitkin's seminal text on representation states, it "presupposes at least a rudimentary conception of what representation (or power, or interest) *is*, what *counts as* representation, where it leaves off and some other phenomenon begins."<sup>35</sup> Pitkin details the modern nature of representation in contrast to ancient ideas that more literally took representation to mean the *re*-presentation of something absent, such as an abstract object like a book or a face depicted in a work of art.<sup>36</sup> Representation only came to be applied to people, and in the context of politics, in the thirteenth and fourteenth centuries.<sup>37</sup>

Once representation was incorporated into early and high modern political theory, its meanings proliferated. From Hobbes' capacious understanding of almost any government as being representative,<sup>38</sup> to Rousseau's narrow view

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32. CRAIG ROBERTSON, THE PASSPORT IN AMERICA: THE HISTORY OF A DOCUMENT 4–7 (2010); JOHN TORPEY, THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE 14–15 (2000).

33. Veronica Harwin, *A Tale of Two States: Challenges to Voter ID Ballot Measures in Missouri and Minnesota*, 42 WASH. U. J.L. & POL'Y 203, 205–11 (2013).

34. W. B. Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 167, 169 (1955–56).

35. HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 1–2 (1967).

36. *Id.* at 2–3.

37. *Id.* at 3.

38. *Id.* at 30.

that representation could only be enacted directly,<sup>39</sup> norms defining what it means to “count” in politics abound. Each political system will generate its own version of representation. In contrast to something like a right to free movement, representation can only be fully understood in context. In Charles Tilly’s terms, we call representation a relative right.<sup>40</sup> Relative rights are defined contextually, relative to the political system that generates them. That means that we can only understand representation in the context of the society and ethical system in which politics is being conducted. What constitutes representation will vary from one political system to another. For example, proportional representation is predicated on the idea that representation of a *demos* with a diverse set of political views requires a similarly diverse set of representatives.<sup>41</sup> By contrast, a winner-take-all system generally produces a relatively small number of political parties with a less diverse set of platforms and candidates.<sup>42</sup> What it means to “count”—to be represented on par with one’s fellow citizens—will depend on very different outcomes in proportional and winner-take-all systems.

The relative nature of representation is critical because it will confine any normative claims we wish to make about whether people are or are not properly represented in any given political system. Representation is best judged from within the political system because it is nearly impossible to specify a single ideal formula for representation. We are better off not making the claim that someone’s citizenship in the United States is degraded simply because they are not represented in the terms that a German citizen would be.<sup>43</sup> We might ask instead whether that U.S. citizen is represented in the manner promised by the U.S. political system. Is that person represented on the same terms as all other U.S. citizens?

The answer, according to Levinson, is that many people in the United States are not fully and equally represented in the manner promised by the U.S.

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39. JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 102 (Rogers D. Masters ed., Judith R. Masters trans., 1978) (1762).

40. Relative rights are distinguished from autonomous rights. Autonomous rights do not depend on context for interpretation. So, for example, the autonomous right to free exercise will not mean something different in different regimes. CHARLES TILLY, DURABLE INEQUALITY 25–26 (1998).

41. André Blais, Agnieszka Dobrzynska & Indridi H. Indridason, *To Adopt or Not to Adopt Proportional Representation: The Politics of Institutional Choice*, 35 BRIT. J. POL. SCI. 182, 183 (2005).

42. Pippa Norris, *Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems*, 18 INT’L. POL. SCI. REV. 297, 301 (1997).

43. An exception is the interrogation of representation lodged by Robert Dahl in ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2d ed. 2003), and a separate discussion of our legislative process in SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006). I will take up these concerns later in this Article. See *infra* notes 61–70.

political system and on the same terms as their fellow citizens.<sup>44</sup> He points to a powerful set of examples illustrating precipitous disparities of representation within the U.S. population.<sup>45</sup> As noted earlier,<sup>46</sup> undocumented immigrants, unnaturalized persons, felons, and an array of other groups of persons cannot vote even though all of them are counted for the purposes of the census and congressional apportionment. Each of these groups is also taxed and subject to the law of the land and each is eligible for some, if meager, social and civil rights.<sup>47</sup> These groups are semi-citizens who cannot vote and whom Levinson therefore claims are also denied the political right to representation.<sup>48</sup>

“*Who Counts?*” “*Sez Who?*” rightly expresses that public officials view the job of representation to be responding to, and even mirroring, the stated preferences of their constituents.<sup>49</sup> This is an accurate reflection of what many elected officials report and what many, if not most, of their constituents also report.<sup>50</sup> But democratic theorists have produced a very rich and important second tradition of representation. This second tradition regards elected officials as the guardians of the best interests of the public.<sup>51</sup> Edmund Burke makes the distinction into one between preferences and interests.<sup>52</sup> Delegates are bound to represent the preferences of voters.<sup>53</sup> Trustees are bound to represent the interests of the voters.<sup>54</sup> When voters’ stated preferences diverge from an assessment of their interests, the delegate cannot justifiably act on knowledge of those interests and a trustee should not be swayed by any statement of preferences.<sup>55</sup> For Burke, representatives are obligated to be the ultimate source of judgment about the best interests of a *demos*.<sup>56</sup>

There are various names for the two traditions. In deference to the common parlance of political theory, I will call them the delegate and the trustee models of representation. The essay “*Who Counts?*” “*Sez Who?*” speaks primarily of

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44. Levinson, *supra* note 4 at 947–57.

45. *Id.*

46. *See supra* note 28 and accompanying text.

47. For a discussion of how to think about the relative depth of rights available to these and other semi-citizen groups, see COHEN, *supra* note 1, at 72–73.

48. Levinson, *supra* note 4, at 947–57.

49. *Id.* at 949.

50. *Id.* at 949–50.

51. Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 AM. POL. SCI. REV. 214, 214–15 (2009).

52. *See* EDMUND BURKE, *A Letter to Sir H. Langrishe, Bart., M.P.*, in V THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 157, 200 (1907).

53. *See id.*

54. *See id.*

55. PITKIN, *supra* note 35, at 55.

56. NADIA URBINATI, *REPRESENTATIVE GOVERNMENT: PRINCIPLES AND GENEALOGY* 89 (2008).

the delegate model of representation and tacitly defends this model of representation. It is important, however, not to dismiss trusteeship. Trusteeship shares important normative premises with other pillars of the U.S. political system. It is also empirically virtually impossible not to incorporate elements of trusteeship into a legal rational government. Nadia Urbinati astutely notes that Rousseau's body of work, taken as a whole, does not reject representation (as so many people assume after reading *The Social Contract*) so much as he sees delegation as a form of trusteeship that is distinct from the act of representing one's own views in a deliberation and decision-making process.<sup>57</sup> Decision-making should be done by citizens, but other kinds of legislation might be better effected by representatives. We must not convince ourselves, however, that delegation is somehow a more authentic form of representation than trusteeship. Delegates are interpreters of interests just as are trustees.

#### IV. THE PLACE OF TRUSTEESHIP IN REPRESENTATIVE DEMOCRACY

The normative defenses of trusteeship are not only plausible, they are integral to the theories of representation that shaped the American political system. Controversial norms aside, trusteeship is inextricably woven into the fabric of U.S. politics. Elsewhere, Levinson points out that the Philadelphia Convention saw open advocacy of including an element of trusteeship in the construction of the U.S. legislature.<sup>58</sup> As political theorist Bryan Garsten has noted: "Counterintuitive as it sounds, a fundamental purpose of representative government, as Constant and Madison saw it, is to *oppose* popular sovereignty in the sense that it is usually understood . . . ."<sup>59</sup> Madison departed from the Burkean tradition of elitist trusteeship, but he still saw representation as primarily an act of independent interpretation rather than simply the relaying of an expressed preference.<sup>60</sup> It was the intent of some influential founders to create a set of buffers between the mass of constituents and policy outcomes by treating the vote and representation as distinct entities. What the founders created is in exact accord with what we would expect doctrinal conflict to produce. The bargain our founders struck was a system of representation that sliced up the right to representation and gave us only partial access to delegate representation, reserving some of the power of the state for trusteeship.

To some this warrants calling U.S. democracy undemocratic. Political scientists Robert Dahl and Sanford Levinson have both written books decrying the U.S. constitutional structure for this very reason.<sup>61</sup> More recently and more

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57. *Id.* at 62.

58. LEVINSON, *supra* note 43, at 32.

59. Bryan Garsten, *Representative Government and Popular Sovereignty*, in POLITICAL REPRESENTATION 90, 91 (Ian Shapiro et al. eds., 2009).

60. Rehfeld, *supra* note 51, at 223–24.

61. DAHL, *supra* note 43; LEVINSON, *supra* note 43.

publically, the radical left publication *Jacobin*, reported in an article called “Tea Party Yankees”:

The average member of the House “Suicide Caucus” (half of which is southern, compared to 30% of the overall House) won his or her last election by a margin of 32 percentage points. Nationwide the average House member won by a 31 point margin. For the average Republican winner the margin was 29%. By comparison, in the last UK election the average parliamentary victor won with a *total vote* of 47%.

But the problem runs deeper than the mere mechanics of elections. When voters do bother to vote, even on the rare occasions their vote matters, the results are rendered opaque and irrelevant—a proliferation of veto points, a miasma of dispersed authority—by a constitutional structure meticulously designed to suppress any visible connection between the casting of a ballot and the enactment of a program.<sup>62</sup>

The verdict—that our Constitution is “not very democratic”—was a foregone conclusion if one rejects the idea that there is a place for trusteeship in any liberal democratic state.

Robert Dahl, Sanford Levinson, and *Jacobin* are three very different voices articulating surprise and disapproval that representation is so buffered by trusteeship in the United States. However, trusteeship cannot and should not be rejected out of hand. In fact, the legitimacy of our democracy is reliant on trusteeship. I say this because there is so much evidence of these two phenomena: on the one hand, disaffected constituents who decry the quality of their delegate representation and contribute to the incredibly low popularity of our representative institutions in this country;<sup>63</sup> and on the other hand, evidence of Congress and other public officials acting very much as trustees of people who do not and may never vote.<sup>64</sup> If we were to predicate the legitimacy of our democracy solely on the quality of delegate style representation, we would be setting an impossibly high bar for democracy. As I will show, it would be far less democratic to abandon trusteeship entirely and insist on only legitimizing delegate representation. A great deal of democratic

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62. Seth Ackerman, *Tea Party Yankees*, JACOBIN, <https://www.jacobinmag.com/2013/10/tea-party-yankees/> (last visited Jan. 7, 2014).

63. For a recent sampling of public opinion polling on Congress, see *Congressional Job Approval*, REALCLEARPOLITICS.COM, [http://www.realclearpolitics.com/epolls/other/congressional\\_job\\_approval-903.html](http://www.realclearpolitics.com/epolls/other/congressional_job_approval-903.html) (last visited Feb. 2, 2014).

64. In the 2010 midterm (i.e., non-presidential) election, only approximately 40% of eligible voters turned out. See *2010 General Election Turnout Rates*, U.S. ELECTIONS PROJECT, [http://elections.gmu.edu/Turnout\\_2010G.html](http://elections.gmu.edu/Turnout_2010G.html) (last updated Feb. 4, 2012). While rates tend to be higher during presidential election years, this has less relevance for the question of whether people actually vote for their representatives. See *2012 General Election Turnout Rates*, U.S. ELECTIONS PROJECT, [http://elections.gmu.edu/Turnout\\_2012G.html](http://elections.gmu.edu/Turnout_2012G.html) (last updated July 22, 2013).

deliberation and inclusion would grind to a halt if we were to think this way about representation.

Thinking about the best interests of the public and considering representation to be trusteeship transforms the terms of any discussion about who counts in politics in two crucial ways. First, trusteeship does not prioritize the stated preferences of constituents over other information regarding their welfare that may be available. A representative may weigh a person's stated preferences against an understanding of their interests. This is actually necessary even when the representative considers himself to be a delegate. For example, people protesting with signs that say "Keep your government hands off my Medicare" are sending their representatives an illegible message.<sup>65</sup> The representative must interpret whether that protestor is more committed to small government or more committed to Medicare. Representation is always an act of interpretation, as noted by Pitkin and as discussed earlier in this Article.<sup>66</sup> We might say that trustees fail at this some of the time, leaving their non-voting constituents unrepresented, but then we would also say that they fail to represent many voters' interests as well.

A second change enforced by considering trusteeship to be an important form of representation is that under trusteeship our constituency is not considered to be solely a collection of individuals. Trusteeship recognizes individual voters to be parts of constituencies defined not simply by electoral math but by interests. Ultimately, to a trustee, voters compose one single *demos*, whose collective relationships, histories, and other characteristics and outcomes outweigh the importance of any single individual's interests. An individual is almost a fiction in this view because we cannot understand much about someone's needs and interests outside of their social context, which inevitably requires understanding their group memberships. Thus, a trustee never represents a set of individuals. A trustee always represents a group of people. While delegates are also ultimately working on behalf of groups, the information they receive necessarily takes the form of aggregated expressions of preferences. Using other information treats an entire society rather than segmenting the society into distinct demographics. Trustees are trustees of social groups as well as individuals. Those social groups will include non-voters. The trustee's job is to use that information to protect and further the well-being of her constituents, either as individuals, as members of groups, or both.

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65. This was a refrain that went viral prior to the passage of the Affordable Care Act. Bob Cesca, *Keep Your Goddamn Government Hands Off My Medicare!*, HUFFINGTON POST (Aug. 5, 2009, 6:45 PM), [http://www.huffingtonpost.com/bob-cesca/get-your-goddamn-governme\\_b\\_252326.html](http://www.huffingtonpost.com/bob-cesca/get-your-goddamn-governme_b_252326.html).

66. See *supra* notes 35–38, 55 and accompanying text.

## V. HOW DO WE KNOW WE EXPECT OUR REPRESENTATIVES TO BE TRUSTEES?

There are myriad arguments to be made about the relative costs and benefits of trusteeship versus delegate models of representations. The Burkean and Madisonian traditions of trusteeship representation make normative arguments in favor of trusteeship for predictable reasons, and scholars such as Dahl and Levinson fire back with legitimate concerns about paternalism and outright exclusion. At this point, I would like to turn the conversation away from normative evaluation and examine how representation actually occurs.

In any representative system, but particularly in two-party systems, it is expected that electoral contestation will result in a winner or set of winners and a set of people whose preferred candidate is not elected. As a matter of course, it is also true that constituents who vote for a candidate or even a party that loses are not considered either disenfranchised or unrepresented just because they did not get their way. Robert Dahl's scathing indictment of the U.S. Constitution as undemocratic considers how the Senate unfairly privileges residents of sparsely populated states, giving them "more" representation per citizen than the residents of populous states receive.<sup>67</sup> He and Levinson also critique "first-past-the-post" electoral systems for their tendency to produce only two political parties, which marginalize or entirely eradicate smaller parties and the minority views they represent.<sup>68</sup> What Dahl does not say is that people who vote for losing candidates should be considered fully disenfranchised or unrepresented. Voting for losing candidates is considered an inevitable part of democratic politics and representative government.

In any system of indirect representation we accept that some of the time we can and must be represented by someone for whom we did not vote. We also know that we will be represented by someone who was elected by people with points of view that depart from our own. Any kind of representative government depends on citizens' acceptance of departures from their expressed preferences. If any indirect representative system is predicated on the idea that people can and will be represented by elected officials for whom they did not vote, we cannot dismiss an electoral system such as that of the United States as unrepresentative.

The expectation that we will be represented by people for whom we did not vote or by people whose electoral majority expresses views that depart from ours invalidates the idea that representatives simply express constituents stated preferences. Recognizing trusteeship as legitimate and unavoidable is a crucial point in the discussion of representation because, once we accept that representation is not always the *re*-presentation of what we said we wanted, the very idea of voting, or of having one's vote "count," takes on a new cast. If our

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67. DAHL, *supra* note 43, at 48–50.

68. *Id.* at 57; LEVINSON, *supra* note 43, at 91.

representatives are trustees, then we will loosen the expectation that there must be a direct correlation between how we vote and what an elected official does. Instead of a sharp demarcation between representation and its opposite, we see a spectrum of representations that are offered to the population.

Recall that in the first half of this Article I argued that each of the core elements of citizenship exists not in a binary relationship to the absence of that right, but rather as a continuum.<sup>69</sup> Levinson and Dahl see the continuum of representation as marked on one end by direct and participatory democracy and on the other end by trusteeship. This slips easily into a treatment of voting as an instance of representation and as possibly the only truly democratic instance of representation. We move quickly to the point at which we have actually conflated voting and representation rather than treating them as distinct ends unto themselves.

In fact, it would not appear that either Levinson or Dahl want to treat voting as the only legitimate form of representation. If they were to make this argument, any election that seats one party's candidate automatically diminishes the citizenship of the losing party's supporters. Even systems of proportional representation will frequently fail to seat a member of every political party in an electoral contest. And any representative formula is a recipe for diluting the political will of individual constituents. Having access to the franchise is an important element of citizenship, but we cannot jump from an argument about disenfranchisement directly to an argument about representation. Instead of the direct representation/trusteeship continuum, we might recognize voting and representation as having equal and integral importance to one's political citizenship. They are each their own continuum. In this case we do not move along a sliding scale of democratic-ness that begins with the vote and ends somewhere around trusteeship. Instead, instances of representation can happen in the absence of enfranchisement just as we expect that representation can still occur when the exercise of one's franchise rights does not result in one's chosen candidate or party being elected. This is a good thing for many reasons, not the least of which is the fact that so few people vote in the United States, let alone vote in non-presidential elections.

If we treat representation and enfranchisement as having equal significance to any person's political citizenship, the most important ongoing work a member of the population can do is the work of making her identity and all of her life circumstances visible in the public sphere. This is consistent with T.H. Marshall's description of civil rights of speech as integral to political rights of representation and franchise.<sup>70</sup>

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69. *See supra* Parts I–III.

70. MARSHALL, *supra*, note 23, at 65, 78.

## VI. TRUSTEESHIP AND DISENFRANCHISED GROUPS

Our implicit acceptance of trusteeship in any representative system opens the way to ask questions about whether semi-citizens who are not enfranchised are also not represented. Levinson mentions a wide array of groups who are disenfranchised in contemporary American politics. He focuses particular attention on ex-felons and non-citizens.<sup>71</sup> To this list we might also add children, who generally compose the largest disenfranchised group in any democratic society.<sup>72</sup> Relying for the moment on these notable instances of antidemocratic representation, we can interrogate whether the absence of the political right to vote automatically leads to a breakdown of representation. Felons (and sometimes ex-felons), non-citizens, and children are all classes of persons that are disenfranchised. To what extent do we also believe that each of these groups is also unrepresented?

### A. *Children's Semi-Citizenship and Representation*

Political theorists considering the idea of childhood have advocated for considering the state to be the fiduciary of children's basic interests while parents are treated as fiduciaries of children's best interests.<sup>73</sup> Fiduciaries in this context "act[] on behalf of someone else, usually because of that person's temporary or permanent incapacity. Fiduciaries do not pursue their own interests; indeed, to do so would generally be seen as an abuse of the fiduciary role."<sup>74</sup> Fiduciaries embody the trusteeship model of representation. In the basic interests/best interests formulation, the state is responsible for providing children with a basic social safety net. To the extent that this requires representation, various government agencies at the federal and state levels are responsible for recognizing children as persons, bringing children's interests into the public sphere, and fulfilling the charge of ensuring their security and physical well-being. This might mean ensuring a free and high-quality public education, or it might require funding welfare programs that feed and shelter poor families with children. Parents, in turn, are fiduciaries of children's interests in things like their religious upbringing, the transmission of personal values, their connection to a community, and the development of their political

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71. Levinson, *supra* note 4, at 950–51.

72. The United States Census estimates that 23.5% of the population is under the age of eighteen. *USA QuickFacts from the US Census Bureau*, U.S. DEP'T OF COMMERCE, <http://quickfacts.census.gov/qfd/states/00000.html> (last updated Jan. 7, 2014). By comparison, approximately 2.5% of the voting population is disenfranchised as a result of a felony conviction. James Ridgeway & Jean Casella, *Nearly 6 Million Americans Can't Vote Due to Felon Disenfranchisement Laws*, MOTHER JONES, (July 13, 2012, 1:30 AM), <http://www.motherjones.com/mojo/2012/07/black-vote-felon-disenfranchisement-laws-florida>.

73. IAN SHAPIRO, *DEMOCRATIC JUSTICE* 92, 96–97 (1999).

74. *Id.* at 70.

views. The fiduciary model departs from the coverture model insofar as it stipulates that the state is responsible for certain children's interests regardless of whether parents exercise their franchise on behalf of their children. It would be beyond the scope of this discussion to thoroughly evaluate all the ways in which the state does or does not fulfill its responsibilities to children. The essential observation to make is that states regularly prove themselves capable of discharging their duties to children as well as they discharge their duties to most full citizens. Nor is it clear that enfranchising even children who are developmentally quite similar to adults would result in a markedly different or improved outcome. While it is important to recognize that children are not full citizens, it would be impossible to fully enfranchise all children. Conflating enfranchisement and representation obscures the ways in which trusteeship functions to represent children.

### B. *Non-Citizen Semi-Citizenship and Representation*

Levinson raises questions about the disenfranchisement of non-citizens.<sup>75</sup> Non-citizen disenfranchisement takes several forms. Undocumented persons, various types of temporary residents including guest-workers and students, refugees, and permanent residents all have different forms of semi-citizenship and different citizenship trajectories. What they all have in common is that they are counted by the census, and hence for the purposes of apportionment, they are expected to obey laws including those that tax them, and they have some civil and social rights associated with citizenship.<sup>76</sup> Those civil and social rights are quite robust in the case of permanent residents and quite anemic in the case of undocumented persons and temporary workers.<sup>77</sup> They also share a common political fate: none may vote in federal elections and almost nowhere in the United States can any of them vote in any election.<sup>78</sup>

Is the disenfranchisement of non-U.S. citizens tantamount to the absence of any opportunities for the representation of non-citizens in U.S. politics?

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75. Levinson, *supra* note 4, at 947–57.

76. Peter J. Spiro, *The (Dwindling) Rights and Obligations of Citizenship*, 21 WM. & MARY BILL RTS. J. 899, 906 (2013).

77. On the degree to which permanent residents have close to full citizenship, see PETER J. SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* (2008). On the weak rights of guest-workers, see Etan Newman et al., *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers*, FARMWORKER JUSTICE (2011), available at <http://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20No%20Way%20To%20Treat%20A%20Guest%20H-2A%20Report.pdf>.

78. On non-citizen voting, see RON HAYDUK, *supra* note 28; Raskin, *supra* note 28, at 1393–94. A very few highly localized exceptions to the non-voting rule do exist. See Aaron Kraut, *Takoma Park Stands by Non-U.S. Citizen Voting Law*, WASH. POST (Mar. 14, 2012), [http://articles.washingtonpost.com/2012-03-14/local/35449488\\_1\\_takoma-park-noncitizens-vote-campaign](http://articles.washingtonpost.com/2012-03-14/local/35449488_1_takoma-park-noncitizens-vote-campaign).

There is evidence that non-citizen interests in fact do receive representation, and that in their case trusteeship representation has and might again offer the opportunity for a transition from trusteeship to both delegate style representation and the forms of enfranchisement offered to full citizens. Somebody is doing *some* work to represent the interests of undocumented immigrants, one of the most fully and permanently disenfranchised groups to whom “*Who Counts?*” “*Sez Who?*” refers. Otherwise they would not be getting driver’s licenses in some states,<sup>79</sup> being regularized by infrequent but important amnesties,<sup>80</sup> and receiving various other benefits.<sup>81</sup> This is not to say that their semi-citizenship constitutes a fully just arrangement. It is simply an observation that representation occurs in the absence of the franchise.

The starkest evidence of this fact is the 1986 amnesty, which ultimately transformed approximately three million undocumented and temporary workers into permanent residents eligible to naturalize.<sup>82</sup> If representation of either the trusteeship or delegate can be said to accomplish anything, it ought to accomplish large-scale change that expands the opportunities for political participation of groups seeking those rights.

Their interests are not only being protected because businesses stand to profit or because they have family members in this country, both of which would constitute an indirect form of trusteeship. Governors, senators, and even the President have also spoken on behalf of the interests of the undocumented.<sup>83</sup> They also are speaking on behalf of themselves in Congress, as we saw when Pulitzer Prize winning journalist Jose Antonio Vargas testified

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79. Esther Yu-Hsi Lee, *In-State Tuition, Driver’s Licenses, And Other Immigrant-Friendly Laws That Took Effect This Week*, THINKPROGRESS, (Jan. 3, 2014, 4:13 PM), <http://thinkprogress.org/immigration/2014/01/03/3114881/immigration-laws-january-1-2014/>.

80. *The Seven Amnesties Passed by Congress*, NUMBERSUSA, <https://www.numbersusa.com/content/learn/illegal-immigration/seven-amnesties-passed-congress.html> (last updated June 7, 2011).

81. Spiro, *supra* note 76.

82. Betsy Cooper & Kevin O’Neil, *Lessons From the Immigration Reform and Control Act of 1986*, MIGRATION POL’Y INST. 3 (Aug. 2005), available at <http://www.migrationpolicy.org/research/lessons-immigration-reform-and-control-act-1986>.

83. See Jenna Portnoy, *Chris Christie Trumpets Signing of Dream Act in Union City*, STAR-LEDGER (Jan 07, 2014, 9:10 PM), [http://www.nj.com/politics/index.ssf/2014/01/chris\\_christie\\_trumpets\\_signing\\_of\\_dream\\_act\\_in\\_union\\_city.html](http://www.nj.com/politics/index.ssf/2014/01/chris_christie_trumpets_signing_of_dream_act_in_union_city.html); Andy Bromage, *Sanders and Welch Go to Bat for Migrant Farmworker Facing Deportation; Leahy Still Noncommittal*, SEVEN DAYS: VT’S INDEPENDENT VOICE (Jun. 18, 2013, 11:02 AM), <http://www.sevendaysvt.com/OffMessage/archives/2013/06/18/sanders-and-welch-go-to-bat-for-migrant-farmworker-facing-deportation-leahy-still-noncommittal>; President Barack H. Obama, Remarks by the President on Immigration Reform (Oct. 24, 2013), available at OFF. PRESS SEC’Y, WHITE HOUSE, <http://www.whitehouse.gov/the-press-office/2013/10/24/remarks-president-immigration-reform>.

about Comprehensive Immigration Reform.<sup>84</sup> One could hardly say that disenfranchisement has denied non-citizens access to the public sphere or the opportunity to influence public policy. If we take the premise of the first half of this Article seriously, we presume that semi-citizenship is inevitable. Some people will be disenfranchised in any liberal democratic state. The prevalence of birthright citizenship laws makes it likely that non-citizens will also be semi-citizens, disenfranchised either temporarily or in some cases permanently. But this need not seem to have resulted in the permanent absence of immigrant interests from any part of the public sphere.

### C. *Felon Semi-Citizenship and Representation*

Levinson's other example of a sizeable group that is counted by the state but not included in the *demos* is felons.<sup>85</sup> The semi-citizenship of felons differs from that of children and most non-citizens. While children are persons on their way to enfranchisement, and many non-citizens start out and remain disenfranchised, felons were at one time enfranchised but they lose that right upon their incarceration. Sometimes they regain that right and sometimes they do not.<sup>86</sup> Any adult offender incarcerated for a felony possessed a vote prior to their first conviction. This difference creates a gulf between the trusteeship models of representation on behalf of children, immigrants, and felons. Losing one's vote is a categorically different circumstance than someone who is on track to become enfranchised but has not yet completed the track. In the felon's case, it leads to ask how someone previously considered competent to vote and represent herself can be deemed incompetent to do so.

This question begs us to examine the basis for disenfranchisement. All three groups under consideration are treated by the *demos* as either temporarily or permanently "incapacit[ated]," to reintroduce Ian Shapiro's justification for the use of a fiduciary model of representation.<sup>87</sup> Children's developmental immaturity is well documented,<sup>88</sup> even if some children demonstrably outperform their peers or even some adults in matters of political judgment. It is not difficult to see why children are considered unfit to represent themselves. Non-citizens are also treated as having untested loyalties, and it is a nearly universal rule that foreign-born persons will have to endure a probationary

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84. Testimony of Jose Antonio Vargas in Hearing on Comprehensive Immigration Reform Before the S. Comm. on the Judiciary (Feb. 13, 2013), available at <http://www.judiciary.senate.gov/pdf/2-13-13VargasTestimony.pdf>.

85. Levinson, *supra* note 4, at 950–51.

86. The Brennan Center tracks the voting rights of felons, ex-felons, parolees, and people on probation at the state level. BRENNAN CTR. FOR JUSTICE, *supra* note 28.

87. SHAPIRO, *supra* note 73, at 70.

88. Andrew Rehfeld, *The Child as Democratic Citizen*, 633 ANNALS AM. ACAD. POL. & SOC. SCI. 141, 146 (2011).

period before they are enfranchised.<sup>89</sup> The probationary period is thought to allow the development of ties and the acquisition of knowledge and norms required for informed political participation.<sup>90</sup> However, the least well-represented group of disenfranchised persons, felons and ex-felons, is different. Children and non-citizens are developing political capabilities. We do our best to ascertain when that threshold of capabilities has been reached, and we judge it incrementally.<sup>91</sup> A felony conviction is a breach of the social contract. Crimes of moral turpitude therefore make a judgment about character rather than capability, the trait to which Shapiro referred.

A character judgment departs from a capability judgment and necessarily represents the most subjective and potentially fraught elements of the democratic *ethos*. Recall Robert Dahl's reluctance to introduce contingency to questions of enfranchisement except in cases involving children, transients, and the mentally unfit.<sup>92</sup> Dahl resists a higher degree of contingency because character judgments are highly vulnerable to the prejudices held by the *demos*. Character judgments are often proxies for judgments that address neither capability nor character.<sup>93</sup>

Returning to the question at hand: the conclusion that a felony conviction voids someone's capacity to make any political judgments is difficult to reach and seems unrelated to the history of felon disenfranchisement. The most detailed studies of the history of felon disenfranchisement in the United States document that the practice gained initial momentum among states seeking to counteract the enfranchisement of blacks following the passage of the Thirteenth Amendment.<sup>94</sup> More recently, Michelle Alexander has illustrated how post-Jim Crow drug criminalization and sentencing practices were part and parcel of explicit attempts on the part of the Republican Party to politically isolate and disempower black Americans.<sup>95</sup> Felon disenfranchisement is categorically different from the disenfranchisement of children and non-

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89. The waiting period is so universal that it is one of the crucial measures integrated into the Citizenship Policy Index used to evaluate how liberal or conservative a country's immigration policy is. MARC MORJÉ HOWARD, *THE POLITICS OF CITIZENSHIP IN EUROPE* 212 (2009).

90. See Elizabeth F. Cohen, *Citizenship and the Law of Time in the United States*, 8 DUKE J. CONST. L. & PUB. POL'Y 53 (2013).

91. COHEN, *supra* note 1, at 206.

92. See DAHL, *supra* note 14, at 129.

93. Dahl makes this point in his discussion of the contingent principle. DAHL, *supra* note 14, at 128. Alexander Keyssar mirrors this in the specific context of felon disenfranchisement. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 163 (2000).

94. KEYSSAR, *supra* note 93, at 162.

95. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDESS* (rev. ed. 2012). Alexander discusses a number of facets of the Republican strategy. Of particular relevance is the war on drugs perpetrated by the Reagan administration and the federal intervention in local and state policing practices. *Id.* at 73.

citizens. It has a long history of connection with racial discrimination in the United States.

Mirroring the difference in the trajectory and basis of felon disenfranchisement, the quality of political representation available to them is markedly lower than that available to children and many non-citizens. By and large, trusteeship fails as a model for the representation of felons. Mounting evidence exists demonstrating that the disenfranchisement of felons has a measurable and important effect on the outcome of elections at every level of government.<sup>96</sup> Furthermore, the experience of incarceration in the United States has proven to be intractably inhumane. Recent protests and hunger strikes have revealed the truly sordid conditions in which people incarcerated in overcrowded prison systems such as California and Texas live.<sup>97</sup> These efforts at launching a social movement have by and large been declared a failure.<sup>98</sup> Similarly, Texas's Maricopa County has gained national notoriety for housing prisoners in "Tent City," a site infamous for cruelly high temperatures and otherwise inhumane conditions.<sup>99</sup> While incarcerated, prisoners work for a fraction of what their legal wages would be were they not incarcerated.<sup>100</sup>

The fact that felon disenfranchisement is not predicated on a developmental discrepancy between felons and full citizens and the fact that felon disenfranchisement has been directly linked to racially discriminatory practices may explain why trusteeship on behalf of felons fails in comparison to the trusteeship exercised on behalf of children. In this case, disenfranchisement is neither protective nor probationary. Felon disenfranchisement is intended not just to disenfranchise but also to reduce the likelihood that the interests of black Americans will be represented. Based on the findings of Uggen and Manza, it would appear that this effort has had at least some success. Not only has a large and disproportionate subset of black Americans been disenfranchised, but this disenfranchisement has altered multiple electoral outcomes and affected the degree to which the interests of black Americans, particularly those targeted by the criminal justice system, are

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96. Christopher Uggen & Jeff Manza, *Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 786-90 (2002).

97. Paige St. John, *Inmates End California Prison Hunger Strike*, L.A. TIMES (Sep. 05, 2013), <http://articles.latimes.com/2013/sep/05/local/la-me-ff-prison-strike-20130906>.

98. *Id.* The prisoners suspended their strike without state accession to any of their demands. *Id.*

99. *Tent City Jail*, MARICOPA CNTY. SHERIFF'S OFFICE, <http://www.mcso.org/JailInformation/TentCity.aspx> (last visited Jan. 9, 2014); James Ridgeway & Jean Casella, *America's 10 Worst Prisons: Tent City*, MOTHER JONES (May 3, 2013, 2:00 AM), <http://www.motherjones.com/politics/2013/05/10-worst-prisons-america-joe-arpai-tent-city>.

100. *Section III: The Prison Economy*, PRISON POL'Y INITIATIVE, <http://www.prisonpolicy.org/prisonindex/prisonlabor.html> (last visited Jan. 9, 2014).

cared for in any capacity.<sup>101</sup> During the period of time since the Voting Rights Act came into effect, the number of black men that are incarcerated and the length of time served has skyrocketed.<sup>102</sup> It seems implausible to say that the moral character of any social group has or could have plunged so rapidly during this period. More likely, as Alexander persuasively demonstrates, it is the case that the omnipresent resistance to adequately representing black Americans has found a highly effective vehicle in felon disenfranchisement.

#### CONCLUSION: INEVITABILITY

Like all rights of citizenship, the political rights associated with participatory democracy can be structured in more than one way and can be parceled out to greater and lesser degrees. This creates semi-citizenships for members of the population who have some but not all rights associated with full citizenship. Semi-citizenship is inevitable because liberal democratic states inevitably engender doctrinal conflict. That competition results in bargains being struck in which citizenship rights are portioned out into different bundles for different groups and individuals. Many of us hold forms of semi-citizenship at one or another points in our lives.

Our political rights of franchise and representation exemplify this phenomenon. Regardless of whether we think it just or unjust, liberal democratic states disenfranchise some members in an attempt to reconcile conflicting doctrines. This does not always mean that the disenfranchised are unrepresented. Precisely because there is often as much doctrinal support for including any given semi-citizen in the purview of the state as there is support for excluding them, these disenfranchised groups are frequently represented in the public sphere, sometimes in quite robust fashion. This can occur when representatives serve as fiduciaries or trustees; Ian Shapiro's definition of the fiduciary was someone to whom we entrust the interests of a person who is temporarily or permanently incapacitated. Semi-citizens are just such persons and can in some cases be represented via trusteeship. In this sense, they are not entirely different than people who vote for losing candidates and must rely on someone for whom they did not vote for representation.

This Article does not argue in favor of abandoning the cause of enfranchising semi-citizens who are capable of exercising franchise rights. Quite the contrary: the most successful instances of trusteeship described in this Article are those that move toward or end in the enfranchisement of different semi-citizens. The argument of this Article is simply that trusteeship

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101. Uggen & Manza, *supra* note 96, at 789.

102. The prison population of the United States rose every single year between 1978 and 2009. *U.S. Prison Population Declined for Third Consecutive Year During 2012*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF J. (July 25, 2013, 10:00 AM), <http://www.bjs.gov/content/pub/press/p12acpr.cfm>.

is an accepted and absolutely unavoidable means for ensuring that people who are not full citizens still count in democratic politics—even when the *demos* is less convinced of their equality than are either the state or liberal philosophy. Exclusion, misrecognition, and disenfranchisement are inevitable. The work of democracy is not limited to voting and delegating. It also requires that we constantly scrutinize and contest the reasons and bases on which we exclude, misrecognize, and disenfranchise. In so doing, the interests of the disenfranchised will receive public attention. In the cases presented in this Article, scrutiny yielded a marked distinction: groups for whom disenfranchisement is a starting point in their political trajectories and for whom disenfranchisement is based on a change in their capabilities are distinguished from groups with ostensible moral failings mired in a history of discrimination. In the latter case, we find a set of much more objectionable practices than we do in either of the two former cases. Our work as citizens and semi-citizens is then to figure out how to represent both our individual selves and the interests of the groups, selves, and identities whose rights are unjustifiably compromised.