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The Meme of Voter Fraud

Atiba R. Ellis

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THE MEME OF VOTER FRAUD

Atiba R. Ellis⁺

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⁺ Associate Professor of Law, West Virginia University College of Law. This paper benefitted from discussions and feedback from various presentations, including the winter 2013 Ohio Legal Scholarship Workshop, the LatCrit XVII Legal Scholarship Conference, the ClassCrits VI Legal Scholarship Conference, and the West Virginia University College of Law Faculty Research Colloquy. In particular, the author wishes to thank Terry Smith, Deirdre Bowen, Karen Kunz, and Jena Martin for reading early versions of this Article. This Article has also benefitted from conversations with Spencer Overton, Brad Smith, Luis Fuentes-Rowher, Anne Lofaso, Kendra Huard Fershee, and Joshua Fershee. The author also wishes to thank Dean Joyce McConnell for her support and the financial support of this work by the WVU College of Law Hodges Faculty Research Fund. The author also wishes to acknowledge the outstanding research assistance of Dallas F. Kratzer III (WVU Law Class of 2013) and Imad S. Matini (WVU Law Class of 2014). All errors are the sole responsibility of the author. Feedback may be addressed to atiba.ellis@mail.wvu.edu.

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The debates concerning recent election regulations center on the idea that a voter fraud crisis of “biblical proportions”¹ plagues American elections. Republican legislators in over a dozen states decry this modern-day bogeyman of voter fraud and demand voter identification laws to solve the problem.² On the other side of the aisle, Democratic legislators cry foul on the fraud argument and raise vocal opposition to those laws.³ Nonetheless, this purported crisis prompted the adoption of voter identification laws in over half of the states in the country,⁴ including “strict” voter identification laws in roughly a dozen

1. Tom Cohen, *Archconservatives: Anger, Denial but No Acceptance of Obama’s Victory*, CNN (Nov. 22, 2012, 11:47 PM), <http://www.cnn.com/2012/11/20/politics/tea-party-grief/index.html> (describing the results of, and reactions to, the results of President Barack Obama’s 2012 reelection). *See also infra* Part IV (addressing a lack of evidence of voter fraud).

2. *See* Wendy Underhill, *Proof at the Polls*, ST. LEGISLATURES, July 2011, at 58, 58–59 [hereinafter Underhill, *Proof at the Polls*], available at <http://www.ncsl.org/LinkClick.aspx?fileticket=boF7MsJI-ac%3D&tabid=23269/> (claiming “Republicans most often support the [voter identification] requirement, while Democrats tend not to”).

3. *See* Heather K. Gerken, *The Invisible Election: Making Policy in a World Without Data*, 35 OHIO N.U. L. REV. 1013, 1014–15 (2009) (stating that liberal advocates view the voter identification laws as equivalent to voter suppression tactics). *See also* Joel A. Heller, *Fearing Fear Itself: Photo Identification Laws, Fear of Fraud, and the Fundamental Right to Vote*, 62 VAND. L. REV. 1871, 1886 (2009) (arguing that a legislator’s use of fear-based lawmaking to promote voter identification laws “is particularly misguided when the fundamental right to vote is at stake”); David Schultz, *Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 486 (2008) (noting the Democratic opposition to voter identification).

4. *See* Wendy Underhill, *Voter Identification Requirements*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> (last updated Apr. 30, 2014) [hereinafter Underhill, *Voter Identification Requirements*] (noting “[thirty-four] states have passed laws requiring voters to show some form of identification at the polls”).

states.⁵ Additionally, many states curtail early voting,⁶ strictly regulate student voting,⁷ and implement other measures that prevent access to the polling place in the name of preventing fraud.⁸

Numerous scholars and commentators suggest massive, rampant voter fraud is a myth.⁹ However, authors such as Richard Charnin, John Fund, and Hans von Spakovsky persist in sounding a less-than-credible threat of voter fraud.¹⁰ Due to their specious claims of voter fraud and their incomplete methodology in considering these claims, one prominent scholar labeled these writers “the Fraudulent Fraud Squad.”¹¹

But the voter fraud campaign is neither a purely rhetorical nor purely literary movement. Indeed, politicians, typically of a conservative persuasion, have

5. *See id.* (stating that eleven states have strict voter identification requirements). Strict voter identification states include Indiana, Kansas, Tennessee, Texas, and Georgia. *Id.*

6. *See, e.g.,* Steve Benen, *Ohio Voting Restrictions Face Pushback from Federal Court*, MSNBC (June 11, 2014, 4:19 PM), <http://www.msnbc.com/rachel-maddow-show/ohio-voting-restrictions-face-pushback> (describing Republican Ohio Secretary of State Jon Husted’s choice to curtail early voting statewide).

7. Underhill, *Voter Identification Requirements*, *supra* note 4 (highlighting the limited acceptance of student identifications to fulfill voter identification requirements).

8. *See, e.g., id.* (noting North Carolina changed its same-day and pre-registration rules, making it more difficult for citizens to vote).

9. *See, e.g.,* LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* 5–6 (2010) (providing an in-depth analysis of the voter fraud argument). Data from across the country that analyzes election statistics arguably undermines the argument that there is a mass conspiracy or a mass amount of collective action to influence elections through massive voter impersonation fraud. *See id.* at 12–13 (noting that in the 2004 election cycle, only 185 votes nationwide could truly be linked to possible fraud after analysis). *See also* JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, *THE TRUTH ABOUT VOTER FRAUD* 7 (2007) (reporting that “by any measure, voter fraud is extraordinarily rare”); SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* 152–56 (2006) (discussing the types of people harmed by voter identification laws); Fabrice Lehoucq, *Electoral Fraud: Causes, Types, and Consequences*, 6 ANN. REV. POL. SCI. 233, 251 (2003) (stating that “the colorful history of vote fabrication probably exaggerates its role in determining election outcomes”); Eric Rauchway, *The Great Voter-Fraud Myth*, NEW REPUBLIC, June 4, 2007, <http://www.newrepublic.com/article/the-great-voter-fraud-myth> (suggesting that any evidence of voter fraud has alternate, and more likely, explanations). Moreover, although scholarship concedes that election fraud exists, and is also likely to exist, that fraud is not in-person voter impersonation fraud. *See* MINNITE, *supra* note 9, at 35–36 (exploring the difficulties and risks of in-person voter fraud, while offering alternative explanations for a double-vote).

10. *See, e.g.,* RICHARD CHARNIN, *PROVING ELECTION FRAUD: PHANTOM VOTERS, UNCOUNTED VOTES, AND THE NATIONAL EXIT POLL* 1–4 (2010) (citing poll data as evidence that election fraud exists); JOHN FUND, *STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY* 5 (2004) (stating that election fraud “can be found in every part of the United States”); JOHN FUND & HANS VON SPAKOVSKY, *WHO’S COUNTING: HOW FRAUDSTERS AND BUREAUCRATS PUT YOUR VOTE AT RISK* 34–39 (2012) (claiming that voter fraud exists, although, “[a]ccording to liberals, there essentially is no such thing as voter fraud”).

11. RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* 41–44, 52–53 (2012).

echoed the voter fraud argument since the November 2000 election and resulting *Bush v. Gore*¹² debacle.¹³ The view that rampant voter fraud exists is embedded in certain segments of American political society.¹⁴ This view has not only spurred a legislative epidemic of voter identification and other laws, but also encouraged a number of citizens to act as “voting vigilantes” through so-called grassroots efforts to police voting practices.¹⁵

The conventional wisdom is that the voter fraud myth persists because of a partisan-engineered means to motivate allied supporters.¹⁶ This Article supports the notion that the politics of voter fraud generate these results, but it also posits that the partisanship-driven explanation of voter fraud remains incomplete and unsatisfactory. Specifically, this theory ignores concerns about how Americans think about the right to vote, and how those thoughts should govern future political policy.

The idea that rampant, unchecked voter fraud is continuously replicating and evolving, despite the lack of evidence thereof, raises disturbing questions. Why is this myth of voter fraud so salient? What outcomes may result if Americans fully accept this myth? Traditional doctrinal election law analysis does not analyze these questions,¹⁷ nor does political science scholarship.¹⁸ In fact,

12. 531 U.S. 98 (2000).

13. See HASEN, *supra* note 11, at 43 (noting the anxiety surrounding voter identification and the resulting “tide of voter identification laws” following the 2008 presidential election).

14. See Underhill, *Proof at the Polls*, *supra* note 2, at 58–59 (describing the position of voter fraud beliefs in the court system, in political debates, and in the general public).

15. See Claire F. Martin, Comment, *Block the Vote: How a New Wave of State Election Laws is Rolling Unevenly over Voters & the Dilemma of How to Prevent It*, 43 CUMB. L. REV. 95, 100 (2012) (acknowledging the use of voter suppression tactics, despite their unconstitutionality). See also Justin Levitt, *The Danger of Voter Fraud Vigilantes*, N.Y. TIMES (Oct. 29, 2012, 9:17 PM), <http://campaignstops.blogs.nytimes.com/2012/10/29/the-danger-of-voter-fraud-vigilantes/>. One “voter vigilante” even filed a formal affidavit stating his challenge to another Montana resident’s voting eligibility. Affidavit of Challenger, at 1 (2008), available at <http://www.scribd.com/doc/107060215/Furey-Challenge>.

16. See Fredreka Schouten, *State Voter ID Laws on the Rise; Opponents Say Turnout Will Suffer*, USA TODAY, June 20, 2011, at A1 (stating that voter identification laws were “all passed by GOP-controlled legislatures”). Moreover, the same politicians who use this issue as a means to rally their voters frame the issue in partisan terms. The contention of this Article, however, is that there is an ideological conflict that goes beyond the partisan that motivates the voter fraud claim and causes it to persist. See *infra* Part II.A.

17. This failure may be a symptom of the larger problem concerning modern “election law” as currently construed, which focuses primarily on the constitutional dimensions of elections without considering outside ideological forces. See Spencer Overton, *Political Law*, 81 GEO. WASH. L. REV. 1783, 1785–86 (2013) (noting the creation of election law as a field and its focus on Supreme Court case analysis). Overton argues that the broader field of “political law” not only takes into account analyses and doctrinal developments from the Court, but also analysis of the actions of non-judicial actors. *Id.* at 1790–91.

18. See, e.g., *71% Favor Requiring Voter ID at the Polls*, RASMUSSEN REP. (Oct. 17, 2012), http://www.rasmussenreports.com/public_content/politics/general_politics/october_2012/71_favo

traditional law and political science theories likely cannot answer the underlying questions about the ideology of political participation that lie at the heart of these issues. To fill this gap, this Article will attempt to develop a new explanation of how these concerns raise matters ripe for study in the law of politics.

The most appropriate way to contemplate these voter fraud claims—particularly those claims made in the past decade or so—is as a meme. A “meme” refers to “an idea, behavior, style, or usage that spreads from person to person within a culture[.]”¹⁹ The “meme” lens provides insight into the nature and viral quality of the argument that voter identification laws and other voting restrictions are necessary to prevent voter fraud. The voter fraud claim is a discrete argument—accompanied by motivational claims—that spurs people to replicate the voter fraud meme. This replication appears in the ultimate form of legislators passing voter identification and other fraud-prevention legislation. In turn, the legislation and rhetoric of political campaigning lead the general public to replicate the claim and undertake actions such as intimidating potential voters.²⁰ Further, the voter fraud meme is a manifestation of the ideological desire to shrink the electorate and game politics to favor one political group over another. Various arguments and beliefs advocating the exclusion of “unworthy” voters have existed over time.²¹ The meme of voter fraud is the most recent iteration of those ideas.²²

r_requiring_voter_id_at_the_polls (finding that even supporters of voter identification laws view them as discriminatory, without providing deeper explanation for the laws); Andrea Boyle Tippet, *National Survey Shows Support for Voter ID Laws Strongest among Those with Negative Attitudes Toward African Americans*, U. DEL. CENTER FOR POL. COMM. (July 17, 2012), http://www.udel.edu/cpc/research/idrace2012/Voter_ID_and_Race_2012/Voter_ID_and_Race.html (acknowledging that a correlation between racial attitudes and voter identification law support may offer some insight).

19. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 774 (11th ed. 2003).

20. LEVITT, *supra* note 9, at 4.

21. *See infra* Part II.B.

22. This memetic theory considers how ideological sources impact legal movements. In some respects, it is akin to the way the popular constitutionalism movement analyzes how the Supreme Court makes decisions that fall in line with certain popular ideological sentiments. *See, e.g.*, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 7 (2005) (noting that “[b]oth in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution”); Douglas Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 883 (1999) (claiming that “the meanings of court decisions are constructed by their intersection and interaction with existing norms, interests, and ideologies”). By deploying the theory of memetics to analyze the ideology of exclusion underlying election law choices, this Article seeks to expand the scope of election law analysis. As Spencer Overton argues, it is necessary for the area of law concerned with the infrastructure of elections in the United States to consider more than just analyses of doctrinal developments from the Court, but also analyses of the actions of non-judicial actors with public policy consequences. Overton, *supra* note 17, at 1787–88. Such analytical tools should be deployed with respect to election law, and this Article seeks to

The contemporary history of legislation based on memes suggests popular forces impacting modern election law should be taken into account when attempting to understand the law of politics. Therefore, the impact of ideology should be studied in a systematic way. Accordingly, this Article proceeds as follows. Part I defines memetics and implements J.M. Balkin's theory of ideology to provide a set of concepts through which this Article analyzes the voter fraud meme.²³ Next, Part II analyzes the history of the ideology of exclusion of "unworthy" voters in the United States and frames the history of the right to vote from the perspective of those who sought to exclude voters through allegations of misconduct. Part III of the Article turns to the twenty-first century voter fraud meme. It traces the meme based on its proponents and results, not only to demonstrate that voter fraud claims are largely partisan, but also to show that the ideology behind the voter fraud meme excludes and limits the electorate to those who possess a certain socioeconomic and political status. Part IV considers the consequences of making policy based on the meme, specifically the harm of the growing incoherence of the right to vote's meaning and the direct damage done to the vision of inclusiveness grounded in existing voting rights law. Part V explains how one should consider the meme of voter fraud. It suggests the nation currently suffers from the meme's interference with direct, fact-driven considerations of the ongoing crisis in election infrastructure and that the meme erodes the goal of developing an inclusive electorate. Finally, this Part proposes that the study of ideological effects, and the memes that cause them, should be further pursued by scholars in the field. Part V also suggests that courts should adopt the memetic approach this Article advocates to separate inchoate concerns from actual policy concerns when evaluating laws that create vote denial claims.

I. IDEOLOGY AND THE MEMETICS THEORY: AN INTRODUCTION

A. *Memes and Memplexes*

A meme is "the simplest unit of cultural replication; it is whatever is transmitted when one person imitates, consciously or unconsciously, another."²⁴ As such, memes include ideas, beliefs, concepts, or behaviors that are held in the mind, and then, much like the biological process of natural selection, evolve

make a novel contribution to the broader scholarship of political law with respect to the theory of memetics.

23. See *infra* notes 78–79 and accompanying text (explaining the basic tenets of J.M. Balkin's "cultural software" theory and applying it to meme ideology).

24. Michael D. C. Drout, *A Meme-Based Approach to Oral Traditional Theory*, 21 ORAL TRADITION 269, 269 (2006).

through another set of actions.²⁵ Richard Dawkins coined the term in his 1976 book *The Selfish Gene*.²⁶ He used the word “to argue for an approach to . . . cultural evolution . . . inspired by Darwinian theories of evolution, and more latterly, genetically founded Darwinism theories of evolution.”²⁷ Dawkins’ theory “is that complexity and apparent design in nature could arise without the need for a designer.”²⁸

Generally, evolution by natural selection depends upon the “differential survival of replicating entities” within a given environment.²⁹ Specifically, natural selection requires: “(1) entities that replicate[;] (2) a . . . mechanism of variation that continuously provides differences among entities[;] (3) a means by which variations can be passed on to future replicants[;] (4) an environment in which the entities replicate[;] and (5) different degrees of survival for different entities within the environment.”³⁰ When “all five conditions are met, a process of natural selection results, producing highly complex and differentiated entities over time.”³¹

This definition of natural selection does not only apply to biological organisms.³² Rather, principles of natural selection also apply to a human being’s capacity to transmit ideas and culture, a concept J.M. Balkin refers to as “cultural know-how.”³³ Memetics is the study of the evolution of that culture and those ideas.³⁴ This Article defines a meme within that context.

25. J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 43 (1998); SUSAN BLACKMORE, *THE MEME MACHINE* 4–7 (1999) [hereinafter BLACKMORE, *THE MEME MACHINE*]; Kenneth D. Pimple, *The Meme-Ing of Folklore*, 33 J. OF FOLKLORE RES. 236, 236 (1996).

26. See RICHARD DAWKINS, *THE SELFISH GENE* 192 (2d ed. 1989) (illustrating that Dawkins created the word by identifying the Greek root “mimeme” then transforming the root into a word that sounded like “gene,” resulting in the term “meme”).

27. Russell Williams, *The Business of Memes: Memetic Possibilities for Marketing and Management*, 38 MGMT. DECISION 272, 272 (2000).

28. *Id.*

29. DAWKINS, *supra* note 26, at 192.

30. BALKIN, *supra* note 25, at 42.

31. *Id.* See also DANIEL C. DENNETT, *CONSCIOUSNESS EXPLAINED* 200 (1991) (describing the three conditions required for evolution as: (1) variation; (2) heredity or replication; and (3) differential “fitness”).

32. BALKIN, *supra* note 25, at 42 (stating that natural selection can apply to cultural understandings).

33. *Id.* at 6, 42 (defining the concept as “the abilities, associations, heuristics, metaphors, narratives, and capacities that we employ in understanding and evaluating the social world”).

34. While Balkin’s work is a pioneering effort by a legal scholar to utilize memetics in a systemic manner, his is certainly not the only legal scholarship to deploy it. Substantial literature utilizing meme theory continues to replicate and evolve in law journals and is directed at a variety of legal issues. See, e.g., Jorge O. Elorza, *Secularism and the Constitution: Can Government Be Too Secular*, 72 U. PITT. L. REV. 53, 69 (2010); Daniel J. Gervais & Daniel J. Hyndman, *Cloud Control: Copyright, Global Memes and Privacy*, 10 J. TELECOMM. & HIGH TECH. L. 53, 64 (2012); Oliver R. Goodenough, *Cultural Replication Theory and Law: Proximate Mechanisms Make a Difference*, 30 VT. L. REV. 989, 989 (2006); Neal A. Gordon, *The Implications of Memetics for the*

The modern concept of a meme is fundamental to the modern world,³⁵ and memes are major avenues for commerce despite meager beginnings as “anonymously authored minor distraction[s][.]”³⁶ One need only observe *Facebook*, *Twitter*, or any number of other Internet hotspots to find various famous memes such as “Socially Awkward Penguin,”³⁷ “Ridiculously Photogenic Guy,”³⁸ and “Bad Luck Brian.”³⁹ Even politicians are the subject of wildly popular Internet memes.⁴⁰

Cultural Defense, 50 DUKE L.J. 1809, 1817–18 (2001); Patrick W. Hanifin, *Rice is Right*, 3 ASIAN-PAC. L. & POL’Y J. 3, 3 (2002); Don Bradford Hardin, Jr., *Why Cost-Benefit Analysis? A Question (and Some Answers) about the Legal Academy*, 59 ALA. L. REV. 1135, 1175–76 (2008); Shontavia Jackson Johnson, *Memetic Theory, Trademarks & the Viral Meme Mark*, 13 J. MARSHALL REV. INTELL. PROP. L. 96, 99–100 (2013); Bailey Kuklin, *Evolution, Politics and Law*, 38 VAL. U. L. REV. 1129, 1193–94 (2004); James D. Ridgway, *Patternicity and Persuasion: Evolutionary Biology as a Bridge Between Economic and Narrative Analysis in the Law*, 35 S. ILL. U. L.J. 269, 279 (2011); Theodore P. Seto, *Originalism vs. Precedent: An Evolutionary Perspective*, 38 LOY. L.A. L. REV. 2001, 2010–11 (2005); David A. Simon, *Culture, Creativity, & Copyright*, 29 CARDOZO ARTS & ENT. L.J. 279, 282 (2011); Jeffery Evans Stake, *Are We Buyers or Hosts? A Memetic Approach to the First Amendment*, 52 ALA. L. REV. 1213, 1214 (2001); Andrew E. Taslitz, *Forgetting Freud: The Courts’ Fear of the Subconscious in Date Rape (and Other) Cases*, 16 B.U. PUB. INT. L.J. 145, 150 (2007); Spencer Weber Waller, *The Law and Economics Virus*, 31 CARDOZO L. REV. 367, 367 n.14 (2009). Notably, commentator Patrick Hanifin deploys memetic theory to argue for the correctness of the Supreme Court’s decision in *Rice v. Cayetano*, 528 U.S. 495 (2000), which struck down a Hawaiian voting system that limited eligible voters for the directors of the Office of Hawaiian Affairs to descendants of indigenous Hawaiians who lived on the archipelago prior to Western discovery in 1778. Unlike Hanifin’s apologetic for *Rice*, this Article deploys memetic theory as a framework for considering the nature of modern attacks on the right to vote and suggests that the field use memetics to address larger issues that impact the law of democracy.

35. Michael S. Fried, *The Evolution of Legal Concepts: The Memetic Perspective*, 39 JURIMETRICS 291, 297 (1999).

36. Bonnie Ruberg, *Cash in on Internet Memes*, PCWORLD (May 28, 2009, 9:00 AM), http://www.peworld.com/article/165608/internet_memes_for_cash.html.

37. *Socially Awkward Penguin*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/socially-awkward-penguin> (last visited Aug. 14, 2014).

38. *Ridiculously Photogenic Guy/Zeddie Little*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/ridiculously-photogenic-guy-zeddie-little> (last visited Aug. 14, 2014).

39. *Bad Luck Brian*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/bad-luck-brian> (last visited Aug. 14, 2014).

40. See, e.g., *Michele Bachmann Newsweek Photo*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/michele-bachmann-newsweek-photo> (last visited Aug. 14, 2014) (parodying Michele Bachmann’s *Newsweek* cover); *Relatable Romney*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/relatable-romney> (last visited Aug. 14, 2014) (featuring a photo of Mitt Romney looking caring and understanding); *You Didn’t Build That*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/events/you-didnt-build-that> (last visited Aug. 14, 2014) (demonstrating a series of memes regarding the 2012 presidential election).

But what makes memes spread virally across the Internet?⁴¹ One theory posits that “the meme is prone to abundant social sharing because it plays into shared emotions and experience.”⁴² Additionally, memes seem capable of preventing their own destruction by “environmental forces that would tend to extinguish them.”⁴³ They replicate profusely by competing in social media and passing from person to person “in much the same way as genes pass through a species.”⁴⁴ This phenomenon allows a meme to successfully and repeatedly make itself known in society without extra effort or promotion from the original creator.⁴⁵ Memes replicate and travel in various ways, but language is the most important mode.⁴⁶ Both informal and formal communication operates as a means of social programming and provides memes with ways to permeate society.⁴⁷

However, the replication of a meme does not necessarily connote that meme’s importance or truthfulness.⁴⁸ Rather, popular memes simply flourish “for whatever reason.”⁴⁹ Ultimately, two primary criteria determine a meme’s “fitness.”⁵⁰ The first criterion reflects the host’s ability to understand the meme, both linguistically and culturally.⁵¹ The second criterion denotes the meme’s appeal, or how likely the host is to pass it on to another.⁵² Additionally, a meme’s success partially depends upon its power to increase the status of “those who act as replicators” and its own inherent power to replicate.⁵³

41. DENNETT, *supra* note 31, at 205 (explaining that memes can spread extremely quickly as long as they have a reliable vehicle). *See also* Fried, *supra* note 35, at 297 (noting that the rate at which memes spread increased dramatically over the last century and that the Internet will continue the trend).

42. Simon Owens, *How Internet Memes Went Corporate*, U.S. NEWS & WORLD REP. (Apr. 25, 2012, 5:05 PM), <http://www.usnews.com/news/articles/2012/04/25/how-internet-memes-went-corporate>.

43. DENNETT, *supra* note 31, at 206 (explaining that “[o]ther things being equal, population memetics predicts that conspiracy theory memes will persist quite independently of their truth”).

44. Kalle Lasn, *The Meme Machine*, ECOLOGIST, Apr. 2000, at 44.

45. Betsy D. Gelb, *Creating “Memes” While Creating Advertising*, J. ADVERTISING RES., Nov.-Dec. 1997, at 57.

46. Fried, *supra* note 35, at 297.

47. *Id.* (exploring types of meme replication methods in different groups and cultures).

48. DENNETT, *supra* note 31, at 203 (noting that there is no correlation between a meme’s popularity and its goodness).

49. *Id.* at 203 (explaining that memes designated the most “fit” are those considered most difficult to eradicate).

50. Richard J. Pech, *Mememes and Cognitive Hardwiring: Why Are Some Mememes More Successful than Others?*, 6 EUR. J. INNOVATION MGMT. 173, 174 (2003).

51. *Id.*

52. *Id.*

53. *Id.* at 176. Pech also notes that:

meme fitness or one meme’s ability to replicate at the expense of others can be explained by its degree of compatibility with one or more of the four following criteria: (1) . . . a meme’s compatibility with the brain’s hardwiring, which is largely the result of evolutionary pressures and subsequent adaptations; (2) . . . the ease with which a meme

The unique ability of memes to shape beliefs and enable political power should not be underestimated. One researcher believes that:

[i]t's with memes, not bombs, bullets or tear gas, that the real geopolitical battle of the next century will be fought . . . Good strong memes can change minds, alter behaviour, catalyze collective mindshifts and transform cultures. In our information age, whoever has the memes has the power.⁵⁴

Further, memes create what some have termed “memeplexes.”⁵⁵ Originally known as “coadapted meme complexes,” memeplexes represent groups of memes that replicate together.⁵⁶ How memes operate within a memeplex is best illustrated by the following example borrowed from Susan Blackmore’s *The Meme Machine*.

Suppose you receive an email with the subject line “From X.” The email states that if you receive a message with the subject line “From X” and open it, you will let in a virus that will destroy your hard drive, and then send the virus to all your contacts. You subsequently forward the “From X” email you received to your contacts to warn them of the virus. In this example, the real virus was the email providing the warning about the virus. As Blackmore described, “[t]his is a very clever little memeplex that uses both threats and appeals to altruism to get you—the silly, caring victim—to pass it on.”⁵⁷ In essence, the collective meme-group (here, the warning email) allows each meme (the virus and the warning email) to replicate faster and with more success than each could individually.⁵⁸

can be replicated, although this should not be confused with simplicity as a factor for explaining meme fitness; (3) . . . a meme’s ability to provide for or meet the needs of the people it encounters . . . ; [and] (4) . . . an accidental or involuntary lodging of a meme or part of a meme in the neural network. This may occur because one or more of a meme’s components act as instinctive triggering devices. Sometimes a tune, a verse, or a thought repetitively and irritatingly lodges itself in our minds.

Id. at 179.

54. Lasn, *supra* note 44, at 44 (expounding the changing scene of political and corporate protests and the new tactics employed by protestors). *See also* Pech, *supra* note 50, at 173 (detailing that “[c]ommonly cited examples of powerful memes include religious beliefs, political views, a catchy tune, fashions in clothes, cars, or music”).

55. H.C. Speel, Paper Presentation, *Memetics, the Way a New Worldview Can Act as an Overall-Language to Promote Communication between Disciplines* (June 1995); Symposium, *Einstein Meets Magritte*, Free Univ. of Brussels (1995). *See also* BLACKMORE, *THE MEME MACHINE*, *supra* note 25, at 19.

56. BLACKMORE, *THE MEME MACHINE*, *supra* note 25, at 19. *See also* BALKIN, *supra* note 25, at 75 (proposing that one way memes can ensure their successful replication is to attach to one another).

57. BLACKMORE, *THE MEME MACHINE*, *supra* note 25, at 21.

58. *Id.* at 20.

B. Going Viral, Including Legislative Viruses

The rapid replication of memes helps to explain how the meme theory applies to the legislative process. Memes replicate without regard to consequences of their replication, and such replication elicits a variety of reactions from diverse groups of people.⁵⁹ Some of these reactions can be harmless while others can be quite dangerous and can generate conflict and hostility among people. For example, memes in the Internet domain can be seen by many people and become wildly popular.⁶⁰ Some memes may result in significant amusement and enjoyment, but others, such as those related to racial or religious intolerance, may result in violence, oppression, or harm to millions.⁶¹

Nonetheless, this phenomenon raises the question of how memes spread. Memetic research offers some answers, each of which centers on the idea that irresistible memes replicate more readily.⁶² Despite this persuasive notion, a comparable line of social science research offers a more specific and structured answer: memes spread like viruses.⁶³ To be more precise, particularly attractive memes spread in a way similar to that of a medical or social epidemic.⁶⁴

A number of social science and popular studies have examined the question of social epidemics. Most notably, journalist Malcolm Gladwell's "tipping point" analysis persuasively argued for the value of applying social epidemic processes to business and other pursuits.⁶⁵ Professor Catherine Carpenter has argued that the tipping point analysis can apply to legislative innovations, particularly in the criminal law context.⁶⁶ Specifically, Carpenter claims

59. *C.f.* BALKIN, *supra* note 25, at 74–75 (listing the various reactions that memes prey upon to prompt replication).

60. *See* Ruberg, *supra* note 36.

61. *See* BLACKMORE, THE MEME MACHINE, *supra* note 25, at 187–92; DAWKINS, *supra* note 26, at 197–98 (remarking on the powerful religious memes of hell and blind faith to justify good and bad actions); Susan Blackmore, *The Power of Memes*, SCI. AM., Oct. 2000, at 52, 65, 66 [hereinafter Blackmore, *The Power of Memes*], available at <http://www.susanblackmore.co.uk/Articles/SciAm00.html>.

62. BALKIN, *supra* note 25, at 75.

63. *See* BLACKMORE, THE MEME MACHINE, *supra* note 25, at 22 (using the concepts of viruses and children's games to demonstrate the irresistibility of memes).

64. *See id.* (mentioning a comparison of memes to bacteria). *See also* RICHARD BRODIE, VIRUS OF THE MIND: THE NEW SCIENCE OF THE MEME 45 (3d ed. 2009); AARON LYNCH, THOUGHT CONTAGION 1–12 (1998) (using memetics and meme theory to describe such social occurrences as parenthood, religion, sexuality, and even the HIV virus).

65. MALCOM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A DIFFERENCE 7 (2000) (arguing that rapid social changes, such as fashion trends or crime rates, have a particular point at which they reach a viral level).

66. Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country*, 58 BUFF. L. REV. 1, 2 (2010).

Gladwell's tipping point analysis is valuable in understanding how some legislative movements sweep across state legislatures like epidemics.⁶⁷

The premise of the tipping point analysis is that word-of-mouth social movements transmit from person-to-person like viruses.⁶⁸ Put another way, mass movements generate in a manner similar to a viral epidemic.⁶⁹ The analogy rests on the notion that important factors must be at play in order for an epidemic to occur. A threshold number of people must be infected.⁷⁰ One person must contract it from another person.⁷¹ Each individual's vulnerability to a disease varies, and some may be exposed to more infected people before contracting the disease.⁷²

67. *Id.* at 2–3.

68. GLADWELL, *supra* note 65, at 7–9.

69. *Id.*

70. Mark Granovetter, *Threshold Models of Collective Behavior*, 83 AM. J. OF SOC. 1420, 1424–25 (1978). The idea of surpassing a specific threshold originated with sociologists in the 1960s and 70s. *Id.* at 1422–23. See also Thomas C. Schelling, *Dynamic Models of Segregation*, 1 J. MATHEMATICAL SOC. 182–83 (1971).

71. See Granovetter, *supra* note 70, at 1424 (explaining that one person's behavior “activates” another's).

72. See Patti Neighmond, *Why Some People Evade Colds and Others Don't*, NPR (Feb. 7, 2011, 12:01 AM), <http://www.npr.org/2011/02/07/133500558/why-some-people-evade-colds-and-others-dont> (explaining that “some of us humans are easier to infect [with the common cold] than our more sturdy counterparts”).

Carpenter extends Gladwell's framework for explaining viral ideas⁷³ to the idea that legislation itself can spread like an epidemic.⁷⁴ Using criminal legislation as an example, Carpenter explains how laws, such as the three strikes law and laws heightening penalties for driving under the influence, meet the three criteria explained above.⁷⁵ Her work focuses on specific individuals and groups that pioneered different types of education efforts to institute legislative changes.⁷⁶ She notes the legislation included rhetorical elements meant to persuade legislators to enact laws.⁷⁷ Finally, Carpenter shows how the environment at each respective time was conducive for passing these legislative changes.⁷⁸ Theories like Carpenter's provide the framework through which to explore meme transmission. A meme can become viral through people who advocate for and persuade others to adopt the meme, the memorable and persuasive nature of the meme, and the meme's creation during the correct

73. The tipping point analysis rests on three major premises: the "Law of the Few," "Stickiness Factor," and the "Power of Context." GLADWELL, *supra* note 65, at 19. The Law of the Few suggests that information transmits across diverse groups of people because of the efforts of a concerted few people who disseminate the information. *Id.* at 37–38. When it comes to social epidemics, three types of people exist who make such transmission possible. First, "connectors" maintain a greatly populated social network; thus, they can spread a piece of information to a number of people. *Id.* at 38. Second, "mavens" particularly influence the spread of memes, serving as clearinghouses for the types of data that appeal to them. *Id.* at 59–60. That is, if a maven is interested in a subject, he or she will stay well-educated on the topic and take great pleasure in teaching others about it. *Id.* at 62. Finally, "salesmen" are highly persuasive people who have a unique talent in convincing people to take action of some sort. *Id.* at 71–72. The Stickiness Factor raises the second precondition for the spread of social epidemics: the message must be powerfully compelling, or "sticky." *Id.* at 92–94. It must capture the receiver's attention in such a way as to convince the person to both accept the meme and pass it along. *Id.* at 38. The third factor of importance is the Power of Context, which is the idea that environmental factors make a big difference between viruses—biological and memetic—remaining contained or becoming an epidemic. *Id.* at 138–40. Moreover, the idea posits that the change within the environment only needs to be relatively small for the meme to become a full-blown viral meme. *Id.* at 167. Although Gladwell has eschewed the idea of memetics, see *Q and A with Malcolm*, GLADWELL.COM, <http://gladwell.com/the-tipping-point/the-tipping-point-q-and-a/> at question (last visited Aug. 15, 2014), his objection does not change the fact that these factors are analogous to the idea of memetic transmission. Indeed, Gladwell's objection to memes as ideas runs counter to the premise of *The Tipping Point*, that ideas can spread virally. Yet, the point for this analysis is that memes replicate most readily when motivated people spread ideas that are "contagious," within the correct context. This cultural triumvirate fuels the spread of an idea.

74. Carpenter, *supra* note 66, at 1–2.

75. *Id.* at 9–44.

76. See *id.* at 8–20 (naming Mothers Against Drunk Driving and parents of murdered children who took up advocacy for longer prison sentences for offenders).

77. *Id.* at 25–34.

78. See *id.* at 34–41 (describing key environmental factors that make messages more amenable to legislators).

political environment.⁷⁹ All these factors were at play during the development of the popularity of the voter fraud meme.

C. Ideology and Memes

As units of ideas that evolve and spread through transmission that mimic a social epidemic, memes have the power to elicit various effects via persuasion and replication.⁸⁰ Memes induce the person who believes the meme to replicate it through some sort of action. Memes propagate in this manner. Hence, the question of ideological effect centers on whether or not a meme has a harmful or detrimental impact on a person's ability to fully express her individuality.⁸¹

Balkin suggests that in order to appreciate the ideological impact of memes on a person, understanding that person's "cultural software" is key.⁸² "Cultural software" lies at the core of a human's ability to process information and develop cultural ideas.⁸³ A person uses existing cultural concepts to develop new tools that continuously evolve into new constructs.⁸⁴ Balkin stresses that memes transmit through various means, including the creation of ideas and narratives.⁸⁵ Memes form an ideology that allows an individual to interpret and form a worldview.⁸⁶ That ideology may manifest as a narrative or in other heuristic forms.⁸⁷ The notion of memetic evolution can guide an analysis of the voter fraud debate.

79. See BLACKMORE, *THE MEME MACHINE*, *supra* note 25, at 6–8; Pech, *supra* note 50, at 173–74.

80. See Pech, *supra* note 50, at 173–74 (discussing how memes become successful).

81. See BALKIN, *supra* note 25, at 107 (exploring how culture and context impact a meme, and how the effect shapes individual virtues).

82. *Id.* at 23–25.

83. *Id.*

84. *Id.* at 31.

85. *Id.* at 188.

86. *Id.* at 188–89 (describing how narrative sequences help human brains process information and make survival decisions).

87. *Id.* Balkin uses this memetic framework to address the underlying question of ideology as he understands it. He argues that a concept of justice underlies individually created experiential stories. *Id.* at 30–31. Although Balkin does not define his concept of justice, his study of ideology depends on the notion that an understandable definition does, in fact, exist. See *id.* at 30–32 (describing "the value of justice" as "inchoate and indeterminate" but noting that "we [] exemplify it in institutions, rules, or [] system[s] of law"). Balkin's analysis focuses on the notion of ideology as relativist and dependent upon cultural context. Indeed, his analysis centers around the theory that people who believe different ideologies will conflict based upon these beliefs. See *id.* at 30 (hypothesizing that "the institutions that people construct to exemplify justice may be different in different eras and different lands"). As such, his notion of justice is also relativist in nature. He explains that to study ideology is to depend heavily on understanding the context of a particular situation. *Id.* at 30–32. Threat of the denial of the right to vote and its expressive effects form the context this Article seeks to address.

II. THE IDEOLOGY OF PARTICIPATION: EXCLUSION, INCLUSION, AND THE EVOLUTION OF THE RIGHT TO VOTE

Memplexes of war, racism, religion, or culture-specific stereotypes can be harmful upon replication because the replicator imposes the meme's ideology upon the receiver.⁸⁸ The meme of voter fraud represents the latest variation of these meme types, and is geared to promote an ideology of exclusion from the political process of those deemed unworthy.⁸⁹ The meme of rampant voter fraud is best explained as an idea that distorts the degree of reliability individual voters have in the electoral process. Those who consider the meme realistic believe the electoral system is degraded and fraudulent. Thus, it compels those believers to action, such as passing election reform laws or acting as voting vigilantes in efforts to police the vote. Although other serious flaws exist in our electoral infrastructure, this idea further distorts the American process, leaving it open to the ideological effects of excluding otherwise eligible voters. From the memetic perspective, the meme of voter fraud represents the latest round of America's evolution from an exclusion-based republic to an inclusive republic supporting full participation of all citizens. Understanding enfranchisement in the United States as a continuing evolutionary process allows Americans to apply a storied historical perspective to the right to vote and its ultimate meaning. This generational standpoint is more reliable than the reasoning memes create.

A. *Politics, Perverse Incentives, and the Memplex of Exclusion*

Voting rules matter (especially for voters at the margins of the electorate), but the rules are often manipulated to discourage or encourage voter turnout.⁹⁰ Although highly contested in current voter identification law debates, the notion is not new. Politicians and policymakers throughout American political history

88. See BALKIN, *supra* note 25, at 112–13; BLACKMORE, *THE MEME MACHINE*, *supra* note 25, at 7–8; Blackmore, *The Power of Memes*, *supra* note 61, at 3–5. However, fundamental rights constitutionalism serves as a firebreak concerning certain dangerous memes such as slavery, excluding women from voting, or requiring the payment of a poll tax for voting. It is worth noting from a memetic perspective that a number of our memetic firebreaks revolve around the nature of political participation by citizens. The Fourteenth, Fifteenth, Seventeenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments all address direct voter access and form the backbone of the right to vote. These amendments, along with the ultimate passage of the Voting Rights Act (VRA) and modern measures designed to facilitate participation in the franchise, represent the ascendancy of the value—or memplex—of inclusion, in contrast with the ideology of exclusion. The tension between these two positions represents the scope of the evolution of the right to vote in the United States. See *infra* Part III.D.

89. See OVERTON, *supra* note 9, at 150–53 (claiming that measures to prevent voter fraud “would seriously outweigh any speculative benefit[.]” and noting how many African Americans do not possess driver’s licenses compared to white Americans).

90. See HASEN, *supra* note 11, at 42–44 (discussing the effects of voter identification laws on minorities and tracing the history of these laws).

manipulated the rules of entry to the franchise in order to control voter turnout.⁹¹ By doing so, the majority in power—whether political, ideological, or otherwise—could exercise tyranny over the minority by ensuring their exclusion from the political process.⁹² This exclusion was initially accomplished through explicit rule making, but the tactics of exclusion became increasingly implicit as the constitutional principles of democratic inclusion evolved.⁹³ Notably, politicians have an incentive to define the electorate to whom they wish to be accountable.⁹⁴ Doing so allows them to predict a favorable turnout, primarily whether groups that are historically excluded from the political process will be helpful to their interests. While this truth about the nature of politics may seem obvious, it sets the stage for how and why the memplex of exclusion exists.

B. *The History of the Memplex of Exclusion from the Franchise*

American society previously excluded certain people from full citizenship—particularly, participation in the political process—due to certain characteristics those individuals possessed.⁹⁵ This legacy of exclusion has a long history in Western democracy.⁹⁶ Indeed, the first democracy of ancient Greece recognized that only a certain group of persons, called “citizens,” were worthy of participation in governing the polis.⁹⁷ Strict standards determined entry into the group and denied entry to those who did not conform to specific qualifications.⁹⁸ Similarly, British political power was historically concentrated in the monarchy.⁹⁹ The monarch doled out power to those deemed worthy on the basis

91. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 9 (2000) [hereinafter KEYSSAR, *THE RIGHT TO VOTE*]; Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 *DENV. U. L. REV.* 1023, 1038 (2009).

92. KEYSSAR, *THE RIGHT TO VOTE*, *supra* note 91, at 9.

93. *Id.* at 227–37.

94. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 10–11 (1994); OVERTON, *supra* note 9, at 33; TERRY SMITH, *BARACK OBAMA, POST-RACIALISM, AND THE NEW POLITICS OF TRIANGULATION* 23–24 (2012); TOVA ANDREA WANG, *THE POLITICS OF VOTER SUPPRESSION: DEFENDING AND EXPANDING AMERICANS’ RIGHT TO VOTE* 108–25 (2012).

95. KATHERINE IRENE PETTUS, *FELONY DISENFRANCHISEMENT IN AMERICA* 21–22 (2d ed. 2013).

96. WANG, *supra* note 94, at 17–18.

97. See PETTUS, *supra* note 95, at 21 (noting that those who possessed citizenship were allowed to vote).

98. See *id.* (remarking that “those excluded . . . were socially, physically, legally, and economically vulnerable in ways that *nondishonored* citizens were not”).

99. See Erica Cook, *The British Monarchy: The Value and the Controversy*, ASHBROOK CENTER (July 1998), <http://ashbrook.org/publications/respub-v8n2-cook/> (noting “the British monarchy has been an essential part of the nation’s culture and history” for centuries).

of birth, social standing, and property ownership.¹⁰⁰ Nobles, landed gentry, and real property owners were considered sufficiently worthy of participation in British government.¹⁰¹ These Grecian and British traditions became part of the American legacy of democratic republicanism.¹⁰²

In 1787, the Constitution of the United States delegated the promulgation of voting requirements to the states.¹⁰³ Later, when early nineteenth century state legislators determined who had the right to vote, they did not consider citizenship a factor.¹⁰⁴ In fact, legislators did not link citizenship to voting rights until the Reconstruction Amendments of the 1860s and 70s.¹⁰⁵

Exclusion was often based on irrational characteristics specifically tied to the prevailing social order. For example, antebellum period social order dictated that propertied white men were effective members of society, implicitly excluding many of those who did not possess those characteristics.¹⁰⁶ As a result, legislators created rules that favored white, male, propertied individuals in the electoral process.¹⁰⁷

Property requirements created an economic barrier to voting privileges.¹⁰⁸ The underlying rationale for the barrier was that property ownership sufficiently indicated that the owner possessed the characteristics society wished to see in its voters.¹⁰⁹ Owning property proved that a person had the appropriate relationship

100. See Ed Crews, *Voting in Early America*, COLONIAL WILLIAMSBURG FOUND., <http://www.history.org/Foundation/journal/spring07/elections.cfm> (last visited Aug. 16, 2014) (claiming that “[c]olonial [v]oting restrictions reflected eighteenth-century English notions about gender, race, prudence, and financial success, as well as vested interest”).

101. See *id.* (emphasizing that a “white, male-only electorate” was preferred and discussing property requirements).

102. *Id.* See also KEYSSAR, *THE RIGHT TO VOTE*, *supra* note 91, at 5 (calling the restriction of suffrage to “adult men who owned property” the “lynchpin” of early societies).

103. KEYSSAR, *THE RIGHT TO VOTE*, *supra* note 91, at 24, 28–29.

104. *Cf. id.* (highlighting that property ownership was the primary way to determine who had the right to vote).

105. See *id.* at 95, 103–04 (citing the first drafts of the amendments that extended voting rights to all citizens).

106. See C. VANN WOODWARD, *A HISTORY OF THE SOUTH: ORIGINS OF THE NEW SOUTH 1877-1913* 331–32 (Wendell Holmes Stephenson & E. Merton Coulter eds., 1951) (claiming that wealthy white individuals were desirous to exclude both black voters and poor white voters).

107. *Id.*

108. See KEYSSAR, *THE RIGHT TO VOTE*, *supra* note 91, at 9 (noting that “[o]nly men with property, preferably real property, were deemed to be sufficiently attached to the community and sufficiently affected by its laws to have earned the privilege of voting”).

109. *Cf. id.* (explaining that those who argued for enfranchisement of only propertied white men believed that if those without property were allowed to vote, they “would constitute a menace to the maintenance of a well-ordered community”); WOODWARD, *supra* note 106, at 331 (quoting John B. Knox, the then-president of the Alabama constitutional convention, as claiming that suffrage restrictions were intended to “place the power of government in the hands of the intelligent and virtuous”).

to the established social and political order, and thus deserved the right to vote.¹¹⁰ Accordingly, excluded persons included poor whites, women, and minorities.¹¹¹

Although property served as a proxy for the boundary between inclusion and exclusion from the electorate during the antebellum period, a political consensus evolved by the end of the Civil War that shifted the underlying social order to include men, regardless of race and status as freed men or former slaves, in the political process.¹¹² The resulting Thirteenth and Fourteenth Amendments to the Constitution mandated equal protection of the law to all citizens.¹¹³ The Fourteenth Amendment even created a penalty clause for any state that diminished the voting rights of its citizens on any grounds other than “rebellion or other crime.”¹¹⁴ The Fifteenth Amendment then went further, ensuring that no state could deny the right to vote on the basis of race.¹¹⁵ Simply put, the majority in power following the Civil War deemed race-based exclusions from the electorate unconstitutional and unacceptable.¹¹⁶ This consensus inaugurated an era of formal induction of ex-slaves into society as citizens, beginning the memplex of inclusion into the franchise.

However, despite the promising changes from exclusion by virtue of slavery or class status to inclusion, a wholesale shift that ignored prevailing ideology was impossible. At the time, white supremacy was a dominant social force within American society.¹¹⁷ Accordingly, a methodology of exclusion evolved upon the basis of race.¹¹⁸ To avoid the effects of the Reconstruction

110. KEYSSAR, *THE RIGHT TO VOTE*, *supra* note 91, at 9.

111. *Id.*

112. Ellis, *supra* note 91, at 1039–40. *See also* Steven Mintz, *Winning the Vote: A History of Voting Rights*, GILDER LEHRMAN INST. AM. HIST., <http://www.gilderlehrman.org/history-by-era/government-and-civics/essays/winning-vote-history-voting-rights> (last visited Aug. 16, 2014) (noting that by 1790, six states “permitted free African Americans to vote”).

113. U.S. CONST. amend. XIII, § 1; U.S. CONST. amend. XIV, § 1.

114. U.S. CONST. amend. XIV, § 2.

115. U.S. CONST. amend. XV, § 1.

116. *See* Ellis, *supra* note 91, at 1039–40 (explaining that “voters were guaranteed not to be discriminated against on the basis of race when it came to voting”).

117. *See* KEYSSAR, *THE RIGHT TO VOTE*, *supra* note 91, at 110–13 (describing the successful tactics of white Americans to exclude minorities from enfranchisement). Some argue that white Americans remain in control of the political process. *See, e.g.*, GUINIER, *supra* note 94, at 21 (explaining that even if “[b]lack may vote . . . it is whites who will govern”).

118. *See* KEYSSAR, *THE RIGHT TO VOTE*, *supra* note 91, at 110–14 (noting that “[m]any of the disfranchising laws were . . . administered in a discriminatory fashion[;] . . . [s]mall errors in registration procedures or marking ballots might be paid easily or only with difficulty [and] tax receipts might or might not be issued”). African American participation in the electorate parallels the history of participation based on gender. Property requirements often excluded women from voting because they could not own land, and even when those requirements were not at issue, many state laws completely barred women from voting. *Id.* at 174–76. The Supreme Court upheld these gender-based restrictions as legitimate state regulations of voting rights. *See, e.g.*, *Minor v. Happersett*, 88 U.S. 162, 172 (1874) (demonstrating that the Court believed preventing women

Amendments and to ensure political social order reflected ideological social order, the ex-Confederate states formulated barriers of exclusion that targeted minorities without *explicitly* using racial considerations.¹¹⁹ These states instituted requirements, such as poll taxes, literacy tests, and similar exclusionary tools, to target minority voters.¹²⁰ Moreover, the discretion afforded the registrar of elections ensured that the rules applied specifically to minorities.¹²¹ Powerful white Americans ensured that other white voters, particularly poor whites whom would otherwise fail a literacy test or be unable to pay a poll tax, would: (1) be exempt from these requirements; (2) have enough political backing to meet the requirements; or (3) simply have the requirements waived outright.¹²² By the turn of the century, these practices diminished the African American voting electorate from approximately sixty to eighty-five percent of eligible black voters to single digit percentages.¹²³ The black electorate remained at these staggeringly low levels for nearly sixty years across the South.¹²⁴

The memplex of exclusion thus evolved through a formalistic approach to voting laws that had disparate impacts on racial groups and the poor. The poll

from voting was appropriate because, at the time, “in no State were all citizens permitted to vote”). The twentieth century represented an extended period of expansion of the right to vote. GUINIER, *supra* note 94, at 7; KEYSAR, THE RIGHT TO VOTE, *supra* note 91, at 223–24. The American societal consensus shifted towards including many groups previously excluded from the electorate. KEYSAR, THE RIGHT TO VOTE, *supra* note 91, at 262–63. Our ideology evolved to include women and minorities, and laws that acted to exclude these groups were subsequently considered distasteful. *Id.* Specifically, the Nineteenth Amendment granted women the right to vote, U.S. CONST. amend. XIX, § 1, and was the result of decades of lobbying and protest by women’s groups, KEYSAR, THE RIGHT TO VOTE, *supra* note 91, at 172–73, 217–18. These groups not only demanded that women have the right to vote, but also argued that women were intrinsically entitled to participate in the political process. *Id.* at 174. Women had to fight the prevailing meme that females were incapable of wielding the vote. *Id.* Arguments against granting suffrage included a lack of economic autonomy, a legal subservience to men, and a virtual representation through husbands and fathers. *Id.* See also ELLEN CAROL DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN’S MOVEMENT IN AMERICA 44–46 (1978) (explaining that “woman suffrage constituted a serious challenge to the masculine monopoly of the public sphere”); MARY BETH NORTON, LIBERTY’S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750–1800 190–93 (1980) (noting that, at the time women were granted the right to vote, some men believed women’s votes would be “subject to the discretion of their male relatives”).

119. KEYSAR, THE RIGHT TO VOTE, *supra* note 91, at 111–12. See generally DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME 228–96 (2008) (discussing Southern sentiment at the time).

120. KEYSAR, THE RIGHT TO VOTE, *supra* note 91, at 111–12.

121. WOODWARD, *supra* note 106, at 332–33.

122. See *supra* note 118 and accompanying text.

123. KEYSAR, THE RIGHT TO VOTE, *supra* note 91, at 115.

124. See *id.* (noting that “the African-American population remained largely disfranchised until the 1960s”).

tax in particular perfectly exemplifies the effect. The *Breedlove v. Suttles*¹²⁵ and *Butler v. Thompson*¹²⁶ courts upheld the poll tax based on the power of state legislatures to decide voting qualifications.¹²⁷ The courts reasoned that if a law is facially neutral, has a rational basis, and is fairly enforced, then it meets constitutional muster regardless of its discriminatory intent.¹²⁸ Therefore, the poll tax was considered a constitutional economic standard.¹²⁹ Until the Civil Rights Revolution of the 1950s and 60s, formalistic exclusion of people of color from political and economic power was the norm in American political society.¹³⁰

C. Inclusion as a Democratic Value

This account of exclusion conflicts with the triumphant narrative about voting and citizenship that Americans embrace. Yet, inclusiveness has undeniably emerged as an important constitutional and democratic value.¹³¹ The right to vote revolution of the 1960s restored the promise of the Reconstruction Amendments.¹³² Constitutional and legislative intervention rejected the view that states have sole power over voting rights.¹³³ The Twenty-Fourth Amendment to the Constitution abolished poll taxes as a limit on federal elections.¹³⁴ The Supreme Court, in a series of cases including *Reynolds v. Sims*,¹³⁵ and *Harper v. Virginia State Board of Elections*,¹³⁶ articulated that the right to vote is a fundamental preservation of all rights and an essential component of citizenship.¹³⁷ In particular, African-American citizens were recognized as full, valid members of the community who were entitled to all

125. 302 U.S. 277 (1937).

126. 97 F. Supp. 17 (E.D. Va. 1951), *aff'd*, 341 U.S. 937 (1951).

127. Ellis, *supra* note 91, at 1047.

128. *Id.*

129. *Id.*

130. See KEYSSAR, THE RIGHT TO VOTE, *supra* note 91, at 257–58 (explaining that, until that time, African Americans’ “efforts to vote were thwarted more often than not”).

131. See, e.g., Erica K. Drew, *Indiana’s Voter ID Law and the Disenfranchised*, 56 RES GESTAE 13, 14–15 (2012) (quoting a dissenting judge’s opinion which asserted that any denied vote is an affront to justice); Martin, *supra* note 15, at 124–25 (exemplifying that the Court recognizes that “poor, elderly, and disabled voters are more likely to be unable to bear the costs and difficulties” of complying with voting regulation requirements); Schultz, *supra* note 3, at 488–89 (reviewing the Supreme Court case that declared voting to be a right, thereby adopting an inclusive perspective).

132. See Ellis, *supra* note 91, at 1047–48 (claiming that the amendments “shaped the national conception of what should be considered as protected rights”).

133. *Id.* (noting that federal laws protected African Americans from discrimination imposed by the states).

134. *Id.* at 1047.

135. 377 U.S. 533 (1964).

136. 383 U.S. 663 (1966).

137. WANG, *supra* note 94, at 1–4.

rights guaranteed to such members.¹³⁸ Further, the Voting Rights Act of 1965 (VRA) protected the right to vote against segregationist actions.¹³⁹

After the legislative and judicial voting rights revolution, later Court decisions narrowed the breadth of the individual-focused right to vote. In cases such as *Anderson v. Celebrezze*¹⁴⁰ and *Burdick v. Takushi*,¹⁴¹ the Court held that to determine the constitutionality of a particular provision, harms alleged by election law violations must be balanced against the state's interest in propounding those laws.¹⁴² Importantly, the degree of harm must be assessed prior to the constitutional analysis, raising the standard for plaintiffs and creating a presumption in favor of the state.¹⁴³ This balance of harms anchored the Court's *Crawford v. Marion County*¹⁴⁴ opinion, in which it found the government's interest in deterring voter fraud outweighed the plaintiffs' speculative vote denial claims.¹⁴⁵

Decisions like *Crawford* provided constitutional cover for voter identification laws. As the Court acknowledged in that opinion, states have rational bases for protecting elections: ensuring election integrity and preventing voter fraud.¹⁴⁶ These justifications are bolstered by ill-supported claims that voter fraud is endemic.¹⁴⁷

III. VOTER FRAUD AND THE IDEOLOGY OF EXCLUSION IN THE TWENTY-FIRST CENTURY

A. *How the Meme of Voter Fraud Functions*

The meme of voter fraud denotes the idea that certain unworthy voters undertake the effort to vote fraudulently through voter impersonation or related

138. This parallels the idea that full citizenship can be defined by the normative functions it accomplishes: communitarian equality and individual entitlement. See Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1348–49 (2011). Indeed, this suggests a social contractarian theory of American citizenship that focuses on the relationship between the state and its people as well as the idea that the state exists through agreement by the people. Accordingly, the rights of the people to constitute their government should be of paramount importance.

139. Ellis, *supra* note 91, at 1047.

140. 460 U.S. 780 (1983).

141. 504 U.S. 428 (1992).

142. *Id.*; *Celebrezze*, 460 U.S. at 788–89.

143. Ellis, *supra* note 91, at 1064–65.

144. 553 U.S. 181 (2008).

145. *Id.* at 189–91, 200–03.

146. *Id.* at 201–04.

147. See, e.g., *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2014 WL 184988, at *20 (Pa. Commw. Ct. Jan. 17, 2014) (determining that Pennsylvania voter fraud was “exceedingly rare” and that “[c]ertainly a vague concern about voter fraud does not rise to a level that justifies the burdens constructed [by Pennsylvania voter identification laws]”).

bad acts. That argument is bolstered by the claim that the current electoral system remains vulnerable to such bad acts; the argument is that bad acts permeate the system to the extent that they distort, or threaten to distort, elections in the United States.¹⁴⁸ Because of this claim, stricter regulation of the democratic process is considered appropriate, and even necessary.

From a memetic perspective, the meme of voter fraud interrelates with and depends upon the larger memplex of exclusion and complementary memes regarding status discrimination. Memes have a better chance of evolving and replicating in the company of other memes.¹⁴⁹ Therefore, the meme of voter fraud combines with other memes that compose the larger memplex of exclusion, including the belief that minorities, women, and those of lower socioeconomic status are meant to and ought to have less say in the democratic process. In this way, the ideology of exclusion on the basis of perceived status exists and replicates. The latest stage of this evolution is the meme of voter fraud.

B. Creators, Replicators, and Viral Transmitters of the Meme of Voter Fraud

How the voter fraud meme replicates requires detailed examination. As merely an idea, the meme of voter fraud is a supposition lacking any evidence. Yet, the meme spreads for the purpose of supporting the claim that elections should be more stringently regulated in order to maintain electoral integrity. Specifically, proponents asserting that a crisis of voter fraud exists claim some Americans defraud the electoral process by either voting illegally or otherwise corrupting the process.¹⁵⁰

These claims are frequently situated in the context of voters within racial minority or economically disadvantaged districts. For example, during and following the 2012 presidential election, claims of rampant voter fraud mostly targeted inner-city districts in battleground states, such as Ohio.¹⁵¹ Indeed,

148. See, e.g., CHARNIN, *supra* note 10, at 1 (claiming that automated poll systems and other recent innovations have elevated voter fraud to an endemic level); FUND, *supra* note 10, at 5.

149. See *supra* Part I.

150. See, e.g., CHARNIN, *supra* note 10, at 4; JOHN FUND, HOW THE OBAMA ADMINISTRATION THREATENS TO UNDERMINE OUR ELECTIONS 23 (2009).

151. See, e.g., Garret Bruno, *Ohio Voter Fraud 'Does Exist' but 'Not an Epidemic'*, ABC NEWS (May 23, 2013, 3:19 AM), <http://abcnews.go.com/blogs/politics/2013/05/ohio-voter-fraud-does-exist-but-not-an-epidemic/> (listing the type of voting irregularities that occurred in Ohio during 2012, but mentioning how few instances of fraud actually took place); Liz Klimas, *Have You Heard about 'Spigot Cities' That May Pump Votes to Obama?*, BLAZE (Nov. 1, 2012, 9:11 PM), <http://www.theblaze.com/stories/2012/11/01/have-you-heard-about-spigot-cities-that-may-pump-votes-to-obama/> (asserting that "highly targeted voter fraud in key cities [] could determine who gets the electoral votes in many swing states[.]" and, particularly, mentioning Cleveland); Robert Schlesinger, *No, Obama Didn't Win 108 Percent of the Vote in an Ohio County*, U.S. NEWS & WORLD REP. (Nov. 20, 2012, 9:00 AM), <http://www.usnews.com/opinion/blogs/robert-schlesinger/2012/11/20/the-108-ohio-obama-voter-fraud-myth-and-the-recount-petition> (noting

voting groups that considered it their role to police elections, groups author Justin Levitt calls “voter vigilantes,” specifically directed their “policing” efforts toward minority and economically suppressed districts.¹⁵² The targeting of these groups suggests that the stereotypes of the “vicious voter”¹⁵³ era influenced replication of the voter fraud meme. Moreover, this policing treatment draws directly from the stereotype of criminalizing certain voters by forcing some citizens, but not all, to bear the burden of proving that they are legitimate voters.¹⁵⁴

Voter fraud meme replication serves a number of interests, and thus creates incentives for certain actors to replicate the meme. First, the idea that voter fraud (or the threat of massive voter fraud) currently exists demands immediate action to fix the problem.¹⁵⁵ This imperative becomes an impetus for legislation and regulation, as evidenced by the passage of voter identification laws, the curtailment of early voting, and the utilization of other tactics that some call “voter suppression.”¹⁵⁶

Second, voter fraud allegations consolidate political bases.¹⁵⁷ Proponents of the voter fraud meme frame it as a primary issue for their political party and rally

that, following Obama’s 2012 election, a popular petition called for a vote recount in light of perceived voter fraud in Ohio); Eric Shawn, *Did Obama Supporter Vote 6 Times in 2012? Ohio Poll Worker Target of Investigation*, FOX NEWS (Feb. 19, 2013), <http://www.foxnews.com/politics/2013/02/19/ohio-poll-worker-obama-supporter-investigated-for-potentially-voting-six-times/> (reporting that one voter claimed that she voted twice during the 2012 presidential election).

152. Levitt, *supra* note 15.

153. This term represents one of the phrases Southern disenfranchisers used to describe the citizen, whether African American or white, who was unworthy of voting. *See, e.g.*, Ellis, *supra* note 91, at 1042 (citing WOODWARD, *supra* note 106, at 336) (describing Southerners that propounded the idea that the poll tax should “pile up so high that he [the vicious voter] w[ould] never be able to vote again”). Southerners wanted to erect barriers structured around the poverty of voters, such as the ability to pay a tax, read, and demonstrate appropriate societal standing before those people were permitted into the franchise. WOODWARD, *supra* note 106, at 330–31. Such policing of status is occurring today, and the rationale for it is the voter fraud meme.

154. *See* Rick Lyman, *Pennsylvania Voter ID Law Struck Down as Judge Cites Burden on Citizens*, N.Y. TIMES, Jan. 18, 2014, at A12 (noting that one judge found that voter identification regulations, given their disparate impact on the poor, do not “assure a free and fair election”).

155. *See* MINNITE, *supra* note 9, at 129 (attributing the recent explosion of voter fraud claims to the voter fraud myth alone).

156. *See, e.g.*, OVERTON, *supra* note 9, at 150–51; Schultz, *supra* note 3, at 485.

157. MINNITE, *supra* note 9 at 10–11, 86–89, 128.

support based on belief in the meme.¹⁵⁸ Also, politicians use the meme to gain ground in key electoral battles over time.¹⁵⁹

Conversely, opponents of the meme consider it a tool of political discrimination and suggest that supporters use the meme discussion to attack the opposing political party.¹⁶⁰ This also has a consolidating effect. Thus, the meme becomes a point of contention and a way to entrench political power. Therefore, politicians have an incentive neither to remedy the voter fraud myth nor to engage in analytically driven electoral reform.

C. Replicators of the Meme

1. Legislative and Judicial Replicators

The twenty-first century voter fraud meme originated with the hotly disputed 2000 presidential election.¹⁶¹ Although Florida was the source of a number of disputes concerning voter purges and miscounted ballots, a curious thing happened in Missouri, where massive voter roll purges led to long lines on Election Day.¹⁶² Incumbent United States Senator John Ashcroft lost his bid for reelection to former Governor Mel Carnahan.¹⁶³ The problem was that

158. *Id.* See also *Republican Voter Fraud*, VOTER FRAUD FACTS, <http://voterfraudfacts.com/republican-voterfraud.php> (last visited Aug. 20, 2014) (claiming “[t]he Republican election strategy [] involves smearing the competition[] [and] accusing them of voter fraud”); *Vote Fraud News*, REPUBLICAN NAT’L LAW. ASS’N, <http://www.rnla.org/votefraud.asp> (last visited Aug. 20, 2014) (providing consolidated access to news stories covering alleged voter fraud).

159. See MINNITE, *supra* note 9, at 128–30 (describing case studies and the reasons parties use voter fraud to their advantage).

160. See, e.g., OVERTON, *supra* note 9, at 150–52 (noting Republicans claim that Democrats “stuff[] ballot boxes with votes of dead people . . .” while Democrats allege that Republican-advanced measures “disproportionately exclude people of color and less-affluent voters”); Ben Leubsdorf, *N.H. Democrats Accuse GOP of Hypocrisy on Issue of Voter Fraud*, CONCORD MONITOR, Sept. 7, 2013, <http://www.concordmonitor.com/home/8377877-95/nh-democrats-accuse-gop-of-hypocrisy-on-issue-of-voter-fraud> (illustrating one occasion in which New Hampshire Democrats accused the Republican Senate Majority Leader’s son of voter fraud, claiming that Republicans “made claims about voter fraud all summer,” and characterizing Republican behavior as hypocritical); *GOP “Voting Fraud” Claims Debunked*, DEMOCRATIC GOVERNORS ASS’N, <http://democraticgovernors.org/gop-voting-fraud-claims-debunked/> (last updated July 10, 2013) (“[Democrats] always knew the notion of widespread ‘voting fraud’ was a sham invented by Republicans to justify their anti-democratic suppression tactics.”); *Homepage*, REPUBLICANS SUCK, <http://republicanssucks.org> (last visited Aug. 20, 2014) (claiming Republicans “have passed [a]nti-Democratic voter suppression laws”).

161. See MINNITE, *supra* note 9, at 130–32.

162. HASEN, *supra* note 11, at 45–47.

163. DOUGLAS KELLNER, *GRAND THEFT 2000: MEDIA SPECTACLE AND A STOLEN ELECTION* 26–27 (2001).

Carnahan had passed away almost a month before the election.¹⁶⁴ In the aftermath of this defeat, Republican Party operatives contended that illegal voters committed voter fraud in the rural counties of southwestern Missouri,¹⁶⁵ supposedly causing the election to swing in Carnahan's favor. Although these arguments did not amount to a vote contest, the situation nonetheless set the stage for voter fraud concerns to become a governmental priority.¹⁶⁶

President George W. Bush appointed Ashcroft to the Attorney General position in 2001,¹⁶⁷ and Ashcroft subsequently became one of the prime replicators of the voter fraud meme. When Ashcroft set priorities for the Department of Justice (DOJ), one of those priorities included investigating voter fraud across the United States.¹⁶⁸ However, DOJ's investigations into voter fraud resulted in few convictions and revealed little evidence of voter fraud sufficient to disrupt American elections.¹⁶⁹ Regardless, state legislatures believed voter fraud was a problem and proceeded to undertake initiatives legislators believed would eliminate it.¹⁷⁰ The meme of voter fraud persevered because just enough alleged instances of fraud existed¹⁷¹ and, as the Court established in *Crawford*, the state's interest in abolishing voter fraud is said to satisfy the government's interest in maintaining the integrity of elections.¹⁷²

2. Further Analysis of Crawford

In *Crawford*, the Court upheld Indiana's voter identification law.¹⁷³ The Court applied the balancing test established in *Burdick* and determined that the state's interest in enforcing the voter identification law outweighed any negative

164. See Clayton Bellamy, *Ashcroft Ousted in Historic Senate Race*, MO. DIGITAL NEWS (Nov. 8, 2000), <http://www.mdn.org/2000/STORIES/SENSWRAP.HTM> (characterizing John Ashcroft as "the first senator to ever be defeated by a dead man").

165. See HASEN, *supra* note 11, at 46–47 (noting that Missouri Senator Christopher Bond "blamed the Democratic machine . . . for voter fraud").

166. See *id.* at 47 (mentioning the attention Congress paid voter fraud following the Missouri debacle and the 2000 presidential election).

167. KELLNER, *supra* note 163, at 27.

168. Alexander Keyssar, *Barriers to Voting in the Twenty-First Century*, in REPRESENTATION: ELECTIONS AND BEYOND 49 (Jack H. Nagel & Rogers M. Smith eds., 2013) [hereinafter Keyssar, *Barriers to Voting*]; MINNITE, *supra* note 9, at 218–21.

169. See Keyssar, *Barriers to Voting*, *supra* note 168, at 49–50 (recounting that only 120 indictments and eighty-six convictions resulted from the Department of Justice (DOJ) investigations); MINNITE, *supra* note 9, at 222–24 (explaining the difficulty involved in identifying an accurate number of instances of voter fraud).

170. MINNITE, *supra* note 9, at 131–35.

171. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 194–96 (2008).

172. *Id.* at 191. Interestingly, *Crawford* involved an *absence of evidence of voter fraud*, but the Court nevertheless presumed fraud when interpreting the law and looking at the history of voter fraud. See *id.* at 194–96 (stating that although there is not evidence of widespread fraud, it does exist).

173. *Id.* at 204.

impact that the statute would have on voters potentially shut out by the law.¹⁷⁴ Despite a lack of evidence of fraudulent activities, the opinion explicitly credited Indiana's argument that the voter identification law was necessary to maintain electoral integrity.¹⁷⁵ Specifically, the Court recognized Indiana's interest in both modernizing its elections and protecting against voter fraud,¹⁷⁶ but did not name specific types of recent voter fraud against which the state wished to pursue protections. The opinion instead relied on the facts that neither party presented evidence of either the existence of voter fraud or actual harm done to a particular voter as a result of the law, and that Indiana's voter rolls were overinflated.¹⁷⁷ Moreover, the opinion discussed both recent and historic instances of voter fraud in the Midwest, and considered that history sufficient justification for the state's concerns about fraud.¹⁷⁸ Finally, the Court highlighted the state's interest in safeguarding voter confidence, specifically to protect "public confidence 'in the integrity and legitimacy of representative government.'"¹⁷⁹

The Court found that the plaintiff failed to present sufficient evidence on the record to support its assertion that the law should be struck down on a facial challenge.¹⁸⁰ The opinion noted that the plaintiff was unable to show that he or any other Indiana citizen on the record was denied the right to vote under the law.¹⁸¹ The plaintiff also failed to forecast how many voters the law would impact.¹⁸² In his concurring opinion, Scalia argued the law was subject to rational basis review, and concluded that the government met this standard because the law was generally applicable and non-discriminatory.¹⁸³

Justices Souter and Breyer dissented, arguing that the evidence was sufficient to tip the scales in favor of the plaintiff. Justice Souter claimed that the number of Indiana voters adversely affected by the law could be measured.¹⁸⁴ He also argued that the government's rationale for the law fell short due to the absence of voter fraud cases in Indiana.¹⁸⁵ Justice Breyer argued that the law placed a

174. *Id.* at 194–96.

175. *Id.* at 191, 194.

176. *Id.* at 191.

177. *Id.* at 194–98.

178. *See id.* at 195–96 (demonstrating that the Court also relied upon the Chicago Mayor primary vote in 2003, as well as historical examples from other states).

179. *Id.* at 197.

180. *Id.* at 200–02.

181. *Id.* at 201–02.

182. *Id.* at 221 (Souter, J., dissenting).

183. *Id.* at 204–05 (Scalia, J., concurring).

184. *See id.* at 220 (Souter, J., dissenting) (stating that up to 43,000 voters could be burdened by the law).

185. *Id.* at 226.

substantial and disproportionate burden on voters without a photo identification or the means to obtain one.¹⁸⁶

Several states passed voter identification laws after *Crawford*.¹⁸⁷ Republican legislatures based the policy rationale for the laws on the idea that voter fraud actually exists.¹⁸⁸ Essentially, *Crawford* provided state legislatures with authorization to pursue voter identification and other restrictive laws using policy justifications of election integrity and the supposition of massive voter fraud, or at least the threat thereof.¹⁸⁹

A variety of voter identification initiatives ensued.¹⁹⁰ These regulations generally may be classified as either “non-strict” or “strict” identification requirements.¹⁹¹ States that passed non-strict voter identification requirements simply added a photo-identification option to the list of methods by which a voter may prove her identity.¹⁹² On the other hand, strict voter identification statutes mandated that government-issued photographic identification was the exclusive means by which a prospective voter could identify herself.¹⁹³

Although some argue that the vast majority of potential voters can easily satisfy this requirement, particularly people who vote routinely,¹⁹⁴ opposing advocates argue that these laws disproportionately target and impact low-income, minority, and elderly voters.¹⁹⁵ For example, statistics show that almost

186. *Id.* at 237 (Breyer, J., dissenting).

187. See Underhill, *Voter Identification Requirements*, *supra* note 4 (noting that as of 2013, “[a] total of thirty-four states [had] passed voter ID laws”).

188. OVERTON, *supra* note 9, at 150–52.

189. See *Crawford*, 533 U.S. at 191 (detailing the alleged threat to voting that justified the existence of Indiana’s voter identification law).

190. See Underhill, *Voter Identification Requirements*, *supra* note 4 (claiming that voter identification regulation was “a high-profile issue in many state legislatures in 2014, although not as active as in the previous three years”).

191. *Id.*

192. *Id.* This raises an important point: voters have always been required to prove their identity in order to vote. No one legitimately contests that there has been no identification mechanism. The question at stake in the voter identification debate is: “what requirements should be used to prove a voter’s identity and how onerous should those requirements be?” Such shifting in rules, when those shifts affect a particular group without justification, creates an ideological effect that harms the excluded groups. This exclusion problem lies at the center of the voting restrictions debate. Yet, under the Court’s jurisprudence, harm in the voter context is difficult to ascertain. The measure of harm under the Court’s jurisprudence is arguably incoherent, and this leaves no clear fix to this dilemma. See generally Atiba R. Ellis, *A Price Too High: Efficiencies, Voter Suppression, and the Redefining of Citizenship*, 42 SW. U. L. REV. (forthcoming 2014).

193. See Underhill, *Voter Identification Requirements*, *supra* note 4 (noting that “a voter cannot cast a valid ballot without first presenting ID”).

194. See, e.g., *Crawford*, 533 U.S. at 198 (claiming that obtaining identification that satisfies voting regulations does not impose any burdens beyond those usually required to vote, and suggesting that many will already possess the requisite identification).

195. See, e.g., OVERTON, *supra* note 9, at 153 (noting that “[a] photo-ID requirement would exclude Americans of all backgrounds, but the poor, the disabled, the elderly, students, and people

ten percent of Americans lack identification that meets the requirements of voter identification statutes.¹⁹⁶ This figure increases to almost twenty-five percent when considering solely African American voters.¹⁹⁷

Many of the current legal challenges to these laws rely on the theory that these laws, if implemented, will disparately affect minority and low-income citizens. Indeed, in both South Carolina and Texas, the United States brought challenges to state voter identifications laws under the Voting Rights Act (VRA).¹⁹⁸ The government argued that the disproportionate impact of the state laws on African American and Latino voters would violate the VRA's non-retrogression standard.¹⁹⁹ As a result of the lawsuits, South Carolina altered its voter identification law to moderate the law's effects.²⁰⁰ Moreover, a Texas federal court enjoined the law altogether.²⁰¹ Additionally, in *Obama for America v. Husted*,²⁰² an Ohio federal court prevented that state from implementing restrictive voting policies in the face of the 2012 elections.²⁰³ Thus, though the voter fraud meme replicates by situating itself in the larger memplex of election integrity, the courts have created what Richard Hasen calls a "judicial backstop" against abuse of the electoral system.²⁰⁴

of color would bear the greatest burden"); Joel A. Heller, *Fearing Fear Itself: Photo Identification Laws, Fear of Fraud, and the Fundamental Right to Vote*, 62 VAND. L. REV. 1871, 1873 (2009) (stating that voting regulations typically impact the "indigent, elderly, or members of minority populations"); Josh Israel, *Study: Voter ID Laws Affect Young Minorities Most*, THINK PROGRESS (Mar. 13, 2013, 4:20 PM), <http://thinkprogress.org/justice/2013/03/13/1710351/study-voter-id-laws-affect-young-minorities-most/> (claiming that voter regulations primarily "impact young people, especially young minorities"); Tamara Manik-Perlman, *The Voter ID Law and Its Effect on This Year's and Future Elections*, AZAVEA J. (Sept. 2012), <http://www.azavea.com/blogs/news/letter/v7i4/voter-id-law-and-its-effect-on-elections/> (describing the "clear relationship between the racial and ethnic makeup of a ward division and the proportion of voters without [identification]").

196. *Policy Brief on Voter Identification*, BRENNAN CTR. FOR JUSTICE, <http://www.brennancenter.org/analysis/policy-brief-voter-identification> (last updated Sept. 12, 2006).

197. *Id.*

198. *See, e.g., Texas v. Holder*, 888 F. Supp. 2d 113, 115 (D.D.C. 2012), *vacated* 133 S. Ct. 2886 (2013). *See also* Rick Hasen, *Breaking News: DOJ Blocks South Carolina Voter ID Law*, ELECTION L. BLOG (Dec. 23, 2011, 1:18 PM), <http://electionlawblog.org/?p=26991> (describing DOJ's position that "racial disparities in the new effect of the photo id [sic] law preclude[] allowing preclearance").

199. *See Holder*, 888 F. Supp. 2d at 140-41 (classifying the resulting inability of African Americans to vote as "retrogression").

200. Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 GEO. WASH. L. REV. 1865, 1874 (2013).

201. *See Holder*, 888 F. Supp. 2d at 144 (denying "Texas's request for declaratory relief").

202. 888 F. Supp. 2d 897 (S.D. Ohio 2012), *aff'd* 697 F.3d 423 (6th Cir. 2012).

203. *Id.* at 910-11.

204. Hasen, *supra* note 200, at 1868. In the wake of *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013), which struck down section 4(b) of the VRA because of its coverage formula (used to determine which states and subdivisions are subject to preclearance limitations), litigation has increased on the issue of the alleged discriminatory effects of voter identification laws. As of this

3. *The Public Intellectual Replicators of the Meme*

While some policy makers argue that the voter fraud meme justifies heightened regulation of the electoral process, other public figures replicate the meme by asserting the existence of a voter fraud crisis.²⁰⁵ These replicators use particular tactics to garner support for the meme, such as conflating weaknesses in the political system and the bad acts of some entities (not individual voters) to suggest voter fraud is an “epidemic.”²⁰⁶

These replicators exaggerate forms of election fraud that have nothing to do with individual voters and thereby suggest that voters would commit similar fraud.²⁰⁷ For example, some commentators argue that because of the actions of organizations like the Association of Community Organizations for Reform Now (ACORN), which sought to submit false voter registration forms to gain income for registering voters who did not exist, individual voters may attempt to vote under different names.²⁰⁸ However, in-person voter impersonation fraud of this sort is virtually non-existent.²⁰⁹

Similarly, public intellectual advocates of the meme deploy sweeping, generalized fallacies to further its transmission. The fallacies articulate a general proposition and apply that proposition too broadly without considering specific applicability to a particular case.²¹⁰ For example, in the voter identification context, some argue that because the government requires government-issued photo identification to enter an airport or a federal building, it should also require that identification of individuals when voting.²¹¹ This contention is fallacious

publication, lawsuits under the Constitution and section 2 of the VRA concerning voter identification laws are pending in North Carolina, Wisconsin, Arkansas, Ohio, and Texas. See *Major Pending Election Administration Cases*, MORITZ COLLEGE L., www.moritzlaw.osu.edu/electionlaw/litigation/index.php?sort=topic&active=yes (last visited Sept. 16, 2014) (summarizing recent voting rights litigation). The prevalence of the allegations of fraud and how courts will analyze those allegations will play a significant role in resolving this post-*Shelby County* voter identification litigation.

205. See, e.g., FUND, *supra* note 10, at 28–29; Peter Nelson & Harry Niska, *A Means to Increase Confidence in Elections*, 69 BENCH & B. MINN., Aug. 2012, at 17, 17–18 (2012).

206. See, e.g., FUND, *supra* note 10, at 28–29; Nelson & Niska, *supra* note 205, at 17–18.

207. See, e.g., FUND & SPAKOVSKY, *supra* note 10, at 34–44 (detailing the actions of the Mexican-American Political Association and other groups that were accused of registering illegal voters).

208. See, e.g., *id.* at 38–39 (describing ACORN’s alleged attempts to “subvert the laws”); John Fund, *More Acorn Voter Fraud Comes to Light*, WALL ST. J., May 9, 2009, at A15.

209. See MINNITE, *supra* note 9, at 226–28 (claiming voter fraud is so rare that there is not a way to effectively “distinguish those [] voters” from other voters).

210. *Sweeping Generalisation Fallacy*, LOGICAL FALLACIES, <http://www.logicalfallacies.info/presumption/sweeping-generalisation/> (last visited Aug. 21, 2014).

211. See, e.g., FUND & SPAKOVSKY, *supra* note 10, at 47–48 (claiming that voting is just as important as having access to federal buildings); Andrew Rosenthal, *The Voter Fraud Fraud*, N.Y. TIMES (Nov. 7, 2011, 11:38 AM), <http://takingnote.blogs.nytimes.com/2011/11/07/the-voter->

because photo identification is the only means by which federal courts and transportation security agents can confirm the identification of the person before them.²¹² Those institutions have incentives to maintain a high level of security because identity validation may be deterrent to those who might commit criminal behavior. In contrast, the justification for voter identification laws is that they require the person who presents herself to prove she is the person she claims to be.²¹³ However, although a photo identification card may offer an efficient way to obtain this information, it is not the only way. For example, a registration log, which includes the voter's name, signature, and address, could provide a number of ways to validate the voter's identity. Signature matches, letters from governmental or quasi-governmental authorities, and affidavits were other historically sufficient means.²¹⁴ Unlike a governmental building or an airport, polling places do not have high-risk, direct threats to security. To assume, without evidence, that a threat exists of illegitimate voters inserting themselves into the political process to justify more stringent voting regulations is an application of the voter fraud meme.

4. *Grassroots Activist Replicators*

In addition to the public intellectual campaign to replicate the voter fraud meme, grassroots activists also replicate the meme by questioning those individuals the activists believe are illegitimate voters.²¹⁵ These voting vigilantes rally like-minded persons to believe the overarching narrative of the meme: that a threat of invalid voters who will disrupt and corrupt the process exists. Further, they suggest that voting activists must spread this meme themselves because the government does not adequately address the threat.

With this agenda in mind, voter vigilantes create organizations across the country to counter the alleged voter fraud problem. Perhaps the most prominent of these organizations is True the Vote,²¹⁶ which was active in the 2010 and 2012

fraud-fraud/?_r=0 (explaining that some voter fraud regulation proponents question what the difference is between voting and boarding an airplane).

212. See OVERTON, *supra* note 9, at 157 (acknowledging that producing a photo identification is a prerequisite to boarding an airplane).

213. See John Fund, *Why We Need Voter-ID Laws Now*, NAT'L REV. ONLINE (Apr. 9, 2012, 12:00 AM), <http://www.nationalreview.com/articles/295431/why-we-need-voter-id-laws-now-john-fund> (referring to the requirement that a voter identify herself before voting as "common sense").

214. See MINNITE, *supra* note 9, at 141.

215. See, e.g., Levitt, *supra* note 15 (noting that voter integrity groups target "voters they find suspicious").

216. See TRUE THE VOTE, <https://www.truethevote.org> (last visited Aug. 21, 2014) (providing the homepage of True the Vote, and access to information about True the Vote's affiliates).

elections.²¹⁷ A number of organizations in places like North Carolina²¹⁸ and Ohio²¹⁹ similarly formed to validate the vote in their particular states.

These groups replicate and enhance the meme through self-help investigations of voter fraud. Despite claiming they implement neutral methodology, scholars who analyze the vigilantes' presumptions and the error-prone effects of the groups' activities contest this assertion.²²⁰ Indeed, Levitt believes these groups actually disrupt and bully minority and low-income voters through the electoral process.²²¹

D. The Memplex of Inclusion and the New Jim Crow Meme

Prominent Democratic officials, activist voting rights groups, and left-leaning political organizations back the assertion that recent voter regulations replicate Jim Crow-era policies of wholesale exclusion of people of color through regulations that overly burden the exercise of their right to vote.²²² However, the voter fraud and Jim Crow memes actually are point and counterpoint to each other. Both are a form of programming about how citizens view the problem of voter participation on the margins when faced with an absence of evaluative evidence. The two memes also connect to each other and aid in one another's survival. This fact creates perverse incentives for debate participants (and legislators) to avoid solving the problem of exclusion. To partisans and advocates on either side, it is more valuable to rally a core constituency around the issue than it is to solve the problem.²²³

217. See AJ Vicens & Natasha Khan, *Election Observers True the Vote Accused of Intimidating Minority Voters*, NBC NEWS (Aug. 25, 2012, 5:02 AM), http://investigations.nbcnews.com/_news/2012/08/25/13473761-election-observers-true-the-vote-accused-of-intimidating-minority-voters (explaining that True the Vote is “one of the political right’s fastest growing and most controversial groups”).

218. See, e.g., *Why Are So Many NC Voters Missing?*, VOTER INTEGRITY PROJECT N.C., <http://voterintegrityproject.com> (last visited Aug. 21, 2014).

219. See, e.g., OHIO VOTER INTEGRITY PROJECT, <http://ohiovoterintegrityproject.org> (last visited Aug. 21, 2014).

220. See, e.g., Levitt, *supra* note 15 (stating that voter vigilantes “hunt” members of groups the vigilantes believe are prone to commit voter fraud).

221. See *id.* (claiming that “a volunteer’s challenge [of a voter] is essentially a criminal accusation: an allegation of voter fraud”).

222. See, e.g., Alex Campbell, *Voter ID: The New Jim Crow Laws*, ADVOCATING DEMOCRACY (June 28, 2013), <http://www.advocatingdemocracy.com/?p=335> (comparing new voting regulations to Jim Crow-era laws); Brentin Mock, *Are Voter ID Laws the New Jim Crow?*, COLORLINES (Mar. 27, 2012, 9:53 AM), http://colorlines.com/archives/2012/03/are_voter_id_laws_the_new_jim_crow.html (characterizing new voter regulations as “Jim Crow photo ID laws”); Qasim Rashid, *Virginia’s Racist Voter ID Law is a Chilling Step Towards Jim Crow America*, POLICYMIC (Nov. 5, 2013), <http://www.policymic.com/articles/71947/virginia-s-racist-voter-id-law-is-a-chilling-step-towards-jim-crow-america> (referring to “[t]he upcoming voter ID requirement” as “one example of voter obstructionist laws”).

223. MINNITE, *supra* note 9, at 86–90.

E. Effects of the Memes on Civic Community and Citizenship

The justifications for voter identification center on the need to determine responsible, engaged, and therefore, worthy, citizens. One who neither has appropriate identification nor is willing to obtain it is considered “lazy.”²²⁴ Students are thought to be “flighty” and have little real world experience, so whether or not they have the chance to vote is of little concern.²²⁵ Similarly, felon disenfranchisement laws presume that a person is morally unfit to vote if she has a criminal conviction, and the standards for re-entry into the moral community of those citizens should be much higher.²²⁶ In this way, a kind of regulatory oppression forms that, according to its own logic, rightfully excludes others from the moral community of citizenship.

However, a wider perspective illustrates that the right to vote is both inherently communal and individualistic.²²⁷ Restricting access to this right through regulatory voter suppression *diminishes* the sum of the individual rights possessed by a citizen. It also *narrows* the conception of what our common community means by creating citizenship statuses that are wholly part of the process and by excluding certain other statuses. This is precisely the diminution of the American body politic that took place in the era of explicit Jim Crow segregation. The laws are reminiscent of the harm voter exclusion and

224. See, e.g., *Pennsylvania Republican Condemns ‘Lazy’ Americans without Voter ID*, MSNBC (Sept. 20, 2012, 12:13 PM), <http://www.msnbc.com/rachel-maddow-show/pennsylvania-republican-condemns-lazy> (claiming that “the state can’t fix” the laziness of voters forced to obtain proper identification prior to voting); David Weigel, *GOP Precinct Chairman Says Voter ID Will Hurt “Lazy Blacks,” Then Resigns*, SLATE (Oct. 25, 2013, 10:05 AM), http://www.slate.com/blogs/weigel/2013/10/25/gop_precinct_chairman_says_voter_id_will_hurt_lazy_blacks_then_resigns.html (referencing the statements of Don Yelton, previously a North Carolina GOP precinct chairman, in which he described voter regulations as hurdles for “lazy blacks”).

225. See, e.g., Annie Johnson, *College Students Contend with New North Carolina Voter ID Law*, USA TODAY (Oct. 10, 2013, 3:20 PM), <http://www.usatodayeducate.com/staging/index.php/ccp/students-contend-with-new-n-c-voter-id-law> (noting that North Carolina’s voter regulations now “invalidate school-issued IDs as a valid form of identification”); Emily Schultheis, *Students Hit by Voter ID Restrictions*, POLITICO (Nov. 30, 2011, 10:11 PM), <http://www.politico.com/news/stories/1111/69465.html> (recounting New Hampshire Republican House Speaker William O’Brien’s statement that students “just vote their feelings”).

226. See KEYSAR, *THE RIGHT TO VOTE*, *supra* note 91, at 303 (stating that felon disenfranchisement laws existed although “there was [no] evidence to support the claim that a man or woman who once had broken the law would be particularly likely to engage in electoral corruption or permanently lacked the moral competence to make political judgments”). See also PETTUS, *supra* note 95, at 123 (noting that “because convicted felons are, and historically have been considered morally unworthy of the political rights of citizenship that judges and politicians who support felony disenfranchisement can use a flimsy moralistic discourse to fend off challenges by exoffenders who want their rights restored”).

227. See Fishkin, *supra* note 138, at 1348–49 (showing the breakdown of group exclusion and each citizen’s right to vote).

suppression caused and cases such as *Minor v. Happersett*,²²⁸ *Giles v. Harris*,²²⁹ and *Breedlove* illustrate. Although some debate the actual impact of alleged voter suppression, the expressive harm that results from the impoverishment of the American body politic may be substantial in and of itself.

IV. MEME-DRIVEN POLICY: VOTER IDENTIFICATION LAWS, VOTER SUPPRESSION, AND DISTORTED POLICY

The debate spurred by the voter fraud as a meme is tantamount to a modern argument about whether or not the franchise should be open to all citizens. It focuses on one part of the scope of the problems in the existing electoral system without proof that there is a problem. The nature of the American electoral system is to allow access to all citizens, and those citizens owe a duty to the government and each other to prove themselves capable of voting. However, the meme has shifted the presumption for enfranchisement against the ability of a citizen to vote. Moreover, the voter fraud meme exposes the vulnerable places in our democratic process, such as antiquated registration systems and absentee balloting, and recasts those weaknesses as a potential danger to the entire process that only measures such as voter identification laws can remedy. This narrative has distinct ideological effects that endanger the electoral process and threaten the confidence the citizenry has in the democratic process.

The voter fraud meme likely distorts both the priorities of election law policymakers and the perceptions of at least some members of the public. The meme causes these groups to presume voters are guilty of acts of election fraud until proven otherwise. This perspective makes the citizen the enemy of the democratic process, rather than treating the citizen as a partner in or owner of the process. In an ideal system, those who register to vote would be presumed eligible, unless there was something amiss that raised concerns for the governmental authority facilitating the election.

Ultimately, when it comes to proof of identity issues (the core issues in the voter identification debate), governmental authorities historically were far more accepting of a wide set of documents that prove the prospective voter's identity. Traditionally, those documents included drivers' licenses, military-issued identification, and documentation from the Social Security Administration or quasi-governmental agencies.²³⁰ The rationale behind these policies was to

228. 88 U.S. 162 (1874).

229. 189 U.S. 475 (1903).

230. Samuel P. Langholz, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 746 (2008); Suevon Lee, *Everything You've Ever Wanted to Know About Voter ID Laws*, PROPUBLICA (Nov. 5, 2012, 4:50 PM), <http://www.propublica.org/article/everything-youve-ever-wanted-to-know-about-voter-id-laws>. See also MINNITE, *supra* note 9, at 140–47 (listing each state's voter identification requirements prior to the 2002 Help America Vote Act).

allow the voter to validate her identity through a variety of means.²³¹ Such a policy accommodated persons from a variety of economic statuses and backgrounds.²³² The rationale served as wide a group of voters as possible in order to accommodate all willing voters.²³³ Yet, the voter fraud meme's message is not only that some voters cannot be trusted, but also that a mass of illegitimate voters exists that seeks to overthrow the legitimate electoral process and subvert the integrity of elections. Thus, any particular voter may be suspect and possibly excluded from the process.

Nonetheless, the possibility of bad actors in the democratic process should not be ignored. Fraud does exist in other parts of the electoral system. Unfortunately, the meme, shaped by the politics of voter suppression, causes Americans to see fraud where it does not exist. Thus, many people may come to suspect voters of fraud when no factual basis exists for suspicion. The record is specifically replete with instances of fraud related to voter registration, absentee ballots, payments for votes, and the misdirection of voters in order to subvert an individual's ability to cast her vote.²³⁴ However, in comparison to these well-substantiated occasions, in-person voter impersonation fraud is virtually non-existent.²³⁵ Pre-voter identification election security laws sufficiently deter and capture the rare instances of such in-person fraud.

The result is legislative enactments that address non-existent problems. The legislation effectively excludes voters, whether by threat or by perception, who would otherwise be eligible to vote. This dynamic creates a structural disenfranchisement both implicit in message and indirect in effect that was explicitly propounded in law during the first half of the last century.²³⁶ The echoes of those laws ring true in the perceptions of excluded voters.

This ideology of exclusion has an exaggerated hold on the modern democratic process.²³⁷ To be clear, the fault is not that a policy of excluding illegitimate voters from the process exists. Rather, the fault is that this ideology of exclusion is over-inclusive and burdensome, and thus excludes some voters who would

231. *Cf. Lee, supra* note 230 (demonstrating that opponents decry the possibility of voter fraud if states accepted multiple forms of identification, presumably because more citizens would be added to the eligible voting population).

232. *See* KEYSSAR, *THE RIGHT TO VOTE, supra* note 91, at 314–15 (indicating that when states first permitted citizens to register to vote at motor vehicle bureaus that “the new registrants were disproportionately young, black, [and] high-school educated”).

233. *See id.* at 312–15 (noting that low voter participation was “deemed to be a defect of American politics, and making registration easier, it was argued, would go a long way toward solving the problem”).

234. *See* MINNITE, *supra* note 9, at 34–36, 141 (detailing ways that legitimate voters can disqualify themselves or vote illegally due to confusing voter registration laws).

235. *See* Keyssar, *Barriers to Voting, supra* note 168, at 49.

236. *See* KEYSSAR, *THE RIGHT TO VOTE, supra* note 91, at 312–15 (describing increased voter turnout caused by expanded registration options in the Motor Vehicle Bill).

237. *See* KELLNER, *supra* note 163, at 26–27. *See generally* CHARNIN, *supra* note 10.

otherwise be allowed to vote. The net effect is that the system is more important than the individual voter, even if that potential voter is clearly eligible, but unable, to prove his identity in a narrowly proscribed way. To accept the opposite premise is to adopt the view that justified reasons for under-exclusion exist and that legitimate voters who suffer this fate do not matter.

V. BREAKING THE CYCLE OF EXCLUSION

A. *Separating the Ideology of Voting from the Political Marketplace of Ideas*

Ideological shifts framed the evolution of the right to vote for women and minorities. “Criminalization” of the right to vote spurred by the voter fraud meme may very well frame the next ideological shift. Reframing the electoral rules to ensure that only “legitimate citizens” participate appears facially neutral and reasonable, but no evidence exists to justify claims of voter fraud.²³⁸ Is an ideological shift, one towards manipulating the electorate for an end unrelated to the most effective needs of the democratic process, taking place with respect to our electoral laws?

Among other things, such a shift would suggest problems with the right to vote in the United States. The right to vote is based on a set of negative rights set forth in the federal Constitution and its Amendments, and is constructed by implication.²³⁹ Because the right to vote is piecemeal,²⁴⁰ regulations that do not implicate the protected categories in the Constitution may be manipulated to exclude voters, as demonstrated the history of the poll tax.²⁴¹ Voting regulations exclude people by basing the value of a voter’s qualifications on a socioeconomic barrier. A version of this same belief belies the idea of rampant voter fraud. Ultimately, because the right to vote is an incomplete right, it is vulnerable to memes of exclusion. Yet, our rhetoric concerning the right to vote highly values its existence. Ironically, the right to vote can be the bulwark of freedom, but only for those deemed worthy.

The problem ultimately comes down to the arbitrariness of exclusion and the structural difficulties it entails. Arbitrary line drawing is suspect within the realm of fundamental rights. The right to vote is a particularly concerning example of this problem. Unlike other fundamental rights, the right to vote actually requires governmental participation in order to effectively and

238. WANG, *supra* note 94, at 79.

239. Terry Smith, *Autonomy Versus Equality: Voting Rights Rediscovered*, 57 ALA. L. REV. 261, 262–63 (2005). While this analysis focuses on the federal constitutional right to vote, Joshua Douglas advances a separate and independent argument for voting rights advocacy that may be made under state conceptions of the franchise. See Joshua A. Douglas, *The Right to Vote under State Constitutions*, 67 VAND. L. REV. 89, 98 (2014).

240. See Smith, *supra* note 239, at 262–63.

241. See Ellis, *supra* note 91, at 1041–47 (reviewing how the poll tax loopholes were created to allow white, but not black, citizens to vote).

meaningfully manifest the right.²⁴² Therefore, the right-bearer depends upon the government for actualization of the right. Thus, government choices that artificially and arbitrarily frustrate the right to vote for some should be subject to heightened criticism and possibly even heavier governmental scrutiny.

Perpetuation of the exclusionary meme of voter fraud is wholly antithetical to the idea of an inclusive electorate. Admittedly, some may not agree with that notion, but their disagreement focuses us on the question of whether or not those persons actually believe in universal franchise. If not, the discussion must shift to center on what constitutionally sound basis they would advance to justify the exclusions. For individuals who do believe in an inclusive electorate, the question becomes: “what is the appropriate way to think about the meme and about the ideological effects of the meme in order to create an inclusive and representative electorate?” Inclusiveness will increasingly become an important issue given the shifting demographics of the twenty-first century.

B. Ideology and the Law of Democracy: The Utility of the Meme-Based Approach

The narrative concerning voter fraud and its background memplex of exclusion are actually more complicated than simple partisanship. Further research concerning the effects of heightened voter restrictions and the legal standards that allow the passage of meme-driven laws should continue. In particular, legal scholars should clarify the doctrinal and policy shortcomings with respect to the right to vote that make it susceptible to memes. Analyzing the effects of memes in an academic context will allow scholars to theorize about the right to vote in ways that account for possible ideological effects. Purely doctrinal analyses may ignore such concerns. Moreover, the meme approach adds value because courts evaluating claims of voter fraud can expose the irrationality of the policies driving voter identification laws and other heightened regulations that result in increased exclusion from the franchise.²⁴³ Considering the underlying narratives of the separate memes helps courts look beyond partisanship to determine whether legal proposals rationally relate to making the right to vote available to all.

Practically speaking, the evaluation of right to vote denial claims should be grounded in something greater than a mere assertion that the government’s interest in abstract policy justifies a particular electoral rule. Courts should place the burden of proof on the government to demonstrate an actual electoral problem before changing a rule if that revised rule may exclude voters. A court may then determine whether or not the reason for the change is based in fact or

242. *Id.* at 1027.

243. As aforementioned, felon disenfranchisement is likely the best example of another ideologically driven, entrenched voting practice that may have the effect of excluding citizens. A memetic approach attentive to the ideological concerns surrounding this explicit exclusion from the franchise may offer a novel contribution to discourse in this subfield of voter denial scholarship. The Author anticipates building on this issue in future work.

on a meme. Further, courts should reject vague concerns for inchoate electoral dilemmas like “voter fraud.” This method is the most useful and necessary intervention to counter the meme.

VI. CONCLUSION

Voter fraud is best thought of as a meme. It replicates by shifting the actions of the first replicators, human beings, to aid in its propagation. In this sense, memes program people in order to evolve. This theory helps to explain enduring memplexes of exclusion. Longstanding notions centered on the idea that some people of the republic seek its subversion conflict with memplexes of inclusion. The two viewpoints are engaged in a seesaw battle. Voter fraud is the latest meme of exclusion, and proves that the conflict between the memplexes of exclusion and inclusion rages on.

Historically speaking, the meme of voter fraud is not new. Nonetheless, the meme distorts current policy outcomes in multiple ways. It requires no evidence to prove its existence, yet its explanatory power helps to fill those gaps. As a result, the evidence concerning a lack of voter fraud has failed to penetrate partisan policy analysis. Ultimately, American constitutional values and rules can run counter to memes and their influence. The heuristic role that memes play, including the meme of voter fraud, fills the interstitial break between constitutional values and the choices society makes when, as a whole, it implements rules to express those values.

The values inculcated in the right to vote, as enforced by the judiciary, work to moderate the influence of the voter fraud meme. As demonstrated in Texas and South Carolina, the work of the then extant VRA forestalled the harsh effects of the meme. However, that particular check on the meme has been impaired, allowing politics and the ideology of exclusion to run rampant, thus generating more litigation.

These two issues—the awareness of ideology as a motivating factor in the democratic process and the importance of the rule of law as a bulwark against majoritarian tyranny imposed by ideological influences—will play a defining role in how people think about rights in the future. Crafting solutions to mediate the influence of ideology in relation to problems regarding fundamental rights requires hard work. Articulation of fundamental rights will help people focus on the specific problem. The right to vote should be framed in positive terms that limit the role of government and allow individual citizens to exercise their rights. In this way, the American fundamental right to vote will not be curtailed by a meme.

