American voting : the local character of suffrage in the United States.

AMERICAN VOTING: THE LOCAL CHARACTER OF SUFFRAGE IN THE UNITED STATES

A Dissertation Presented

by

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DEDICATION

To my parents, Gaelen and Richard Ewald, for teaching me to read and to love books.

"All the truth lies in the details."

Stendhal, quoted in William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (1996), at 235.

"Yet the texts of the law must be made socially real: enacted, implemented, imposed."

Sally Engle Merry, *Colonizing Hawa'i: The Cultural Power of Law* (2000), at 218.

"The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise."

Bush v. *Gore*, 531 U.S. 98, 104 (2000).

"The way they guarded that ballot box, they let us know there was something mighty good in voting."

Charles Evers, describing his exclusion from the registrar's office in Decatur, Mississippi in 1946. Quoted in Steven F. Lawson, *Black Ballots: Voting Rights in the South, 1944-1969*, at *x*.

ACKNOWLEDGMENTS

There is a convention of thanking one's spouse or partner last, presumably for dramatic purpose. I would prefer to remove any doubt that my first and last debt is to my wife Emily, who has supported me in every way imaginable as I have worked on this project. Thank you.

I am deeply indebted to John Brigham, who for four years has been showing me how to think closely and creatively about the law. John's mix of sharp criticism and enthusiastic support has been all that I could have wanted in an advisor and dissertation chair. Shelly Goldman has also served as a mentor and model of scholarship over the past four years; I wish Ray LaRaja had arrived at Massachusetts a year or so earlier, so that I could have learned even more from him than I've been able to in the last two years. Many thanks to Betsy Krause of the Anthropology Department, who agreed to work on the project and provided some extremely useful questions and suggestions at an important early point. This committee made the dissertation far more enjoyable than I had hoped it could be.

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My grandfather, George Ewald, died as I worked towards completing this project. His interest in politics and support gave me the strength to go out and do what needed to be done. I have also been sustained for as long as I can remember by the love and

encouragement of my grandmothers, Patricia Ewald and Sue Coffin. These are debts that cannot be repaid.

This dissertation is dedicated to my parents, Gaelen and Richard Ewald, in gratitude for their having taught me to read and to like books.

ABSTRACT

AMERICAN VOTING: THE LOCAL CHARACTER OF SUFFRAGE IN THE UNITED STATES

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This dissertation examines the local dimension of suffrage in the United States. The U.S. has a hyper-federalized system of election administration, in which county and municipal officials and institutions continue to play important roles, and I demonstrate that a systematic analysis and appreciation of these suffrage practices enhances our understanding of voting rights and American political development. The dissertation makes theoretical, historical, and normative contributions to our ideas about American voting. First, I argue that conceiving suffrage as a practice, rather than merely a formal right or an instrumental behavior, produces a more rich understanding of what Americans actually do at the polls. Historically, I show that prominent roles for local officials and a great deal of variation in voting practices at the county or municipal level have always been components of American suffrage. Such variation – which is today often treated as a scandal or, at best, an historical accident to be rectified – is in important ways a product of purposeful state action, and is closely connected to American ideas about popular sovereignty and the state. Normatively, I emphasize the redemptive aspects of the local character of American suffrage, challenging what seems to be the prevailing bias today

against things local. I contend not only that local administration of elections is deeply rooted in U.S. history and thought, but also that local administration has at times been an important engine of inclusion, expanding the bounds of suffrage before state and federal law did so. Americans have always voted together in our communities, and have done so for reasons rooted in our fundamental political traditions.

TABLE OF CONTENTS

CHAPTER 1

VOTING RIGHTS AS SUFFRAGE PRACTICES: THE REDISCOVERY OF PSEPHOLOGY

In this opening chapter, I explain the purposes of the dissertation and establish important foundational points. First, I outline the facts on the ground regarding the unusually-important roles county and municipal officials play in putting American voting rights into practice today. Next I describe what I call the ongoing "rediscovery of psephology," the science of ballots and votes, prompted in part by Election 2000, and point to some of the questions that election forces us to consider. The recent proliferation of literature on the mechanics of suffrage highlights the relative lack of such work previously. I contend that while political science and related fields have produced superb scholarship on voting rights and suffrage, we have erred in conceiving voting rights in overly formalistic and binary terms, and limited ourselves by focusing only on the kinds of variation that most clearly shape election outcomes. Finally, I describe the dissertation's major theoretical purpose, which is to supplement our understanding of voting as a right with a conception of suffrage as practice, and explain the scholarly provenance of that approach.

In the United States, voting has always been a local practice. To say this is not to deny the considerable importance of national and state constitutions and statutes in shaping American suffrage. I do contend, however, that scholars have erred by focusing too much on the formal, symbolic, and constitutional aspects of "the right to vote." As powerful and as controversial as it has been – the story of voting rights is itself "The

Contested History of Democracy in The United States"[1] – the idea of a "right to vote" is incomplete if it does not understand suffrage as a *practice*. Across both time and space, American voting has displayed a remarkably rich texture, a diversity of practices which invites and demands greater understanding. The administration of suffrage in the United States is not only federalized, but *hyper*-federalized, with an unusual amount of responsibility and even authority in the hands of county, city, and town employees.

My central objective is to make the case that we need to understand American suffrage as a practice, and describe what is gained by doing so. I put together four main pieces. First, I describe the important roles played by local officials in U.S. elections today. Second, I sketch what I call the "rediscovery of psephology" – the study and the science of ballots and voting – clearly taking place in political science, and review what the Presidential election of 2000 illustrated about the importance of local variation. Third, I contrast the terms of the post-2000 rediscovery with the more symbolic, nationalized understandings of voters and voting rights which has held sway. Finally, I explain the power and appeal of an approach to suffrage which understands voting rights as a practice.

Glenn C. Altschuler and Stuart M. Blumin begin *Rude Republic*, their brilliant revisionist study of nineteenth-century electoral behavior, with an image from Hawthorne's 1851 novel *House of the Seven Gables*.[2] The protagonist, Clifford Pyncheon, watches a political parade from afar and feels inspired. But seeing the sweaty, dirty, agitated visages of the marchers more closely, Pyncheon becomes disappointed.

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[1] Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (2000).

[2] Glenn C. Altschuler and Stuart M. Blumin, *Rude Republic: Americans and Their Politics in the Nineteenth Century* (2000).

One should view politics, he opines, "not in its atoms, but in its aggregate,--as a mighty river of life, massive in its tide, and black with mystery, and, out of its depths, calling to the kindred depth within him."[3] Altschuler and Blumin use this story to make a point about how scholars have understood political activity in the nineteenth century: by looking at its aggregate, and *failing* to see its atoms.[4] We've believed, they argue, that high levels of voting and spectacular campaigns meant high levels of meaningful political engagement. They try to show that this consensus is wrong, and they do so by looking much more closely at what people were actually *doing* when they participated in politics, by investigating "the nature and depth of popular political engagement."[5] Local institutions and local contexts are key, and it is no accident that the unit of measurement historians Altschuler and Blumin choose for their "sample" is the town. I hope to offer something analogous to what Altschuler and Blumin have given us: I am less interested in explaining election *outcomes* than in understanding the nature of the voting activity itself.[6]

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[3] Id., at 3.

[4] There is a "nearly consensual view," they argue, that post-Jacksonian American politics was "a genuinely massive activity in which the vast majority of ordinary Americans—white, voting males, most evidently—participated with an effectiveness born of enthusiasm for and deep commitment to their political party, to specific programs and leaders, and to the idea and practice of democracy itself." Id., at 3.

[5] Id., at 5. The testimonies of actual voters – in court, correspondence, diaries, and particularly in disputed election cases – demonstrates that the act of voting was much more "qualified," "hesitant," and "casual" than we have assumed. Many votes were literally purchased; some were coerced by force, others by drink; and a great many voters cast their ballots in utter ignorance of what and whom they were voting for. Americans' relations to their politics were in fact highly variable, characterized by "detachment as well as commitment, skepticism as well as belief, disgust as well as enthusiasm...." Id., 272. Ample evidence of spectacular campaigns and high turnout have led us into an overly simplistic, "Golden Age" picture of nineteenth-century politics—a picture which neglects the complexity and institutional variation that necessarily characterizes all electoral activity, and neglects "the cultural dimension of political engagement." Id., 6.

[6] I do not put forth new empirical voting-behavior analysis here, offering instead "a work of synthetic interpretation that owes a great deal to the labor of other scholars," as Gary Gerstle described one of his

Speaking a century after Hawthorne's Pyncheon, historian Chilton Williamson opened his history of American suffrage with a similar idea. Explaining his emphasis on contingency and variation in state laws rather than national developments – on "the particular as much as the general" – Williamson offered a metaphor: "Perhaps he who has studied the atom knows as much which is fundamental as he who peers at the stars."[7] In the election of 2000, citizens and scholars were reminded that fundamental truths about American suffrage still lie in the local – in the "atoms" of national elections. The contested election in Florida and the Supreme Court's decision in *Bush v. Gore*[8] have spawned a great deal of scholarship—on federalism, the Electoral College and democracy, and the role of the U.S. Supreme Court in national politics.[9] Yet one of the simplest facts which the election, the recount, and *Bush v. Gore* itself make most

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books. See Gary Gerstle, *American Crucible: Race and Nation in the Twentieth Century* (2001), at 11. As Kim Ezra Shienbaum writes in introducing her *Beyond the Electoral Connection*,

> "Others have seen to it that those fields [that is, empirical study of elections] have been well tilled, and we intend to make full use of the fruits of their labors. Instead, this book attempts to reconceptualize and reinterpret an important aspect of American political behavior whose contradictions have long puzzled informed observers both here and abroad."

See Kim Ezra Shienbaum, *Beyond the Electoral Connection: A Reassessment of the Role of Voting in Contemporary American Politics* (1984), at *vii*.

[7] Chilton Williamson, *American Suffrage: From Property to Democracy, 1760-1860* (1960), at *viii*. In 1960 the atom was perhaps more fraught with meaning than it had been a century before, but Williamson here does not appear to use the term in any kind of threatening or foreboding way.

[8] 531 U.S. 98 (2000).

[9] I discuss some of this scholarship below, in the last section of this chapter. Of many excellent books, one offering a broad sample of citations to the literature – albeit only in the first year after the election – is Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, *When Elections Go Bad: The Law of Democracy and the Presidential Election of 2000, Rev'd Ed* (2001).

abundantly clear is that localities and local officials play unusually important roles in American national elections.[10]

I. The Local Role in Contemporary American Elections.

The local role in American voting is almost certainly greater than in any other developed democracy. It is true that the amount of outright power, authority, and legal discretion which county, city and town officials exercise in implementing suffrage law is probably lower now than at any point in American history. That fact makes the scope of the surviving local role all the more impressive, because in comparative context it is still substantial.[11] While such a pointed view may not be widely shared, it is still possible for critics of the United States' current, fragmented system of election administration to describe it as "thousands of fiefdoms," and to believe that working for a uniform voting system "amounts to a battle against the warlords."[12]

Whether or not it is best described as a "battle," there is no question that American election practices are undergoing great scrutiny, and some reform. And most, if not all, of the topics and controversies at the "frontier" of voting rights today concern the work of local officials and the immediate context of voting. In his 2003 book *You Call This An Election? America's Peculiar Democracy*, political scientist Steven Schier

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[10] The opening paragraph of *Bush v. Gore* is about counties: votes, disputes, and recounts in Leon County, Miami-Dade County, Palm Beach County, and manual vote tabulation in other counties. *Bush v. Gore*, 531 U.S. 98 (2000).

[11] See *infra*, note 28 and accompanying text.

[12] Alan Dechert, e-mail to the author, July 1, 2003. Dechert probably had in mind not only state, local and party officials, but also the various vendors who prosper under the current system by selling and servicing various kinds of electoral technology. Dechert works with a young organization called the Open Voting Consortium, which seeks to develop an "Election Rules Database" covering all U.S. election precincts and practices for the use of election lawyers in challenging discrimination. See <http://www.openvotingconsortium.org> (accessed March 18, 2004).

offers a long list of such controversies, beginning with our "patchwork system of registration" and continuing through questions about ballot technology, early, absentee, all-mail, and internet voting, and ballot-counting and election-contestation rules.[13] Other fights center on better instructions and assistance for voters; help for those with poor literacy or English-language skills; and clear and consistent procedures for the re-enfranchisement of former felons.[14] Advocacy and voter-education groups increasingly understand that how local officials interpret and enforce state and federal law is as important as the content of the laws themselves.[15] And a prominent recent study's central descriptive map of American election machinery depicts the U.S. not by state, but by *county*.[16]

In most states, local and county officials carry the burden of enabling voters to register and of maintaining official registration rolls, and, therefore, of deciding who may

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[13] Steven E. Schier, *You Call This an Election? America's Peculiar Democracy* (2003), at 108-115.

[14] The importance of local officials in these areas is clear. But many such issues are now also governed by federal law. Professor Pamela S. Karlan makes this point in a recent study on reforming American electoral practices produced by The Constitution Project. Karlan endorses proposed reforms to ballots, access, and registration rules, but notes that "many of the problems described in this Report are the product of a failure to comply with existing federal law...." Karlan urges additional attorneys' fees and resources to enforcement agencies, doubting that new legislation alone will "produce full compliance." See Supplemental Views, *Recommendations for Congressional Action*, Forum on Election Reform of The Constitution Project, at 9. Professor Karlan's point strengthens rather than weakens the need for a better understanding of the local component of American suffrage. Without such an understanding, one is hard pressed to appreciate how local and national governing bodies can find themselves *fighting* this way over the franchise in the twenty-first century.

For comprehensive explanation of the modern law of municipalities—emphasizing that cities "have only those powers delegated to them by state government"—see Gerald E. Frug, "The City as a Legal Concept," 93 *Harvard Law Review* 1057 (1980), 1062.

[15] See generally Frances Fox Piven and Richard A. Cloward, *Why Americans Still Don't Vote And Why Politicians Want It That Way* (2000), one of the most prominent combinations of scholarship and reform advocacy.

[16] See CalTech/MIT Voting Technology Project, "Voting: What Is, What Could Be," (2001), at 19.

cast valid ballots on election day.[17] Registering to vote has gotten easier in recent decades, but records are still "maintained in the separate files of the nearly 13,000 local election jurisdictions of the United States," as the 2002 report of the National Commission on Federal Election Reform observed.[18] The U.S. may be unique among democracies in this regard, since most countries take registering citizens to vote to be a governmental responsibility, and compile lists automatically. One recent scholarly assessment of comparative electoral administration found that only the U.S., France, and some Latin American countries require would-be voters to register themselves;[19] an earlier study concluded that only the U.S. has a system so heavily dependent on voters themselves.[20] More than 100 countries have some form of national voter registration system.[21]

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[17] As a generation of scholarship has demonstrated – a "truly enormous" literature, in Walter Dean Burnham's words – registration rules are a key cause of low turnout. See Walter Dean Burnham, "The Turnout Problem," in A. James Reichley, ed., *Elections American Style* (1987), at 108. Burnham writes that "first-rate empirical work has demonstrated that personal registration systematically reduces turnout." Id.

[18] Jimmy Carter et al., *To Assure Pride and Confidence in the Electoral Process: Report of the National Commission on Federal Election Reform* (2002), 27. There is no national list which can even approximate a voter list: tax and Social Security records are shielded by law from state and local officials, and only a relative handful of citizens have passports. Among the many results of this fragmented system is the startling number of inactive voters still registered in many localities—people who may still live in the area, but who may have moved away, died, or be in prison. According to firms used by politicians to contact eligible voters, the amount of "deadwood" on the typical voter list is as high as 16%. Carter et al., 78 n.13. This has obvious impact on political scientists' ability to measure turnout, among other things. Four decades ago, Warren E. Miller found strong associations between variation in voting rates and such practical factors as residence requirements, registration procedures, closing dates for registration, poll tax requirements, and the ballot itself. See Warren E. Miller, "Assessment of the Significance of State Laws Governing Citizen Participation in Elections." Survey Research Center, University of Michigan, Ann Arbor, 1963. Summarized in Frances Fox Piven and Richard Cloward, *Why Americans Still Don't Vote* (2000), 25.

[19] Mark N. Franklin, "The Dynamics of Electoral Participation," in Lawrence LeDuc et al., eds., *Comparing Democracies 2: New Challenges in the Study of Elections and Voting* (2002), 157.

[20] See Kevin P. Phillips and Paul H. Blackman, *Electoral Reform and Voter Participation* (1975), at 5. Phillips and Blackman conclude that

Cities and towns alone pay for elections in most states. Indeed, prior to implementation of the Help America Vote Act of 2002 (HAVA) – implementation which has proceeded more slowly than many had expected – Congress had never provided funds to state or local governments to help them administer elections, and many states have left the entire burden of election financing to localities.[22] For this reason – and because individual counties and towns' individual election-related expenditures are too low to meet mandatory Census reporting requirements – we do not know how much the U.S. spends on elections.[23] In some states, local officials still design ballots for national elections; virtually everywhere, local officials, party staff, and volunteers supervise the casting and counting of ballots. "Local" means different things in different places. For example, in Alabama, the county Board of Registrars, Judge of Probate, Circuit Clerk, and Sheriff all have specific election responsibilities; in Massachusetts, however, elections are administered not by county staff but by town officials.[24] Most Americans vote in local institutions—schools, town halls, and fire stations. There is a great diversity in these facilities, since local officials may choose almost any place they believe will be convenient for voters: in sixty Massachusetts towns, elections take place in churches,

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"[t]he United States is alone in putting the responsibility for registering to vote on the potential voter rather than on the state. *All* Anglo-European nations oblige the state to list eligible voters, and those nations have voting turnouts ranging from five to forty percentage points higher than America's."

[21] See Jamin Raskin, "Suffrage Suffers in the Land of Rights," *Los Angeles Times*, March 15, 2004 (page number unknown).

[22] See *Recommendations for Congressional Action*, Forum on Election Reform of The Constitution Project (2001), at 1.

[23] See CalTech/MIT Voting Technology Project, "Voting: What Is, What Could Be," (2001), at 48. The report notes that "the most basic questions remain unanswered" about American election administration, and provides some national cost estimates. Id., 48-53.

[24] See, for Alabama, http://www.sos.state.al.us/cf/election/borjop1.cfm; for Massachusetts, see <http://www.state.ma.us/sec/ele/eleidx.htm>. For links to descriptions of procedures in all states, see the National Association of State Elections Directors, at <http://www.nased.org/statelinks.htm>.

while voters in at least one California city have voted on the beach.[25] The day after California's special recall election in October of 2003, the *New York Times* devoted most of its front page to photos of three California polling places, including a mortuary and a deli.[26]

The American practice of allowing local officials to control and administer elections — often while acting simultaneously as an agent of one of the major parties — is very unusual.[27] Even in other former British colonies such as Canada, Australia, and India, local officials administer elections only under the oversight of impartial bureaucrats in national independent bodies; in most Western European democracies the role of local officials is much narrower. National governments there include departments specializing in electoral administration, and "tenured civil servants specializing in electoral questions" manage elections and arbitrate disputes.[28]

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[25] See Peter Schworm, "Activist Challenges the Use of Churches as Polling Places," *Boston Globe*, March 31, 2003, at B1. In the town of Weston, all polling places are in churches. Voting in houses of worship, the story notes, is "a cornerstone of New England democracy." In many towns, the church was for centuries the official and unofficial meeting place, and the only building large enough for major public functions. But new polling stations are also placed in churches: such a decision prompted the *Globe* story, which details the complaints of a Jewish citizen who felt he had to "bow before the cross" to vote in a new polling place in a Framingham church. Meanwhile, the city of Venice, California, recently stationed a polling place at a lifeguard station on the beach. Posting to the election-law listserv by Craig Holman of the Public Citizen organization, Apr. 2, 2003.

[26] See *N.Y. Times*, Oct. 8, 2003, at 1.

[27] See Paul Gronke, "Electing to Change in How We Vote," *Los Angeles Times*, Oct. 16, 2003, at 17. Gronke writes that "states and localities, rather than the federal government, control and pay for election administration in the U.S., unlike in other nations."

[28] See Bengt Säve-Söderbergh, Institute for Democracy and Electoral Assistance, "Broader Lessons of the U.S. Election Drama." Available at <http:www.idea.int/press/op_ed_08.htm>. See also Dennis F. Thompson, *Just Elections: Creating a Fair Electoral Process in the United States* (2002), at 177. Thompson writes, "[f]oreign observers are astonished to learn that the political parties operate the polling stations in most elections in the United States." Indeed, American parties play significant roles in everything from ballot design to staffing the polling stations and overseeing counts and recounts. Most European democracies, he writes, put independent, non-partisan government officials in charge of elections.

If international variation suggests that the local dimension of American elections is worthy of study, the great shifts which U.S. history has seen in this area only strengthen the case. As I explain in a subsequent chapter, the local component of the "medley" that is American suffrage[29] has undergone a great deal of change—and it has been neither a linear story nor a simple one. The most recent changes in the history of American voting rights law, however, indicates that American lawmakers may now be paying much greater attention to the practice of suffrage. Following over a decade of advocacy and legislative battles, Congress passed and President Clinton signed the National Voter Registration Act of 1993 (NVRA). Christened the "motor-voter" law because of its requirement that states make registration available in driver's license agencies, the NVRA also required other public agencies to assist registration, including those distributing welfare benefits, food stamps, and Medicaid. Implementation was slow and contentious, but between 1995 and 1998 more people registered to vote than during any similar period in American history.[30]

The election of 2000, of course, provoked tremendous interest in election administration, both among citizens and legislators. In 2002, President Bush signed into law the Help America Vote Act (HAVA), which tries to tackle some of the problems

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As Soderbergh writes, the Florida recount highlighted "the problems inherent in the existence of diverse laws and their varied, devolved implementation." These problems include confusion, disparate counting standards, and lack of public confidence when openly partisan officials attempt to resolve disputes. By contrast, when other democracies vote for common offices such as the chief executive and the national legislature, they do so by means of uniform procedures, administered by non-partisan, professional election officials. For an excellent overview of comparative election structures and their implementation, see the webpages of the Administration and Cost of Elections Project, at <http://www.aceproject.org/main/english/es/es10.htm>.

[29] See Dudley O. McGovney, *The American Suffrage Medley: The Need for a National Uniform Suffrage* (1949).

[30] Fox Piven and Cloward, at *vii-viii*.

created by local variation in election administration. HAVA makes available federal money to states which pass enabling legislation and request funds; the large, complex law requires each state to create computerized voter registration lists, make polling places accessible, improve voting machines, allow for provisional voting by those of uncertain registration status, and provide new penalties for fraud.[31]

As the 2004 elections approach, however, change has been uneven. Some states have improved old systems and moved toward compliance with HAVA, but others have not, as described in a comprehensive report published in 2004 by the research group Electionline.org. In explaining the slow and unsteady rate of reform, the report points a finger at "delays in Washington," both in appropriations and in appointments to the new Election Assistance Commission, as well as reluctance among some state legislators and a lack of sustained public pressure.[32] As political scientist Steven Schier writes, even after HAVA "a large battle remains to be fought over the future role of the national government in election administration."[33]

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[31] See Robert Pear, "Congress Passes Bill to Clean Up Election System," *N.Y. Times*, Oct. 17, 2002, at A1; Robert Pear, "Bush Signs Legislation Intended to End Voting Disputes," *N.Y. Times*, Oct. 30, 2002, at A22. HAVA may mark a major expansion in federal regulation of registration, election administration, and funding. Whether it will bring new levels of consistency and clarity to American federal elections is yet unclear, however, since states must pass their own legislation in order to win federal funds, and proposed state legislation is remarkably varied. Advocacy groups' materials provide the best evidence of the incomplete and uncertain nature of the changes HAVA will bring. See the webpages of Electionline.org, (www.electionline.org), Demos (www.demos-usa.org/HAVA); the Leadership Conference on Civil Rights (www.civilrights.org); the League of Women Voters (www.lwv.org); and the American Association of People with Disabilities (www.aapd.com).

[32] See "What's Changed, What Hasn't, and Why," (January 2004), at 3. The report is available at <http://www.electionline.org>.

[33] Schier, *You Call This An Election?* (2003), at 114.

II. The Rediscovery of Psephology and the Lessons of 2000.

In the summer of 2003, a fascinating article appeared in the prominent new journal *Perspectives on Politics*. In the essay – titled "Beyond the Butterfly: The Complexity of U.S. Ballots" – political scientists Richard Niemi and Paul Herrnson document and examine some of the variation in American ballots.[34] Acquiring sample tickets from all fifty states, Niemi and Herrnson find great diversity in "[b]allot instructions, candidate and party listings, party symbols" and other attributes, variations which "result from a complex and highly decentralized election system".[35] That "system" (multiple *systems*, really) the authors argue, provides "ample opportunity for all but the most sophisticated voters to misunderstand, mismark, or spoil their ballots and for all voters to feel confused and frustrated."[36] The authors acknowledge that they've focused on state-level variation and "made no attempt to examine ballot variations within states," but acknowledge that "doing so would only reinforce our point about the diversity of ballot styles nationwide."[37]

As Niemi and Herrnson note, attention to ballots' impact on elections is not new in political science.[38] But for my purposes here, what is most striking about "Beyond the Butterfly" is its tone – which, by the standards of most political science scholarship today, exudes genuine excitement and a palpable sense of discovery. In a way, the

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[34] Richard Niemi and Paul Herrnson, "Beyond the Butterfly: The Complexity of U.S. Ballots." 1 *Perspectives on Politics* 317 (2003).

[35] Niemi and Herrnson, 317.

[36] Id.

[37] Id., 326 n.7.

[38] In the "early days" of the discipline, they write, ballot design was a prime topic of study, and in the middle of the twentieth century, there was "a flurry of studies" on ballot formats and split-ticket voting. Id., 317.

article's prime findings are quite straightforward, even mundane – for example, one table shows that while some ballots described the Democratic candidate as "Vice Presidcnt Al Gore," others called him "Albert Gore," "Al Gore," and "Gore."[39] Yet these two eminent political scientists clearly believe they have an extremely important set of results to share. And indeed they do, for "Beyond the Butterfly" is a prime document in what amounts to an ongoing rediscovery of the science of ballots – once called "psephology"[40] – among political scientists and researchers in cognate fields. In "Beyond the Butterfly," we see prominent displays of the names, symbols, instructions, phrases and arrangements used on ballots. Here senior scholars, writing in a very high-status journal, have based an article on illustrations of *the actual words, images, and practices* employed in American national elections.[41]

Like most of their colleagues, Niemi and Herrnson conclude that ballot variation has negative consequences, and argue for "[d]oing away with the curiosities, conundrums, and complications" that characterize American ballots in the twenty-first century. They write that this will not be easy, for these variations "have their origin in

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[39] Id., 319.

[40] I first encountered this term in L.E. Fredman's *The Australian Ballot: The Story of an American Reform* (1968), at 119. Fredman refers to "psephology" *not* as the study of ballots themselves, but of voter behavior. As Fredman writes,"[t]he conduct of elections now attracts little attention from political scientists. It is assumed that they are fair and orderly, and an accurate expression of the popular will. It is otherwise with psephology, the study of the electors' behavior." Id., at 119. Etymologically, however, the word refers more specifically to ballots than to behavior. Webster's *Ninth New Collegiate Dictionary* defines psephology as "the scientific study of elections," but notes that it is derived from the Greek term for "pebble," which also came to mean "ballot" or "vote," since some elections were decided by that means. See *Merriam-Webster's Ninth New Collegiate Dictionary* (1988), at 949. An old edition of the two-volume *Oxford English Dictionary*, meanwhile, defines a "psephism" as a "decree enacted by a vote of a public assembly," and notes that a verb form of the Greek word for "pebble" meant "to vote." See *The Shorter Oxford English Dictionary*, vol. II, (Oxford, 1933), at 1611.

[41] See Niemi and Herrnson, *passim*.

the very nature of our political system."[42] The journal's editor, Jennifer Hochschild, takes a firmer normative position on our hyper-federalized system, writing that "states and even localities fiercely protect their autonomy in running the mechanics of elections, with consequences ranging from amusing to appalling."[43]

Something like a new consensus on the crucial role of election administration in American democracy is emerging, together with an acknowledgment that that significance has not been well understood – outside a small community of political practitioners and election-law specialists. Steven Schier has articulated this well. Schier observes that the "beehive of controversies" following the 2000 election "underscores the previously unremarked importance of election administration in American politics."[44] The topic "may at first blush seem dull," he writes,

> "but it shapes the stability, accountability, and turnout of America's electoral system. Its operations also indirectly affect governmental deliberation by influencing who is elected to direct the government's course."[45]

A rich and vast body of work continues to prove Schier right. It would be difficult, to say the least, to write a comprehensive review of the literature on American election law and voting practices in the last three years. The arrival of an important new article, book, court decision, legislative proposal, advocacy study, or journalistic report has literally become a daily event. Indeed, two weblogs – one administered by Loyola

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[42] Id., at 325. Three aspects of that political system are most relevant, they write: federalism; the great number of elected positions at all levels of American government; the proliferation of propositions, constitutional amendments, bond issues, and other state-specific ballot questions; and the current decentralization of election administration. Id.

[43] Jennifer Hochschild, "Introduction and Comments," 1 *Perspectives on Politics* 247 (2003), 247.

[44] Schier, *You Call This An Election?*, at 108.

[45] Schier, 115.

Law Professor Rick Hasen, the other by veteran voting-rights lawyer Edward Still – offer daily summaries of developments, with links to pieces in the media, advocacy reports, and scholarly articles.[46] These sources devote time to questions concerning "passive" voting rights (the right to be *elected*), such as ballot access, primary rules, and campaign finance, as well as "active" voting rights problems, those concerned with casting votes (or, the right to *elect*).

What follows, then, does not claim to be a comprehensive summary, but a few exemplars of the ongoing "rediscovery." Rather than engage with the substance of each piece, I offer these materials as evidence of the quality of attention now being paid to the nuts and bolts of elections in the United States, and as evidence of the need for an understanding of American suffrage which merges practices with constitutional and philosophical ideals. I've selected a few important and representative books, scholarly articles, and policy reports; while many of these studies were sparked or inspired by Election 2000, they do not take that event as their central focus. I discuss examples of that work in a subsequent section.

Three books stand out. One is political philosopher Dennis F. Thompson's *Just Elections: Creating a Fair Electoral Process in the United States*.[47] Thompson builds his examination of American elections around principles of justice, equality, free choice, popular sovereignty, and deliberation, arguing that "[t]he rights that individuals claim have different meanings and different effects depending on the nature of the institutions

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[46] See http://electionlawblog.org/>, Hasen's "blog," and <http://www.votelaw.com/blog/>, Ed Still's "blog."

[47] Dennis F. Thompson, *Just Elections: Creating a Fair Electoral Process in the United States* (2002).

in which they are to be exercised."[48] Thompson casts a broad net, but topics connected to local control and variation appear everywhere in the book. Steven Schier's *You Call This An Election?*, noted above, shares some ground with Thompson's book. Electoral administration is not his primary focus; Schier, like Thompson, tries to raise "broader questions about America's system of elections,"[49] from redistricting and campaign finance to the electoral college and direct democracy. But like Thompson, Schier devotes close attention to the connection — or lack thereof – between practices and ideals. Both books are expertly researched and synthesize the work of legislators, judges, scholars, and journalists.

One of the most important new works in the rediscovery is a collection of essays by political scientists and legal scholars, many of whom have been writing about related topics for some time. In *Rethinking the Vote: The Politics and Prospects of American Election Reform*, Ann N. Crigler, Marion R. Just, and Edward J. McCaffery assemble chapters examining a range of topics – the Electoral College, the news media's eagerness to "call" contests before they're over, the difference between "free speech" in campaigns and inside corporations, and the profound paradoxes posed by elections in modern democracies.[50] Several entries confront directly the peculiarities and perils of the hyper-federalized American system of election administration. R. Michael Alvarez and his co-authors examine ballot-counting; Jon A. Krosnick and two colleagues write about the effects of name order on election outcomes; and throughout, the authors consider what

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[48] Thompson, *Just Elections*, at 5.

[49] Schier, at *ix*.

[50] Ann N. Crigler, Marion R. Just, and Edward J. McCaffery, eds., *Rethinking the Vote: The Politics and Prospects of American Election Reform* (2004).

should change and why. Though many of the authors have tilled these fields before, they also understand that there is a new urgency to their work today. As Crigler and her co-authors put it in one essay, before the election of 2000 the "more mundane, technical issues of balloting—such as ballot formats and types of voting machines—had not made it onto the public radar screen since the first decades of the twentieth century".[51]

Scholars whose critiques reach beneath the ballot and local variation have also capitalized on the new attention given to electoral forms. Lisa Jane Disch published *The Tyranny of the Two-Party System*,[52] which focuses on the benefits obtainable from fusion balloting and critiques the role of political science in constructing the ideology of the two-party system. (Disch began work on the book in the mid-1990s, but she notes the renewed interest in voting and elections since 2000.) And Douglas J. Amy published a new edition of his argument for proportional representation, *Real Choices/New Voices*, acknowledging that the 2000 election had alerted Americans to the importance of "the workings of the electoral system itself."[53]

In addition to the Niemi and Herrnson article described above, three others merit mention here as important "rediscovery" documents. One comes from Richard Bensel, a leading scholar of American state-building. Writing in *Studies in American Political Development*, Bensel reinterprets voting practices in the nineteenth-century U.S.[54] Bensel examines three "aspects of the context within which the polling place is located":

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[51] Crigler et al., "Cleavage and Consensus," in Crigler et al., *Rethinking the Vote*, at 152

[52] Lisa Jane Disch, *The Tyranny of the Two-Party System* (2002).

[53] Douglas J. Amy, *Real Choices/New Voices: How Proportional Representation Elections Could Revitalize American Democracy*, Second Ed. (2002), at 2.

[54] Richard Bensel, "The American Ballot Box: Law, Identity, and the Polling Place in the Mid-Nineteenth Century." 17 *Studies in American Political Development* 1 (Spring 2003).

the physical setting of the polling place itself; the sociological composition of the community, in terms of race, ethnicity, wealth, and literacy; and laws governing elections.[55] What is crucial for my purposes is that Bensel aims in his article to construct "a theoretical framework resting on the actual *practice* of elections".[56] In a footnote, Bensel writes that the essay therefore attempts "to fill a void in both American political historiography and general democratic theory, where the latter merges into material practice."[57]

We can see the breadth and richness of the rediscovery by juxtaposing Bensel's article and a short piece by Jennifer Stromer-Galley on internet voting.[58] Employing Habermas' conception of the "public sphere," Stromer-Galley – like Bensel – discusses "what it means to vote" in terms of the "physical, public space" people enter to cast a ballot.[59] Stromer-Galley summarizes the results of about 60 discussion groups, finding that most participants were enthusiastic about voting on-line. These respondents understood voting primarily in terms of the private sphere, rather than the public; they didn't seem wedded the idea of what Stromer-Galley calls "physical polling."[60]

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[55] Bensel, "The American Ballot Box," at 5.

[56] Id., at 5; emphasis in original.

[57] Id., at 5, n.10. Bensel quotes approvingly from David Grimsted's book about violence in the pre-Civil War U.S., *American Mobbing*, in which Grimsted argues that historians – like many behavioral political scientists – have "largely counted votes rather than paying attention to the complicated realities of casting them...." See *id.*, quoting Grimsted, *American Mobbing, 1828-1861: Toward Civil War* (1998) at 183.

[58] Jennifer Stromer-Galley, "Voting and the Public Sphere: Conversations on Internet Voting." *PS: Political Science and Politics*, Oct. 2003, 727-731.

[59] Id., at 727.

[60] Id., at 731.

Interestingly, another article in the same edition of the journal examines the growing importance of overseas voters in U.S. elections, analyzing the "globalized electorate" in terms of electoral impact, absentee ballot rules, and other issues. See Taylor E. Dark III, Americans Abroad: The Challenge of a

Is something lost when significant numbers of Americans vote early, or absentee, or by mail, or on-line? Dennis F. Thompson believes the answer is yes, and develops the argument in a thoughtful new article in the *American Political Science Review*. To some extent, the essay – "Election Time: Normative Implications of Temporal Properties of the Election Process in the United States"[61] – represents a continuation of Thompson's 2002 book *Just Elections*. Thompson examines three central characteristics of elections – periodicity, simultaneity, and finality – and argues that they require reforms in American suffrage practices. These "temporal properties" of elections, he writes, "are so familiar that they are usually taken for granted, but the way they structure the electoral process has significant theoretical and practical implications that have not been sufficiently appreciated."[62] Specifically, Thompson argues that important philosophical principles should lead us to take legislatures out of redistricting fights, oppose exit polls and early voting, and limit campaign advertising, among other reforms.[63]

Thompson brings a political philosopher's eye to the rediscovery. But out in the "public sphere" of American political discourse, something like a cottage industry in the study of election administration has sprung up virtually overnight, and there people are quite interested in the immediate future. One of the best post-2000 studies merging scholarship with policy advocacy was also one of the first: the CalTech/MIT Voting

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Globalized Electorate, *PS*, Oct. 2003, 733. While his article does not delve into such questions, the author notes that expanding overseas voting "raises profound questions about the relationship of territoriality and citizenship in a rapidly globalizing world." Id.

[61] Dennis F. Thompson, "Election Time: Normative Implications of Temporal Properties of the Election Process in the United States." 98 *American Political Science Review* 51 (February 2004), 51-64.

[62] Id., at 51.

[63] Id.

Technology Project's July 2001 report "Voting: What Is, What Could Be."[64] The report, which runs to almost one hundred pages, places itself "at the intersection of technology with democracy," and laments that American self-government's "'can-do' spirit has 'make-do' technology as its central element."[65] The study's core recommendations – more optical-scan machines and better registration rolls[66] – soon became HAVA's central objectives.

Voting technology has become perhaps the most controversial topic, particularly the use of electronic devices which do not yield a voter-verifiable "paper trail."[67] The Congressional Research Service published a comprehensive analysis of security problems with new technology late in 2003,[68] following a similar paper by Johns Hopkins and Rice University computer scientists.[69] Other studies – published by organizations such as Electionline.org and Demos – have wrestled with problems linked to our hyper-federalized system. Meanwhile, in the high temples of the legal academy, a new non-partisan student group called "Just Democracy" is forming which will endeavor to supply

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[64] CalTech/MIT Voting Technology Project, "Voting: What Is, What Could Be." July, 2001.

[65] Id., at 2.

[66] Id., at 82. After these and other specific recommendations, the conclusion ends with a softer, almost wistful "someday..." list of characteristics the authors wish our electoral system has. Id.

[67] See, among many, many journalistic examples, the editorial in the *New York Times* titled "Making Votes Count: Fixing Democracy," Jan. 18, 2004, at sec. 4, p.10. The editorial launched the "Making Votes Count" series of editorials, available at http://www.nytimes.com/makingvotescount>. The most recent, "When the Umpires Take Sides," urged states to de-politicize the office of Secretary of State as much as possible, so that "no state official who helps run elections should continue to be involved in political campaigns or other partisan activity." See "When the Umpire Takes Sides," *N.Y. Times*, March 29, 2004, A24.

[68] See Eric A. Fischer, "Election Reform and Electronic Voting Systems (DREs): Analysis of Security Issues." Nov. 4, 2003, by the Congressional Research Service.

[69] See Tadayashi Kohno et al., "Analysis of an Electronic Voting System," July 23, 2003.

election monitors to "high-risk polling places around the nation," according to the group's press release.[70]

In publicizing that law-student group's formation, a prominent election-law scholar recently observed that many of her students had been "shocked by some of the problems encountered during the 2000 election."[71] Of course, much of the best critical and scholarly work on American voting rights in the last few years has been framed as a direct response to the election of 2000, and I describe some of that work here as a way of demonstrating the need for a new understanding of the suffrage.

Each of the studies noted above asks, in some way, what our hyper-decentralized suffrage system tells us about American democracy in some theoretical or substantive way – about how we understand equality, or the depth of American federalism, or the operation of popular sovereignty. Election 2000 – offering as it did what one voting-rights lawyer recently called "a vivid glimpse behind the scenes of a fragmented and politically compromised system"[72]—made clear that such questions must be asked. But the reason the election drew the attention of political scientists to our fragmented electoral system is that it did the one thing guaranteed to catch the eye of behavioral scholars: it showed that local variation in suffrage practices can *affect outcomes*.

After all, "The Butterfly Did It," as one prominent article concluded: Palm Beach County's confusingly-designed "butterfly" ballot gave Patrick Buchanan thousands of

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[70] See "'Just Democracy' Project Seeks to Provide Clear Path to the Ballot," press release, distributed to the election-law listserv (election-law@majordomo.lls.edu) by Harvard Law Professor Heather Gerken, March 17, 2004.

[71] See e-mail to the election-law listserv (election-law@majordomo.lls.edu) by Heather Gerken, March 17, 2004.

[72] See Jamin Raskin, "Suffrage Suffers in the Land of Rights," *Los Angeles Times*, March 15, 2004 (page number unknown).

votes he should not have received, depriving Vice President Gore of more than enough votes to defeat George W. Bush.[73] More broadly, the difficulties encountered by Florida's "slapdash system of election administration" revealed that "America's decentralized system of election administration can produce unreliable results that make the outcome of any close election suspect."[74] Of course, in an election so exceptionally close, any number of random factors could have "decided" the outcome, and we still do not know just how random many of Florida's problems were. But the election still "provides a signal opportunity to think critically about the complex interaction between democratic politics and the formal institutions of the state."[75]

In her polemic against the institutional American parties, political theorist Lisa Jane Disch interprets Florida to mean that "we have *many* party systems" rather than two – because in the election aftermath "the process stood with its several ballots, voting technologies, and ways of counting revealed...."[76] But beyond the question of parties themselves, she writes, lay problems with "[o]ur voting process" – linked not necessarily to overt partisan motives, but "a more insidious trouble with aging voting machines and insufficiently staffed polling places that need not be intentionally partisan in order to have partisan effects." This problem is particularly hard to solve in a federalized system

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[73] "The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida," Jonathan N. Wand et al., 95 *American Political Science Review* 793 (2001). The story of how these social scientists met law and politics in the turmoil of the Florida recount is in Henry E. Brady et al., "Law and Data: The Butterfly Ballot Episode," 34 *PS: Political Science and Politics* 59 (2001).

[74] Schier, *You Call This An Election?*, at 1.

[75] Issacharoff et al., *When Elections Go Bad* (2001), at *iii*. These authors are most interested in exploring "the judicial and political remedial structures, state and federal, for resolving election disputes." Id., *iv*.

[76] Disch, *The Tyranny of the Two-Party System* (2002), at 129; emphasis in original.

that "leaves the value of the vote to be determined by whatever tax dollars a given county can afford to invest in it."[77]

Perhaps the hottest charge leveled at the U.S.'s fragmented system after 2000 focused on those dollars, alleging that poor – and predominantly minority-population, and Democratic-voting – counties in Florida and other states were more likely to have the worst error-prone technology. But using county-level demographic data from the Census bureau and county-level data on voting equipment, Stephen Knack and Martha Kropf find "remarkably little support for the view that resource constraints cause poorer counties with large minority populations to retain antiquated or inferior voting equipment."[78] The authors note limitations in their methodology, and other studies have produced different results.[79] Here, what is most important is simply that this major analysis of equitable voting rights in U.S. national elections takes as its crucial object of study not the rulings of federal courts or the language of state constitutions, but the decisions of *counties*. And even county-level analysis was not sufficient to capture all variation among the six different voting methods used in the U.S. In five states – Maine,

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[77] Id., at 131. Later, however, Disch makes clear that her ultimate target is the parties, *not* the machinery. Fixing mechanical problems, she writes, would not remedy "an unfairness that has nothing to do with counting ballots [and] everything to do with *wasting* them." Id., 134; emphasis in original.

[78] Stephen Knack and Martha Kropf. "Who Uses Inferior Voting Technology?" *PS*, September 2002, 541-548.

[79] Notably, they focus on *use* of each technology, not the number of *invalidated ballots* produced by different kinds of machines in different locales. Other studies have shown a relationship between error rates in predominantly African-American communities and the use of punch-card technology. Id., at 547; see also 541 (listing other studies which produced different results).

Explaining why some counties retain old machines while others adopt new technology is a complicated task, and beyond the scope of their paper. But the authors suggest that volume, desire for quick results, and availability of managerial staff and expertise have historically been at least as important as minimizing error. Id., at 543.

Massachusetts, New Hampshire, Vermont, and Wisconsin – voting equipment is selected at the municipal level, so some counties in these states use a mix of technologies.[80]

Another post-2000 study employs statistical methods to explore county-level variation in election technology, its causes, and its effect on outcomes. Political scientists Brian L. Fife and Geralyn M. Miller's *Political Culture and Voting Systems in the United States: An Examination of the 2000 Presidential Election*[81] tries to ascertain whether political culture affects the voting systems Americans use, applying Daniel Elazar's well-known typology of "cultures" in the United States. While their regression results are dogged by statistical insignificance in numerous places, Fife and Miller document some connections between cultural type and election technology.[82] Unfortunately, the authors do not offer much theoretical support for any explanation of these connections, and ultimately, they suggest that population size and income are as likely to explain voting technology as is political culture.[83] Nevertheless, as a document in the rediscovery of psephology, the book vividly illustrates that the 2000 election "charts the course for a new way of looking at voting rights in America," as Fife and Miller write.[84]

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[80] These counties contain about 8% of the U.S. population. Id., 542. Knack and Kropf analyze how differences in ethnicity, poverty status, partisanship, personal income, and property taxes paid align with use of each technology. Id., 544-546.

[81] Brian L. Fife and Geralyn M. Miller, *Political Culture and Voting Systems in the United States: An Examination of the 2000 Presidential Election* (2002).

[82] The authors conclude that voters in "moralistic" states use paper more than their counterparts elsewhere; that "traditionalistic" states use DRE systems more heavily than "moralistic" states; that lever machines are found more often in "individualistic" than moralistic states; and that optical scan technology is used more often in moralistic states than in individualistic states. Id., at 55.

[83] Id., 78-79. This is stylistically a somewhat odd book. For example, it includes not only the kind of detailed explanations of regression equations one usually finds in conference papers, not books, but also explanations of the regression method itself, sometimes running to several pages. See, for example, id. at 45-49.

[84] Id. at 87.

New ideas about how to understand voting rights after *Bush v. Gore* have also come from the legal academy, of course. The number of articles, books, and symposia on the decision and its aftermath runs into the hundreds.[85] For not only was the decision controversial and momentous, but in the crisis "[f]orms of law became exposed to an intense nationwide scrutiny," as law professor Abner Greene writes.[86] Greene's analysis is particularly important here, because he integrates the power of local officials in American elections into a framework of Constitutional legal "forms." Greene contends that the Court could have used a First Amendment approach to reach the same result, without raising as many potential problems as the equal-protection rationale. As Greene writes,

> "[i]n many freedom-of-speech and freedom-of-the-press cases, the Court has insisted that, when law gives discretion to public officials, that discretion must be bounded by clear, objective criteria. For example, if city law gives a city official power to grant or deny parade permits, or power to grant or deny requests to use loudspeakers at a city hall gathering, that law will be upheld only if it sets forth detailed, neutral, objective standards for granting or denying the requests.... Although the Court has never applied this line of cases in the voting rights setting, voting rights share with speech and press rights a core political nature—they are all part of our essential citizenship; they are what allow us, rather than officials, to remain in control of government."[87]

The idea of defining voting as an act of political expression protected by the First Amendment is not itself new.[88] But Greene's argument shows that beyond behavioral

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[85] An up-to-date summary is in Richard L. Hasen, "A Critical Guide to *Bush v. Gore* Scholarship," Social Science Research Network (SSRN) Research Paper No. 2004-2, January, 2004.

[86] Abner Greene, *Understanding the 2000 Election: A Guide to the Legal Battles That Decided the Presidency* (2001), at 180.

[87] Greene, at 132.

[88] See, for example, Adam Winkler, *Note: Expressive Voting,* 68 N.Y.U. L. REV. 330 (1993).

political science, scholars of voting rights now understand that variation in local practices must, one way or another, be reconciled with American constitutional principles.

Surprisingly, some of the best books on *Bush v. Gore* do not devote much attention to this problem. For example, Howard Gillman's *The Votes That Counted: How the Court Decided the 2000 Presidential Election*[89] is a terrific analysis of *Bush v. Gore* in legal and partisan political context, but beyond explaining their importance for equal-protection analysis, it does not take up questions of localism. Bruce Ackerman's edited collection, *Bush v. Gore: The Question of Legitimacy*,[90] discusses county canvassing boards only in the context of judicial disputes over equal protection.[91] And Ronald Dworkin's *A Badly Flawed Election*[92] also focuses on the Court's decision itself, with slightly more attention paid to elements of the election outside those considered by the Court, such as the electoral college.

The *Bush v. Gore* book which devotes the most sustained attention to the local dimension of American suffrage may be Richard A. Posner's *Breaking the Deadlock*.[93] The best-known aspect of Posner's book is his account of the Court's decision as "pragmatically," rather than doctrinally, "defensible."[94] Posner, meanwhile, is eager to frame his argument in partisan and iconoclastic terms. But he actually devotes more

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[89] Howard Gillman, *The Votes That Counted: How the Court Decided the 2000 Presidential Election* (2001).

[90] Bruce Ackerman, *Bush v. Gore: The Question of Legitimacy* (2002).

[91] The central questions concerning Ackerman's contributors are whether the decision has a "foundation in legal principle," what if anything needs be done to reestablish the country's belief in the rule of law, and what the political implications are of having judges effectively decide a national election. Ackerman, at x-xi.

[92] Ronald Dworkin, *A Badly Flawed Election* (2001).

[93] Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* (2001).

[94] Posner, at *ix*.

space to detailing reforms that would help prevent "another Presidential election fiasco" [95] than do many critics of the decision. Moreover, he faces squarely the fact of local control over the American national electoral process. In addition to calling for the abolition of punchcards, Posner urges that ballots be "counted at the *precinct* level to enable as many spoiled ballots as possible to be revoted."[96] (Posner's regression analysis of the sources of spoiled ballots identifies "county-counted" as one of the leading indicators of increased ballot spoilage.)[97] And though he elsewhere treats the lack of voter assistance quite cavalierly, Posner's conclusion argues that people who are "very poorly educated" should not

> "be prevented from voting by a de facto literacy test, which is what punchcard voting technology amounts to, and, to a lesser extent, marksense technology as well when the votes are counted at the county rather than the precinct level."[98]

This is a striking claim. Here Posner not only calls a given ballot type a "de facto literacy test," but does the same for the *place where the ballots are counted*. For all Posner's "conservative" endorsement of the outcome in *Bush v. Gore*, this is one of the more radical critiques of American electoral administration to be found in the literature surrounding the case.

Even among election lawyers, relatively few understood just how important and controversial election administration could be prior to 2000. As Posner points out, "the acquaintance of the professional commentators with the actual administration of

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[95] Id. at 260.

[96] Id. at 259; emphasis added.

[97] Id.

[98] Id. at 259.

elections" was limited.[99] This was largely because of their reliance on Supreme Court decisions as the "texts" of constitutional law, Posner argues. In the huge body of Supreme Court case law on elections, he writes, "virtually none" deals with election administration.[100]

III. How We Got Here: Dominant Approaches to Suffrage Before *Bush v. Gore.*

Posner's criticism of the legal academy's blinders is somewhat overstated, probably because his larger purpose is to discredit the legal professoriat, which was so critical of *Bush v. Gore.*[101] Nevertheless, he's generally right,[102] and this brings us to an important point. Within the range of academic fields studying elections, it was probably voting-rights scholars who had the best chance at perceiving how important the local dimension is in American suffrage. (To be sure, many did, since the renewed and revised

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[99] Id. at 204. Posner writes,

> "That the systematic though not deliberate disenfranchisement of black voters, poor voters, voters with limited experience, new or occasional voters, and voters with reading difficulties might be due to the choice of voting systems had not occurred even to those academics who teach their students, and write for their colleagues, about the constitutional issues created by racial gerrymandering, poll taxes, and literacy tests."

Id. at 204-205. For a book on the courts and the Constitutional law of elections which supports Posner's point, see Christopher P. Banks and John C. Green, eds., *Superintending Democracy: The Courts and the Political Process* (2001). The volume deals with issues such as gerrymandering, campaign finance, and parties; there is very little on administration or localism.

[100] Id. at 207.

[101] One particularly sharp passage attributes the law professoriat's horrified response to the decision in part to

> "a dawning recognition that activist decisions (and, right or wrong, *Bush v. Gore* is undoubtedly activist, in adopting a bold, novel, and expansionary interpretation of federal judicial authority over the electoral process) are as much a weapon of the right as of the left, and that the left's uncritical approbation of liberal activist decisions such as *Roe v. Wade* has disarmed the academic left against the activism of a conservative Supreme Court." Id. at 258.

[102] See, for example, Lowenstein and Hasen, *Election Law, Second Ed.*(2001), at 65, acknowledging that "[u]ntil the controversy surrounding the results in Florida in the 2000 presidential elections, few people probably ever thought about how election administrators counted (or failed to count) ballots."

Voting Rights Act uses federal bureaucracies and courts to tackle problems rooted in systemic discrimination at the local level, such as restrictive registration practices and the lack of bilingual ballots.) Election law – a field standing at the intersection of constitutional law and political science[103] – has blossomed as a specialization in recent years, as two substantial casebooks make abundantly clear.[104] Yet even here, there is an acknowledgment that scholars have not paid enough attention to these phenomena before now.

The legal academy is not alone in this regard, to be sure. The purpose of this section is to show what different approaches to suffrage have been missing, and to demonstrate that the ongoing rediscovery is something of a corrective to our discipline's past approaches. I sample work in three broad literatures: what we might call the "public law" approach; the rational-choice method; and the behavioral study of voting behavior. While each field has produced terrific insights, each has also helped construct a kind of "rights talk"[105] concerned too much with an abstracted, nationalized creature called "the American voter," and too little focused on the rich, diverse, locally-textured practices of American suffrage.

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[103] See Richard L. Hasen, "Election Law At Puberty: Optimism and Words of Caution," 32 *Loyola Law Review* 1095 (1999), at 1095. Hasen writes that "no one can seriously question whether election law is a subject in its own right, related to but apart from its very different parents, constitutional law and political science." A fascinating essay in the same journal is Bruce E. Cain, "Election Law As Its Own Field of Study," 32 *Loyola Law Review* 1095 (1999).

[104] See Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process, Rev'd Second Ed.* (2002); Daniel Hays Lowenstein and Richard L. Hasen, *Election Law: Cases and Materials*, 2nd ed. (2001).

[105] See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991).

a. Public Law.

Within the "public-law" approach, I mean to refer to scholars from various disciplines who've been interested in how American constitutions and statutes define the franchise, and in the meaning of such definitions. Perhaps because there has in fact been so much *change* in explicit suffrage qualifications in American law,[106] scholars have focused on those changes, and have been misled before. In 1928, Harvard historian William B. Munro wrote that the history of American suffrage was "a long and not a very interesting story." He considered that story to have ended. As perceptive a political scientist as E.E. Schattschneider wrote in 1960 that "the struggle for the ballot," which had been "completely peaceful and astonishingly easy," was over. Both Munro and Schattschneider had a good deal of company.[107] Part of why scholars like Munro and Schattschneider got it wrong is that they defined the suffrage solely in terms of constitutional and statutory rights—what we might call the "formal" dimension. From this perspective, asking whether urban Southern blacks had a "right to vote" in 1960, it was possible to answer affirmatively – before the formal demise of the poll tax, with literacy tests still common, rural white districts wielding disproportionate influence in

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[106] See generally Keyssar, *The Right to Vote* (2000).

[107] Keyssar, at *xviii-xx*. One fascinating source reveals that *criticism* of the formalistic, constitutionally-focused approach is generations old, as well. In his 1930 book *The Growth and Decadence of Constitutional Government* (1930), J. Allen Smith writes that "the older and more conservative school of writers in political science" have

> "almost without exception made their discussion of American institutions and problems hinge on the legal theory of the Constitution, which has supplied the norm by which not only laws and policies but even the literature of politics has been evaluated. No writer could hope to win recognition in this field who did not pay homage to our constitutional system by making it the criterion by which controverted questions were to be finally decided."

Smith, at 59-60. Smith's criticism here of the "purely formal and, for the most part, barren character of our later contribution to the literature" focuses on the failure to explore the ideas and principles "back of the Constitution," rather than on practices. Id.

national and state legislatures, and registration rules much more cumbersome than they are today.

Political scientists and legal scholars have long viewed suffrage as an essential component of citizenship. But emphasis has tended to fall on the formal possession of the right to vote, with its attendant symbolic message of inclusion,[108] rather than on the practice of voting itself.[109] That limitation is evident in some of the most insightful and critical work on the suffrage and citizenship. Judith Shklar, for example, essentially argues in *American Citizenship* that the most important thing about the right to vote is its possession, whether or not it's ever employed as a means to any end – or, by extension, in any particular context or fashion.[110] And even some of the best "institutional political theory," such as Dennis F. Thompson's *The Democratic Citizen*, tends to abstract suffrage from the distinctive, hyper-federalized American context.[111] Such analyses are not "wrong" – far from it. We now understand far better than we did a generation ago

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[108] See Judith Shklar, *American Citizenship: The Quest for Inclusion* (1991). Shklar writes, "The struggle for citizenship in America has, therefore, been overwhelmingly a demand for inclusion in the polity, an effort to break down excluding barriers to recognition, rather than an aspiration to civic participation as a deeply involving activity." *Id.* at 3. See also *id.* at 45: "citizenship and voting had become inseparable."

[109] See Brigham, *The Constitution of Interests*. Brigham refers to "a mutually constitutive process by which groups seeking to influence the law are themselves influenced by the way they understand it," and writes that excessive emphasis on a certain view of rights "distracts us from the forms that constitute" rights and interests. Pages *x*, 130.

[110] Shklar writes, "[t]he deepest impulse for demanding the suffrage arises from the recognition that it is the characteristic, the identifying, feature of democratic citizenship in America, not a means to other ends." Shklar, *American Citizenship*, at 56.

[111] See Dennis F. Thompson, *The Democratic Citizen* (1970), at 120-148. This excellent discussion of voting focuses almost entirely on questions of rationality and collective decision-making in democratic elections.

just how important suffrage restrictions have been in American political history and development.[112]

As Keith Bybee has demonstrated, courts and legal disputation have played an essential role in "constructing" the political identity of the American voter, particularly in relation to race, community and the meaning of "the people."[113] Similarly, scholars' attention to legally-enforced voting rights may have both constructed and *constricted* our understanding of the meaning of suffrage. Numerous vital problems in American ideology, politics and law concern constitutional and statutory limits on the right to vote, and generations of scholars have attacked them with zeal and skill. But in so doing, we have mistakenly considered suffrage to be a "settled" subject before, and have failed to perceive essential attributes of the electoral process—in particular, the power of local officials.[114]

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[112] One of the best examples of this correction is J. Morgan Kousser's *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (1974). Kousser wrote in 1974 that V.O. Key's analysis of Southern politics "reflected a more general belief shared by many other political scientists that electoral laws play a minimal role in shaping the political system." Kousser, at 3. One of Kousser's central objectives in *The Shaping of Southern Politics* is to respond to Key's claim that suffrage restrictions merely formalized changes in Southern politics already brought about by other means. Specifically, the question is how the Democratic Party came to dominate the South; Kousser claims that is rise was "directly connected with suffrage restriction," whereas Key focuses on other reasons. Id.

[113] See Keith Bybee, *Mistaken Identity: The Supreme Court and the Politics of Minority Representation* (1998).

[114] Some recent scholarship has paid close attention to this issue. See Keyssar, *The Right To Vote*, *passim*; Dennis Thompson, *Just Elections: Creating a Fair Electoral Process in the United States* (2002), at 55-61, examining "Equality versus Locality" in the law of elections. An intriguing earlier exploration of the importance of local phenomena and local culture surrounding elections is Frank O'Gorman, "The Culture of Elections in England: From the Glorious Revolution to the First World War, 1688-1914," in Eduardo Posada-Carbo, ed., *Elections before Democracy: The History of Elections in Europe and Latin America* (1996), 17-31. O'Gorman writes that it is "obvious" that "the necessary vehicle for the 'performance' of electoral culture is a party system operating at the local level." Id., 29.

Close documenting of the power of local officials in the American context has mostly been confined to its most severe exclusionary dimension, particularly in the Jim Crow South. See *Louisiana v. U.S.*, 380 U.S. 145, 153 (1965), in which the Supreme Court struck down Louisiana's "understanding" test and observed that it depended on the "whim or impulse" of local registrars.

The irony in this focus on formal rights is that under the U.S. Constitution, as recently interpreted by the *Bush v. Gore* Court, the "individual citizen has no federal constitutional right to vote for electors for the president of the United States."[115] None of the many voting-rights amendments contains a positive statement, or affirmative entitlement, of a right to vote, particularly for President or U.S. Senator; if a state chooses to hold such an election, however, it cannot exclude citizens from the franchise without a compelling reason to do so.[116]

Of course, the "right to vote" has been an immensely powerful legal and political concept nonetheless, and it may have achieved something like the status of a "catchphrase." Lisa Jane Disch revives this term, borrowed from party historian Ronald P. Formisano, as a way to attack not only the two-party system, but political science. Some phrases, she writes, become "more than a name for a thing" – they begin to "form[] the very fields to which [they] only seem to refer."[117] Eventually, she contends, the idea of the two-party system has "*disciplined* voting," by "positing major party voting as legitimate, rational, and calculable behavior," and marginalizing other forms of behavior.[118]

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[115] *Bush v. Gore*, 531 U.S. 98 (2000).

[116] Citizens convicted of crime are, of course, the last great exception to this standard. See *Richardson v. Ramirez*, 418 U.S. 24 (1974).

[117] Disch, *The Tyranny of the Two-Party System* (2002), at 59-61.

[118] Disch, at 81. Disch is punning with "discipline" here, criticizing the field of political science while using the term "discipline" as Foucault employed it. As Disch writes, this kind of discipline "forms objects of knowledge, designates canons of relevance, institutionalizes techniques and methods of investigation, and recognizes those who may speak, know, and act with authority." Id., at 81.

Catchphrases can become obstacles, as Disch writes, when "the very terms in which we have come to speak about this system render us less likely to question it."[119] The analogy to the phrase "the right to vote" here is only partial, of course: Disch's normative agenda is to attack the duopolistic power of the dominant parties, while mine is to enrich and strengthen our conception of voting and voting rights by defining suffrage as a practice.

But it seems clear that the current rediscovery of psephology springs partly from a sense among scholars that *something* kept us from looking closely enough at the particularities and practices of suffrage. Part of the explanation is that the American "right to vote" has been understood by most public-law scholars in formal, binary, Constitutional and symbolic ways, rather than as a complex and locally-contingent practice.[120]

b. Rational Choice

A second approach to voting which has produced powerful insights but which now appears seriously limited is the public-choice or rational-choice method. In the study of voting, the founding work in this field is probably Anthony Downs' *An Economic Theory of Democracy*.[121] Downs' explanation of why voting may be irrational, from the perspective of costs and benefits, remains useful and provocative. But rational-

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[119] Disch, 82.

[120] While the field of comparative election study has boomed in the last two decades, even some of the best recent synthetic work does not devote much space to election administration and suffrage practices as those terms are considered here. See, e.g., David M. Farrell, *Electoral Systems: A Comparative Introduction* (2001). Farrell's book compares proportional, majoritarian, and mixed systems.

[121] Anthony Downs, *An Economic Theory of Democracy* (1957).

choice approaches to politics tend to achieve their greatest insights precisely by abstracting *away* from particular practices and toward general theories, and that has come at a cost. Others have been pointing out those limitations for some time, particularly in terms of turnout. "Unfortunately for [rational choice] theory," wrote one scholar, "people do vote."[122] Another leading public-choice scholar lamented, "[o]ur specialty has developed clear models of first and second derivatives but cannot answer such simple questions as 'Why do people vote?'"[123] After all, it's been clear to theorists for some time that, as Hanna Pitkin put it, the typical voter "is not, of course, the rational, informed, interested, politically active citizen our formula seems to require."[124]

Public-choice theory has raised crucial questions in the study of elections and voting behavior. It is a broad and flexible approach, and has important contributions to make to a practice-based understanding of suffrage – for example, in developing ideas about how fragmented and obscure procedures may increase information costs to voters, decrease turnout, and increase the number of blank or mis-marked ballots. However, on balance this approach has not asked the kinds of questions that bring the distinctive nature of American voting into more clear focus.

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[122] Carole Uhlaner, quoted in Donald P. Green and Ian Shapiro, *Pathologies of Rational Choice Theory* (1994), at 50. Chapter Four of Green and Shapiro's volume, "The Paradox of Voter Turnout," at 47-71, is an excellent summary of criticisms of the rational choice approach to voting.

[123] William Niskanen, quoted in Jeffrey Friedman, "Introduction: Economic Approaches to Politics," in Friedman, ed., *The Rational Choice Controversy* (1996), at 13. An excellent survey of literature on the decision to vote as "rational" is in Daniel Hays Lowenstein and Richard L. Hasen, *Election Law: Cases and Materials*, 2nd ed. (2001), at 46-57.

[124] Hanna F. Pitkin, *The Concept of Representation* (1967), at 219. Voting decisions, wrote Pitkin, are determined far more by "habit, sentiment, and disposition" than by calculations of self-interest. *Id.* Another authority concluded after a lengthy study of political activity in one city that "there is very little evidence of the intellectual processes in voting behavior—that is, open-minded, unprejudiced examination of each case in itself...and the coming to a cognitive decision on the merits of the matter." David Wallace, *First Tuesday: A Study of Rationality in Voting* (1964), at 272.

c. Voting Behavior

A truly massive literature – now in its second or third full generation – endeavors to explain election outcomes, demonstrating with empirical evidence why Americans vote as they do.[125] This dissertation is not about voting behavior; I've described some post-*Bush v. Gore* behavioral research on American suffrage practices above, and others with appropriate methodological interests are hard at work investigating such questions. Meanwhile, I draw throughout this project from many authors concerned with election outcomes and the effects suffrage rules and practices have on them. Still, it is important to note here that voting-behavior scholars by and large joined their public-law and rational-choice colleagues in failing to grapple with the local dimension of American voting rights. Rather than reviewing fifty years of behavioral literature in order to demonstrate that such work has largely ignored local variation, perhaps it is useful to examine two of the sources that have done most to help construct the nationalized creature known as "the American voter."

Of course, *The American Voter* is the title of the volume Angus Campbell and his colleagues published in 1960.[126] The book brilliantly synthesizes reams of research on electoral behavior, with a focus on turnout and voter choice in Presidential elections. Parties, ideologies, election law, and social status are among the many variables the authors arrange into the famous "funnel of causality" leading to electoral choice.[127]

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[125] See Thompson, *Just Elections* (2002), at 199 n.2, listing seminal works in empirical election analysis and noting that "they focus on outcomes (and procedures mainly as they relate to outcomes)."

[126] Angus Campbell, Philip E. Converse, Warren E. Miller, and Donald E. Stokes, *The American Voter* (1960).

[127] Id., at 24.

For all the complexity of its analysis, however, *The American Voter* tends to treat its subject on a national level. Of course, many variables are studied, including differences in regions (particularly North and South) and races (particularly whites and blacks). There is also occasional attention to state-level variation. But by and large, the unit of analysis is the individual voter, set in a national frame: "an interplay between remote events of national politics and individual constructions of political reality that result," as the authors put it.[128] The "American" voter, Bruce E. Cain writes, is here understood "in a highly aggregated sense."[129]

One section deviates from this course, and offers insightful analysis of county-level variation. The "American political system," the authors acknowledge, while "bound together by many nationwide features, embraces a variety of political subcommunities." Each community is a "medium within which [voting] behavior must occur;" individuals interpret events in their local settings, and so each medium "leaves some characteristic impress on that behavior." The most specifically relevant characteristics of the local medium, in their analysis, are election administration, ballot design, and partisanship at the county level. Maintaining the work's focus on election outcomes, the authors write that election laws and procedures may "have some real consequences on the day of elections." The rules governing elections "constitute an important aspect of the individual's political environment that bears directly upon our analysis of electoral behavior."[130]

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[128] Id., at 266.

[129] Bruce E. Cain, "Election Law As Its Own Field of Study," 32 *Loyola Law Review* 1095 (1999).

[130] Id., at 266-267.

Much of the discussion that follows is concerned with partisanship interacting with state-level electoral variations. However, in analyzing racial differences in turnout, the authors conclude that it is the *county* that is most important. Racial composition of counties, they discover, appeared to contribute to turnout: where blacks were *more* than 30% of a county's population, they were *less* likely to vote than in counties which were less than 30% black. Campbell and his colleagues interpreted these results to mean that "[w]here white dominance is numerically more extreme, there is apparently less community resistance to Negro voting." In other words, it was not variation in state legislation, but rather "informal, extralegal barriers" that "account for much of the variability in the turnout of the Southern Negro."[131]

A generation later, the successor to *The American Voter* appeared, titled *The New American Voter* and authored by Warren E. Miller and J. Merrill Shanks.[132] The new book offers methodological sophistication and new data, but maintains the focus on key questions of turnout and choice – "should I vote, and (if so) for whom?"[133] The nationalized voter remains the star of *The New American Voter*. In fact, the original's short, meaningful glance at local conditions' effect on turnout and partisanship has fallen away. There seems to be no significant discussion of county-level variation, differing

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[131] Id., at 279-281. Later in the chapter, Campbell and his colleagues also show that partisanship within the county affected whites, as well. The "partisan climate of the community," they write, may influence individual voting behavior, particular that of weak partisans, and particularly where ballot laws do not facilitate partisanship (such as by allowing straight-ticket voting). Id., 288. Meanwhile, their survey data show that the impact of ballot form on partisanship in voting "varies with the motivation of the voter." Id., 284. Registration requirements, meanwhile, affect the politically "uninvolved," but not the "intense partisan." Id., 286.

[132] Warren E. Miller and J. Merrill Shanks, *The New American Voter* (1996).

[133] Miller and Shanks, at *ix*. With a bit more modesty than warranted, Miller and Shanks describe their long and complex compendium of the antecedent and proximate causes of voting as offering merely "the skeleton of a complex causal structure." Id.

ballot forms or technologies, or any other part of what Campbell and his co-authors called the "local medium."[134] The absence is unfortunate and ironic, since so much had changed in American election law and practice between 1960 – the year Schattschneider prematurely declared the "struggle for the ballot" to be over – and 1996.

A second important source is the data generated by the American National Election Survey, or ANES. No data set has done more to help us understand modern American election behavior. But despite the large and ever-changing question set employed by ANES researchers – a question set developed through "fads and fancies," rather than anything more systematic[135] – the survey has not helped us see the importance of the local dimension of U.S. elections. I searched the codebooks employed at four-year intervals from 1948-2000, looking for terms relating to local administration.[136] "Town," "city," and "county" appeared frequently, of course, in respondent-identification sections, but only rarely and sporadically elsewhere. Since the 1950s, registration questions have appeared regularly in the survey, suggested as reasons for non-participation, but not enquiring about which officials one encountered in the registration process. In 1988, an interesting question related to voting rights – one which was quite prominent in eighteenth- and nineteenth-century suffrage development – appears for the first time:

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[134] In about thirty pages of bibliography, the authors do not mention Peter Argersinger, J. Morgan Kousser, or other prominent scholars of voting rights and administration; the Index does not mention registration at all, and the book makes only a few brief references to the Voting Rights Act of 1965.

[135] Miller and Shanks, *The New American Voter*, at *x*.

[136] I acquired the codebooks in portable document format (pdf), and searched using the "find" function. These searches work well, but are not perfectly reliable. I also searched the 1948-2000 cumulative file.

"We're interested in how far people have to go to vote. Where did you go to vote in the November election?"[137]

Aside from these questions, the only specific questions about American suffrage practices one encounters in five decades of ANES codebooks is a specialized Election Administration Survey – directed to election staff rather than voters, and employed from the mid-1980s at least into the 1990s.[138] Like *The American Voter*, the ANES has been invaluable in helping us understand trends and predictors of voting behavior. But over a half century when the American experience of elections has seen dramatic change – in ballots and ballot technology, registration rules, and the balance between national, state, and local authority under successive VRA statutes, to name a few areas – the ANES does not appear to have directly addressed the local dimension of suffrage.

IV. Suffrage as a Practice.

The limitations of each approach should not be overstated. I draw throughout this work on the insights of scholars classifiable under each of the schools criticized above. Indeed, one way of describing this project is that as it tries to build a new framework for understanding American voting, it cuts a new axis through the voluminous literature on suffrage and elections in the United States, identifying and connecting previous work. The fundamental premise of the new framework is this: as scholars think about voting, rights, and the law, we need to look more carefully at the *practice* of voting. American

[137] This appears in the 1988 ANES, section 14A, questions D3b. and D4. After encountering this question, I re-examined all previous codebooks, looking for "how far." 1988 was the first survey in which I found anything like this question; previous "how far" questions asked about topics such as population mobility generally. The codebook alone does not make clear how this data was checked or, for that matter, entered, since it appears to be a request for an address rather than a distance.

[138] I first found the EAS survey in the 1984 ANES codebook; I do not yet have the results of these surveys.

voting practices, in turn, direct our attention to "the places where law matters," as John Brigham has put it.[139] Responsibility for the administration and enforcement of rights rests with public employees[140]—particularly electoral rights, which depend in so many ways on the performances of public officials. In the United States, those practices, places, and officials are *local*, in distinctive and important ways. What Frank O'Gorman wrote about eighteenth- and nineteenth-century England is no less true of the U.S.: "[e]lectoral history must, of course, be rooted in local history."[141] The Constitution is obviously essential to understanding American suffrage. But so are the civil servants who "run the Constitution," in John A. Rohr's words.[142]

This is an institutional, rather than individualist, approach to voting. The individualist approach to suffrage emphasizes things like constitutional rights, the rationality of voters, and the expressive content of the ballot, all of which are indisputably important. But the individualist method still leaves us with an incomplete picture. An approach which focuses only on "the independent actions and discrete claims of individual voters," as Dennis Thompson argues, "neglects the interactive effects and structural patterns of the institutions in which elections take place."[143] The rights we

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[139] John Brigham, *The Constitution of Interests: Beyond the Politics of Rights* (1996), at *x*.

[140] See Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (1999), at 101. Holmes and Sunstein argue here that the enforcement of rights "depends on the timely delivery of limited public money to the agents charged with enforcing them." See also 119: rights "are implemented by public officials who, drawing on the public purse, have a good deal of discretion in construing and protecting them."

[141] Frank O'Gorman, *Voters, Patrons, and Parties: the Unreformed Electorate of Hanoverian England, 1734-1832* (1989), at 7.

[142] John A. Rohr, *Civil Servants and Their Constitutions* (2002), 141. Rohr writes, "[T]he examples of how civil servants play their roles as constitutional actors are quite disparate . . . but they all reinforce the point that civil servants 'run the Constitution,' i.e., they reduce its grand principles to practice by their actions both routine and extraordinary."

[143] Thompson, *Just Elections* (2002), at 5.

claim, writes Thompson, "have different meanings and different effects depending on the nature of the institutions in which they are to be exercised."[144] Thompson counsels us to deliberate over electoral rules and arrangements "between abstract theory and concrete practice, where principles and institutions meet."[145]

In his study of American citizenship, Kenneth L. Karst writes that voting is not just a tool for gaining power or expressing political preferences, but is "an assertion of belonging to a political community."[146] Karst here emphasizes the need for substantial equality in the national political community,[147] but many authors identify the *local* community as the essential context of suffrage. For example, in a 2002 essay appropriately titled "More Than A Vote," David M. Shribman of the *Boston Globe* sang the praises of the "shared, community experience" offered by "local polling places."[148] Shribman lamented that since he is always working on Election Day, he misses "the best

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[144] Id. Later, framing his examination of how electoral institutions define our principles of democratic equality, Thompson writes that "we need to consider not merely what the institutions do, but what they express. We need to give attention to the public meanings of electoral institutions." Id. at 21.

[145] Id. at 192. Thompson defines this approach as "institutional political theory." He writes that institutional political theory should have three central characteristics: it should examine principles in institutional context, consider the "incompletely theoretical" ideas of lawmakers and citizens, and interpret "midrange principles." Thompson, *Just Elections*, *viii-ix*.

[146] Kenneth L. Karst, *Belonging To America: Equal Citizenship and the Constitution* (1989), at 93. Karst quotes Judge Learned Hand: "I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture." Id. at 94.

[147] Karst writes that the principle of equal citizenship "is also a principle of substance; the principle goes unfulfilled when substantive inequalities effectively bar people from full membership." Karst, at 9.

For a similar critique, see Matthew A. Crenson and Benjamin Ginsberg, *Downsizing Democracy: How America Sidelined Its Citizens and Privatized Its Public* (2002). In a chapter entitled "The Rise and Fall of the Citizen," Crenson and Ginsberg write that Americans "do not seem to be in immediate danger of losing the formal rights they won in an earlier political epoch. The vestigial organs of citizenship can survive long after their original purposes have evaporated." Crenson and Ginsberg, at 46.

[148] David M. Shribman, "More than a vote," *The Boston Globe*, Oct. 29, 2002, at F1.

part of politics," which is going to "my neighborhood polling place."[149] Political scientist Paul Gronke, making the case against early and mail-in voting, asks "[d]o we really want to end that most essential act of public participation: going to the polling place and casting a ballot?"[150] Dennis Thompson agrees, emphasizing the "public affirmation" involved in the process of "[w]alking to the polling station and standing in line with one's neighbors."[151]

As I have argued above, part of why we have not looked closely enough at the importance of American suffrage practices is that we have focused so much on the *right* to vote, with its formalistic and binary connotations.[152] Such connotations are not necessarily linked to the term, but anyone reading the citizenship, suffrage and elections literature will find them hard to miss. The "right to vote" is far from being an "obsolete

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[149] Id. Shribman writes,

> "let me tell you about the joys I am missing by not voting on the day when everybody else does, on Election Day. I miss standing in line with my neighbors talking about the weather and whether we stayed up late to watch Monday Night Football. I miss the ritual of giving my name to the clerk who knows very well who I am because I have lived here for years. I miss being ushered into the polling booth. I miss being given one of those I Voted stickers.... I miss the people standing outside with the placards and their cups of coffee and the most tempting piece of American food there is—the jelly doughnut."

Id., at F12. Similarly, Michael Schudson describes his participation in the 1996 elections as "a small ritual of neighborly cheer." Michael Schudson, *The Good Citizen: A History of American Civic Life* (The Free Press, 1998), at 3.

[150] Paul Gronke, "Electing to Change in How We Vote," *Los Angeles Times*, Oct. 16, 2003, at 17.

[151] Thompson, *Just Elections* (2002), at 34-35.

[152] Schudson argues that the rise of the "rights-bearing citizen" in American political discourse has come at a direct cost to the importance of voting. He writes,

> "The 'rights-bearing citizen' has not displaced the 'informed citizen' at the ballot box, but the expansion of rights-consciousness has made the polling place less clearly the central act of political participation than it once was. The 'political,' carried on the wings of rights, has now diffused into everyday life."

Schudson, *The Good Citizen* (1998), at 8.

verbal ritual,"[153] but it must be enriched by a better understanding of suffrage as a practice – the "how" of voting, not just the "who."[154] Some leading voting-rights lawyers have grasped the limitations of the "right" idea, conceptualizing suffrage as a serial process or even as a "nested constellation of concepts," in Pamela S. Karlan's elegant phrase.[155] Meanwhile, the important 2001 CalTech/MIT report begins an important chapter with the words "[v]oting is a system."[156]

The concept which I find most helpful in directing our attention towards the vital local dimension of American suffrage is to define voting as a practice. In addition to sources discussed above, this draws on Richard Flathman's 1976 book *The Practice of Rights*.[157] At a general level, Flathman's ideas about bringing scholars' concepts into more close contact with realities on the ground aligns well with the goals of this project.

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[153] See Louis Menand, *The Metaphysical Club: A Story of Ideas in America* (2001), at 88. Menand writes that William James intended pragmatism as an argument for "discarding obsolete verbal ritual."

[154] See Daniel Wirls, "Regionalism, Rotten Boroughs, Race, and Realignment: The Seventeenth Amendment and the Politics of Representation." 13 *Studies in American Political Development* 1 (1999), 1-30. As Wirls paraphrases Harold Lasswell's famous definition of politics, electoral structures determine who gets to vote for what, when, and how. Wirls, at 1. The "who" has long gotten the lion's share of scholarly attention. But as Wirls points out in his analysis of the origins of the Seventeenth Amendment, the "'how' and 'for what' of voting have also played crucial, though perhaps less understood, roles in the politics of democratization." Id., at 1. American history, Wirls notes, "is replete with struggles, large and small, over characteristics of electoral systems." Id., 2. Wirls is interested in "how" people chose their Senators; his focus is on how regional and partisan differences interacted to bring about the Seventeenth Amendment. For an example of a rich and provocative study of a "rights-based" topic in American politics which shines new light on the topic by attending more closely to specific practices, see Mark A. Graber, *Rethinking Abortion: Equal Choice, the Constitution, and Reproductive Politics* (Princeton University Press, 1996). Graber focuses particularly on a woman's ability to pay for an abortion.

[155] See Pamela S. Karlan, "Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement." Social Science Research Network Research Paper No. 75, Stanford Public Law and Legal Theory Working Paper Series (2004), at 11. Karlan here identifies Karlan identifies participation, aggregation, and governance as the most important elements of the constellation; her primary purpose is to explain why there is inevitably a group dimension to voting rights: "courts, legislatures, and the public have come to see that any right to genuinely meaningful political participation implicates groups of voters, rather than atomistic individuals." Id. See also Karlan, "The Rights to Vote: Some Pessimism About Formalism," 71 *Tex. Law Review* 1705, 1709-19 (1993).

[156] CalTech/MIT Voting Technology Project, "Voting: What Is, What Could Be" (2001), at 14.

[157] Richard E. Flathman, *The Practice of Rights* (1976).

As Flathman puts it in a criticism of much political theory, "substantive coherence of the sort sought by political philosophy can be forced only at the cost of losing contact with the political realities putatively under analysis."[158] Meanwhile, at a more specific level, his conception of rights as social practices illuminates American voting. Flathman does not talk about voting rights, and his main purpose seems to be to strike a new balance in the conflict between what we might call the philosophical account and the social account of rights.[159] Yet his core theoretical frame is remarkably apt. When Flathman says that "the practice of rights is a social practice,"[160] he means to reconcile "both the individual and social dimensions of rights."[161] Drawing on Wittgenstein, Flathman points out that language, as a practice, is used according to rules, but is also put to "distinctive, unprecedented use" by individuals.[162] Rights too fit this description:

> "they presuppose, encourage, and in fact instantiate both an elaborate skein of concepts, norms, rules, institutions, and arrangements that must be called social . . . *and* self-directed individual actions that cannot be completely conceptualized as social."[163]

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[158] *Id.*, at *v*. Elsewhere, Flathman writes that political philosophy "attempts to render the world comprehensible in a sense going beyond that which is involved in day-to-day conduct. It does so (among other ways) by evolving concepts and conceptual sets by which to identify and chart the relationship among the elements of the world as understood and acted in by participants in the practice it studies." Id., at 26.

[159] Flathman describes this as a dispute over whether the individualism of the eighteenth-century natural-rights philosophers is accurate and tenable or is "a meaningless abstraction unknown in the real world of human affairs," as authors from Edmund Burke to Emile Durkheim have argued. The latter instead describe rights in terms of "statuses, roles, and other intrinsically social positions and relationships." *Id.*, at 5. By describing the practice of rights as "a social practice," Flathman hoped to bridge this divide.

[160] *Id.*, at 219.

[161] *Id.*, at 6. "Practice" is a common word, he writes, but "the notion of the practice of rights is not established in ordinary language. We have adopted it here because its properties as a unit of analysis concept are promising as a way of recognizing and reconciling both the individual and the social dimensions of rights. Rights arise out of and are accorded within a rule-governed social practice." Id.

[162] *Id.*

[163] *Id.* at 5-6. Elsewhere Flathman writes "by treating rights as forming a practice, we try to capture the ways in which they can be devices for warranting highly diverse and individuated action and, at the same time, one of the means through which individuals have been incorporated in sociopolitical orders marked by patterned coherence and considerable stability and even predictability." Id., 15. The understandings

The parallel to American suffrage is not perfect, but it works well. Voting rights – and note that Flathman is not trying to *replace* the term "rights," but to improve our *understanding* of rights – are certainly defined and bounded by rules. But there is a great flexibility in their use and implementation. Obviously, individuals can put voting rights to "distinctive use," but in the United States, local, state, and party officials have always had opportunities to shape the suffrage process, as well.

By extension and analogy, this idea also forces us to reconsider voting and voting rights across *time* in the United States. For example, when men discussed or exercised "the right to vote" in the U.S. around 1800, they did a thing remarkably different from what their peers did in the year 2000. (The first man's vote not only was not secret, but may not even have been *written down*; neither parties nor campaigning existed as we know them; neither the female members of his household, nor his poorer fellow freemen, nor his black "neighbors" joined him in line at the polls; and in national elections, the man was not voting for Senator at all, and was almost certainly voting for Presidential electors, not for President.) On one hand, in terms of some political principles and legal concepts, it makes sense to say that both men exercised a "right to vote" in an American election. This is the rule-bound or social half of the definition. At the same time, the tremendous variation between the two experiences tells us that each era has put that practice to "distinctive use"—the "self-directed," individualized component of rights.

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and activities of participants is essential to this approach: "The enterprise of analyzing a practice is in large measure dependent upon, one might say responsible to, the understandings and activities of the participants in it." Id., 17.

The "right to vote" in the U.S. is a practice governed by rules, but also characterized by immense and important variation. Attending to the importance of local officials and local contexts will deliver a more complete understanding of the meaning of American suffrage. In subsequent chapters, I try to color in some of what we have missed by not perceiving the local dimension of suffrage in the U.S., and in examining why our unusual, locally-administered electoral systems have survived, I try to shed new light on American ideas about popular sovereignty, citizenship, centralized power, and how to include and exclude certain people from the polity.

CHAPTER 2

THE LOCAL DIMENSION OF AMERICAN VOTING: A BRIEF HISTORY

This chapter offers a synthetic, chronological account of the evolution of what I call the "local dimension" of American suffrage: the control exerted by county and municipal officials over voting qualifications and election administration, as well as the immediate context of the voting act. I demonstrate that a prominent role for local officials – and a great deal of variation at the county or municipal level – has survived through great changes in formal and informal U.S. suffrage law and practice. In fact, a significant amount of local control emerges as one of the most consistent features of American suffrage. Histories of American suffrage which emphasize the steady nationalization of voting rights, I conclude, are inadequate to the extent that they do not recognize the depth and importance of local control and local variation in election practices. Meanwhile, this history has important implications for contemporary reforms. We should not fear change in election administration, since virtually everything about American voting has been altered before, usually many times. But reformers aiming to nationalize American voting procedures should understand that one constant in the story of American suffrage is a great deal of local responsibility for running elections.

> "In the long parade from colonial Virginia or colonial New England to a secret ballot in a California garage, American citizenship has changed dramatically."[1]

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[1] Michael Schudson, *The Good Citizen: A History of American Civic Life* (1998), at 5. In linking citizenship with specific "experiences of politics," Schudson writes that "[p]olitical education

> "comes to most people not only from history textbooks or recitations of the Pledge of Allegiance in school but from the presence and practice of political institutions themselves. Elections educate us. The ballot educates us.... The product of this education is our citizenship, the political expectations and aspirations people inherit and internalize." Id., at 6.

In the roiled wake of the 2000 election, many scholars are paying a great deal of attention to topics which had been almost the exclusive domain of political practitioners, advocates, and specialized voting-rights lawyers: election administration, ballot technology, and the mechanics of suffrage. The local dimension of American voting – consisting of the control exerted by county and municipal officials, as well as the immediate context of the voting act – is under increasingly close focus. The right to participate in elections acquired new national protections a generation ago in the United States, from both federal legislation and Supreme Court rulings; state governments and political parties retain a great deal of control over many aspects of the process, from ballot access to the voting rights of people convicted of crime. But county, city, and town officials have always played prominent roles in determining the conditions under which American votes are cast and counted, and they continue to do so today. The result is that the U.S. has a *hyper-federalized* suffrage system, virtually unique among democracies. Numerous reforms have been proposed, and what may become the most substantial overhaul American election administration has ever received is under way as states begin to implement changes required and endorsed by the Help America Vote Act (HAVA) of 2002.

This research, advocacy, and action proceeds without much understanding of how we got here, however. As Richard Bensel writes in an important new article, there is a "void in both American political historiography and general democratic theory" regarding the "actual *practice* of elections."[2] This chapter begins to fill that void by synthesizing,

[2] Richard Bensel, "The American Ballot Box: Law, Identity, and the Polling Place in the Mid-Nineteenth Century," 17 *Studies in American Political Development* 1 (Spring 2003), at 5, 5 n.10.

in a way that has not been done before, the history of the "local dimension" of American suffrage. After 2000, there is a widespread assumption that the kind of variation laid bare in Florida is at best an historical accident, at worst an un-democratic scandal and disgrace. What we have not fully appreciated, however, is that this is how Americans have always performed the central constitutive act of our national citizenship.

I show here that a prominent role for local officials – and a great deal of variation at the county or municipal level – has survived through great changes in formal and informal U.S. suffrage law. A close look at the activities Americans have engaged in at the polls reveals an immense and fascinating diversity, across both time and space. Beyond its intrinsic interest, this material provides vital context for ongoing discussions of reform. Scholars and advocates are right to regard today's level of local control and diversity of practices to be significant phenomena. But if we think *this* level of variation is significant, the far *greater* levels of variation which obtained in previous generations must be at least as important. Meanwhile, because there is merit in comparing the election of 2000 with those of, say, 1800 and 1876, we must understand that what Americans actually *did* at the polls in those earlier years was profoundly different from what we do now.

We now understand that suffrage practices can shape voting behavior at both the micro and macro levels. At the individual level, for example, registration procedures can affect a person's decision about whether to participate, as can voting-place proximity and polling hours; name order determines some vote choices, and different ballot technologies lead to different rates of wasted and spoiled ballots. In statewide and

national contests, differences of fractions of a percent can easily be traced to various mechanisms, and such swings regularly decide state-wide elections.

This chapter applies that understanding to American suffrage. I survey the history of American voting practices, particularly prior to the Voting Rights Act of 1965, from the perspective of town, city, and county control. We know a great deal about American voting behavior past and present, and historians and political scientists have done terrific work in recent decades analyzing formal suffrage qualifications.[3] I'm interested in a set of questions treated in different places in our substantial literatures on voting, voting rights, and elections: informal and formal suffrage qualifications, registration procedures, balloting mechanisms, and electoral practices. I draw together branches of suffrage scholarship which have often been separated in order to develop a framework for discussing voting as a practice[4] set in local contexts and institutions, a framework which enables us to merge theoretical and practical aspects of suffrage. This history of American voting offers a supplement or corrective – "antidote" is too strong a word – for the heavy emphasis on formal voting rights and mass outcomes which dominate most accounts of American voting. By focusing closely on the *phenomenology* of suffrage, I draw attention to those important aspects of American voting which not only were not nationalized long ago, but also are still not completely subject to state control.

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[3] See, for example, Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (2000); Judith Shklar, *American Citizenship: The Quest for Inclusion* (1991); Albert O. Hirschman, *The Rhetoric of* Reaction (1991); J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (1974); Marchette Chute, *The First Liberty: A History of the Right to Vote in America, 1619-1850* (1969); and Chilton Williamson, *American Suffrage: From Property to Democracy, 1760-1860* (1960).

[4] This draws on the work of Richard Flathman, among others. See Richard E. Flathman, *The Practice of Rights* (1976).

In a later chapter, I engage in a more sustained analysis of important causal and conceptual questions this history raises. Specifically, I analyze how core strands in American political thought – particularly ideas about popular sovereignty, centralization and state-building, and exclusive citizenship principles – help explain the endurance of local control. While I raise those questions in places here, the purpose of this chapter is to provide a synthetic narrative describing important changes and continuities in U.S. suffrage practices, particularly where local administration is concerned. The hyper-federalized nature of American election administration today results from a developmental path that placed responsibility for overseeing the casting and counting of votes in the hands of local officials. That history begins in the long colonial period.

In the beginning, all suffrage was local. During the colonial period and, more than we might expect, into the early decades of the U.S. itself, virtually every substantive aspect of voting was either under local control or varied considerably at the local level. Obviously, the broader nature of citizenship – and the meaning of those votes – changed enormously between the early seventeenth century and the beginning of the nineteenth. But in terms of local control, the creation of the national state may have brought less change than we would assume.

I. Colonial America.

Colonial elections were radically different affairs than Americans are used to today. As Robert J. Dinkin shows in *Voting in Provincial America*, there was virtually no media, parties, or campaigns, and no "national" electoral system of any type; elections were held at widely varying and uncertain intervals; many were essentially uncontested;

and voting itself was entirely public, usually conducted *viva voce*.[5] The voter declared his choice loudly, and probably then enjoyed a glass of rum punch at the expense of the man he voted for. Even where it was contested, the election was no place for serious conflict: instead, it served to reaffirm the social hierarchy of the community. This was "rule by gentlemen," and "the politics of assent," as Michael Schudson puts it;[6] as a way of choosing lawmakers, it was much closer to what Mark Kishlansky calls "parliamentary selection" than to our idea of a contested election.[7] Many voters lived some distance from the polls – several miles to outlying villages in New England, twenty-five miles across a county in middle colonies like New Jersey, over one hundred miles in some parts of the Carolinas, where the parish was the political unit.[8] Chilton Williamson agrees with Dinkin and Schudson that elections tended to be occasions "for eating, drinking, and

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[5] Robert J. Dinkin, *Voting in Provincial America: A Study of Elections in the Thirteen Colonies, 1689-1776* (1977), at 3, and *passim*.

[6] Schudson, *The Good Citizen*, at 4-5, 7.

[7] See Don Herzog, *Happy Slaves: A Critique of Consent Theory* (1989). In his *Parliamentary Selection: Social and Political Choice in Early Modern England* (1986) Kishlansky, writes Herzog,

> "distinguishes what he calls *parliamentary selection* from *contested elections*. In selection, the franchised community is presented with a slate of candidates running unopposed. They are selected as the natural leaders of the community: not those of Aristotelian eminence in virtue, but those leading in social status and honor. The techniques for counting the votes are the view and the cry, respectively grouping the voters together and gauging the volume of their voice vote. These techniques aren't particularly well suited for precise calculations of the vote, but such calculations aren't needed. For voting here isn't the resolution of a dispute. It's rather a ritual of acclamation, a public act that recognizes (and reconstitutes) the superior status of the candidate. And the lavish entertainment that surrounds the meetings, with candidates providing meat, drink, and revelries, isn't electoral corruption, a base attempt to bribe voters. It couldn't be, since there is no other candidate. It's officially a moment of celebration, where communal unity is publicly demonstrated."
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> Herzog, 197-198. Emphasis added.

[8] Chilton Williamson, *American Suffrage: From Property to Democracy, 1760-1860* (1960), 43-44.

being merry at the expense of the candidates;" he notes that in England, merriment was so general that rum prices often rose sharply at election-time.[9]

American ideas and practices alike emerged from seventeenth- and eighteenth-century English electoral politics, and local variation was part of that colonial continuity. As Dudley O. McGovney notes, the four hundred members of Commons were chosen in over two hundred localities, "in each of which the qualifications of voters were fixed by local customs varying one from another, and differing also from the requirement for voting in counties." Two central features of the English franchise were class limits and "lack of uniformity of voting qualifications in the various localities – a medley of voting qualifications in electing members of a single legislature. Both of these features were imitated in America."[10]

In fifteenth-century England, ownership of a church pew was one way to satisfy the property qualification for shire elections.[11] In the English colonies, churches continued to play an important role in seventeenth-century suffrage. Perry Miller calls our attention to the fact that by a Massachusetts law of 1631, the franchise was limited to

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[9] Id., at 55-56.

[10] Dudley O. McGovney, *The American Suffrage Medley: The Need for a National Uniform Suffrage* (1949), at 2. See also Frank O'Gorman, *Voters, Patrons, and Parties: the Unreformed Electorate of Hanoverian England, 1734-1832* (1989). O'Gorman describes Hanoverian England's electoral system as "controlled by local families and connections." Id., at 8-9. O'Gorman writes, "[e]very election contest took place in a highly specific social situation, its proceedings fuelled by ideas of reciprocal obligation." *Id.* Most scholars who trace the connection between English and American suffrage law emphasize theories and principles rather than practices. For a good corrective, see James S. Fishkin, *The Voice of the People: Public Opinion and Democracy* (1995), at 98. Fishkin here discusses Trollope's *Phineas Finn* as a study in how England's "rotten boroughs" exemplified total corruption long after English suffrage law had been reformed and the franchise expanded.

[11] Id., 68. Churches were less prominent in Southern than Northern elections, both in qualification and as polling places. Williamson notes that only South Carolina limited voting for vestrymen—who fulfilled ecclesiastical as well as secular functions, including poor relief—to members of the Church of England. Id., 37.

full members of the churches, so that about one in five adult males were enfranchised.[12] The best way to provide notice of an upcoming election was by postings on the church door – a particularly appropriate site, because there "men would discuss the shortcomings of the present government along with those of the minister."[13] The first use of a written ballot in English North America may have been in Salem church's choice of a minister, on July 20, 1629.[14] Indeed, Spencer Albright links the relatively early American use of ballots with the "democratic and elective principles of the Congregational form of the Christian Church," among other intellectual precursors.[15] The dignity of paper, however, did not arrive immediately. Paper was used to choose the governor and deputy of the Massachusetts Bay colony in 1634, but a Massachusetts Bay statute of 1648 ordered that 'that for the yearly choosing of Assistants ... the freemen shall use Indian Corn and Beans, the Indian Corn to manifest Election, the Beanes contrary.'"[16] (Systems derived from James Harrington's *Oceana* often required voters to cast ballots not just for one candidate, but against others.) Beans were also used in Pennsylvania in 1689, when black and white legumes were placed into a hat; balls made of some substance were used in 1676 in West Jersey.[17] Massachusetts was using paper ballots regularly as early as the

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[12] Perry Miller, ed., *The American Puritans: Their Prose and Poetry* (1982) (1956), at 108.

[13] Charles Seymour and Donald Paige Frary, *How the World Votes: The Story of Democratic Development in Elections*, vols. I and II, (1918), at 208.

[14] Spencer D. Albright, *The American Ballot* (1942), at 14.

[15] Id. Albright writes that the written ballot came into use in the Americas because of precedents in "England, Holland, Harrington's *Oceana*, ... and the Christian Church," as well as dissatisfaction with the *viva voce* method. Id.

[16] Dinkin, at 133; see also Albright, at 15.

[17] Dinkin, at 133.

1680s,[18] and a secret ballot of one type or another generally prevailed in colonial New England. Nevertheless, colonial areas employing written ballots used widely varying practices concerning confidentiality, counting measures, and responding to fraud.[19] In the South, elections were almost all *viva voce*.[20]

Even regional generalizations are hard to make, however, for the most striking features of the history of balloting in late colonial America – and later, the young United States – are its variation and its non-linear development. Dinkin concludes that electoral mechanisms differed not only from one colony to another, but also from one election to the next in the same place: North Carolina, for example, changed its methods four times in the eighteenth century.[21] South Carolina voters used secret ballots until 1766, when they apparently reverted to *viva voce* methods. At least six mid-Atlantic and Southern colonies used some form of *viva voce* selection at some time in the provincial period.[22] Pennsylvania, Connecticut, and Massachusetts all permitted, but did not require the use of ballots, meaning that one town might vote aloud while others did so privately in writing. Meanwhile, written ballots were not at all necessarily secret. In Rhode Island,

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[18] This is illustrated by a wonderful piece of evidence in an Appendix to Cortlandt F. Bishop's *History of Elections in the American Colonies* (Columbia College, 1893), at 268. This is the vote-counter's oath, the "Oath to be administered to those that sort and number the votes," in 1679-80:

> "Whereas yow ABC are appointed and betrusted ffor the opening the Proxies sent in by the Freemen, and receiving sorting and numbering the Votes for the choice of Gou'nor Deputy Gou'nor, Assistants and other public Officers of this Jurisdiction to be Chosen on the ellection Day yow doe now sweare by the Name of Almighty God that yow will deale truely and uprightly therein as also that you will not either directly or indirectly discouer either persons or number of Votes until the Election is ended. So help you God."

[19] See Dinkin, at 136-143.

[20] Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (1988), at 183. See also Dinkin, at 136-137.

[21] Dinkin, 133.

[22] Id. These were New York, New Jersey, Maryland, Virginia, North Carolina, and Georgia.

ballots for county elections had to be signed by the voter, though votes for town offices could be secret; New Jersey required lists of voters and their choices to be compiled and occasionally published.[23]

New York was apparently the only colony where the use of ballots became a full-blown partisan controversy. Following almost thirty years of dispute, an intense struggle over the question culminated with the narrow defeat of a secret-ballot bill in the New York Assembly in 1769-1770. Critics of open voting called for the secret ballot in the interest of minimizing voter coercion – to no avail. Opponents of reform argued successfully that ballots allowed *more* coercion and corruption than *viva voce* selection, because ballots allowed some electors—including the infamous Germans of Pennsylvania – to cast already-prepared tickets in complete ignorance.[24]

From a modern perspective, voice voting seems to place the elector under intolerable public pressure and invite manipulation. But in the eighteenth century, Dinkin writes, many people "thought this style respectable and insisted that it encouraged rather than discouraged honesty." Nothing could be concealed: the ballot box could not be stuffed, and individual votes could not be disputed, so deception and corruption were all but impossible. By contrast, the secret ballot would "destroy that noble generous openess that is characteristick [sic] of an Englishman, and...introduce a Vile Venetian Juggle and Cunning," as South Carolina governor James Glen argued in 1748.[25] (Apparently, Glen knew that James Harrington and others had taken an interest in the secret ballot after

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[23] Williamson, at 41. See also 86, noting that there was some advocacy of "a return to the use of ballots in elections" in North Carolina in 1775.

[24] Williamson, 77-78 and 41-42.

[25] Id., at 135.

learning of its use in Venice.) Some pointed to the arguments of authorities like Montesquieu and Blackstone, both of whom argued that the secret ballot had failed the ancient world.[26] Montesquieu – who would later be cited more than any other authority in the debate over the Constitution[27] – contended that after the basic question of who was qualified to vote, "*the manner of voting* was the most important decision facing practical statesmen."[28] Noting that some American politicians pushed for a change from "the customary oral voting" to ballots in the 1770s, Gordon Wood argues that such efforts "enlarged the political arena and limited the power of those who clung to the traditional ways of private arrangements and personal influence."[29] There is some disagreement among modern scholars, meanwhile, as to how much social pressure would have affected electoral behavior.[30] At any rate, New England colonists seemed to feel that the secret ballot was "an important means of heading off public dissension and preserving communal solidarity," as Dinkin puts it.[31]

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[26] Id., at 136. Montesquieu held that the public pressure of open voting was needed to help the "lower classes" comport themselves correctly in elections, since they would feel "the gravity of eminent personages." Montesquieu, *The Spirit of the Laws* (1949) vol. 1, 155, quoted in Dinkin, at 135-136.

[27] Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967), at 344-345.

[28] Williamson, at 12 (emphasis added).

[29] Gordon S. Wood, *The American Revolution* (2002), at 51. Ballots were only part of a set of proposed reforms such leaders advocated. Wood writes that in "some colonies politicians called for an expanded suffrage, the use of ballot rather than the customary oral voting, the opening of legislative meetings to the public, the printing of legislative minutes, and the recording of votes taken in the legislatures." *Id.*

[30] As Morgan writes in *Inventing the People*, we can glean important ideas about what "the consent of the governed" meant in early America by studying "the way in which the voters were bullied or bought or simply talked into choosing their betters to govern them." Morgan, at 175. But recent studies, he cautions, have shown that those of lower status may have had more power than we assume in this bargain. Id., at 175 n.1, citing John B. Kirby, "Early American Politics—The Search for Ideology: An Historical Analysis and Critique of the Concept of 'Deference,'" 32 *Journal of Politics* 808-838 (1970).

[31] Dinkin, at 136-137.

Local conditions in the colonies quickly strained some inherited ideas about voting, such as the English notion of "virtual representation." Almost immediately, Americans wanted a closer fit, even in selecting colonial assemblies. Massachusetts established a system of assembly delegates for every hundred voters, but residents of small towns protested: "might as well share a soul with other individuals," as James Morone imagines their response.[32] Meanwhile, Chilton Williamson shows that eighteenth-century Americans essentially lived with several different franchises, since the qualifications for voting in colony elections "were seldom if ever the same as those for voting in local elections in town, borough, city, or county."[33] In the mid-Atlantic and Southern colonies, many localities allowed a broader franchise for local elections than colony elections, and some expanded the franchise for all elections: one North Carolina borough simply allowed any man to vote in any election who was within two miles of the borough on election day. On the eve of the Revolution, residents of some cities and towns may have enjoyed a broader suffrage than rural voters.[34]

Many colonies did not put in place formal age, sex, or residency restrictions, leaving a good deal of discretion in the hands of local officials. Only three confined the vote explicitly to males; six required that voters be twenty-one; and four set no residency standard at all. Some, but not all, disenfranchised Catholics before the Revolution.[35] Naturalization – toward English citizenship, of course – was in local hands in some

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[32] James A. Morone, *The Democratic Wish: Popular Participation and the Limits of American Government, Revised Ed.* (1998), at 41.

[33] Williamson, *From Property to Democracy*, at 16. Only Rhode Island drew no distinction between town and colony elections: there, the town was the key to the colony, as a man admitted to freemanship in the former automatically gained it in the latter.

[34] Id., 37, 17-18.

[35] Id., 15-16.

places: James Kettner finds that South Carolina put justices of the peace in charge of administering the required oaths after 1704.[36] Williamson concludes that for a full generation before the Revolution, Pennsylvania Germans "evidently voted and held local office, with or without benefit of either private [or provincial] acts of naturalization."[37] At least a few Pennsylvania communities printed electoral material in Dutch as early as 1742. Property tests, meanwhile, were usually based on towns' lists of assessable property.[38]

All this variation helps explain why scholars struggle to derive firm estimates of the percentage of American adults enfranchised at the Founding.[39] It is not just the absence of firm population data that stands in our way, but suffrage's local variation, based on local rules, property ownership, officials' discretion, and the type of election being held. "Enfranchisement," writes Alexander Keyssar, "varied greatly by location," with some newly-settled, cheap-land communities allowing four-fifths of white men to vote, but others restricting the franchise to only about half.[40] Some colonies did attempt to bring a measure of regularity to franchise rules, even before independence. For

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[36] James H. Kettner, *The Development of American Citizenship, 1608-1870* (1978), at 100, 100 n.31. Colonial citizenship policies generally were more inclusive than their English predecessors: "[t]he need to attract settlers produced generous naturalization policies that promised aliens virtually the same rights as Englishmen. Despite some resistance from imperial authorities, the distinctions between the various categories of subjects—still quite real in the mother country—began to soften and blur." Id., at 9.

[37] Williamson, at 52. This practice continued after independence, including in Maryland, where foreigners were frequently "naturalized just before elections in illegal fashion and allowed to vote." Id. at 140.

[38] Id., at 60, 16.

[39] James Morone estimates that in the late-eighteenth-century colonies, between 50 and 70 percent of white adult males qualified to vote. Morone, *The Democratic Wish*, at 36. Another authority estimates that in the 1770s 50 to 80 percent of white adult males could vote. See Christopher Collier, "The American People as Christian White Men of Property" in *Voting and the Spirit of American Democracy* (Donald W. Rogers ed., 1992), 25. Even the best scholarship must settle for an estimate of a twenty-point range—and that of a *subset* of the population. Gordon S. Wood estimates that "two out of three" American men could vote, as contrasted with one out of six in Britain at the time. See Wood, *The American Revolution* (2003), at 39.

[40] Keyssar, *The Right To Vote*, at 7.

example, in 1742, Massachusetts "limited the suffrage to owners of real estate valued at twenty pounds or more," and required town assessors to provide the town clerk with a copy of land records "for use in connection with elections."[41] Overall, however, colonial voting practices were characterized by a considerable "lack of uniformity."[42] And out of that "wide range of experience," concludes Robert J. Dinkin, emerged modern election systems.[43]

II. The Early National Period.

In its 2002 report, the National Commission on Federal Election Reform offers a very brief history of suffrage law and administration. One key development in the first half of the nineteenth century, the authors conclude, was that state governments "established that they, not municipal governments, were the final arbiters of who could vote in the state."[44] This is an accurate statement, and a quite revealing one. Despite the presence of new state constitutions and statutes regulating the franchise, local control

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[41] As Joseph Harris writes, this was not a true voter-registration roll, but was "probably the earliest forerunner in this country of an official registration system." Joseph Harris, *Registration of Voters in The United States* (1929), 66-67.

[42] Dinkin, at 143.

[43] Dinkin, at 143.

[44] Jimmy Carter et al., *To Assure Pride and Confidence in the Electoral Process: Report of the National Commission on Federal Election Reform* (2002), at 26-27. As Alexander Keyssar points out, some of the sharpest conflicts between state and municipal governments during this period dealt with voting in municipal elections, where the suffrage was often much more restricted than for state elections. See Keyssar, *The Right to Vote* (2000), at 31. Such battles continued into the twentieth century, with particular controversy over the election of local officials, and over whether cities could control qualifications, procedures, and candidates for such elections. Generally, state laws prevailed, but a great deal of variation and uncertainty remained. See Howard Lee McBain, *The Law and the Practice of Municipal Home Rule* (1916), at 182. In Missouri, state courts had to decide in 1884 whether the "home rule" powers of St. Louis to elect and appoint city officials outweighed the state's interest in effective local elections—particularly those in which state as well as city officers were chosen. McBain, at 141-144. The state's authority was held to be greater in this case. In 1896, the same court defined the city's power over elections broadly in considering a Kansas City tax on men over twenty-one who had not voted in the city election: in practice, a compulsory-voting law. McBain, 183-186.

remained considerable a full generation after independence. Tremendous variation in voting practices survived as well. This can be easy to overlook: after all, the formal institutions of American national government were in place, and enfranchised men in a few states were indeed voting for their state legislators, U.S. Representatives, and Electoral College delegates by the early 1790s. Meanwhile, the arrival of political parties on the national scene – despite the Philadelphia Founders' clear intentions – transformed electoral politics. Indeed, the great gap between party politics in the U.S.'s first decades and today probably obscures the gulf between the nature of voting as an *activity* then and now.

As early as 1800, some Americans were describing "the right of suffrage" in universal terms not unfamiliar to modern ears.[45] States wielded formal control over suffrage qualifications, but they still do today, at least for people convicted of crime. (And, according to the *per curiam* opinion in *Bush v. Gore*, states still retain final control over whether to hold Presidential elections at all, since the "individual citizen has no federal constitutional right to vote for electors for the president of the United States."[46]) But despite the familiarity of debates over the "right to vote," and despite the nation-wide scope of conflicts over that right's reach in the young United States, the truth is that voting itself was a far cry from what we experience today. I focus here on three

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[45] See Keyssar, at 44. Keyssar quotes New Yorker James Cheetham, who quoted from the Declaration and wrote that "the right of suffrage cannot belong to one man without belonging to another; it cannot belong to a part without belonging to a whole." It was not until mid-century that more radical democrats started calling for the inclusion of blacks, women, and the poor in the franchise.

[46] *Bush v. Gore*, 531 U.S. 98, 104 (2000). The full sentence reads, "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College." This was one of many surprises in the *per curiam* opinion.

important dimensions of voting in the early republic: formal suffrage qualifications and their local implementation; how and where people voted; and for whom they voted.

Between the Revolution and the Constitutional Convention, James Fishkin points out, no state democratized the property qualification for voting.[47] The new Constitution left both qualifications and questions of "time, place, and manner" in state hands – as Hamilton explained in *Federalist* 59, those governments would regulate elections in a way "both more convenient and more satisfactory."[48] In practice, while some formal standards were set at the state level, the implementation of suffrage law was still almost entirely a local affair.

Property qualifications were all but universal in the first decades of American national suffrage.[49] These restrictions were gradually abandoned in the early 1800s; Maryland did so in 1802, South Carolina in 1810. (Vermont had abolished property-holding or taxpaying requirements in 1777, but retained religious restrictions.[50]) Even in the first years of party politics – well before the mass parties of the Jacksonian era – partisan interests played a role in suffrage expansion, as Crenson and Ginsberg note.[51] By the end of the 1820s, Daniel T. Rodgers shows, only Rhode Island, Louisiana,

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[47] See Fishkin, *The Voice of the People*, at 99.

[48] Alexander Hamilton, *Federalist* 59, in Garry Wills, ed. *The Federalist Papers,* by Alexander Hamilton, James Madison, and John Jay (1982).

[49] For a comprehensive list of suffrage requirements relating to property or taxpaying, residency, gender, and race, see Keyssar, *The Right to Vote*, Appendix A.1, "Suffrage Requirements: 1776-1790," and A.2, "Property and Taxpaying Requirements for Suffrage: 1790-1855."

[50] Williamson, *American Suffrage*, at 98.

[51] Matthew A. Crenson and Benjamin Ginsberg, *Downsizing Democracy: How America Sidelined Its Citizens and Privatized Its Public* (2002), at 53-54.

Virginia, and North Carolina retained significant property restrictions on the suffrage.[52] But restricted suffrage in municipal voting persisted, partly because "individual locales wanted to control the entry portals into their political communities," as Keyssar puts it.[53]

For other residents – those who were not citizens – local control often led to expanded access to voting. Well into the nineteenth century, citizenship status generally did *not* determine one's eligibility to vote. New Hampshire was first to require voters to be citizens, in 1814; Connecticut and Virginia followed a few years later, and half a dozen other states excluded non-citizens in the next two decades. Some new states required that voters be citizens, but Vermont, Tennessee, and Ohio did not; these states did not exclude non-citizens from suffrage until 1828, 1834, and 1852, respectively.[54] Most states permitted aliens to vote deep into the nineteenth century—at least twenty-two did so in 1875. Meanwhile, many other states were withdrawing those rights, beginning with Illinois in 1848 – but it was not until 1926 that no states permitted aliens to vote.[55] The survival of alien voting in many states for a full century demonstrates at least a tacit confidence in the ability of local officials to control the suffrage.

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[52] See Daniel T. Rodgers, *Contested Truths: Keywords in American Politics since Independence* (1998), at 236 n.12. In 1840 in Rhode Island, only holders of land and their eldest sons could vote in state elections. Id., 102.

[53] Keyssar, *The Right to Vote*, 29-32. See also Williamson, *American Suffrage*, at 220-221, on state laws denying suffrage in local elections because of the centrality of taxation and expenditures.

[54] Paul Kleppner, "Defining Citizenship: Immigration and the Struggle for Voting Rights in Antebellum America," in Donald W. Rogers, ed., *Voting and the Spirit of American Democracy* (1992), at 45.

[55] See Leon E. Aylsworth, "The Passing of Alien Suffrage," 25 *American Political Science Review* 114, 1931. Today, localities may be leading a reconsideration of the lack of voting rights of aliens. The Amherst, Massachusetts town meeting has twice considered permitting resident aliens to vote in local elections. Chicago and New York have allowed non-citizens to vote in school board elections, and some Maryland communities already permit resident aliens to vote in local elections. See Jeff Donn, "Mass. Town considers granting vote to non-citizens," LEXIS AP wire, Oct. 22, 1998; John McIlhenny, "Amherst tries to allow its aliens to vote," LEXIS AP wire, Sept. 4, 2001.

As with the Revolutionary period, so much variation occurred at the local level that it is hard for scholars to estimate turnout and the size of the electorate. Much remains opaque, for the simple reasons that state laws and documents do not suffice: town records, particularly of property ownership and taxation, are the necessary sources. It is likely that many policies continued from the late colonial period, such as Pennsylvania's practice of providing town tax books listing real and personal property at the polls to check qualifications of challenged electors.[56] Other localities also used tax lists to help the selectmen, sheriff, or other authorities decide who could vote. Williamson finds a good deal of evidence that state law regarding taxpayer and property qualifications offered only a rough approximation of the real franchise, which was probably larger. In South Carolina, numerous observers reported that enforcement was lax all over, and that citizens who did not qualify were being allowed to vote, "rather from want of information of the Constitution and Existing Law of the State, than from audacity, or intentionally violating the same," as one author put it in 1796. When Pennsylvania abolished the freehold qualification in 1788, the diversity of electoral practices and the resulting difficulty of enforcement were important reasons. The same thing happened in Connecticut, where some argued that property tests should be abolished "because they were already meaningless in many towns." Well into the nineteenth century, authorities in eastern Virginia worked to break "the pre-Revolutionary habit of ignoring the suffrage laws," as Williamson puts it, but violations of the laws were legion throughout the state.[57]

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[56] Williamson, at 32.

[57] Id., at 152-153, 134, 171, 230.

To be sure, most qualifications in this period were formally set at the state level. But even where those requirements were followed, they were locally adjudicated and administered. Property records, for example, were kept by county, city, or town officials, and most taxes were assessed at that level, as well. Some states did have statewide taxation as early as the 1790s – since payment of a "state tax" met their suffrage qualification – but at least as many declared that payment of any "county tax" met the standard.[58] Clearly, though, some real estate holding was the modal early qualification, and those records would have been kept locally. (Meanwhile, in states where the property-holding qualification could be satisfied by wealth instead of real estate, depreciation in the value of paper money broadened the franchise – what Fishkin calls "reform by inflation."[59])

In Pennsylvania, no direct state tax was collected until 1832; voters met the state's taxpayer qualification by paying a county tax, levied six months before the election. Specifically local economic activity determined voting qualifications elsewhere. In 1825, the New York state senate wrestled with one of the difficulties created by the taxpaying requirement for lessors and lessees: where the *tenant* paid the taxes, the *landlord* could lose his right to vote, and vice versa. Similar phenomena extended to non-economic qualifications: two years earlier, hundreds of men apparently lost their suffrage rights because instead of doing militia duty, they served on volunteer fire departments instead.[60] When Massachusetts' constitutional convention revised its qualification in 1820 to allow all taxpayers – rather than property owners – to vote, a kind of press release published

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[58] See Keyssar, *The Right To Vote*, Appendices A.1 and A.2

[59] Fishkin, *The Voice of the People*, at 99.

[60] Williamson, at 136, 205.

after the convention declared that the new test would "relieve Selectmen from much perplexity, and will enable them easily to distinguish between those who have a right to vote and those who do not."[61] This means not only that Selectman had previously determined who was qualified, but that the new suffrage rule intended for them to continue to do so. State officials were not making decisions as to who was qualified to vote: local officials were.

How and *where* people voted – as well as *who* voted – remained matters of great diversity. First, while independence brought many changes, it did not alter the character of Southern elections, which retained their carnival air – "barbecued oxen, kegs of rum, and everybody roaring drunk," writes Edmund Morgan.[62] As one participant described an election for a U.S. House seat in 1790s South Carolina, the Greenville courthouse became "a scene of noise, blab, and confusion," with "much drinking, swearing, cursing, and threatening...clamor and confusion and disgrace."[63] The "disgrace" here was probably the intimidation and physical force sometimes used to keep one's opponents from the polls, sometimes with official acquiescence.[64] Voice voting would dominate

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[61] Id., at 193.

[62] See Morgan, *Inventing the People*, at 184, 185.

[63] Id., quoting from the diary of Edward Hooker.

[64] At least once, the U.S. House closely examined such violence in deciding whether the extremely close election of 1794 in one Virginia district – decided by ten votes, amidst undisputed allegations of massive intimidation and beatings of would-be voters – meant that the result should be overturned. In allowing the winner to keep his seat, most Representatives agreed with Rep. Samuel Smith of Maryland, who stated that he "had never known an election in the Southern States where there was so little mischief." Another member expressed mystification that "there should be such a noise about this election...when others were just as bad, or worse." Morgan, 186-188. One colorful point of contention involved a Justice of the Peace who had been beaten in a brawl at the polls. It's true he was knocked down, respondents said, but he was drunk himself, and threw the first punch. Id., 188. Morgan quotes from the *Annals of Congress* 1789-1824, vol. III, 598-600, 608-613.

most of the South until after the Civil War.[65] As in the colonial period, voting itself sometimes took place not just out loud, but literally on a stage. In Virginia, a platform was often erected in front of the courthouse; the candidates sat there, and each voter ascended the platform, announced his vote, and was personally thanked by the candidate. Inconsistencies in voting mechanisms continued throughout the young U.S. There had been a shift to paper in the 1770s, but Virginia and Maryland retained *viva voce*, and at least half a dozen states adopted voice voting after that time, as Peter Argersinger shows in his indispensable essay "Electoral Processes in American Politics."[66] Kentucky went back to *viva voce* in 1799, and did not formally adopt paper again for almost a century.[67] Conflicts over paper and voice voting were often sharp, as the implications of methodology became clear in various areas. Connecticut in 1801 passed the "Stand Up Law" abolishing the ballot, a change explicitly designed to intimidate would-be Republican voters. And decades later, several Southern and border states would temporarily discontinue *viva voce* polling during the Civil War and Reconstruction, out of fear that traditional elites would re-assert control if voters had to vote out loud.[68]

We do not have a firm count, but most states did convert to paper ballots in the early nineteenth century.[69] Paper voting, however, was vastly different from what we

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[65] Dinkin, at 133.

[66] See Peter H. Argersinger, *Structure, Process, and Party: Essays in American Political History* (1992), at 34-68; 47.

[67] State law required paper ballots in 1891. Albright, *The American Ballot*, at 15-19. It is not clear how Kentucky voters prior to 1891 managed to vote secretly in elections for the U.S. House, as required by federal law in 1872. Meanwhile, paper was used in at least some parts of the state prior to 1891, since Kentucky required the Australian ballot in Louisville in 1888.

[68] Argersinger, at 47, 48. Argersinger lists Virginia, West Virginia, Arkansas and Missouri in the latter category.

[69] See A. James Reichley, *The Life of the Parties: A History of American Political Parties* (1992), at 72.

know today. One difference was that in the early national period – before the development of mass parties and their election infrastructure – voters often had to *write down* the name of their preferred candidates. An increase in the number of candidates and offices led some voters to accept party-printed tickets as a labor-saving device, and parties quickly saw the potential. In Massachusetts, it was not until 1829 – when the state's supreme court sided with a voter whose ticket had been rejected because it was pre-printed – that voters officially won the right to use printed ballots. Maine, Vermont, and Connecticut would officially authorize the use of printed ballots in the 1830s and 1840s, either by statute or constitutional amendment.[70]

At any rate, the written ballot was not at all necessarily a secret ballot, and it appears that for at least the first several decades of U.S. elections, relatively few voters cast written votes in secrecy. In 1782, New Jersey abolished the secret ballot in a brazen effort "to intimidate the Tory vote," Williamson concludes, then restored it in 1783 – but only in some counties. In 1788, the state would increase the number of counties employing the ballot.[71] In 1794, states as diverse as Maryland and New York held *viva voce* elections, and some observers identified them as a source of coercion and corruption. Wealthy New York Federalist Stephen Van Rensselaer, for example, openly offered his tenants significant reductions in their fees if they would vote as directed, and sent colleagues to make sure they did so. New York established a secret ballot for city

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[70] Albright, *The American* Ballot, at 19, 19 n.39

[71] Williamson, at 122, 108, 121, 104, 110, 101. Williamson here discusses various states' policies during and after the Revolution, indicating that New York decided in 1777 to require the secret ballot in state elections after the war but did not actually do so until 1788; North Carolina rejected the secret ballot in the same year; and in 1778, a prominent Massachusetts gentleman included the absence of the secret ballot in a polemic against the state's suffrage rules.

elections in 1804, and for town elections in 1809.[72] Indiana used written ballots after 1811, and Illinois did so after 1813 – but then returned to voice voting in 1829, after decades of controversy over ballots. However, Illinois was apparently unusual, as most new states employed the ballot. Rhode Island's new constitution of 1842 – following the Dorr Rebellion – included a new registration requirement, but no secret ballot. In 1851, when Virginia changed its suffrage laws to allow all white male citizens to vote, it still did not require a secret ballot. And the secret ballot remained a controversial partisan issue in Massachusetts politics as late as 1853.[73]

Once mass political parties developed an electoral infrastructure, of course, the lack of secrecy could be exploited in earnest. Argersinger writes that the fact which enabled mid-nineteenth-century American political parties "to exercise the most influence in shaping politics and political culture" was the total absence of secrecy in voting. Voters carried their tickets to a window or table, often on the street, courthouse steps, or public porch, announced their identity, and passed their ballot to an official. The ballots were produced by parties, who had every incentive to design tickets distinctive in color, size, and design.[74] Others were deceptive, listing one party's names but featuring the image of another party's standard-bearer to trick illiterates.[75]

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[72] Id., at 140, 160, 164.

[73] Id., at 257, 241, 270.

[74] Argersinger, *Structure, Process, and Party* at 124.

[75] See Glenn C. Altschuler and Stuart M. Blumin, *Rude Republic: Americans and Their Politics in the Nineteenth Century* (2000), at 265. Altschuler and Blumin here note that there "is considerable evidence in the testimony on disputed elections that ticket distributors who smuggled one or more of the wrong names onto a party ticket could count on fooling a fairly large number of voters." Argersinger notes the later example a Democratic ballot featuring a large picture of U.S. Grant. Id., at 127.

Some commentators on the state of American elections at the beginning of the twenty-first century believe it's particularly important that we vote in physical polling places, alongside our neighbors.[76] That local dimension had a very different meaning when votes were cast either out loud in front of those neighbors, or on partisan tickets which any interested observer could easily identify. As I explain below, the arrival of the "Australian ballot" after 1888 brought secrecy to almost all American voters. But for over a century – indeed, for almost half of the country's post-independence history – many, and perhaps most, American voters did not make their choices in secret.

A second crucial change in the early national period involved the location of polling places. The long distances colonial voters had had to travel to the polls became unacceptable in the new republic, and across the country, electoral districts became smaller, making it easier for rural voters to get to the polls.[77] As early as the 1790s, voters in states as diverse as New York, Maryland, and New Jersey were calling for an increase in polling places.[78] "[T]rue principles of Republicanism and of genuine Liberty," one advocate of township polling in New Jersey argued in 1793, "requires [sic] that elections should be brought as near to every Man's Door as possible so that the genuine voice of the People may be taken."[79] Commenting on New Jersey's election-reform law of 1788, which provided for polls to move from town to town, Williamson writes that the "bringing of the poll closer to the voters was, possibly, as important an

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[76] See, for example, David M. Shribman, "More than a vote," *The Boston Globe*, Oct. 29, 2002, at F1; Michael Schudson, *The Good Citizen: A History of American Civic Life* (1998), at 3; Paul Gronke, "Electing to Change in How We Vote," *Los Angeles Times*, Oct. 16, 2003, at 17; Dennis F. Thompson, *Just Elections* (2002), at 34-35.

[77] Reichley, *The Life of the Parties*, at 72.

[78] See Williamson, at 121, 141, 179-180.

[79] Id., at 179-180.

event as the prior abandonment of the freehold qualification for voting." A generation later, the introduction of township polling in the new west (instead of in only one town per county) "was possibly a greater factor in enfranchising the population of Indiana than the abandonment of the freehold qualification."[80] Such reforms came unevenly, however: as late as 1825, some Virginia voters asked the assembly for a new polling place, since they had to travel thirty miles to the county seat to vote, losing two days of farmwork. The citizens argued that the legal entitlement to participate was not worth much if the right was so costly to exercise.[81] It was state governments which multiplied the number of polling places, adding more "taverns, mills, and churches" to go with the county courthouses.[82] This means that paradoxically, the hyper-federalized American suffrage system of today – in which local jurisdictions play such a prominent role – was initially created by state governments.

A final element of suffrage in the early republic which is easily overlooked today concerns *for whom* people voted. Variation on these matters was a state and not a local matter, so I do not discuss this here as part of the story of local control, but rather as an example of just how greatly the nature and content of American voters' participation in elections has been transformed across time. The size and reach of the federal government has grown and the American voter's political consciousness has become "nationalized" in the twentieth century, and it is easy to lose sight of just how limited voters' direct

[80] Id., at 123, 216.

[81] Id., at 231.

[82] See Argersinger, *Structure, Process, and Party*, at 43-44. Argersinger writes, "many state governments began to create new voting districts, usually at the township level, and new polling places. In addition to the county courthouse, now taverns, mills, and churches were used as polling places, greatly facilitating access to the ballot box and reducing the necessity for holding elections over several days to accommodate voters coming from long distances." Township boundaries were usually sufficient in rural areas; in cities, special election districts were sometimes created in when wards became too populous. Id., at 44.

connections to the national government actually were in the first generation of U.S. suffrage. Of course, the Constitution directed state legislatures to choose U.S. Senators, and that method survived into the twentieth century. The Presidential Electoral College, meanwhile, lost almost immediately the genuinely deliberative function it was intended to have. However, the *selection* of electors did not change nearly as rapidly. Into the 1820s, several states had no popular balloting at all for the Presidency.[83] Only in 1824 did a substantial majority of the states use popular election to determine who their Presidential electors would be; only beginning in that year did it seem useful to record popular votes generally.[84] A comprehensive statistical history of Presidential elections does not present popular vote totals for elections before 1824; in that year, no popular-vote numbers are available for a quarter of the states.[85] Change came rapidly after that point, however, as within a decade almost all states allowed voters, rather than state legislators, to choose electors. By 1845, popular election of Presidential electors was general enough that Congress saw fit to establish Tuesday after the first Monday in November as the day on which electors should be chosen. (The same date was applied to the selection of U.S. Representatives in 1875, and to U.S. Senate races in 1914.)[86] The fact of widespread popular choice of electors early in the nineteenth century does not tell the whole story, however. As Leon Aylsworth has shown,[87] and as I explain below, it

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[83] Keyssar, at 40.

[84] See Eric Foner and John A. Garraty, Eds., "Election of 1824," in *The Reader's Companion to American History* (1991), at 334.

[85] See Svend Petersen, *A Statistical History of the American Presidential Elections* (Greenwood Press, 1981 (1968), at 18.

[86] See Bryan L. Fife and Geralyn M. Miller, *Political Culture and Voting Systems in the United States* (2002), at 13.

[87] See Leon E. Aylsworth, "The Presidential Ballot," *American Political Science Review* (1923).

was not until the twentieth century that most states either eliminated electors' names altogether, or at least grouped them to make voters' Presidential choices more clear. Some states did begin to do so in the 1820s, however, putting in place winner-take-all popular selection – the "general ticket" – in order to increase the state's influence on Presidential elections.[88] Argersinger identifies that change as key to the growth of parties, as well: "[t]he adoption of the general ticket," he writes, "stimulated far more than did the district system [of elections] the development of statewide political organizations."[89]

Those political organizations were at the heart of American voting through the balance of the nineteenth century. Local officials continued to supervise elections: town selectmen, local judges or election inspectors in New England, sheriffs or parish church wardens in the South. But increasingly, these officials were members of the locally-dominant political party, and their impartiality was often called into question.[90] This marked the beginning of a new period in American suffrage practices – beginning in the middle third of the century – in which parties, rather than state or local government officials, must be seen as the dominant actors. As Keyssar argues, by 1840 parties and an increasingly-competitive competitive political arena had made American suffrage a very different beast, and elections became a kind of "public theater." In the 1820s, Keyssar writes, "popular participation in electoral politics was limited: turnout levels were low and many offices were filled either by appointment or by legislative, rather than popular,

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[88] See Argersinger, *Structure, Process, and Party*, at 36-37.

[89] Id., at 37.

[90] Id., at 45, 46.

vote."[91] The formation and mobilization of mass parties, the growth of the electorate, the multiplication of polling places, increasing use of popular election in Presidential races, and new ballot forms – particularly the party-printed ballot – together changed that. William Gienapp agrees, writing that by 1840, the "structure and ideology" of American politics "had been democratized" by new forms of campaigning and higher turnout.[92]

Parties were national in scope, and closely connected to state governments, but they were built on local foundations. The Jacksonian party system, Gienapp writes, "derived considerable strength from the capability of parties to emphasize national, state, or local issues as their situation dictated." Parties were able to take issue positions – and avoid taking positions – strategically. "The extent of these local variations remains impressive," Gienapp writes.[93]

In sharp contrast with modern practice, the federal courts played virtually no role in regulating suffrage or elections during this period. The most high-profile example of the Supreme Court's pre-Civil War reluctance to involve itself in elections came in *Luther v. Borden*, the 1849 decision holding that even the most momentous matters of elections and representation were "political questions" unfit for judicial resolution. The twentieth-century Court would famously refer to apportionment as a "political thicket,"[94]

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[91] Keyssar, *The Right to Vote*, at 40.

[92] William E. Gienapp, "Politics Seem to Enter into Everything," in Stephen E. Maizlish and John J. Kushma, eds., *Essays on American Antebellum Politics, 1840-1860* (1982), at 15. Gienapp writes,

> "for the first time politics assumed a central role in American life. Previously deference to social elites and mass indifference characterized the nation's politics; despite suffrage laws sufficiently liberal to allow mass participation, few men were interested in politics, and fewer still actively participated in political affairs."
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> Id.

[93] Gienapp, at 49, 50.

[94] *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

but that metaphor is too mild for the problems encountered by the Court in *Luther*. The case emerged out of the "Dorr War" or "Dorr Rebellion" in Rhode Island, which had long lived under an anachronistic constitution and severe malaportionment. Here, the "Dorr Rebellion" deserves note for two reasons. First, it was sparked by suffrage law, particularly eligibility and apportionment; second, it led to a signature Court decision of the era, in which the Court stated its intention of staying out of election law.

Rhode Island's ancient constitution, derived from the 1663 charter, disenfranchised about half the adult males and gave disproportionate power to rural landholders at the expense of urban workers. Unable to bring about change within the existing state government, Thomas Dorr and his colleagues invoked the Declaration of Independence and organized an extralegal constitutional convention; the resulting document was ratified overwhelmingly by an extralegal election. Dorr was elected governor, and during 1842, Rhode Island effectively had two constitutions and two governments fighting for legitimacy. Covertly encouraged by President John Tyler, Rhode Island's pre-Dorr governor called up the state militia, which soon defeated the "Dorrites."[95]

Luther v. Borden – argued before the U.S. Supreme Court in 1848 and decided in 1849 – got its start in 1842, and was first argued in federal court in 1843. It was a trespass suit, filed by Dorr sympathizer Martin Luther against Luther Borden and eight other men who had searched Martin Luther's home during a period of martial law. The case asked a simple question about the lawful use of force, with potentially large

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[95] Harold M. Hyman, "Luther v. Borden," in Kermit L. Hall, ed., *The Oxford Companion to the Supreme Court* (1992), 515-516. *See also* George M. Dennison, *The Dorr War: Republicanism on Trial, 1831-1861* (1976).

implications for the definition of state power and republicanism. The Supreme Court would eventually dodge these larger questions with the "political questions" doctrine, despite the fact that some federal judges had been willing and eager to intervene in the Rhode Island crisis early on. Federal District Judge John Pitman wrote a pamphlet denouncing the rebels in 1842, and no less an authority than Joseph Story wrote approvingly to Pitman that "[i]f ever there was a case that called upon a judge to write and speak openly and publicly, it was the very case then before you."[96] (By "case" Story meant "problem;" there was then no case in the courts.) In the same year, Story wrote to Secretary of State Daniel Webster, urging President Tyler to be ready to take action against the Dorrites, who he called "without law and against law."[97] Chief Justice Taney wrote for the Court in *Luther v. Borden*, and his opinion tacitly imbued the political status quo with a new aura of legitimacy and accepted "a new definition of the emergency powers available to government."[98] Ironically, Abraham Lincoln would use Taney's decision to justify the restriction of *habeas corpus* and other Civil War restrictions.[99]

III. Reconstruction and the Late Nineteenth Century.

After the Civil War, the national Constitution for the first time began to define the American franchise. In 1868, radical Republicans were reluctant to assert federal control over the suffrage – and to confront Northern racism – and decided not to use the

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[96] See Gettleman, *The Dorr Rebellion*, at 175. Chapter Seven of Gettleman's book, titled "The Judiciary vs. the Rebels, 1842 to 1849," emphasizes "judicial hostility" to the efforts of the Dorrites. *Id.*

[97] Gettleman, at 176. Joseph Story was presiding judge in the circuit court which heard the case; not surprisingly given the views noted here, he acted "more like an additional lawyer against Luther than an impartial judge." Gettleman, at 179.

[98] George M. Dennison, "The Dorr War and the Triumph of Institutionalism," 15 *Social Science Journal* 39, 49 (1978).

[99] *Id.*

Fourteenth Amendment to explicitly bar racial discrimination in voting. Instead, they wrote into Section Two of that Amendment a formula designed to allow resurgent Southern whites to bar black men from voting, but to firmly penalize states that did so by reducing their representation in the national government proportionally.[100] The "original understanding" of Section Two, one authority writes, was to confront southern states "with a choice between enfranchising the blacks and losing almost half their votes in the House of Representatives and the electoral college."[101] Another writes that Section Two was meant to *help* Southern blacks indirectly, without antagonizing Northern whites,[102] many of whom were unwilling to confront racial discrimination directly at the national level. Abolitionist Wendell Phillips denounced the entire amendment as a "fatal and total surrender" because "it implicitly acknowledged the right of states to limit voting because of race."[103]

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[100] See U.S. Constitution, Amend. XIV, §2.

[101] Elliott, *The Rise of Guardian Democracy*, at 57. Eric Foner writes that because compelling all states to enfranchise blacks "did not command majority support, the search began for alternatives." Foner, *Reconstruction*, at 252. Section two emerged from that search as a way to leave voting requirements to the states, "while indirectly promoting black suffrage." *Id.*

[102] Michael Perman, *Struggle for Mastery*, at 116. Perman argues that the second section of the fourteenth amendment "offered greater representation if the states acted with foresight and opted to enfranchise all or a large part of their male African American population." In *U.S. v. Reese*, 92 U.S. 214 (1876), the Supreme Court held that the Fifteenth Amendment did not confer a right to suffrage, but merely prohibited exclusion on racial grounds. In dissent, Justice Hunt argued that the second section of the fourteenth amendment did not guarantee the franchise to "the colored race"—"its exclusion was permitted." See *Reese*, 92 U.S. at 247 (Hunt, J., dissenting).

[103] Foner, *Reconstruction,* at 255. Charles Sumner called section two a "compromise with wrong" for permitting racial limits on the suffrage. *Id.* at 253. The radical Republican Thaddeus Stevens, however, argued hopefully that "the representation clause . . . would either compel the South to enfranchise blacks or 'keep [it] forever in a hopeless minority in the national Government.'" *Id.* at 254. Indeed, one Southern newspaper "calculated [that] the region would sacrifice one third of its House membership." *Id.* at 259. White southerners, however, quickly saw that section two was not a difficult obstacle to overcome. As a Virginia legislator told Congress, southern whites would simply employ the "obvious policy" of using nonracial literacy or property qualifications, under which states would get "the benefit of the negro race in counting our population, and under which white people would do all the voting." *Id.* at 252. Meanwhile, leaders of the women's suffrage movement felt "betrayed" by the amendment, because for the first time the word "male" was introduced into the Constitution. *Id.*, at 255.

This purpose of Section Two was never realized, and the courts have regarded its disenfranchisement-endorsing aspect as a dead letter. (The great exception is criminal disenfranchisement, which the Court held in 1974 is explicitly endorsed by the presence of the phrase "except for rebellion, or other crime" in Section Two.[104]) While the Equal Protection Clause in Section One of the Fourteenth Amendment is essential to voting-rights law today, that development is a creature of twentieth-century political thought and jurisprudence.[105]

The Fifteenth Amendment – added in 1870, two years after the Fourteenth – did bar discrimination "on account of race" in voting, aiming to protect the rights of newly-freed blacks. Of course, the purpose and spirit of the Amendment was quickly and flagrantly violated, particularly in the South, by targeted criminal disenfranchisement laws, poll taxes, literacy tests, the grandfather (or "fighting grandfather") clause, and the white primary, as well as extra-legal intimidation and violence. For my purposes, it is important to emphasize that even as they were written into state constitutions or statutes, virtually all of these restrictions on voting by free blacks (and some poor whites) were designed to be effected by discriminatory enforcement at the *local* level. "I do not expect an impartial administration of this clause," as one author of the Virginia's 1902 literacy test famously said.[106]

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[104] See *Richardson v. Ramirez*, 418 U.S. 24 (1974).

[105] Some scholars and judges still contest whether this interpretation of the Equal Protection Clause is warranted by the Amendment's authors' purposes. For a summary of recent literature on this question, see Michael J. Perry, *We The People: The Fourteenth Amendment and the Supreme Court* (1999), at 217 n.69.

[106] Kirk Harold Porter, *A History of Suffrage in the United States* (1971), at 218.

Beyond the initial extension of voting rights to African Americans, the Fourteenth and Fifteenth Amendments had surprisingly little practical effect on nineteenth-century American suffrage. The national government, including the courts, lacked the political will to implement them forcefully. But prevailing American ideas about suffrage and the language of the Amendments themselves were also responsible. As James Kettner argues in his history of American citizenship, "[t]he crucial right of eligibility for the suffrage remained 'in a fringe area,' frequently linked with citizenship, but not yet 'nationalized' and guaranteed by the government as an automatic corollary of the status."[107] Even as a formal matter, then, American law did not identify an affirmative "right to vote," despite the presence of that phrase in both the Fourteenth and Fifteenth Amendments.[108] Among national political élites, meanwhile, belief in universal suffrage declined sharply in the late nineteenth century. In the event, resurgent white elites had little difficulty in virtually eliminating blacks from Southern political life in the decades after Reconstruction.

After this expansion and contraction of the franchise following the Civil War, a second great change in American suffrage during the latter part of the nineteenth century was the implementation of Australian-ballot procedures in most states in the 1880s and 1890s. I discuss these two phenomena – the post-Reconstruction backlash, and the spread of the Australian ballot – at some length in later chapters. Scholars disagree over

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[107] Kettner, *The Development of American Citizenship, 1608-1870*, at 344, quoting Alexander Bickel, "The Original Understanding," 69 *Harvard Law Review* 7, 46 (1955-56). Kettner observes that Section Two of the Fourteenth and the Fifteenth both included the phrase "right to vote," but "in both clauses, the language was indirect and negative, open to interpretations that left states with wide powers to curtail access to the suffrage." Kettner, 344.

[108] As Kettner puts it, "in both clauses, the language was indirect and negative, open to interpretations that left states with wide powers to curtail access to the suffrage." Kettner, at 344.

their causes and consequences – more so, to be sure, in the case of the Australian ballot – but both developments are integral parts of the story of American voting's local dimension.

This is also true of a third important development, the spread of compulsory voter-registration laws in the late nineteenth century. As I've explained above, in the first half of the nineteenth century state governments asserted their authority to define the franchise. But the adoption of mandatory voter registration in most states in the latter half of the century – initially in cities, as a "good government" reform aimed at minimizing fraud – would change that. Registration brought about "a new decentralization of power to determine the eligibility of voters, devolving from state governments down to the local and county governments that managed this process and maintained the rolls," as the 2002 report of the National Commission on Federal Election Reform concludes.[109] In other words, the nineteenth century may have begun with states taking some control of election qualifications *away* from localities, but the registration reforms of the century's latter half effectively *returned* a good deal of that power. Mandatory registration spread quite slowly after Massachusetts in 1800 became the first state to enact a compulsory-registration law; few states outside New England adopted compulsory registration prior to the Civil War, and from 1860 to 1880, older northern states enacted requirements applying only to large cities. Western and southern states followed between 1880 and 1900.[110]

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[109] Jimmy Carter et al., *To Assure Pride and Confidence in the Electoral Process: Report of the National Commission on Federal Election Reform* (2002), at 27.

[110] Joseph Harris, *Registration of Voters in The United States* (1929), at 65.

Three facts about this history are most important. First is the strength of local officials' control of the suffrage under early registration law. Under the 1800 Massachusetts law, for example, town assessors prepared lists of qualified electors; the lists were submitted to selectmen, posted and revised; and selectmen or assessors met on election day to hear applications for registration.[111] Deep into 1800s, then – even where state governments had acted to harmonize the franchise at the state level – voter qualification was as a practical matter almost entirely at the discretion of local officials.[112] A second remarkable aspect of registration's spread across the U.S. is simply how slowly it occurred and how little of the population it affected. At the time of the Civil War, there were no registration rules at all in most states, and only in cities long thereafter. (In fact, this was the case well into the twentieth century.[113]) Finally, it seems that partisan fraud – the cessation of which was the key objective of many registration rules – easily survived the new laws. In-person registration was not generally required, and local officials were authorized to "prepare lists of qualified electors from their knowledge," so party machines had little trouble corrupting the new system. Typically,

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[111] Id., 67. Compulsory registration was challenged and upheld in Massachusetts in *Capen v. Foster*, 12 Pickering 485 (1832). However, some courts later struck down compulsory registration, particularly between 1868 and 1886, holding that the elector has an absolute right to cast a ballot. Under these decisions, local officials had to allow the voter to "swear in his vote at the polls." See Harris, 305-310, for an excellent summary of this and other legal controversies.

[112] As Tocqueville observed, registration was "compulsory" for local officials as well as for voters, since Massachusetts selectmen who failed to draw up a list of township voters "were guilty of a misdemeanor." But there is little evidence that this law was enforced, much less that state officials checked the accuracy of town lists. See Alexis De Tocqueville, *Democracy in America, Vol. I.* (1990) (1835), at 63.

[113] As Harris observed in 1929, "[p]ractically every state with one or more large cities has registration provisions which apply only to such cities...." Federal courts held such distinctions to be constitutional, as there was no requirement of uniformity in registration laws. Harris, 312-313. Another source, however, reports that most states had some form of registration requirement as of 1894. See Thos. E. Hill, *Hill's Political History of the United States* (1894), at 122. Hill finds that only Delaware, Indiana, Kentucky, Oregon, and Tennessee had no registration law; he does not explain, however, whether some of the states that *did* have such laws applied the requirement only to cities.

party precinct captains would simply hand in long lists of names, including those of people who had moved away, died, or were altogether fictional.[114]

The decades prior to the advent of the secret, state-produced ballot probably marked the high point of American parties' control of American suffrage practices. Many scholars have also regarded the nineteenth century as a golden age for enlightened, committed political participation generally, though recent work such as Altschuler and Blumin's *Rude Republic* challenges that interpretation, demonstrating that a great deal of nineteenth-century political activity was casual or very uninformed.[115] (It is worth noting here that Altschuler and Blumin study nineteenth-century partisan political practices through a local lens, following events in a few representative towns.) Meanwhile, some of the best scholarship on nineteenth-century American elections does not devote much attention to specific suffrage practices, or to variation at the local level.[116]

Certainly, election days themselves were much more like the festivals of colonial times than the quiet, private affairs of today. As Robert Wiebe writes in *Self-Rule: A*

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[114] Harris, 66.

[115] Id. There is a "nearly consensual view," Altschuler and Blumin argue, that post-Jacksonian American politics was "a genuinely massive activity in which the vast majority of ordinary Americans—white, voting males, most evidently—participated with an effectiveness born of enthusiasm for and deep commitment to their political party, to specific programs and leaders, and to the idea and practice of democracy itself." Id., at 3. Altschuler and Blumin show that that the act of voting was much more "qualified," "hesitant," and "casual" than we have assumed. Many votes were literally purchased; some were coerced by force, others by drink; and a great many voters cast their ballots in utter ignorance of what and whom they were voting for. Americans' relations to their politics were in fact highly variable, characterized by "detachment as well as commitment, skepticism as well as belief, disgust as well as enthusiasm...." Id., at 272. The authors urge us to stop using the nineteenth century "as a club with which to beat subsequent generations of declining voter turnout."

[116] See, for example, Paul Kleppner, *The Third Electoral System, 1853-1892: Parties, Voters, and Political Cultures* (1979). Kleppner's weighty, deeply-researched book examines "the social bases of American mass political behavior," specifically "the social bases of mass partisan support." Id., at *xv, xvi*. In studying election outcomes, Kleppner examines voting data at the county level – and even subcounty in some places – but appears not to have found evidence that different voting mechanisms affected outcomes. See id., *passim*.

Cultural History of American Democracy, "[t]he short, funereal lines outside a modern voting booth would have alarmed a 19th century democrat at least as much as the thought of the 19th century's boisterous, partisan crowds seems to distress commentators today."[117] Michael Schudson labels nineteenth-century voting "the politics of affiliation."[118] Nineteenth-century voters might march together to the polls, fighting opponents along the way; the polling place was full of boisterous partisans, waving banners and torches. Ballots were produced and distributed by parties, and listed the party's candidates for each office; as noted above, the ticket was usually distinctive in color, size, and shape, so everyone at the polls could easily observe any vote.

The kinds of "affiliations" made real through the lack of privacy were often supplemented by parties' habit of rewarding their supporters financially. Outright payments and other activities now condemned as fraud were general in the middle third of the century; they were clearly understood differently then, by many Americans, as simply legitimate "patronage" or "spoils." New York, Philadelphia, and Chicago saw serious fraud during elections in the 1840s; after the Civil War, the Tweed Ring specialized in registering and pressuring new Irish immigrants in droves just before elections, sometimes swelling the rolls by thirty percent in a matter of weeks.[119] The

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[117] Robert Wiebe, *Self-Rule: A Cultural History of American Democracy* (1995), at 7.

[118] Schudson, *The Good Citizen*, at 5-6.

[119] Robert Goldberg, "Election Fraud: An American Vice," in A. James Reichley, ed., *Elections American Style* (1987), at 182. Well into the twentieth century, Goldberg writes, massive fraud was clearly practiced in a wide variety of states. Id., at 183. Fraud today is almost certainly on a smaller scale than in the past, but fraudulent registration, use of absentee ballots, vote buying, and actual falsification of returns are not uncommon. Id., at 184-188.

social norms enabling such behavior were probably localized; this is Elazar's theory, and holds that some types of "local culture" are more likely to tolerate fraud.[120]

It is well-known that state-level Australian-ballot reforms were aimed at reducing such behavior. What is less well understood is that the federal government tackled the problem as well, two decades before state ballot reform began in earnest. In one of the first significant national regulations of suffrage practices,[121] the Federal Elections Law of 1871 required secrecy of some sort, whether by envelopes, folding, or some other method.[122] The law's story is an excellent indicator of the era: it was a national statute, but its implementation rested both formally and informally on local conditions.

The law appears to have been primarily a response to fraud in northern cities. The 1871 law, Argersinger writes, "constituted the largest federal attempt to regulate elections" up to that time, and was necessary simply because "state and local [election administration] laws were inadequate and poorly enforced."[123] The law barred impersonation, repeat voting, intimidation, or bribery of voters in congressional elections, or in registration for those elections; it applied only to large cities, and only under certain important conditions. Two different types of federal officials oversaw elections under the law – supervisors, appointed by federal district courts, and deputy U.S. marshals,

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[120]As Goldberg puts it, Elazar's essential argument is that "election fraud should be harshly condemned in areas characterized by moralistic subcultures, generally tolerated by traditionalistic subcultures, and almost expected under individualistic subcultures." Goldberg, id., 190. But as Goldberg points out, many areas of the U.S. do not fit the theory. Id., 190-191.

[121] Congress in 1842 had required that members of Congress be elected from single-member districts, rather than at-large. See Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process, Rev'd Second Ed.* (2002), at 239.

[122] See Albright, *The American Ballot*, at 21-22. See also "Before the Voting Rights Act," U.S. Dept. of Justice, Civil Rights Division, Voting Section, at http://www.usdoj.gov/crt/voting/intro/intro_a.htm>. As this source notes, the 1871 law "provided for federal election oversight," which distinguished it from the more widely-known "Force Act" of 1870, which criminalized interference with the right to vote.

[123] Argersinger, *Structure, Process, and Party*, at 50.

appointed by the federal executive branch. The two had very different connections to partisan politics. First, the federal circuit court appointed two supervisors per district, and the supervisors had to be of different parties. Supervisors could challenge registration, "inspect the voting process, count the ballots, and issue election certificates."[124] Minority parties—Republicans in most Northern cities, Democrats in Philadelphia—usually requested supervisors. The other officials authorized by the 1871 law were deputy U.S. marshals. The marshals did *not* have to be of different parties; since the U.S. marshal was a federal appointee of the (usually Republican) President, that meant that multiple deputy U.S. marshals gave a distinctly Republican cast to election administration and law enforcement in the 1880s and 1890s. As Argersinger writes, the presence of numerous Republican deputy marshals "suggest[ed] to some that the presence of armed federal election officials was intended to intimidate Democratic voters, particularly in certain ethnic neighborhoods...." Hundreds, and perhaps thousands, of such deputies were authorized over the life of the law. There is a great deal of evidence that Republican deputies aided corruption, sometimes flagrantly; the marshals sometimes arrested Democratic elections officials and ran the polls themselves.[125] In 1894, the law was repealed on a straight party vote, after Democrats made big gains in the 1892 elections. It may be that the effect of the 1871's law's enforcement was to give national involvement in election administration a bad name – at least an utterly partisan one.

Still, the most important change in late-nineteenth-century American election practices was the introduction of a set of reforms that became known as "the Australian

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[124] Id., at 50-51.

[125] Id., at 51-52. At least once, the marshals arrested the federally-appointed Democratic supervisor himself. Id.

ballot." In 1872, Britain did away with oral voting and adopted a method pioneered in her Australian colonies in the 1850s: the government designed, printed, and distributed paper ballots, and stipulated secrecy in voting.[126] (The French had apparently experimented with secrecy as early as 1789, but the practice had not stuck.[127]) The idea caught on American "Mugwumps" in the 1880s, but was not enacted into state law until Kentucky (in Louisville only) and Massachusetts (statewide) tried it in 1888. While there was some variation in the laws that followed, a state-produced, relatively uniform ballot, voted in secret under official supervision were the most common provisions; importantly, reform groups usually emphasized not only enactment of new laws, but also their enforcement.[128] The course of Australian-ballot reform suggests that localities were the laboratories of change: most states initially applied the Australian ballot only to certain municipalities and parts of the state. Among other "early adopters," this was the case in Minnesota, Missouri, Tennessee, and Wisconsin, as well as Kentucky. North Carolina adopted the Australian ballot in one county in 1909, extending it to the entire state two decades later; in 1922, Georgia authorized counties to adopt reform on their own if they wished.[129] Meanwhile, as of 1889, many states set the characteristics of ballot boxes

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[126] See L.E. Fredman, *The Australian Ballot: The Story of an American Reform* (1968), at *ix*.

[127] The 1789 law establishing the States General called for secret ballots in the selection of some delegates; the law of 1791 setting up the country's first legislative assembly called for secrecy in all elections, but it was apparently not well enforced, and a subsequent law allowed voters to *choose* whether to vote openly or in secret. See Stein Rokkan et al., *Citizens, Elections, and Parties: Approaches to the Comparative Study of the Processes of* Development (1970), at 152-153.

[128] Albright, *The American Ballot*, at 26, 25.

[129] Id., at 27.

themselves in state law, but it was up to towns, cites, counties, and school districts to pay for and furnish them.[130]

The publicly-funded, state-produced, secret ballot, distributed only at polling places, was designed to cut down on corruption and reduce the influence of parties. Some states added to the diminishment of parties' power by arranging names by office – the "office-bloc" format – rather than by party, making it more difficult for voters to simply choose a party slate. Indeed, Argersinger concludes that this era of ballot reform was noteworthy because unlike virtually all other changes in American voting law and practice, it was *not* primarily driven by the major parties. Instead, "patrician Mugwumps, labor organizations, and radical parties" motivated reform.[131] However, the changes did not go nearly as far in weakening American parties as it could have: in Australia itself, the "Australian ballot" omitted party designations altogether from general-election ballots, but that did not happen in the U.S.[132]

At least for small parties, the results provided a hard lesson in unintended consequences. Politicians understood full well that electoral structures "had significant practical consequences for voters, parties, and public policy,"[133] and the major parties did all they could to consolidate their control. As Lisa Jane Disch points out, the Australian

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[130] James H. Blodgett, "Suffrage and Its Mechanism in Great Britain and the United States," *The American Anthropologist*, Jan. 1889, at 70. Blodgett offers some fascinating details about state requirements for the boxes themselves, of which the most intriguing is that "Colorado calls for a circular box of glass enclosed in a wooden frame, with a lid fastened with three unlike locks, a key in the custody of each judge of election." Id., at 71.

[131] Argersinger, *Structure, Process, and Party*, at 53.

[132] See Leon D. Epstein, *Political Parties in the American Mold* (University of Wisconsin, 1986), at 163.

[133] Id., at 122. With the advent of the Australian ballot, a slew of crucial administrative decisions previously left to parties – the structure of the ballot, registering candidates, and administering the balloting itself in new ways – were placed before state lawmakers. Not surprisingly, as Argersinger's work on preventing fusion candidacies shows, "politicians often responded to political conditions and manipulated the rules to achieve partisan ends." Id., at 54.

ballot – along with other turn-of-the-century changes – "installed unprecedented obstacles to third-party participation in elections."[134] Previously, as Disch writes, "[t]o act as a party was to qualify as one." (At the time, one scholar concluded that the American way of doing elections led to a great "waste of ballots," because "unorganized voters beyond the reach of sympathizing committees" were effectively unable to vote as they wished.[135]) But now "party fitness [became] a matter for the states to decide," and major-party-dominated state legislatures made life hard for smaller parties in ballot access and design, including erecting new barriers to "fusion" voting. In addition to fundamentally changing how Americans voted, then, ballot reform also helped transform parties themselves: having begun the nineteenth century as essentially private associations with an extremely uncertain status in American constitutional thought, the major parties ended it as quasi-public utilities, with great power to restrict electoral choice.[136] Party scholar Leon Epstein writes that the Australian ballot "may well have been a necessary condition" for the modern American belief in "treating our parties as public utilities."[137]

Not all the action was in state legislatures, however. We do not know enough about the implementation of Australian-ballot laws, but two intriguing pieces by Argersinger show that county-level decisions remained crucial. In Maryland in 1890, conflict over state and county control was an intense partisan controversy. Dominant

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[134] Lisa Jane Disch, *The Tyranny of the Two-Party System* (2002), at 13.

[135] See James H. Blodgett, "Suffrage and Its Mechanism in Great Britain and the United States," *The American Anthropologist*, Jan. 1889, at 68.

[136] Disch, at 44.

[137] Leon D. Epstein, *Political Parties in the American Mold*, at 163.

Democrats wrote into the secret-ballot law a provision allowing the governor to appoint county election supervisors – a power previously held by county commissioners – enabling the Democrats to gain a foothold even in Republican counties. Moreover, the governor could now appoint "state election police" to staff each polling place. One Republican denounced these measures as "flagrant act[s] of centralization and partisanship," which "cheated the people by robbing the counties of their right of self-government."[138] This language might sound a bit strong to modern ears, but nineteenth-century Americans were accustomed to having important aspects of the suffrage closely linked to local experiences: in several places, a man's residence for voting purposes was determined by "where he had his washing done."[139]

Two years later in Oregon, changed rules and partisan maneuvering led to important county-level variation in ballot design. The Presidential election of 1892 was the first held under Oregon's new Australian-ballot law, and Republicans sought to use statewide control to quash Democrat-Populist fusion hopes that year with a ballot-access rule requiring that each name be listed only once.[140] Democrats protested; there was no time for the courts to weigh in, so county clerks turned to party officials for advice on

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[138] Argersinger, *Structure, Process, and Party*, at 140-141, 142. The supervisors may have gained importance because of another feature of the law, which allowed foreign-born residents to vote as long as they were accompanied by a registered friend. *Id.*

[139] See Blodgett, "Suffrage and Its Mechanism in Great Britain and the United States," *The American Anthropologist*, Jan. 1889, at 73. Here three different scholars attest either to experiencing this rule themselves, or hearing of its use elsewhere. One man was trying to vote in Nashville when "he was asked where he had his washing done, and found, when about to resent the inquiry as impertinent, that it was the legal test of residence." Id.

[140] See Argersinger, *"A Place on the Ballot": Fusion Politics and Antifusion Laws*, 85 *American Historical Review* 287 (April 1980), at 293. The Republicans enacted a law barring any candidate's name from appearing more than once on the ballot. At the time, this may have been "a logical corollary to the ballot type," which was the office-bloc format, as Argersinger writes. When Democrats realized the devastating implications for their fusionist hopes in 1892, however, they scrambled to adjust, attempting to get fusionist Presidential elector Nathan Pierce listed twice. Republicans countered that Democrats and Populists would have to either list Pierce once or create a new category for him, such as "Populist-Democrat."

how to list the elector. The result was predictable partisan variation at the county level: Democratic county clerks listed the key fusionist elector, Nathan Pierce, twice, while clerks who took direction from Republican party leaders listed him only with other Populists – but labeled him with the names of both parties. The inconsistencies made "a very pretty jungle," commented one satisfied Republican.[141] The outcome was what Republicans hoped for: lower percentages of both Democrats and Populists voted for Pierce in counties with Republican-designed ballots than in Democratic-controlled counties.[142]

The Australian ballot changed American voting in a final simple but dramatic way. Previously, the ballot was designed, produced, and distributed by parties; usually, all a voter had to do was acquire a pre-printed ticket and place it in a box. In some states, it was illegal for the voter to mark the ticket at all, lest doing so cause confusion. But now, voters would be required not only to read their ballots and choose among candidates listed there, but to indicate a choice either by checking a box, circling a name or set of names, or scratching off disfavored candidates' names. The parties quickly saw that massive voter confusion could be one result, and embarked on voter-education drives to head off trouble. They taught voters about the need to write on the ballot, and showed voters with poor literacy skills how to recognize the vignette or symbol of their party. In Minnesota, one Republican argued that rather than offering "profound dissertations on the tariff and the currency," the best way to secure votes was to instruct partisans in "the

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[141] Id., at 293-294. Republicans hoped that the "Populist-Democrat" label would destroy fusion's delicate balance – since many Populists did not consider themselves Democrats, and vice-versa – and cost Pierce votes. *Id.*

[142] Id., at 294. Pierce still qualified as an elector, but sonly narrowly, and probably with about nine percent fewer votes than he would have had with a dual listing. Id.

art and science of casting a ballot under the Australian system."[143] And in a wonderful detail from Maryland in 1890, "both major parties constructed voting booths and carried them around the state to illustrate the new system of voting at each political rally."[144] (A similar phenomenon is taking place in 2004. In at least one Florida county, the elections supervisor lugs an optical-scan voting machine around the county, visiting parties and barbeques and showing voters how to use the new equipment.[145])

By the turn of the century, the American experience of voting had been transformed for most participants. But despite the advent of registration rules, the state-designed ballot and private voting, and despite significant expansions in both federal and state roles in supervising elections before the end of the nineteenth century, local variation remained the rule. As anthropologist James H. Blodgett concluded his nationwide survey in 1889,

> "[g]reat diversity of provision will continue in different parts of the United States upon the leading features of representation and the conduct of elections, as no uniform legislation is practicable. Only for national elections and in the Territories or by restrictions in enabling acts for new States can the General Government properly legislate as to local adjustments. The inevitable diversity will serve to keep on trial a great variety of plans that find local favor, and may help toward a better solution of the problems of representative government."[146]

IV. The Early Twentieth Century.

No bright line separates the reforms of the late nineteenth century from those of the twentieth. Local responsibility for election administration remained almost total,

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[143] Argersinger, "A Place on the Ballot," at 295.

[144] Argersinger, *Structure, Process, and Party*, at 142.

[145] See Abby Goodnough, "After 2000 Chaos, Voters in Florida Are Wary," *New York Times*, May 24, 2004.

[146] Blodgett, "Suffrage and Its Mechanism," at 73.

even as state legislation continued and the national constitution was amended to require direct election of U.S. Senators and extend the franchise to women. The typical American experience of voting, meanwhile, continued its generation-long transformation. As Michael Schudson argues, developments like the secret ballot and registration rules combined with Progressive projects such as civil-service reform and prohibitions on campaigning in polling places to "celebrate[] the private, rational 'informed citizen' that remains the most cherished ideal in the American voting experience."[147] Indeed, together such reforms really *created* that sober, private voting creature, which had been rarely seen in the public, party-dominated, festive voting environment of the nineteenth century. Today, some critics of the Progressives argue that electoral reforms and changes in "voting day practices" during the period played a crucial role in further separating modern citizens from their own government and from public life generally.[148] Crenson and Ginsberg contend that at least some of that separation was purposeful, since many Progressives wanted to reduce government's "receptivity to popular activism," because they "regarded mass mobilization as an impediment to effective government."[149]

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[147] Schudson, *The Good Citizen*, at 6. Schudson writes that "today's most honored notion of citizenship, the ideal of the 'informed citizen,' arose in the Progressive Era as part of a broad-gauge attack on the power of political parties." Id., at 9.

[148] Schudson, for example, argues that "civil service reform and the decline of voting day practices that provided the ordinary citizen with monetary and social rewards for political activity also removed a manifest level of self-interest from the citizen's relation to politics." Schudson, at 183. Michael McGerr finds that the "intense partisanship" and "inclusive popular politics" of the nineteenth century were, by the 1920s, replaced by "a more constricted public life." Michael E. McGerr, *The Decline of Popular Politics: The American North, 1865-1928* (1986), at 9. The "transformation of ideas and institutions," he writes, "made it increasingly difficult for many Northerners to link their political impulses with political action." Id. And Benjamin Barber criticizes modern American elections for having lost their pomp and ritual, "largely in the name of the kind of efficiency symbolized by voting machines and the kind of privatism represented by the secret ballot." Barber, *Strong Democracy* (1984), at 187.

[149] Crenson and Ginsberg, *Downsizing Democracy*, at 55.

Driving reform in voting practices during the early twentieth century – particularly ballot reform and registration rules – was either a desire to help *foster* a rational, literate, privatized way of voting, or a belief in *limiting* the franchise to only those citizens educated, wealthy, and committed enough to stay engaged in politics and participate under the new rules. It was probably a combination of the two, which are by no means exclusive. As I've noted above, the spread of compulsory registration marked a major practical decentralization and devolution of the power to define the franchise. But requiring registration did something else: it shifted a significant measure of responsibility from the state to the individual, because "it became the duty of individual voters to secure their own eligibility."[150] The Australian ballot, meanwhile, was primarily aimed at partisan corruption and voter intimidation, but it was also a powerful way to cut down on voting by those with less formal education. After all, some Progressives believed that big-city parties and their hordes of working-class, immigrant members were themselves "a corruption" of American democracy.[151] In Great Britain and Australia, voting had been primarily *viva voce*, and the secret ballot was introduced to guard against what we might call "vertical" pressures on voters – "intimidation, often subtle, of working-class voters by their employers or social superiors"[152]—but in the U.S., it primarily aimed to prevent "horizontal" pressures and other defects of the party-dominated ticket system.

States varied in their pursuit of these goals: some permitted poll-workers or even friends to assist voters, but others designed complex ballots which were very difficult for

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[150] Id., at 56.

[151] Id.

[152] Leon D. Epstein, *Political Parties in the American Mold*, at 163.

those with poor literacy skills to understand.[153] But by the 1920s, some advocates came to regard existing registration rules as cumbersome, obscure, and expensive. Initial vulnerabilities to fraud had been "fixed" by requiring in-person registration, limiting enrollment to only a few days a year, an official house-by-house canvass, annual purges of the rolls, and required identification at the polls. But these systems were "exceedingly expensive, cumbersome, and inconvenient," and amidst "growing concern over non-voting," cities and states saw widespread advocacy for reform in the 1920s.[154] As a study produced for the National Municipal League in 1927 concluded, existing registration systems were enacted "before any consideration was given to the idea that participation in elections should be made easy and convenient for the voter."[155]

Not just voter convenience, but cost to parties and city governments – which together sank huge sums into registering voters and running elections – motivated change.[156] Some reformers – including Progressives like William U'Ren of Oregon – pushed for automatic universal registration by the state, observing that European countries already employed such a system and that some American town officials had long been required to compile lists of eligible voters.[157] Almost every state would

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[153] See Keyssar, *The Right to Vote,* at 142-143.

[154] Harris, 66.

[155] The Committee on Election Administration of the National Municipal League, *A Model Registration System* (1927), at 45.

[156] On cost to parties, see Harris, 15; on inconvenience to voters and cost to cities, see National Municipal League, *A Model Registration System* (1927), at 45. As the report observed, "[i]t is impossible even to estimate the cost in time and bother to the mass of citizens to keep registered under existing inconvenient registration systems. In a number of states they must register every year, and are permitted to register only on two or three specified days when sessions are held in the precinct."

[157] Harris, 15-16. For a comprehensive description of where registration laws stood in 1929, see *id.*, 305-333, listing statutes, constitutions, and cases. Harris supported reform, but opposed registration by the state, observing that

eventually enact new laws making registration permanent,[158] but records were still compiled, maintained, and implemented by local officials.

Indeed, even after a full generation of state-level legislation and two Constitutional amendments relating to the suffrage, the National Municipal League in 1927 concluded that American elections were still "largely decentralized." "There is at present," the report states, "very little control or supervision over registration exercised by state officers."[159] Some governors and secretaries of state had "nominal" powers over registration and elections, but local and party officials generally ran the show.[160] While it does not specifically address causation, the League's report suggests that three factors explained local control's persistence: expertise borne of experience; state governments' reluctance to take on what had become a significant expense; and necessity, because of high population mobility and the tendency for local elections to accompany state and national contests.[161] (This connection had not been general until the twentieth century,

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"[t]his method is practicable in foreign countries where a close check up is kept of the comings and goings of individuals, but in this country it has always resulted in inflated and highly inaccurate lists. On the whole, it would seem wise to place the responsibility upon the voter himself and to require a personal registration, but our systems require a revision in order to be made more convenient."

Id. at 16.

[158] Carter et al., at 27.

[159] National Municipal League, at 52.

160 Id. The report does not advocate a systematic shift of power and knowledge to state from local governments. This is particularly clear in the list of recommended changes at the close of the volume. Indeed, a late mention of what would be a statewide registration list writes that it would be "possible, but hardly feasible" to use such a system. Id. at 84.

[161] For example, the authors write that differences within and among states make specifying a national registration system impossible. "The registration law for any city or state should be drafted with careful attention to the local election law and organization, as well as any peculiar local problems, and should be prepared by a competent person who has a thorough knowledge of registration administration." Id., at 48. The League's Committee on Election Administration, headed by political scientists like Charles E. Merriam and Joseph P. Harris, appears to have been heavily populated by city and state elections officials. See id., "Foreword" (page not numbered.)

since partisans in many states purposefully kept elections separate lest national issues overwhelm their ability to focus voter attention on matters closer to home.[162])

The story of American election administration and suffrage practices is distinctly non-linear – in terms of expansion and contraction of local control, inclusive or exclusionary effects on the electorate, the power of parties, and the nature of ballots themselves. A snapshot of Presidential ballot development during the early twentieth century illustrates this well, and also demonstrates again how much Americans' experience of voting in national elections has changed. As Daniel Wirls writes in his study of the Seventeenth Amendment, electoral structures determine who gets to vote for what, when, and how.[163] In Presidential elections, of course, Americans technically vote not for a Presidential candidate himself, but for delegates to the Electoral College. We might assume this has been a mere mathematical formality for a long time, but it isn't so. In fact, as an important recent article points out, in the 2000 election five states still listed electors' names on the ballot, together with the names of the candidates they were pledged to support. One state, Georgia, listed electors' names in larger font than the candidates. And two states permitted write-in votes for individual electors.[164]

We do not know whether such phenomena affect election outcomes today. At the very least, they must shape voters' experience of Presidential voting by raising their

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[162] See Argersinger, *Structure, Process, and Party*, at 45.

[163] See Daniel Wirls, "Regionalism, Rotten Boroughs, Race, and Realignment: The Seventeenth Amendment and the Politics of Representation." 13 *Studies in American Political Development* 1 (1999). Wirls here paraphrases Harold Lasswell's famous definition of politics. The "who" has long gotten the lion's share of scholarly attention, Wirls writes, but the "'how' and 'for what' of voting have also played crucial, though perhaps less understood, roles in the politics of democratization." Id., at 1.

[164] See Richard Niemi and Paul Herrnson, "Beyond the Butterfly: The Complexity of U.S. Ballots." 1 *Perspectives on Politics* 317 (2003), at 323. The states in the first category were North and South Dakota, Arizona, Louisiana, and Georgia; Pennsylvania and Tennessee permitted write-in votes for individual electors.

awareness of the Electoral College itself; simply by adding another layer of complexity to the ballot, listing delegates injects further uncertainties into our understandings of how voters behave. But such a ballot – listing electors' names, grouped alongside that of their candidate – was very rare in the early twentieth century. In fact, for *most* of U.S. history, most American elections did not present voters with a choice between Presidential candidates *on their ballots*. In his history of the American ballot, Spencer Albright finds that Massachusetts (1892) and Minnesota (1901) pioneered the grouping of electors' names.[165] Kansas in 1897 and Wisconsin in 1901 first added the names of Presidential and Vice-Presidential candidates; not until 1917 did Nebraska become the first state to omit the electors' names entirely by statute.[166] Of course, we can assume the vast majority of voters knew whom they were supporting for President. But it is remarkable to look at facsimiles of old ballots – such as that of Arkansas in 1940 – and look in vain for the names of Presidential candidates. Instead, pride of place goes to a list marked FOR PRESIDENTIAL ELECTORS, followed by the names of nine Democrats and nine Republicans.[167]

It took U.S. ballots well over a century to catch up with practical changes in how Americans selected their President; state practices remained deeply divided decades into the twentieth century. As of 1923, virtually all states persisted in what political scientist Leon Aylsworth called "the absurd legalism of presenting an opportunity to vote for electors individually," and many even instructed voters in how to *split* their Presidential

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[165] Albright, *The American Ballot*, at 101.

[166] Id., at 102-103. Iowa had listed only Presidential candidates' names as early as 1900, but not as a matter of law, and only because new voting machines could not accommodate multiple names. Id., 141.

[167] The voter is instructed to "Cross Out or Scratch Off the Names of All Persons Except Those For Whom You Wish to Vote," which must have led to considerable error. Albright, at 48.

vote among electors of different parties – behavior not in the interest of either the individual voter or the state as a whole.[168] Aylsworth found that states used one of five rough types of Presidential ballot. These ranged from entirely ungrouped electors, without corresponding candidates' names and sometimes lacking even party designation, to the ballot we're accustomed to today, indicating only the names of the candidates and their party. Only two states used this latter method – the "short ballot" – in 1923, and only four more states would adopt it before 1932.[169] Given that most Americans had to navigate long lists of actual electoral-college candidates, the simple statement that they voted for this or that Presidential candidate seems too simple. At least in terms of ballots, it is more accurate to say they voted for electors or parties, who "mediated" the voter's choice in a way they no longer do today.

Why did the long ballot prove so difficult to kill off? Perhaps many Progressives supported the long ballot precisely for its potential to limit the power of parties. Aylsworth identified, somewhat obliquely, other possible reasons why so many states used long ballots. First, state and local officials might have wanted to separate Presidential politics from state and local balloting. As Aylsworth pointed out in describing the spread of the short ballot, "[t]his merging of the ballots will . . . undoubtedly increase the influence exerted by the national upon the state and local tickets."[170] Meanwhile, the great costs of printing and counting long ballots – the Presidential ticket alone often needed to measure several feet across to accommodate dozens or scores of candidates' names – suggest another explanation: elections must have

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[168] Leon E. Aylsworth, "The Presidential Ballot," *American Political Science Review* 89 (1923), at 92.

[169] Id., at 90-93.

[170] Aylsworth, "The Presidential Short Ballot," *APSR* (1932), at 969 n.11.

been a significant source of employment and patronage, and long ballots provided much more work than short ones. Whatever the reasons, change came surprisingly slowly: as of 1942, thirty-three states still did not use the modern short ballot, and over a dozen southern and western states still listed delegates individually.[171] The Founders' design for the Electoral College as a deliberative group may have fallen by the wayside long before, but in American election practices, the Electoral College was alive and well deep into the twentieth century.

Changes to American voting practices in the Progressive era are particularly difficult to summarize. Some weakened parties, while others, such as the Presidential short ballot, would seem to strengthen them. Some strove to increase burdens on voters, but the second wave of registration reform tried to ease them. In the adoption of the secret ballot and compulsory registration, American suffrage moved closer to its contemporary form. But the continued use of long ballots around the country meant that through the Second World War, many Americans had not had the chance to vote directly for a Presidential candidate on their ballots. Localities, meanwhile, retained sweeping control over a wide variety of formal and informal suffrage qualifications.

V. The Voting Rights Act Era (and Beyond).

The trend in American elections in the twentieth century has been "the increasing intervention of the federal government into the areas of electoral regulation traditionally reserved to the states,"[172] or to counties and cities. Such intervention accelerated in the

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[171] See Albright, *The American Ballot*, at 105, 110.

[172] Argersinger, *Structure, Process, and Party*, at 65.

1960s, particularly with the 1964 abolition of poll taxes in federal elections through the Twenty-Fourth Amendment, and above all with the 1965 Voting Right Act (VRA) and its progeny.

The VRA has been called ""one of the most important and successful pieces of legislation of this century,"[173] and a full analysis of its contents and impact is outside the scope of this essay. Here, what is essential is simply that the Act greatly expanded *de jure* supervision of elections at the national level, but generally left *de facto* administrative responsibility with states and localities. Shocked into action by violence in Mississippi and Alabama in particular, the national government moved from its decade-long policy of litigation to a direct-action strategy to protecting blacks' voting rights.[174] The VRA was enacted for the purpose of "ridding the country of racial discrimination in voting"[175] and ending Southern states' "unremitting and ingenious defiance of the Constitution,"[176] as the Supreme Court put it in upholding the law in 1966. The Act outlawed any "voting qualification or prerequisite to voting" that denied voting rights on account of race, and specifically banned literacy tests, restrictions based on educational achievement or understanding, and tests for 'good moral character.'[177] In his address to Congress on the importance of passing the VRA, President Lyndon Johnson conjured an image of local, procedural hurdles to voting:

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[173] Bernard Grofman, Lisa Handley, and Richard G. Niemi, *Minority Representation and the Quest for Voting Equality* (1992), at 137.

[174] Howard Ball, Dale Krane, and Thomas P. Lauth, *Compromised Compliance: Implementation of the 1965 Voting Rights Act* (1982), at 193.

[175] *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

[176] *Katzenbach*, 383 U.S. at 309.

[177] David M. O'Brien, *Constitutional Law and Politics*, vol. 1 (2003), at 773.

"The Negro citizen may go to register only to be told that the day is wrong, or the hour is late, or the official in charge is absent. And if he persists and if he manages to present himself to the registrar, he may be disqualified because he did not spell out his middle name or because he abbreviated a word on the application. And if he manages to fill out an application, he is given a test. The registrar is the sole judge of whether he passes this test...."[178]

Certainly, the Act diminished the scope of local control, by setting national legislative and litigative power not only against states, but also against localities. The VRA's "coverage" formula applied to any state or locality where a given percentage of voters were un-registered or had not voted in recent elections; scholarly accounts of the first decade of the VRA emphasize violations, litigation, and judicial responses at the county level.[179] Advocates for voting rights instruct citizens in how to recognize and challenge illegal voting procedures by counties, cities, and special election districts, such as changing polling places or voter-registration procedures.[180] And one new book analyzes the impact of the VRA by focusing on its effects on the politics of a single city, Dallas, and concludes that one of the Act's successes was that it "sensitizes local officials to the need to consider the impact on minorities of changes in electoral structures and rules."[181]

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[178] Excerpted in O'Brien, *id.*, at 774-775

[179] For example, see Charles V. Hamilton, *The Bench and the Ballot: Southern Federal Judges and Black Voters* (1973).

[180] See, for example, Barbara Y. Phillips, *How to Use Section 5 of the Voting Rights Act* (1983), at 43-47.

[181] Ruth P. Morgan, *Governance by Decree: The Impact of the Voting Rights Act in Dallas* (2004), at 32. Generally, Morgan's is a cautionary analysis, which urges us to "recognize the limitations of legislation to effect complex political change." *Id.* at 11. Morgan also writes that the VRA "initiated a transformation that restructured local governments, destabilized political systems, and, in some cases, exacerbated racial tensions," though this analysis seems to focus on redistricting and apportionment questions and the idea of "group rights" under the VRA. *Id.* at 62.

Extensions and additions to the VRA in 1970 and 1982 would lead to the abolition of literacy tests and the reduction of residency requirements to thirty days, among many other changes.[182] Of course, numerous Supreme Court decisions have upheld and further expanded the Act's reach into areas previously managed by state and local governments, in keeping with what one critic calls "the mystique of standardization, expertise, crisis, and progress."[183] Standardization was also a driving force behind the National Voter Registration Act of 1993, often called the "motor-voter" bill because it required states to make registration available in driver's license agencies, among other changes. Most recently, President Bush signed into law the Help America Vote Act of 2002 (HAVA), which has the potential to transform and standardize American election practices as never before. If each step seems to move closer to eliminating local variation in American voting, each also illustrates the limits of previous legislation. HAVA, for example, lists dozens of areas in which state and local variation survives, and procedures to remedy grievances under the law clearly indicate that county and municipal authorities will continue to administer U.S. elections.[184] And while registering to vote has gotten much easier in recent decades, records are still "maintained in the separate files of the nearly 13,000 local election jurisdictions of the United States," as the 2002 report of the National Commission on Federal Election Reform observed.[185]

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[182] For an excellent illustration of the range and complexity of the VRA's effects on U.S. elections, see Issacharoff et al., *The Law of Democracy*, Appendices 28-61, which list important Sections of the Act.

[183] Ward E.Y. Elliott, *The Rise of Guardian Democracy: The Supreme Court's Role in Voting Rights Disputes, 1845-1969* (1974), at *vii*.

[184] See, for example, the numerous documents devoted to HAVA implementation located within the websites of U.S. Secretaries of State.

[185] Carter et al., *To Assure Pride and Confidence in the Electoral Process: Report of the National Commission on Federal Election Reform* (2002), at 27. Among the many results of this fragmented system is the startling number of inactive voters still registered in many localities—people who may still live in the

As the saying goes, it sometimes seems that the one constant in the history of American voting – in the means of voting, the atmosphere at election time, the place of parties, the presence of registration requirements, the content of ballots, the offices subject to direct election, the size and characteristics of the electorate, the willingness of federal courts to scrutinize elections, and the ability of local, state, and national governments to set qualifications and monitor the proceedings – has been change. In fact, however, there has been another enduring characteristic: a prominent role for county, city, or town employees. Why has the local dimension of American suffrage survived through generations of sweeping transformations in other aspects of American voting? This is a difficult question to answer, not least because variation has been so fine-grained as to defy identification of clear national trends. But several hypotheses emerge from the material. To some degree, Americans have acquired our distinctive, hyper-federalized system of election administration as the British acquired their empire: in a fit of absent-mindedness, or at least a fit of inertia. But more purposeful and philosophical factors are certainly present. Arguments for keeping control of national elections close to home have often been premised on specific conceptions of popular sovereignty. Just as often, the famous American dread of centralized power has contributed to a reluctance to centralize voter information or administrative responsibility. And while some of the most egregious examples of exclusionary practices can be found in locally-administered literacy-test and poll-tax laws, local authorities were

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area, but who may have moved away, died, or be in prison. According to firms used by politicians to contact eligible voters, the amount of "deadwood" on the typical voter list is as high as 16%. Carter et al., at 78 n.13.

sometimes more eager than state and federal officials to allow new immigrants, non-citizens, and women to vote.[186]

This history has normative consequences for reformers today. As the U.S. reforms electoral administration to meet modern standards of fairness, we should not fear change – after all, virtually every aspect of American voting has changed profoundly, usually more than once. But the important local character of the voting process should also be preserved. Voting may be the central activity of American national citizenship, but it has always been a way that Americans build and express our *local* citizenship, as well. Reforms rectifying discriminatory, severely error-prone, or otherwise inadequate electoral practices should proceed, but with a keen awareness that American national elections have always been a patchwork quilt made of tiny pieces. Americans have always voted together in our communities, and have done so for reasons partly rooted in our fundamental political traditions.

[186] State laws regulate the voting rights of people convicted of crime today, but in at least a few cases, even *formal* control of suffrage qualifications lies with county officials. For example, a 1993 Georgia case, *Jarrard v. Clayton County Board of Registrars*, showed that the decision as to whether an offense reveals enough "turpitude" to warrant the loss of voting rights – here, repeat violation of drunk-driving law – is still sometimes made at the county level.

CHAPTER 3

"DOG TAGS AND DUMP STICKERS:" AMERICAN VOTING, THE STATE, AND THE PRACTICE OF POPULAR SOVEREIGNTY

This chapter develops an argument about suffrage, popular sovereignty, and the American state. I analyze the implications for popular sovereignty of our distinctive, locally-administered way of voting, defining popular sovereignty as having both instrumental and constitutive aspects. Many contemporary commentators assume that local control inhibits the exercise of popular sovereignty, but I argue that its potential to enhance self-rule is at least as great. My central thesis comes in two parts. First, I want to show that thinking about voting practices improves our conceptions of American popular sovereignty. Second, I argue that on balance, contrary to the current conventional wisdom, the hyper-federalized American way of suffrage makes sense when placed into the story of American self-rule. The chapter consists of four sections. First, I consider the perils and promise of local voting, seen from the vantage of current events in the U.S., and explain the language I use to analyze its connections with popular sovereignty. Next, I explain why the connection between voting practices and popular sovereignty deserves scrutiny, and draw on new research in comparative politics which links legitimacy with election management in new democracies. This section also outlines why it is still important, in the era of the VRA, Bush v. Gore, and HAVA, to focus on the power of local officials as well as national lawmakers. Third, I analyze election administration from the perspective of the state-building literature. Fourth, I make the case "for" local control of election administration by connecting the American

way of voting with the ideas of Madison and other founders, Tocqueville, and contemporary democratic theorists.

I. "Please come out."

Between the disk jockey's tables and the food tent, Gadsden County elections supervisor Shirley Green Knight set up her new optical-scan voting machine at a town party in Sawdust, Florida. Gadsden is one of Florida's poorest counties and its only majority-black county, and it had the highest rate of disqualified ballots in the Presidential election of 2000. Knight, who took on the job of elections supervisor in 2001, has spent a good deal of time in 2004 toting the optical-scan machine to "church fellowship halls, town carnivals, high school classrooms and anywhere she can appeal to large groups," as the *New York Times* recently reported.[1] Knight's "gently pleading message:" "Your vote will count this time, so please come out." At the Sawdust gathering, the D.J. took the microphone between songs to remind partygoers to register.[2]

Far north of Gadsden County, the town clerk of a white and wealthy town in the Massachusetts Berkshires told a similar tale. Asked by a skeptical visitor about the wisdom of having registration and elections run by officials in each tiny town – Massachusetts is one of the states in which towns and cities, not counties, choose election machinery and administer elections – Monterey town clerk Barbara Swann responded that she and her peers take great pride in high rates of registration and turnout. Like

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[1] Abby Goodnough, "Reassurance for the Florida Voters Made Wary by the Electoral Chaos of 2000," *N.Y. Times*, May 24, 2004, at A18.

[2] *Id.* One county commissioner told the *Times*, "[e]very population has gotten the feel of that machine. Sometimes it's a little awkward when Shirley shows up at these events, but people say, 'If she's taking it way out here then there must not be anything to hide.'" *Id.* Knight's story is part of a larger movement "rising in poor black communities to register and to educate, reassure and entreat." Id.

Shirley Green Knight in Gadsden County, Swann said that she actively encourages political participation. "I'm on them to register when they come in for dog tags and dump stickers," she said.[3]

These images capture both the peril and the promise of the distinctive American way of running elections. First, consider the perils: the central reason Shirley Green Knight is making her rounds is that the voters of Gadsden County feel that they were effectively disenfranchised in 2000 by a badly designed ballot, too few polling places, and other factors, some of them directly under county control.[4] About 2,000 residents of this heavily Democratic county voted in vain – a figure four times the margin by which George W. Bush won the state of Florida. Such problems are not exclusively or necessarily linked to local administration. But a more robust system of statewide election administration – let alone a national system – would likely not have permitted such inconsistencies and the use of such inadequate machinery, technology which is a key reason why millions of votes are "lost" in each American election.[5] Knight's travels anticipate the 2004 election, and aim to prevent another failure. She clearly believes that what happened in 2000 prevented her constituents from expressing and securing their interests. Meanwhile, the Berkshire town has enough money and a sufficiently small population to continue using paper ballots – the method which results in the lowest

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[3] Interview with the author, Barbara Swann, Town Clerk, Monterey, Massachusetts, April 7, 2003. As a "participant observer," Swann has close to two decades' experience and the added benefit of a Ph.D. in Anthropology.

[4] Goodnough, *supra*. Some residents had to drive 20 miles to vote; when Knight joined county government, she was able to increase the number of polling places.

[5] CalTech/MIT Voting Technology Project, "Voting: What Is, What Could Be," (2001), at 17.

percentage of "lost" votes.[6] Such considerations suggest that local administration of elections *compromises* American popular sovereignty.

On the other hand, Knight is an official – a member of the government, but one who knows many constituents personally – literally *recruiting* people to register and vote, at non-political events. The same thing occurs in rural Massachusetts. Each official feels intensely her duty and obligation to facilitate voting by her neighbors – that is, her constituents. This immediacy, close connection, and linkage of the political and social realms would be extraordinarily difficult to achieve under state or federal administration. These factors suggest that the local dimension of suffrage *enhances* the exercise of popular sovereignty in the U.S.

Ultimately, the simple fact of the work these two women do – one in a poor, mostly black, southern county, the other in a rich, mostly white, northern town – reveals the importance of local administration in the practice of American popular sovereignty. Taking its cue from such stories, this chapter develops an argument about suffrage, popular sovereignty, and the American state. I address a question crystallized by Shirley Green Knight's story: what are the implications for popular sovereignty of our distinctive, locally-administered way of voting? First, the local dimension may *inhibit* or *enhance* the practice of popular sovereignty in the U.S. As I have explained in previous chapters, many contemporary commentators assume the negative conclusion: that our fragmented, tiny-patchwork electoral system is an anachronistic flaw in American democracy, if not "a national scandal," as the *New York Times* recently editorialized in a

[6] See Stephen Knack and Martha Kropf, "Who Uses Inferior Voting Technology?" *PS*, September 2002.

criticism of locally-maintained voter lists.[7] These questions are ultimately too complex to be reduced to "good" and "bad." But this chapter emphasizes the less prominent, perhaps counterintuitive side of the argument: local administration and local contexts, I argue, have always played an important role in how Americans exercise popular sovereignty, and the local dimension has significant redemptive qualities. Through American history, many politicians, scholars, and commentators have either urged or simply taken for granted that Americans vote under the supervision of local authorities and in particular local contexts. Indeed, even the *Times* editorial noted above does not call for any diminution of local control, aiming its recommended reforms at "states and localities."[8]

Second, the local dimension of voting shapes and defines American popular sovereignty in both *instrumental* and *constitutive* ways. Again, the Gadsden County story elucidates this conceptualization. The *instrumental* aspect of popular sovereignty refers simply to the citizenry's ability to choose their leaders, acting both individually and collectively. When a person is made more likely to register, to travel to the polls (or vote through other means), to vote her intentions on a clear and intelligible ballot, and to have that vote accurately counted (and, if necessary, recounted), this instrumental side of popular sovereignty is enhanced. Conversely, when any step in the serial voting process

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[7] See "How America Doesn't Vote," *N.Y. Times* (editorial), Feb. 15, 2004. The editors wrote, "[t]he lists of eligible voters kept by localities are the gateway to democracy, and they are also a national scandal." As the editorial notes, "[f]ederal law provides some general guidelines about keeping voter rolls, but the basic decisions about who is eligible to vote are largely left to local officials. City and county election offices are responsible for adding new registrants to the voter rolls, and purging voters who die, move away or are convicted of felonies."

[8] The editors called for clear standards for purging voters, greater transparency, and nonpartisan administration. *Id.*

is made more difficult – or even obstructed, either purposefully or accidentally – popular sovereignty's efficacy is diminished.

The ultimate demonstration of any variable's effect on this instrumental side of popular sovereignty is a showing that the factor in question – here, local administration – can affect election outcomes. As I have explained in previous chapters, strong evidence that local variation helped decide the Presidential race in Florida in 2000 is a major reason why election administration has captured the attention of behaviorally-oriented political scientists, journalists, and state legislators around the country.

In the comparative study of elections, political scientists are accustomed to discussing elections as "instruments of democracy" – tools by which citizens influence policy and policymakers – and examining their efficacy from that perspective.[9] As Hannah Pitkin wrote, successful democracy "require[s] functioning institutions that are designed to, and really do, secure a government responsive to public interest and opinion."[10] A considerable literature builds from this premise, ranging from political philosophy into behavioral election studies and public choice. Where this work is comparative, it tends to take a "macro" perspective – comparing plurality and

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[9] See G. Bingham Powell, Jr., *Elections as Instruments of Democracy: Majoritarian and Proportional Visions* (2000), 3. Powell writes that "elections should not only provide symbolic reassurance, but also genuinely serve as instruments of democracy." Id., 4. As Hannah Pitkin put it, "Our concern with elections and electoral machinery, and particularly with whether elections are free and genuine, results from our conviction that such machinery is necessary to ensure systematic responsiveness." Quoted in Powell, 255 n.1. See also Douglas W. Rae, *The Political Consequences of Electoral Laws, Revised Ed.* (Yale, 1971). Rae focuses on the relationship between parties and electoral laws, but does not address election administration directly. For a critical review of the dominance of instrumental theories of voting in American constitutional law, see Adam Winkler, "Note: Expressive Voting," 68 *N.Y.U. Law Review* 330 (1993), at 341-346. As Winkler notes, the instrumental understanding depicts the vote "as a societal tool for exercising social power" and "a means of pursuing informed political choices in an effort to direct governmental institutions." *Id.* at 331. *See also* Anthony Downs, *An Economic Theory of Democracy* (1957), at 36-39, explaining "the basic logic of voting" by hypothesizing the utility-maximizing decisions of individual voters, who make voting choices by calculating their "utility income" from different government activities."

[10] Hannah Pitkin, *The Concept of Representation* (1967), at 234.

proportional systems, for example[11] – rather than examining how electoral instruments function in practice. Today, empirically-oriented political scientists and election-law practitioners are taking an increasingly close look at the practical consequences of America's fragmented system of election administration.

The *constitutive* element of popular sovereignty is no less important. I use this term to try to capture the processes and practices by which Americans exert and experience their control over the government. In my view, those practices – along with other attributes of political life – constitute American popular sovereignty and give it a distinctive character. As I explained in Chapter One, many contemporary commentators laud the neighborly character of American elections as their finest feature.[12] Critics of early, absentee, and all-mail voting also extol the local dimension of casting ballots in the U.S. in different ways, as do some critics of the expanding use of "direct democracy" tools such as the referendum and recall.[13] When a democratic citizen chooses her representatives standing in a local institution such as a school, firehouse, or church, after conversing with her neighbors and the other town or county officials who had helped her register to vote, may have designed the ballot, and now instruct her on how to mark her

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[11] See, for example, Powell, *id.*, which evaluates majoritarian and proportional systems and discusses electoral influence, mandates, and government responsiveness; Arend Lijphart, *Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies, 1945-1990* (1994), which analyzes the rules and operation of different electoral regimes; and Martin Harrop and William L. Miller, *Elections and Voters: A Comparative Introduction* (1987), which emphasizes electoral systems and voter behavior. One exception is Yonhyok Choe, *How to Manage Free and Fair Elections* (Göteborg, 1997), which examines election administration as a central component of free and fair elections in comparative perspective. And for a historical, contextually-rich comparative approach, see the essays collected in Eduardo Posada-Carbo, ed., *Elections Before Democracy: The History of Elections in Europe and Latin America* (1996).

[12] See Chapter One, notes 149-151 and accompanying text, quoting from Dennis F. Thompson, David Shribman, and Paul Gronke.

[13] Recent examples include David S. Broder, *Democracy Derailed* (2000); John Haskell, *Direct Democracy or Representative Government?* (2001); Larry Sabato, Howard Ernst, and Bruce Larson, eds., *Dangerous Democracy?* (2001), and Richard J. Ellis, *Democratic Delusions* (2002).

ticket, she exercises popular sovereignty in a fundamentally different way than if she voted on-line, on the phone, or sitting at home filling out a universal national ballot. Moreover, when she has an opportunity to work in the election process herself, either as a volunteer helping out at a local polling place or by seeking local political office, she may gain a greater sense of her "sovereignty" over the state than she would have if a federal election-administration system limited such opportunities. That expanded sense of power would exist whether or not she had actually changed any votes or even increased the chances of her political allies' votes being counted – that is, regardless of whether the *instrumental* aspect of popular sovereignty was enhanced for her. And over time, the two are likely to be connected: a greater sense of electoral satisfaction among voters will likely lead to increased participation. This is the message of Edmund S. Morgan's insightful comparison of Northern and Southern elections in the late colonial and early national periods. Except in Rhode Island, he writes, early New England elections "displayed none of the violence, none of the campaigning, none of the corruption – and none of the excitement – to be found in the South." Turnout in New England's "sober elections," he writes, "was smaller than in the aristocratic South's drunken ones."[14]

As Morgan's pointed regional comparison reminds us, popular sovereignty has always been one of the most important contested concepts in American political thought. But a defining attribute of that sovereignty has not been properly understood, because voting practices and election administration have not been addressed from the perspectives outlined here. Closer attention to the local dimension of American voting –

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[14] Morgan, *Inventing The People*, at 207. New England, Morgan concludes, may indeed have been the cradle of American democracy. But if elections and electoral campaigns "give plausibility to the fiction of popular government, southerners knew a good deal more about engaging the public in elections than New Englanders did." Id., 208.

the goal of this dissertation – shows us that American popular sovereignty has always had a locally-textured character, mediated by local institutions and practices. That character distinguishes and defines American popular sovereignty in ways which are different from the more familiar kinds of filters and limits on the popular will we have long emphasized – those established by federalism, election districts, the electoral college, parties, and interest groups, for example.

As voters, Americans exercise popular sovereignty through their ballots. But to a degree unusual among democracies, American suffrage has always been administered largely by county and municipal officials and subject to local conditions, in a variety of ways. Even as they exercise popular sovereignty on a national scale and constitute their own national citizenship, then, Americans experience their *local* political identities as well. This local dimension of American voting shapes popular sovereignty in the U.S. in constitutive and instrumental ways, and has the potential to both inhibit and enhance the people's authority over the state. These are the themes of this chapter.

My thesis has two complementary parts. First, I want to show that thinking about voting practices improves our conceptions of American popular sovereignty. Second, I argue that on balance, contrary to the current conventional wisdom, the hyper-federalized American way of suffrage makes sense when placed into the story of American popular sovereignty. The local dimension of American voting becomes much more intelligible and defensible, and much less a scandalous accident of history, when incorporated into the family of ideas built around popular sovereignty and the state.

II. Sovereignty Made Real: Suffrage, Sovereignty, and American Voting.

a. Why Voting (Still) Matters

For all their flaws and foibles, elections are the most direct way in which democratic citizens exercise authority over the state. When Judith Shklar sought to identify the central activities and ideas which define American citizenship, she chose "voting" and "working."[15] As a matter of "institutional political theory,"[16] then, the specific practices and contexts comprising the central activity of American citizenship carry important ideas about self-rule, equality, and popular sovereignty. Despite Downs, and despite the alleged "vanishing voter," voting is still the way citizens make real their ownership of the government and membership in the polity, converting it from theory to practice.

American voter participation is now low by historical standards.[17] But the importance of ballots as instruments of self-rule is undiminished, because popular participation in so many *other* aspects of public life has declined at least as rapidly. As Gianfranco Poggi observed, "[c]ontemporary publics have fewer and fewer opportunities and incentives for mobilizing around public issues and for experiencing the attendant heightened feeling of widely shared involvement in and concern with public issues." Voting in elections, Poggi continues, "constitutes practically the only regular expression

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[15] See Judith Shklar, *American Citizenship: The Quest for Inclusion* (1991).

[16] On the importance of context, Dennis F. Thompson writes, "[t]he meaning of principles such as equality and liberty cannot be adequately understood apart from the institutions in which they are realized. Until we examine the ways they play out in political institutions, not only can we not decide what kind of equality or liberty we wish to promote, we cannot even determine what the principles mean." Thompson, *Just Elections*, at *viii*. As Thompson explains, institutional political theory seeks to examine principles in institutional context, consider the "incompletely theoretical" ideas of lawmakers and citizens, and interpret "midrange principles." Id., *viii-ix*.

[17] For a critical review of the "vanishing voter" literature, see Michael P. McDonald and Samuel L. Popkin, "The Myth of the Vanishing Voter," 95 *American Political Science Review* 963 (2001).

of partisanship – and for that matter of active citizenship."[18] In *Downsizing Democracy*, Crenson and Ginsberg make a similar argument, describing a "general political demobilization [in] the past several decades," which has "reduced the government's reliance on the active and collective cooperation of the people."[19]

These insights have important implications. First, as other opportunities for exerting public power slip away – in areas ranging from military and tax policy to the strength of unions and the changing nature of interest groups – elections may become more important as instruments of popular control, simply by default. Second, if Poggi is right to focus on the "feeling of widely shared involvement in and concern with public issues," then we should seek a specific, constitutive understanding of the nature of that involvement, in terms of actual electoral practices and contexts. To put these two points together: even given well-known concerns about the efficacy of voting in a huge, money-driven, two-party democracy, and despite declining turnout, American suffrage practices remain crucial to the exercise and the character of American popular sovereignty.

Of course, popular sovereignty is one of the essential "contested concepts" in American politics. As Edmund S. Morgan brilliantly explains in *Inventing the People*, the concept itself took centuries to gain hold in Anglo-American thought, and only a long process of fictionalization, invention, and myth-making embedded popular sovereignty in American ideology.[20] The sovereignty of the people was one of the four tenets of

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[18] Gianfranco Poggi, *The State: Its Nature, Development, and Prospects* (1990), at 138.

[19] Matthew A. Crenson and Benjamin Ginsberg, *Downsizing Democracy: How America Sidelined Its Citizens and Privatized Its Public* (2002), at 45.

[20] Edmund S. Morgan, *Inventing The People: The Rise of Popular Sovereignty in England and America* (1988).

Jefferson's preamble to the Declaration of Independence,[21] and the topic dogged debates over the new Constitution, both in terms of the mechanics of ratification and the substance of the new document.[22] Federalism and sectional disputes repeatedly raised thorny practical questions about the identity of the "people" and about sovereignty's exercise,[23] and John C. Calhoun's theory of "concurrent majorities" tried explicitly to revise American ideas about sovereignty.[24] Robert A. Dahl's *A Preface to Democratic Theory* is built around competing theories of sovereignty, which he labels "Madisonian" and "Populistic."[25] Gerald Leonard, like others, calls those traditions "Madisonian" and "Jeffersonian."[26] In his *The Invention of Party Politics*; Leonard elegantly integrates

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[21] The others were natural law doctrine, the compact theory of the state, and the right of revolution. See Herman Belz, Alfred H. Kelly, and Winfred A. Harbison, *The American Constitution: Its Origins and Development, vol. 1.* (1991), at 60.

[22] See generally Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969); and Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1997), at 18, 101, 105-107. Rakove makes one particularly insightful observation regarding the special electoral mechanism used to ratify the Constitution – the Federalist-driven choice of popularly-selected ratifying conventions rather than existing state legislatures. This "resort to popular sovereignty," he writes, "marked the point where the distinction between a constitution and ordinary law became the fundamental doctrine of American political thinking. Far from being less legal than the other charters that had gone before it, the Constitution established a more profound criterion of legality itself." Id. at 130.

[23] See Daniel T. Rodgers, *Contested Truths: Keywords in American Politics Since Independence* (1998), at 84-92.

[24] John C. Calhoun, *A Disquisition on Government* (1851).

[25] Robert A. Dahl, *A Preface to Democratic Theory* (1956).

[26] Gerald Leonard, *The Invention of Party Politics: Federalism, Popular Sovereignty, and Constitutional Development in Jacksonian Illinois* (Chapel Hill, 2002). Leonard offers an insightful picture of the ideas through which Americans around 1840 came to incorporate partisan behavior into their ideas of popular sovereignty and political practice:

> "The campaign of 1840 forced Americans as never before to confront the practical questions entailed by an abstract, national commitment to 'popular sovereignty' or 'democracy.' If the Constitution enshrined self-government by free and equal individuals, then how were those abstractions to be put into practice? If equality implied majority rule, if majority rule implied compromises of individual judgment, if an individual's freedom and equality were actually conditioned on his or her social, economic, and political resources, if political organization could enhance individual freedom and equality in some circumstances but fatally compromise it in others – if all these things were true, then how was self-government by free and equal individuals to be implemented? Was the Constitution's formal institutional design the whole answer? Or did the

political parties and constitutional thought into the story of American popular sovereignty. These are just a few examples from the massive literature in history, political science, and law exploring the topic.

Two recent projects in comparative politics exemplify a renewed interest in the implications of electoral *practices*, rather than instrumental outcomes alone, for popular sovereignty. In *How to Manage Free and Fair Elections*, Yonhyok Choe evaluates election management regimes as part of his comparison of Swedish, British, and South Korean elections.[27] Choe and a colleague embarked on an ambitious global survey project, aiming to systematically outline types and patterns of election management around the world.[28] As Choe writes, and as I have noted above, students of electoral systems have tended to focus on "the rules of the game (electoral law) and the principles of translating votes into legislative seats (electoral system), on the one hand, and their impact on the party system, on the other," rather than on how elections are actually operated.[29] Choe acknowledges that elections can be run at "national, regional, or local" levels, but the three case studies that form the core of his study lead him to focus on the characteristics of relatively strong national administrative bodies. Unfortunately, Choe's

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Constitution's basic principles necessarily imply a further institutionalization of the sovereign people? The ideologues of the Democratic and Whig parties of 1840 claimed to have the answers...." Id. at 206.

See also Laura J. Scalia, *America's Jeffersonian Experiment*, at 5. Scalia writes that "Jefferson and Madison offered two different ways of balancing America's allegiance to private rights and popular sovereignty. Jefferson tipped the scales toward self-government whereas Madison tipped them toward rights."

[27] Yonhyok Choe, *How to Manage Free and Fair Elections* (Göteborg, 1997).

[28] See *id.* at 93 for results, as of 1997. Choe told me in an e-mail that the project is currently on hold for lack of funding.

[29] Id., at 90.

framework – a rich and well-theorized set of schemas, typologies, and sequences – has only slight applicability in the American context, partly because it is designed primarily for emerging democracies and partly because Choe's specific analysis of the U.S. Federal Election Commission's character is limited.[30] Nevertheless, the work offers exciting possibilities, and demonstrates one way of analyzing election administration as a central component of democratic governance.

Similarly, Jørgen Elklit and Andrew Reynolds recently examined the effects of election administration on the legitimacy of governments in eight sub-Saharan emerging democracies.[31] Studies of electoral systems, Elklit and Reynolds point out, tend to focus on the effects of variables like executive and legislative power, seat-allocation formulas, and federalism. But elections, Elklit and Reynolds write, "do not just happen and legislatures are not like manna falling from heaven." Because elections are complicated, "the quality of election administration must be included among the factors" which explain "the level of sense of individual efficacy" and governmental legitimacy.[32]

Elklit and Reynolds' study deals with legitimacy in a set of new and transitional democracies, all of which have some type of central Electoral Management Body (EMB). Their focus is on variables such as the internal organization of the EMB, its independence from partisan forces, and the characteristics and motivations of its staff. While their

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[30] Choe refers to the FEC at one point as "a special independent body organized for the operation of elections" which is "responsible for the conduct of elections." Choe acknowledges that "the election administrations at the local level (state and local government) are in charge of the operation of the electoral process." Id. at 91. But still, this description of the FEC paints it as both more "independent" than it is – it is bipartisan, but generally regarded as subservient to the interests of the parties and under their control – and overstates its authority.

[31] Jørgen Elklit and Andrew Reynolds, "The Impact of Election Administration on the Legitimacy of Emerging Democracies: A New Comparative Politics Research Agenda," 40 *Commonwealth and Comparative Politics* 86 (July, 2002).

[32] Id., at 88.

preliminary conclusions are relatively broad and intuitive – the electoral commission's perceived independence matters, as do logistical difficulties in voting[33] – the U.S. simply does not have a comparable body. But Elklit and Reynolds' core hypothesis combines ideas which I have labeled the instrumental and constitutive components of popular sovereignty, placed in the context of democratization:

> "our claim is (1) that individual experiences in a number of fields related to the conduct of elections have a direct bearing on how the sense of political efficacy develops in individual citizens and (2) that this is an important factor behind the development of democratic legitimacy as well as a principled commitment to democracy...."[34]

What may be most important about these two recent studies is that both emphasize democratic *legitimacy* as a function of successful election administration, and neither concludes that *winning and losing* are the overwhelming determinants of that legitimacy. In other words, the directly *instrumental* component of elections is only *part* of what makes democratic citizens regard them with respect – the procedural, experiential, and *constitutive* aspects of voting are important, as well.

In the contemporary U.S., of course, citizens' participation in the democratic process is subject to federal law and the supervision of federal courts; the Constitution and the courts are now the ultimate guarantor of a person's voting rights. This fact marks the obvious limits of my argument: without question, American voting has a crucial "national dimension" as well as a local dimension. But even as the federal government might be described as "sovereign" over the voting process, local contexts remain crucial to how

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[33] Id., at 113-116.

[34] Id.

Americans exercise their sovereignty in the state. Next, I explore this paradoxical but logical state of affairs.

b. "Mighty Platonic Guardians?" The Courts, Suffrage, and Sovereignty.

Richard L. Hasen begins his new book about the Supreme Court and electoral equality with a quotation from Justice Clarence Thomas. "We would be mighty Platonic guardians indeed," Thomas wrote in a concurring opinion, "if Congress had granted us the authority to determine the best form of local government for every county, city, village, and town in America."[35] (In the case, *Holder v. Hall*, the Court decided that a single-commissioner county government was not subject to vote-dilution claims under the Voting Rights Act.) Hasen borrows "Mighty Platonic Guardians" as the title of the opening section of his book. The necessity of enlightened "guardians" for a healthy state, of course, comes from Plato's *Republic*. But the idea that the federal courts have taken on an excessive, unhealthy amount of power over American democratic processes has more recent lineage, as well, as in Ward E.Y. Elliott's 1974 book *The Rise of Guardian Democracy*.[36] Elliott, in turn, took his cue in part from critics of the Voting Rights Act like Justice Hugo Black, who famously denounced the 1965 VRA for having converted the states into "little more than conquered provinces."[37]

This material is noted briefly in order to clarify the clear limits of my argument, and how the term "sovereignty" is used here. In the late twentieth century, federal

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[35] Richard L. Hasen, *The Supreme Court and Election Law: Judging Equality from* Baker v. Carr *to* Bush v. Gore (2003), at 1. See *Holder v. Hall*, 512 U.S. 874, 913 (1994).

[36] Ward E. Y. Elliott, *The Rise of Guardian Democracy* (1974).

[37] See *South Carolina v. Katzenbach*, 383 U.S. at 309 (1966).

statutes and the federal courts took on a new level of supervisory authority over American elections. As a result of the Voting Rights Act of 1965 and its subsequent extensions and amendments – as well as the 1993 National Voter Registration Act (NVRA) and sections of laws such as the Americans with Disabilities Act (ADA) – most of the voting process is now subject to national rules of some specificity.[38] Yet while the Voting Rights Act defines and guarantees voting rights in statutory and judicial terms, it did not displace local authorities from their essential administrative roles in putting voting rights into *practice*. Indeed, the structure of the VRA in some ways recognized and reaffirmed local responsibility for running elections, even as it set new bounds on that control. The VRA's "coverage" formula, which aimed at jurisdictions where discrimination had been most clear, singled out six Southern states – but also "forty counties in North Carolina, Alaska, and a handful of counties in Arizona, Hawaii, and Idaho," as Laughlin McDonald explains in *A Voting Rights Odyssey*.[39]

A long line of cases holds that the national government is effectively "sovereign" over the electoral process: the Attorney General and federal courts hold the ultimate authority to deem some practice, regulation, or policy illegal and require its alteration. Without question, that means that what I call the "local dimension" of American suffrage is now far more circumscribed than it was fifty or one hundred fifty years ago. The national government guarantees individuals a bundle of voting rights, rights which people can and do invoke to challenge the conduct of state and local authorities. But as I have

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[38] For excerpts from these statutes, see Carter et al., *To Assure Pride and Confidence in the Electoral Process: Report of the National Commission on Federal Election Reform* (2002), 282-329; and Issacharoff et al., *The Law of Democracy*, Appendices 28-61. For a brief introduction to the Act's operation, see Laughlin McDonald, *A Voting Rights Odyssey: Black Enfranchisement in Georgia* (2003), 124-128.

[39] McDonald, *A Voting Rights Odyssey*, at 125.

argued above, I believe public-law scholars' focus on this judicial element of voting rights – or maybe it would be more precise to say the *justiciable* elements of voting rights – is part of what kept us from seeing the importance of voting *practices*, until Election 2000 made it unavoidable.

That election, of course, led to the 2002 enactment of HAVA, legislation which has the potential to enact the most sweeping changes in American voting since the VRA. Yet even HAVA – which aims to establish new standards in voting technology, registration, provisional voting, and other areas – will not displace local administrative responsibility. For example, in terms of registration, while virtually all states are moving towards the statewide voter rolls required by HAVA, the vast majority have changed more slowly than expected and have requested waivers postponing implementation of the rolls until 2006.[40] And as many states' elections publications make clear, localities will certainly retain central day-to-day responsibility for election administration. Michigan offers a good example, particularly given that Michigan's Qualified Voter File (QVF) is considered an excellent model of statewide voter registration.[41] "Making sense of Michigan's election system can be a daunting prospect," the Secretary of State tells visitors to an official website, "but it isn't difficult once you have a basic understanding of the people who make it work." Those people, the explanation continues, include the

[40] As of January 2004, 41 states had requested such waivers. See Electionline.org, "What's Changed, What Hasn't, and Why," (January 2004), at 4.

[41] See John Mark Hansen, Task Force on the Federal Election System, "Statewide Voter Registration Systems" (July, 2001), at 3. "Michigan represents an attractive model," the task force concludes, explaining the logistics and expense of the QVF.

staffs of "83 counties, 273 cities, 1,242 townships, 262 villages and more than 500 school districts."[42]

Finally, HAVA also created a new national body, the Election Assistance Commission (EAC), which will take over some duties formerly performed by the Federal Election Commission. The EAC's name, however, reflects its mission, which is to advise and assist state and local officials, not directly administer or even supervise elections. In terms of voting practices, then, the vast majority of the people working every day as "guardians" of American suffrage are still people like Shirley Green Knight and Barbara Swann.

III. From Dread, Weakness? American State Development and the Perils of the Local Dimension of American Suffrage.

We can see the local dimension of American voting in the literature on the American state. That scholarship suggests two central insights. First is an explanatory hypothesis: local administration of elections may have endured because Americans want it that way, fearing too much centralized control over their democratic ritual. Second is a caution: that fear may inhibit the American citizenry's ability to act together as a united people, particularly in terms of the instrumental aspect of popular sovereignty.

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[42] See "Get To Know Your Elections Officials," at <http://www.michigan.gov/sos/0,1607,7-127-1633_8716-21041--,00.html> . Accessed June 4, 2004. The explanation continues,

"The secretary of state serves as Michigan's chief election officer, with the Bureau of Elections acting on the secretary's behalf. The bureau is responsible for the integrity of an election by ensuring election laws are followed, training and advising 2,300 local clerks, compiling official election results and providing instructional materials. Next are the county election officials. Counties support the election process in a number of ways. Each county has a County Elections Commission, with a chief judge of probate of the county or probate court district, the county clerk and county treasurer. The commission provides election supplies, including ballots for federal, state and county elections." Id.

a. Decentralized: The American "State" and American Suffrage.

"We have come to take the state for granted as an object of political practice and political analysis," wrote the critical sociologist Philip Abrams, "while remaining spectacularly unclear as to what the state is."[43] Indeed, scholars in political science and its cognate disciplines have long wrestled with how to conceptualize "the state." Those conceptions have rarely included voting practices. Gianfranco Poggi does consider the franchise in connection to the construction of the democratic state,[44] but Poggi focuses on the class-based restrictions of nineteenth-century European suffrage, and on parties and campaign practices in contemporary elections.[45]

In her study of the origins of American entitlements, Laura S. Jensen urges us to understand the state "less as a monolithic entity" and more "as an ensemble of institutions, rules, discourses, and practices".[46] However, classic works in the "state-building" literature – books by Huntington, Skowronek, Bensel, Skocpol, and most recently Jensen[47] – tend to focus on what the central state *provides* for citizens, particularly entitlements, as well as on economic regulation. For that reason, election

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[43] Philip Abrams, "Notes on the Difficulty of Studying the State," *Journal of Historical Sociology* vol. 1 (1988), 58-89, at 59. Abrams concludes that the state is "the mask which prevents our seeing political practice," and teases out definitions of the "state-system" and the "state-idea." *Id.*, at 82.

[44] Gianfranco Poggi, *The Development of the Modern State: A Sociological Introduction* (1978); Poggi, *The State: Its Nature, Development, and Prospects* (1990).

[45] See, for example, Poggi 1978 at 123, 131 (on suffrage's formal restriction and its expansion), and 140-142 (on modern campaigns).

[46] Laura S. Jensen, "The Early American Origins of Entitlements," 10 *Studies in American Political Development* 360 (1996), at 363.

[47] See Samuel P. Huntington, *Political Order in Changing Societies* (1968); Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (1982); Richard F. Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877* (1990); Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (1992); Laura S. Jensen, *Patriots, Settlers, and the Origins of American Social Policy* (2003).

administration does not map neatly onto the concepts developed by state-building scholars: it deals with how people *choose* those who direct the state, rather than how governing institutions define, regulate, protect and provide for the citizenry. But the local dimension of American suffrage has important implications for our conception of the American state. Those implications can be condensed into two words: *capacity* and *centralization*. The first, of course, is something the American national state lacked, at least until relatively recently; the second is something Americans have famously opposed, even dreaded.

As Samuel P. Huntington has observed, while the expansion of political participation took place earlier in the U.S. than in most of Europe, the modernization, centralization, and rationalization of governmental authority happened first in Western Europe. Indeed, the early American constitution, Huntington writes, was "essentially Tudor and . . . significantly medieval."[48] Elements of that "medieval" constitution in America, Huntington writes, included "the vitality of local governmental authorities."[49] In his analysis of how American political culture helps determine policy choices, Charles Lockhart reaches similar conclusions.[50] Lockhart notes that "the immigrants who populated the territories which later became the United States shared . . . an unusual degree of skepticism about powerful central authority." That skepticism helped cause the Revolution, and the "governing principles of the revolutionary period and its immediate aftermath . . . honored to an extraordinary degree the limited and local government

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[48] Samuel P. Huntington, *Political Order in Changing Societies* (1968), 96. By "constitution," Huntington here reforms to institutions, norms, and practices – the "small-c constitution" – rather than a document.

[49] Id. Huntington's analysis gives a remarkably flat account of the expansion of electoral rights in America. Id., 93-94. This does not detract from the applicability here of his account of American state-building.

[50] Charles Lockhart, *The Roots of American Exceptionalism: Institutions, Culture and Policies* (2003).

aspects" of the American experience. While the new Constitution certainly strengthened the central government, "considerable government decentralization" remained the rule, and two centuries later, Lockhart writes, "government institutions [remain] relatively small."[51]

Focusing on the nineteenth century, Stephen Skowronek describes a "highly developed democratic politics without a concentrated governing capacity."[52] The "sense of statelessness" foreign observers often felt, he writes, was created by "a broad diffusion of power among the localities" and state governments.[53] Altschuler and Blumin, like Skowronek, argue that American democratic politics took shape in the nineteenth century, "an age when small central and state governments contributed to (or intruded into) most people's lives in relatively remote, indirect, and minimal ways."[54] And as Daniel T. Rodgers has pointed out, it was in the nineteenth century that the nascent discipline of political science identified a "splendid abstraction" called "the state" – which "spread a wonderful coherence" over the divisions, conflicts, and disintegrative forces of nineteenth-century America.[55] Something akin to Skowronek's "sense of statelessness" greatly irritated one scholar who surveyed American suffrage practices in the late 1880s. Compared to voters in Great Britain and Canada, wrote anthropologist James H. Blodgett, Americans wasted a great deal of money and ballots in elections

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[51] Id., 160-161.

[52] Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (1982), 8.

[53] Id., 23. Skowronek writes that modern institutional politics in the U.S. remains "distinguished by incoherence and fragmentation in governmental operations." Id., at *viii.*

[54] Altschuler and Blumin, *Rude Republic*, at 6.

[55] Daniel T. Rodgers, *Contested Truths: Keywords in American Politics Since Independence* (1998), at 169.

because they lacked consistent balloting rules, and hence relied on parties and local organizations. Blodgett wrote,

> "It seems like a failure to adapt customs and laws to the conditions of national growth that the community in choosing its servants leaves itself dependent for an essential instrument for expressing its choice upon those with special or private interests, and continues to prescribe methods fitted only to a town-meeting of a score or two spending a day in deliberation."[56]

Blodgett's objection was that in other areas of public life, "the conditions of national growth" suggested a strong American state, but when the community chose the "servants" who would run that state, it lacked the capacity to speak together.

b. A Question of Capacity?

Local administration of American elections today may have roots in the early development of relatively broad suffrage among males in the U.S. The U.S. extended the franchise to most adult white men long before the national government acquired anything like the capacity to manage elections – indeed, before many state governments had such capacity. Town officials were best-positioned and best able to manage elections, and have continued to do so – even as the wealth, expertise, and power of the national government have expanded, and as protections of voting rights have been nationalized in law. One result is that the U.S. has a fragmented system for measuring the will of the voters, a system quite unusual in the democratic world. In many other democracies, meanwhile, broad suffrage was won only *after* state capacities enabled electoral

[56] James H. Blodgett, "Suffrage and Its Mechanism in Great Britain and the United States," *The American Anthropologist*, vol. II, Jan. 1889, at 68.

processes to be rationalized and centrally-directed.[57] For those who regard fragmentation in modern American elections as a flaw in our national democracy today – or at least a potential weakness – this story is quite paradoxical.

Voter registration is a key element of local control now, and Walter Dean Burnham is among those who have suggested that the hyper-federal American registration system emerged from weak state bureaucratic capacities. Burnham acknowledges that late-nineteenth and early-twentieth-century registration rules were probably put in place with exclusionary purposes: "to reduce as much as possible the impact of urban immigrants on statewide elections." But Burnham argues that it was the weak state, and *not* partisan or exclusionary goals, that best explains voter-dependent, locally-administered registration rules. Having decided to erect this new portal to voter participation, state legislators saw that only local officials could manage the door. Noting that "[e]verywhere else in the West (including neighboring Canada) it was early accepted that it was the state's task to compile and update electoral registers," Burnham says that such a task "presupposed the existence of a bureaucracy for administering such enrollment laws or a consensus that such a bureaucracy should be created."[58]

c. "A Dread and a Yearning"

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[57] See Stein Rokkan et al., *Citizens, Elections, and Parties: Approaches to the Comparative Study of the Processes of* Development (1970). (I discuss Rokkan's comparative developmental analysis in more detail below, in my analysis of the advent of secret-ballot laws in the U.S.) See also Säve-Söderbergh, "Broader Lessons of the U.S. Election Drama." As Säve-Söderbergh puts it, "[i]n today's world many aspects of the U.S. electoral process are unique, not least because at the time of its enactment much U.S. electoral legislation was far in advance of other nations. But in tandem with the global trend towards democracy, electoral processes have also evolved significantly, furnishing policy makers with a wealth of new models and practices to consider."

[58] Walter Dean Burnham, "The System of 1896: An Analysis," in Paul Kleppner et al., *The Evolution of American Electoral Systems* (1981), 167.

Burnham acknowledges here the lack of "consensus" on the desirability of such a bureaucracy. This is the second piece of the state-building puzzle: the *fact* of a historically weak central state in the U.S. has long been matched by popular *distaste* for such a state. Alexis de Tocqueville famously observed that "[n]othing is more striking to a European traveler in the United States than the absence of what we term the government, or the administration."[59] Explaining that absence, Tocqueville pointed out that "in America centralization is by no means popular, and there is no surer means of courting the majority than by inveighing against the encroachments of the central power."[60] The reason American administrative power "presents nothing either centralized or hierarchical in its constitution," he found, was that Americans exuded a "dread of the consolidation of power in the hands of the Union."[61]

That dread has survived. One modern author calls Tocqueville's remark about "courting the majority" by inveighing against central power "a passage one might find in a memo from a political consultant today."[62] This distrust could be an important reason why the U.S. still lacks a national election-administration bureaucracy – again, the new Election Assistance Commission is designed to play an advisory role, not an administrative one – as well as consistent ballot-design and vote-counting systems, and why some states still don't have comprehensive voter lists. Many other democracies maintain government-generated voter lists, but Steven Schier points out that in the U.S.,

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[59] Alexis De Tocqueville, *Democracy in America, Vol. I.* (Vintage, 1990) (1835), 70.

[60] Id., 404.

[61] Id., 71, 404.

[62] Rohr, *Civil Servants and Their Constitutions*, 147.

having Congress fund and create such a voter roll "goes very much against the grain of American federalism . . . and has no vocal advocates at present."[63]

"At the heart of American politics," James Morone writes, "lies a dread and a yearning." The dread, as Tocqueville noted, is of centralized public power, particularly in the national government, and that aversion leads to government that is "weak and fragmented, designed to prevent action more easily than to produce it." But simultaneously, Americans yearn for a direct and effective democracy.[64] The survival of local control over American national elections may be a manifestation of this paradox. If it has survived in part because of Americans' dread of national power and their contempt for centralization and bureaucracy, local control may also diminish popular sovereignty. If inconsistent, obscure registration rules prevent many citizens from participating; if problems with ballot design, counting-machine error, and poll-worker support keep would-be voters from having their voices heard; and, most seriously, if such problems have cumulative effects which systematically skew or obstruct the will of the electorate, then local control limits the exercise of popular sovereignty in non-trivial ways.[65] Americans fear too much governmental power, but also yearn for "the people" to

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[63] Schier, *You Call This An Election?*, at 112.

[64] James A. Morone, *The Democratic Wish: Popular Participation and the Limits of American Government*, Revised Ed. (1998), 1.

[65] Early registration rules arose at least in part because when performed by unscrupulous partisans, local administration of state and national elections often obstructed the will of the voters via a much simpler route: fraud. And as the National Municipal League summarized the problem in 1927, the simple pre-registration system of using gangs of "repeaters" to commit massive vote fraud was already being replaced by more modern ways of stealing elections. Most common was simply padding registration list with fictitious names and having the "corrupt precinct election board check off the names and drop the ballots into the box, without the bother of sending 'repeaters' around to do this." Committee on Election Administration of the National Municipal League, *A Model Registration System* (1927), 48-49.

function as "a single, united, political entity," as Morone puts it.[66] Local control may be born of that fear, but it may also compromise the ability of the people to act together in American elections.

IV. The Case for Things Local: Madison, Tocqueville, and Contemporary Advocates.

The core of the case against local administration of elections is that the instrumental aspect of popular sovereignty will be diminished by inadequate voting processes – presumably problems that an adequate national system would solve. There is a constitutive element to the criticism, as well, heard in Blodgett's charge that Americans were acting like they were in a town meeting, not choosing the government of a great and powerful nation.

But there is another side to this coin. I choose three perspectives from which to explain the "redemptive" attributes of local control – the political thought of the American founding, particularly "Madisonian" theories of majority rule; Tocqueville's support for localism; and the ideas of contemporary democratic theorists, particularly Dennis Thompson.

a. "Both More Convenient and More Satisfactory:" Madisonian Thought and Election Administration.

Madison's name has become linked with a theory of democracy and popular sovereignty which, as Dahl puts it, "bring[s] off a compromise between the power of majorities and the power of minorities," and which emphasizes popular rule, on one hand,

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[66] Morone, at 5. Morone focuses here on how the search for more direct democracy ironically produces more bureaucracy. In American elections, that bureaucracy has remained almost entirely local.

but also institutionalizes "the desire to limit their sovereignty on the other."[67] Checks, filters, and limits are the familiar language of this theory, as Daniel T. Rodgers' summary of post-Revolutionary American thought illustrates. In different ways, Rodgers writes that the majority's power was "carefully broken up," "divided in two," "buffered," made "indirect," "federalized," and, finally, "dismembered."[68] As Reichley summarizes Madisonian theory, the best protection for worthy minorities is "extension of governmental authority over a territory so vast and a population so varied that government will have to achieve consensus rather than a simple majority in order to act."[69] Despite the differences between our assumptions about popular sovereignty today and those of the founders, these ideas still wield authority in American thought.[70]

A hyper-federalized suffrage system seems naturally compatible with this Madisonian theory of popular rule. As long as the "the people" can act, it's acceptable and even desirable that they be prevented from acting *together*, in various ways. Of course, Madison's chief concern was with instrumental conduct by rapacious factions, particularly the less-propertied majority faction. But wide differences in suffrage practices – in addition to being unavoidable in "stateless" early America – would seem a good theoretical match.

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[67] Dahl, *A Preface to Democratic Theory*, at 4.

[68] Rodgers, *Contested Truths*, at 86.

[69] Reichley, *The Life of the Parties*, at 27.

[70] Dahl notes that while most Americans seem to accept Madisonian theories, "criticism of its rather shaky rationale never quite dies down." Dahl, *Preface to Democratic Theory*, at 4. And J. Allen Smith wrote in 1930 of the "political fiction" that the founders shared modern ideas about popular sovereignty, a fiction which "has enabled writers to evade the discussion of such vitally important questions as the extension of the suffrage and the apportionment of representation." Smith, 60.

While the historical record is quite limited, I believe that assumption is correct. We can say with confidence that the founders understood and condoned local variation in voting practices and local control of elections, and viewed it as compatible with the frame of government they established. Madison himself offered only one specific comment about election administration that I can locate. But it appears that arch-nationalists such as Alexander Hamilton and Joseph Story put forth at least tacit endorsements of the status quo. Indeed, I have found that an assumption of local variation of election administration was a component of what is now commonly called the "Madisonian" theory of majority rule. And beyond administrative questions, the local political *contexts* in which American voters would choose their representatives were an important part of Madison's conception of how the new government ought to operate.

As if the dilemmas posed to the framers by apportionment were not hard enough – which constituencies were to be represented, on what scale – suffrage itself also raised a number of thorny problems. In addition to eligibility questions, the framers faced issues such as

> "how, literally, were citizens to give their votes: by voicing their preference to the sheriff, who would then record their vote in a poll book, or by secret ballot; at a raucous public fete, with people gathered from miles around for the closest approximation to carnival a Protestant society to produce, or in widely separated polling places, with a decorum more suited to republican manners?"[71]

Jack Rakove overstates this point somewhat. The founders did *know* about these choices and this variation, of course, since virtually all of them had previously been elected by such gatherings. Thirty-nine of the fifty-five delegates to the Constitutional Convention, for example, had served in Congress at one time or another, and seven had been state

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[71] Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1997), at 204.

governors.[72] But they did not have to *answer* these questions; in fact, they quite pointedly left them unresolved, and did not discuss them much. (Indeed, having posed these questions, Rakove in his chapter "The Mirror of Representation" devotes no more time to them.) I believe the founders simply took for granted that the answers to Rakove's list of questions would come from state and local authorities.

One important explicit endorsement of state and local authority to run elections came from Alexander Hamilton, of all people. In *Federalist* 59, Hamilton defended the Constitution's "times, places, and manner" language. The document was correct, he wrote, to assign "the regulation of elections for the federal government in the first instance to the local administrations; which in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory."[73] Only in crisis, Hamilton argued, would it be necessary for the national government to step in and guarantee that state governments did not destroy it. Today, one scholar calls this arrangement the "Hamiltonian proviso:" localities and states control elections as long as they do not impair representation at the national level.[74]

In addition to Hamilton's words, I find only one clear, direct statement of concern with variation in election administration. It is a mixed criticism, but certainly does not reflect a desire to nationalize election administration. Speaking in the convention, Madison worried about manipulation of election procedures by *state* governments.

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[72] Gordon S. Wood, *The American Revolution* (2002), at 153.

[73] Hamilton, *Federalist 59*, in Garry Wills, ed., *The Federalist Papers* (1982) (1787-88), at 300. Continuing, Hamilton raised a ridiculous rhetorical specter: "Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it?" Id., 301. Hamilton's point seems to be that leaving election management *completely* under state control would be an equivalent catastrophe.

[74] See Thompson, *Just Elections*, at 135.

Madison combined theories of representation with questions about election practices in an argument about the House of Representatives. His greatest concern appears to have been instrumental manipulation of election results by variations in the "mode:"

> "The policy of referring the appointment of the House of Representatives to the people and not to the Legislatures of the States, *supposes that the result will be somewhat influenced by the mode.* ...[t]he Legislatures of the States ought not to have the uncontrouled right of regulating the times places & manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place . . . these & many other points would depend on the Legislatures and might materially affect the appointments."[75]

On its face, this appears to be a serious criticism of varying election procedures. But Madison's ultimate purpose is to restrain state governments, and his tactical goal seems to have been to place in the constitution "a controuling power" over elections with the national government, particularly "in the last resort," as Hamilton later put it.[76] Moreover, note that this is a "majoritarian" concern, rather than a classically Madisonian scheme to filter, check, and divide the majority: Madison is worried about self-interested legislators *thwarting* the popular will. Though it is left unsaid, one of Madison's premises appears to be that current electoral regimes are satisfactory – it is manipulations and "abuses" of the system that he worries about, not its normal operation. Finally, Madison stopped well short of arguing that the national government should write a national electoral law – let alone actually administer elections. He simply wanted an insurance policy written into the Constitution.

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[75] Max Farrand, ed., *The Records of the Federal Convention of 1787*, Revised Ed. (1966), Vol. II, 240-241 (emphasis added).

[76] Id., 241; Hamilton, *Federalist* 59 (Wills, p. 299).

Madison got his way on this one. The Constitution, of course, left the "times, places, and manners" of electing U.S. Senators and Representatives to the state legislatures, but allowed Congress to "make or alter such regulations, except as to the place of choosing senators."[77] In his *Commentaries*, Joseph Story wrote that the clause not only encountered little opposition, but did not even appear to have drawn much attention in the convention.[78] But the ratifying conventions were a different animal. In what appears to be an uncited but extraordinarily close paraphrase of Hamilton's *Federalist* 59, Story interprets the provision as having placed discretionary power over elections not with *either* the state legislatures or national government, but *primarily* with the former and *ultimately* with the latter.[79] Opponents disagreed, reading the possibility of Congressional intervention as a dangerous usurpation. They worried, Story reports, that Congress might schedule elections at unreasonable and inconvenient times, or at such distance from the electors as to inhibit voting, or somehow arrange the "manner" of elections so as to guarantee victory for their allies.[80] Story regards the objections as "untenable," adopting the Hamiltonian argument that Congressional authority is a means for the government to "contain in itself the means of its own preservation," particularly in an extreme crisis.[81] In any event, he did not expect Congress to be able to draft "an election law, which would be applicable . . . and convenient for all the states."

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[77] U.S. Const., Art. I., § 4.

[78] Joseph Story, *Commentaries on the Constitution of the United States*, (1987) (1833), at 291.

[79] Id., 292. Story's language here is an almost verbatim match with Hamilton's in *Federalist* 59. See Wills, ed., *The Federalist Papers*, at 300.

[80] Id., 291.

[81] This is the argument of *Federalist* 59.

Story's commentary has two important implications. The first is that if Madison and Hamilton accepted local and state control over election administration, opponents of the Constitution appeared to *support* it fervently. Second, even one of the leading advocates of national power in the first generation of the U.S. – Joseph Story – believed that in normal politics, national involvement in election details would be both unnecessary and unwise.

Theories of decentralized election administration, then, may not have been central to the political philosophy of the founders, but were compatible with it. But there is another way in which the local dimension of suffrage, broadly construed, figured much more prominently in Madisonian theory. Here the "Federalist" view appears ambivalent, but broadly critical of local influences. There was a profound, explicit connection between the new national government and local electoral conditions, a link near the heart of debates over the character and powers of the national government. As Edmund S. Morgan demonstrates, one's conception of how elections *actually functioned* at the local level – the political and social context in which the voters made their choices – was essential to how one understood "the people" and how they would be represented.

The Federalists famously turned the ratification debate to their favor by claiming "the people" as the source of sovereignty, and leaving the Anti-Federalists to defend the less-majestic claims of the state governments. "With the adoption of the Constitution," Morgan writes, "[Madison's] crucial invention of a sovereign American people found realization."[82] National power rested not on the states, but on that sovereign people; this broader base, and the changes it wrought in the American political imagination, would

[82] Morgan, *Inventing the People*, at 285.

ultimately make possible a dramatic increase in *central* power. But Madison's theory of representation under the new Constitution rested on his assumptions about *local* politics. Madison, writes Morgan,

> "had invented a sovereign people, but he had assumed an existing social structure in which the people would know and recognize and defer to their natural leaders. But except during the revolutionary war, Americans had experienced and granted this deference, as they had experienced representation, only on a local level."[83]

It is easy for us to forget now that representation on a national scale was then a very controversial notion. During ratification, that controversy was closely linked to the new government's power to tax, which the Antifederalists found utterly unacceptable. Allowing remote national representatives to levy taxes, they believed, was reminiscent of the "virtual representation" rejected in the Revolution.[84] Moreover, the Revolutionary period had seen not only the defeat of virtual representation, but also an explosion of government at the local level. By the end of 1774, Gordon S. Wood writes,

> "local associations were controlling and regulating various aspects of American life. Committees manipulated voters, directed appointments, organized the militia, managed trade, intervened between creditors and debtors, levied taxes, issued licenses, and supervised or closed the courts. Royal governors stood by in helpless amazement as new informal governments gradually grew up around them."[85]

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[83] Id., at 286.

[84] Morgan, 280; see particularly 280 n.46, where Morgan calls the tax power "probably the most pervasive Antifederalist objection to the Constitution" and lists citations. Pitkin has explained that a major reason why virtual representation did not satisfy Americans was that they already had come to understand legislators to represent *persons*, not *interests*. "In America, representation was clearly to be of persons, and interests became an inevitable evil, to be tamed by a well-constructed government." At the same time, "many of our founding fathers were far from being democrats; the representation of people does not necessarily mean the representation of all people." Pitkin, *On Representation*, at 190. Indeed, virtual representation did not stay dead. The idea resurfaced during the Dorr War, as a justification for Rhode Island's limited suffrage and an argument against the legitimacy of the "People's Convention." See Rodgers, *Contested Truths*, at 103-105.

[85] Wood, *The American Revolution*, at 48.

Americans had come to understand representatives "as the means by which the local feelings and local circumstances of ordinary people found expression in government," Morgan writes, and many believed that the large constituencies of House members removed them too far from those influences. "Representation on a national scale," Morgan argues, "deprived representation of the meaning that Americans had always attached to it."[86]

In some respects, this was exactly what Madison wanted. A "spirit of locality," he argued, was destroying "the aggregate interests of the community."[87] Madison saw corruption and intrigue in the towns and small districts that selected state legislators; enlarging those units to encompass 30,000 people, he hoped, "would eliminate the local pressures and locally oriented candidates that had made the state governments a disgrace."[88] But at the same time, when Anti-Federalists charged that the national government would swallow up the smaller units, Federalists like Madison and Hamilton assured them it would not. Their reasoning, writes Morgan, was that "the people would be more attached to their familiar, local representatives in the state legislatures than they would be to their more remote national representatives."[89] It is hard to know how much of this argument was propaganda and how much a genuine faith in such ties, but it leaves us with a good sense of the ambivalence in Madisonian thought regarding the local dimension of suffrage. On one hand, the founders knew of local variation in election procedures and administration, and clearly made no attempt to subject voting processes to

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[86] Morgan, 277, 280.

[87] Quoted in Wood, *The American Revolution*, at 141.

[88] Garry Wills, "Introduction," in Wills, Ed., *The Federalist Papers* (1982), at *xxii*.

[89] Id., 280.

national control. In fact, their only explicit concerns regarded *state* manipulation of "the mode" of elections. On the other, when it came to the influences of local *interests* on state and national legislators, Madisonian theory was strongly critical, in a way which felt to opponents of the Constitution like a betrayal of the American tradition.

b. "The Strength of Free Nations:" Tocqueville on Municipal Institutions in America.

Tocqueville pointed to the American "dread" of central power and its costs, but he is at least as famous for singing the praises of local politics. As one recent article argues, "the focal point of [Tocqueville's] principal political argument" was the "participatory vector that originated in the political life of the American township and then disseminated its own bracing vitality to civil society as a whole."[90] Tocqueville's approach suggests that for all its inefficiencies, local control of election administration may have a powerful redeeming effect which enhances, rather than diminishes, popular sovereignty.

Tocqueville opens his examination of "the form of government established in America on the principle of the sovereignty of the people" with an admiring study of local governance. As a political entity, he writes, the township "is so perfectly natural" that it "seems to come directly from the hand of God."[91] Municipal institutions, he writes,

> "constitute the strength of free nations. Town meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men

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[90] Robert T. Gannett, Jr., "Bowling Ninepins in Tocqueville's Township," 97 *American Political Science Review* 1, (2003), 7, 1. Significantly, Gannett links a close reading of Tocqueville to current debates within political science over civic culture and democratic citizenship

[91] Tocqueville, *Democracy in America, vol. I.*, 59, 60.

how to use and how to enjoy it. A nation may establish a free government, but without municipal institutions it cannot have the spirit of liberty."[92]

In Tocqueville's account, it would be impossible for popular sovereignty to be weakened by the power of town government in America, because local power *constitutes* that sovereignty. Indeed, the township is where power, sovereignty, and "the people" define themselves, where citizens are trained in both the "practice" and the "spirit" of liberty and order, learning both rights and duties. Without "power and independence," he wrote, "a town may contain good subjects, but it can have no active citizens."[93] As always, Tocqueville finds a tension and paradox here, noting that local power is "an infrequent and fragile thing," because a "highly civilized community can hardly tolerate a local independence, is disgusted at its numerous blunders, and is apt to despair of success before the experiment is completed."[94] Later, he acknowledges that in some cases Americans have "overstepped the limits of sound policy" by allowing localities too much independence.[95] But when Tocqueville, sounding quite Madisonian, lists "CAUSES WHICH MITIGATE THE TYRANNY OF THE MAJORITY IN THE UNITED STATES," first in line is the "absence of centralized administration." Distinguishing centralized *government* from centralized *administration*, he applauds the lack of the latter in the U.S.: should the "details of . . . application" of power join the "right of commanding," "freedom would

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[92] Id., 61.

[93] Id., 62, 64, 68, 67.

[94] Id., 60.

[95] Id., 88-89. On counties, Tocqueville was both brief and dismissive. Tocqueville saw counties as arbitrary, with no connection to individuals or the community, any "natural sympathy:" "their object is simply to facilitate the administration." Lacking these connections as well as power, the county has, "properly speaking, no political existence." Id., 68-69.

soon be banished from the New World."[96] In Tocqueville's America, local practices build citizens, and the absence of centralization is the first barrier against tyranny. But this feels quite different from the instrumentally-oriented Madisonian endorsement of localism, because the *constitutive* dimension of local political activity is what Tocqueville applauds most clearly. I find no direct discussion of *election* administration in Tocqueville, but have no reason to doubt that his praise for towns as the best schools of active citizens would lead him to support the American way of voting.

c. "Citizen Administrators:" The Value of Local Administration Today.

Freedom in the New World has come a long way since 1830, and American government today is very different from what Tocqueville described. But modern authors such as Anthony Lukas have turned to Tocqueville's account of local allegiances to understand contemporary conflicts such as the battle over busing in Boston.[97] To be sure, the image of the community has remained an essential part of American democratic ideology – survived as the "setting" of the American yearning for popular sovereignty. Over the centuries, Morone writes, the idea of community has "pushed beyond geographical place altogether" and become a powerful political symbol.[98]

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[96] Id., 271. Tocqueville calls townships and counties "so many concealed breakwaters, which check or part the tide of popular determination." Id., 272.

[97] See Anthony Lukas, *Common Ground: A Turbulent Decade in the Lives of Three American Families* (1985), 207. Lukas emphasizes here the tension between community and equality.

[98] Morone, *The Democratic Wish*, 7. As Morone observes, appealing to community "is the acceptable form in which to cast collectivist sentiment in a society of state bashers." Id. Not coincidentally, some modern theorists prefer the term "communitarian" to the term "republican." See, for example, Amitai Etzioni, *The Spirit of Community* (1993), at 2 (outlining the "Communitarian thesis").

In American elections today, local control may have democratic benefits well beyond the symbolic power of registering with city officials and voting under their supervision in an election paid for by city taxes and held in a city building. In his searching analysis of where modern election law meets theories of popular sovereignty,[99] political philosopher Dennis Thompson acknowledges that what he calls "spatial variation" in election procedures – particularly ballot design, counting technology, and recount standards – may "frustrate electoral justice" if it systematically makes some voters more powerful than others, by making voting easier and making votes more likely to be correctly tallied.[100] Such variation has always characterized American elections. But Thompson also argues that local administration of national elections can have redeeming effects, since it "is likely to give citizens more control over the electoral process, encourage political participation, increase partisan competitiveness, and enable districts to experiment with different procedures...." Local direction of elections will sacrifice uniformity in national elections, and that may lead to inequalities. But at the same time, local variation "could be seen as recognizing individual responsibility, respecting citizens' capacity for choice rather than denigrating their equal standing."[101]

In an earlier book, Thompson argued that we could increase and improve the amount of rationally self-interested political participation in America by means of "major

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[99] Thompson, *Just Elections*, Chapter Three, "Popular Sovereignty: Who Decides What Votes Count," 123-184.

[100] Thompson, *Just Elections*, 180.

[101] Id., 56. Such benefits, Thompson argues, "may be worth the sacrifice of uniformity not only because they may outweigh the costs of unequal treatment, but because the unequal treatment is not so objectionable." In Thompson's view, a resident of a Florida county which did not count hanging chads was unlucky, but did not have her "civic dignity" insulted, and was not really discriminated against. Moreover, she has the ability to change her county's counting standard, if she can persuade her neighbors to do so. Id., 56.

redistributions of power in a structure of relatively small political units."[102] Here, thinking about electing people to the existing large units, Thompson offers a relatively technical, procedural solution. He suggests that special election commissions "at the same institutional level" to which an election applies should decide how much variation is too much.[103] The question of how local administration of national elections helps or hinders the exercise of popular sovereignty in U.S. elections requires such institutionally-oriented answers, but it also demands further inquiry into how Americans understand fairness, power, and democracy in the electoral context. Allowing county, city, and town officials to direct and implement national elections may compromise majority rule, particularly as the margins of victory in federal elections become ever narrower. But it simultaneously multiplies the number of citizens exercising some responsible role in the central *acts* of sovereignty. This is one message of Michael Schudson's *The Good Citizen*, which begins with an account of his own volunteer work supervising clerks in one of California's polling places.[104] Schudson brought his kids along for part of the day; he considered the work to be part of their political education. Dozens of voters thanked him and others "for our efforts on behalf of this democracy," and many were "proud of their neighbor for volunteering."[105] Similarly, one of the themes of Crenson and

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[102] Thompson, *The Democratic Citizen* (1970), at 147.

[103] In general, Thompson writes, "the authority to decide how much variation in electoral practices is just should be lodged not necessarily in the same institutions but at the same institutional level of the bodies that legislate and execute the laws to which those who vote in the relevant elections are bound." Id., 181. In other words, officials appointed by the city should assess variation in local elections; nationally-appointed commissioners should do the same for Congressional and Presidential elections.

[104] Schudson, *The Good Citizen*, at 1-3.

[105] Id., at 1. "The labor required to run an election is substantial: with more than 25,000 precincts in California alone, each employing three to five poll workers, the outpouring of volunteer labor is enormous and their organization and training no mean feat." *Id.*

Ginsberg's jeremiad *Downsizing Democracy* is the diminishing number of "citizen administrators" in a variety of areas. "Policies designed to make the nation's government and economy operate more smoothly," they write, "have diminished the space in which citizenship can operate."[106] While Crenson and Ginsberg do not identify election administration here, their values seem to echo those of Thompson and Schudson.

Finally, there are empirical dimensions to this question – for example, involving registration of voters. As noted above, the United States is unusual in that the government does not compile and maintain voter lists, instead requiring citizens to register themselves, and allowing town officials to keep the only official records in many states. But if local officials – particularly in small towns – actively *recruit* citizens for the voter rolls – at picnics and parties, and when they come in for those "dog tags and dump stickers" – the result may be increased participation, with the added benefit of a greater connection between citizens and the officials who run their elections.

[106] Crenson and Ginsberg, *Downsizing Democracy*, at 45-46.

CHAPTER 4

THE CONSTRUCTION OF AMERICAN SUFFRAGE: VOTING PRACTICES IN THE JACKSONIAN CONVENTIONS AND THE AUSTRALIAN-BALLOT ERA

This chapter confronts a simple historical question raised by the U.S.'s hyper-federalized suffrage system: where did it come from? Is it simply an accidental remnant of an historical "fit of absentmindedness," and a developmental path which placed administrative control in local hands? I have argued that local voting is linked to fundamental American ideas about popular sovereignty, centralization, and the state. This chapter focuses on two nineteenth-century periods of profound change in U.S. suffrage and election-administration law: the Jacksonian constitutional conventions of the 1820s to 1840s, and the secret-ballot reforms of the century's end. Drawing on constitutional-convention records for the first period and on a wide variety of contemporary and scholarly sources for the second, I conclude that our locally-run electoral system is no accident, but was in fact constructed by state governments during these periods. At no point did states consider establishing statewide election-administration bureaucracies; instead, they aimed new regulations at county and town officials, effectively renewing their responsibility. This conclusion, however, is deeply paradoxical. For by asserting their de jure authority over suffrage qualifications and practices, state lawmakers now made local officials act as agents of state government.

A recent study of early-nineteenth-century constitution-making argues that it was in the states that the ideal of popular rule "was not only debated but actually determined," and where "the ideological and legal development of America's allegiance to active

popular sovereignty" essentially took place.[1] This chapter continues my examination of American voting practices and their relationship with popular sovereignty, seen from the vantage of two major nineteenth-century suffrage reforms. First, I analyze debates over the franchise in several state constitutional conventions held between 1820 and 1844. Second, I study the advent of the Australian ballot in the last decade of the century. In these two periods, American suffrage underwent two of its greatest changes – the first a carefully-theorized shift in qualifications and franchise membership, the second a dramatic change in voting practices.

A straightforward historical question initially motivated this part of the project: why has our hyper-federalized system endured? I wanted to study these reforms to look for hints as to whether reasons linked to concepts of popular sovereignty, resistance to centralization, and ideas about the state explain its survival; I looked for *awareness* of local variation, administration, and the effects of local contexts on voters, and for *judgment* about these aspects of the local dimension of American suffrage. I reach the paradoxical conclusion that these powerful assertions of state authority over suffrage did transform American voting, particularly in the later period, but also *constructed* our hyper-federalized election system by directing all requirements and regulations at local authorities, never contemplating an expanded role for state government in election administration.

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[1] Laura J. Scalia, *America's Jeffersonian Experiment: Remaking State Constitutions, 1820-1850* (1999), at *ix*. Many scholars have attempted to grasp these concepts by reading the records of the federal Constitution, but Scalia argues that that document's "primary concern was never to empower ordinary citizens." Id. In terms of voting and suffrage, Scalia's focus is on formal qualifications and the aggregate, instrumental effects of reform. See, e.g., *id.* at 51-62, 101-102.

I. "The Remaining Record of This Experiment:"[2] The Jacksonian Conventions.

The new state constitutions drafted between 1820 and 1850 are most renowned for expanding suffrage among white men, primarily by reducing or eliminating property qualifications. Many nineteenth-century thinkers regarded those changes as "one of the most important, if not the most important, fact in the political history of the United States."[3] However, the period's suffrage legacy is quite mixed. For example, previously, most states simply subjected free black and immigrant men to the same property tests as whites, but in the first half of the nineteenth century many either explicitly barred blacks from voting or, as in New York, imposed burdensome new property tests on black men alone. Others restricted voting by new residents by lengthening residency requirements or by requiring that voters be citizens. And despite calls for reapportionment as old county districts grew increasingly inadequate, through most of the nineteenth century a disproportionate amount of power stayed in the hands of wealthy rural landowners at the expense of growing city populations. Still, the conventions of the early nineteenth century played an important role in American political development. In many states, the suffrage reformers of the 1820s-1850s argued for an "unfiltered, unbalanced, unchecked will of the greatest number" which was new in American theories of self-rule, as Daniel T. Rodgers writes.[4] And despite the survival of old restrictions and the advent of new ones, "none escaped expanding popular sovereignty in some form or another."[5]

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[2] I borrow this phrase from Scalia, *America's Jeffersonian Experiment*, at 8. Scalia does not cite a source.

[3] J. Allen Smith, *The Growth and Decadence of Constitutional Government* (1930), at 61.

[4] Rodgers, *Contested Truths*, at 83.

[5] Scalia, at 9. Still, one regularly encounters overstated accounts of sweeping populist changes in this period. In the Introduction to the edited bibliography *State Constitutional Conventions*, for example, we find this summary:

My interest in this period of expanding popular sovereignty boils down to two sets of questions. First, as reformers set about to improve their election laws after almost two generations of political experience in the U.S., how do their discussions of suffrage *practices* – as distinguished from more-abstract theories of formal inclusion in the franchise, which scholars including Chilton Williamson, Marchette Chute, Alexander Keyssar, and Scalia, among others, have carefully analyzed – illuminate and connect to ideas about sovereignty and self-rule? Second, what did these reformers think about the great degree of local variation in election practices then in effect, as well as the fact of local administrative control? Were these factors regarded as strengths or weaknesses? Were they "problematized," or effectively invisible, simply taken for granted as the way Americans exercised their control over their government? In the next chapter, I examine the connections between the local dimension of American suffrage and the exclusionary tradition in American political thought. If this chapter focuses on *how* Americans vote, that one centers on *who* should vote. However, in some places I find that these questions were too intimately connected to be separated, so some of the discussions here address both sides of the coin.

In reading the records of the nineteenth-century state constitutional conventions, Daniel T. Rodgers has written, "one puts to sea in an eclectic, democratic flood of talk."

"The constitutions of all the states formed after 1787 were written without reference to the property qualification for voting, and the original thirteen states began to follow their example. During the decade of the 1820s, the political role of the average male citizen came to approximate in fact what the Jeffersonians had long claimed for him in theory. By 1830, only Virginia and North Carolina retained the freehold qualification and in due time it was removed even in those states."

See Browne, ed., *State Constitutional Conventions: From Independence to the Completion of the Present Union, 1776-1959* (1973), at *xx*. As I demonstrate below, this is misleading, because so many states retained a *taxpayer* test after 1830, usually based on the same reasoning that had previously supported the *freehold* test. New York, meanwhile, had only abolished the property test for white men. Finally, while most white men qualified to vote during this period, speaking of the "average" male citizen does not clarify much, and one wonders what "due time" means.

> "Out onto the floors of those conventions rolled an astonishingly variegated tide of words: graceful periods and vicious satire, spontaneous insult and laboriously memorized quotation, close legal reasoning and the worst of doggerel poetry, self-indulgent reminiscences and inspired perorations."[6]

I draw on "tides of words" from constitutional conventions in Massachusetts (1820-21), Virginia (1829-1830), New York (1821), North Carolina (1835), and Iowa (1844). This set reflects the cases chosen by Scalia in her study of the period,[7] as well as those excerpted by Merrill Peterson in his important 1966 work on the Jacksonian conventions, *Democracy, Liberty, and Property*.[8] G. Alan Tarr, in his vital 1998 book *Understanding State Constitutions*, also studies these examples.[9] This is no coincidence, for these states – and very few others – left some records of their convention. Each was of course unique, but at the same time representative of broader national and regional trends.

There are not new editions of these convention records, however, and the early-nineteenth-century publications follow the conventions of the era, which included very limited indexes or none at all. This means the researcher confronts scores of pages of hand-set, tiny-font records of debates over suffrage. (One North Carolinian prefaced a disquisition on electoral districts by pledging to make his case "with the utmost brevity, consistent with perspecuity."[10] Thousands of words later, his motion failed.) For these

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[6] Rodgers, at 144.

[7] See Scalia, 8-19. Scalia was able to include Ohio and Louisiana as well.

[8] Merrill D. Peterson, *Democracy, Liberty, and Property: The State Constitutional Conventions of the 1820s* (1966). Peterson's book is an edited collection of excerpts from the conventions of Massachusetts in 1820-21, New York in 1821, and Virginia in 1829-1830.

[9] G. Alan Tarr, *Understanding State Constitutions* (1998). See especially Chapter Four, "Nineteenth-Century State Constitutionalism."

[10] See *Proceedings and Debates of the Convention of North-Carolina, Called to Amend the Constitution of the State*, 1835 (1836), at 358. The speaker was Mr. Gaston of Craven.

reasons, I cannot claim that what is offered here is a comprehensive or systematic content analysis, but I have found and captured revealing fragments in each state's proceedings.

In terms of the questions posed above, looking for discussions of suffrage practices in that "flood of talk" is a frustrating experience but also an illuminating one. There is page after page of profound debate over suffrage theory and the merits of various formal restrictions and qualifications and restrictions. But there is relatively little specific discussion of election administration, or of local control and responsibility, set in the context of twentieth-century scholarly concepts like centralization, bureaucratic capacity, and the state. On the broader questions which inspire and motivate this dissertation, however – connections between Americans' more abstract ideas about voting rights and aggregate voting behavior and their specific voting *practices* – there is a good deal of fascinating material.

For my causal inquiry into why local administration survived this period – even as state legislators asserted their control over formal qualifications – one ideal kind of data would be "smoking gun" debates in which delegates wrestled with the merits and disadvantages of local administration of elections and argued over whether the state should take over. For better or worse, such debates did not occur. Even as they engaged in what remain some of the most searching, contentious disputes over the nature and purpose of voting in the country's history, American political élites did not seriously consider removing effective control of electoral practices from local hands.

But a stronger conclusion also emerges from these conventions. I believe that the hyper-federalized American system of election administration was essentially *constructed* by state governments during this period. This was not a time of change: by and large,

previous practices continued. But local control over suffrage practices did not simply survive these conventions: it was effectively strengthened and endorsed by state lawmakers, albeit in mostly-tacit ways. After exploring materials from each convention, I explain that interpretation at the close of this section.

a. "In the town where he resides:" Massachusetts, 1820-1821.

One of the most prominent questions facing Massachusetts constitution-drafters in the fall and winter of 1820 was whether to maintain, alter, or scrap the state's current freehold qualification. A motion to "abolish all pecuniary qualification for electors" passed a preliminary vote in the Massachusetts convention.[11] Once serious debate began, the very first comment regarded variation and "difficulties" in administration of the current property test, which allowed those owning property worth two hundred dollars to vote: "what property have you? Have you the tools of any trade? Yes. What else? A pair of steers my father gave me."[12] Inflation – "the change in the value of money" – added to the difficulty, as another delegate said in arguing that "experience had shown the impolicy" of the current freehold test.[13] This delegate – a Mr. Austin of Boston – showed some sympathy for the pressures placed on the local officials who had to interpret and apply the rules. Since hardworking laborers and seamen were supposed to be excluded unless they owned physical property worth two hundred dollars – which most did not – and since "an honest poor man who paid his debts" was excluded while "a fraudulent man . . . who owed more than he was worth" was included, the freehold test

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[11] *Journal of Debates and Proceedings in the Convention of Delegates, Chosen to Revise the Constitution of Massachusetts*, 1820-1821 (1853), 246.

[12] Id., 246.

[13] Id., 252.

"tended to throw suspicion of unfairness on the municipal authority."[14] Later, another delegate agreed, saying the test "had been frequently the means of raising ill blood and producing confusion."[15] This makes clear that while the formal rule may have been established at the state level, local interpretation and enforcement was widely regarded as crucial.

In another area, delegates revealed little confidence in local officials' ability to protect the franchise. Voters in many states were using ballots by this period, but these debates show that they were by no means *secret* ballots. This is made clear in debates over whether the property qualification should be scrapped. Seamen, a Mr. Thorndike told the convention, "scatter a great deal of money and do not save enough to make them voters under the constitution." Their votes "ought not be received," he argued, since "[t]hey were the votes of their owners."[16] Another delegate argued that "a rich man in a populous town might command the votes of men without any property."[17]

It is worth reiterating a point made above, in Chapter Two: the key property and tax records were at this time usually kept locally.[18] The motion on the floor at one point in the Massachusetts convention proposed "that every citizen of the Commonwealth who is subject to pay and does pay taxes *in the town where he resides* . . . shall have the right

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[14] Id., 252.

[15] Id., 256. Much later in debate, a Mr. Lincoln argued that "it was necessary to make some change in the qualification of voters to conform to the alteration adopted respecting the union of towns for the choice of representatives." I am unsure of the meaning of this statement – presumably, he refers either to reapportionment or redistricting in choosing state representatives. At any rate, he seems to state explicitly that prior to this date, qualifications varied considerably between towns. Id., at 556.

[16] Ma., at 253.

[17] Id., at 248.

[18] See Chapter Two, 19-20.

to vote in the election of public officers of this Commonwealth."[19] This was made still more clear in debates over moving to a taxpayer test, rather than a freehold qualification, in Massachusetts. For example, one delegate argued that the tax rolls were an inaccurate and inadequate measure of the citizenry. Surely we all know, he said, "that there are persons in every town, who are never put into a tax bill, because the town officers know very well that no tax could be collected from them."[20] And in a later debate, delegates quarreled over whether the qualifying tax had to be paid in the same town "where the vote was offered."[21] Some state taxes were levied at this time, and Daniel Webster was among those who argued that a tax paid "to the Commonwealth" should be the standard.[22] But others hoped "we should not always have to pay a Commonwealth tax," and the final version settles on "any state or county tax," assessed "in any town or district of this Commonwealth."[23] (This debate was repeated in New York, where one delegate said that defining the franchise by payment of a state tax was risky, since "[t]here might be a time when no state tax would be necessary," perhaps "when the great canal was finished." "Would gentlemen have no voters in such halcyon days?"[24])

The residency requirement would also be administered by local officials, and this too occasioned a good deal of debate, set in a close understanding of local governance.

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[19] *Journal of Debates and Proceedings,* at 257 (emphasis added). Later, another delegate moved an amendment requiring that "the tax be assessed in some town in the Commonwealth." Id., 521.

[20] *Journal of Debates and Proceedings*, at 256.

[21] Id., 553.

[22] Id., 553.

[23] Id., 553, 618.

[24] *Reports of the Proceedings and Debates of the New York Constitutional Convention of 1821* (1821) (1970), at 286.

Residence, opined Mr. Leland of Roxbury, "would be a question of fact to be determined by the selectmen;" a short, six-month standard would be easiest for them, since they could simply use "the taxes assessed in May" for proof.[25] A delegate from Dracut argued that farm workers often came into the state in spring for a six-month period and "were taxed in May for the whole year," and should therefore be allowed to vote.[26] But a Mr. Saltonstall disagreed, pointing to "the evil" known in those town where "hundreds of men" came from New Hampshire in the spring "and voting in our elections, just after they have voted in the elections in their own state.[27]

Saltonstall then used this evocative language: "Requiring a year's residence in the Commonwealth was reasonable, in order that we may know them and that they may become domiciliated."[28] Whether Saltonstall's "we" referred to those delegates who were also local officials, or to the citizenry at large, "in order that we may know them" is a striking illustration of just how personal and "local" American understandings of the franchise were in the early nineteenth century.

b. "Those scenes of iniquity and perjury:" New York, 1821.

Even by the high standards of prolixity established by its peers, the New York convention of 1821 was remarkable, at least in terms of the suffrage. Focusing mostly on the property test and whether black men should be allowed to vote, the delegates repeatedly delivered speeches which took hours, if not entire afternoons. The main

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[25] *Journal of Debates and Proceedings,* at 554.

[26] Id., 555.

[27] Id., 555.

[28] Id.

debate lasted about ten days; the text runs over 110 pages, and in any modern book would fill at least twice as many.[29] Their resolution was suitably complex, a halfway step toward universal male suffrage that allowed white men to qualify either by paying a state or county tax, performing militia or fireman duty, or working on the highways, provided they met residency tests – which, in turn, varied depending on which of the above contributions earned a man the franchise. A property test survived for black men, however.[30]

As in Massachusetts, many comments about suffrage qualifications were linked to specific characteristics of life in New York. Several speakers described the growth of population in the "western parts," and the popularity there of buying houses by "contract" – a kind of lease-to-own arrangement – rather than by formal deed. The "industrious and valuable citizens" holding such contracts, however, were unjustly barred from voting under the freehold test.[31] Another delegate's list of reasons for an expanded suffrage includes the establishment of a "common school fund," and "the diffusion of education" that it would make possible. But the key factor was that "farmers will always out number all other portions of our population." Granted, he argued, New York City's population is increasing rapidly, but "it is not to be doubted that the agricultural population will increase in the same proportion," keeping the city population at about one tenth of the

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[29] See *Reports of the Proceedings and Debates of the New York Constitutional Convention of 1821* (1821) (1970), 178-291. In Peterson's *Democracy, Liberty, and Property*, for example, the excerpts regarding the property qualification are taken from only ten to twelve pages of the 1821 *Reports and Proceedings*, but fill almost thirty pages in Peterson's book.

[30] Const. of N.Y., Art. II, §1, reprinted in *Reports and Proceedings*, at 661.

[31] *Reports and Proceedings*, at 216.

state's total.[32] The "mobs" of the city, even in their worst "depredations" on property, were unlikely to "traverse our immense territory, and invade the farm, and despoil the property of the landholders...."[33]

Delegates clearly understood, and occasionally remarked upon, variations within the existing systems of election administration. The property qualification, one argued "had always been an odious feature in the constitution;" and as it would "bear away with it a vast proportion of the perjuries, slanders, &c. that had often disgraced our elections, he hoped it would be abolished."[34] Those "perjuries" were presumably the oaths as to property value that electors swore to local officials. Earlier, another delegate also criticized the existing system, and hinted that local election officials lacked any kind of list to help them determine who was qualified: "entering them in a register," he argued, would make us "able to test the qualification of electors, without resorting to the multiplication of oaths, which other the present constitution had grown into a most corrupting and alarming evil."[35]

As in other states, New York's debates reveal that even though many voters were using ballots by the 1820s, that did not mean votes were secret. Apparently most elections were by ballot: discussing a constitutional provision requiring the ballot, one delegate observed that those "now elected, viva voce, are so few, being only the road masters and fence viewers...."[36] A ballot requirement was eventually adopted, "except

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[32] Records, 242.

[33] Id., 242.

[34] Id., 284.

[35] Id., 180.

[36] Id., at 205.

for such town officers, as may by law be directed to be otherwise chosen."[37] Nevertheless, convention delegates repeatedly assumed that votes were not private. For example, a Colonel Young argued against allowing black men to vote, contending that the ballot would be "unsafe in their hands," since "[t]heir vote would be at the call of the richest purchaser."[38] Later, another speaker talked about the possibility of "buying, or otherwise unduly influencing" the votes of the "manufacturing population."[39] In a clever rhetorical turn, one delegate named Buel exploited the lack of secret ballots to answer two sets of critics of an expanded suffrage at once – those who feared votes would be bought, and those who foresaw a takeover by the unpropertied rabble. "[I]f the rich control the votes of the poor," Buel argued, "the result cannot be unfavourable to the security of property."[40] For my purposes, what is most important about Buel's adroitness is the part that he does not emphasize but takes for granted: voting must have been public if one man could buy another's vote, and local contexts therefore must have been quite important.

It must be said, however, that throughout the New York convention records one gets a very strong sense that the delegates understood the franchise – at least its crucial formal definitions and qualifications – to be a *state* matter. The national Constitution and, particularly, the laws and practices of other states are discussed regularly.[41] But

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[37] See N.Y. Const. Of 1821, Art. II, §4 (reprinted in *Reports and Proceedings*, at 661.)

[38] Reports of the Proceedings and Debates of the New York Constitutional Convention of 1821, at 191. Young also averred that "[t]he minds of the blacks are not competent to vote. They are too much degraded to estimate the value, or exercise with fidelity and discretion that important right." *Id.*

[39] Id., 280-281.

[40] Id., 243.

[41] One interesting passage revealed that the New Yorkers knew of New Jersey's experience of female voters, made possible because of local interpretations of the word "inhabitants" in the state's 1776

New York – not the U.S., and not individual counties or towns – is the political unit most speakers are concerned with. The "right of suffrage," argued one delegate, "should be regulated only by the will of the people of this state," and not by the "general government" in Washington.[42]

Indeed, one of the most impressive speeches in the convention was delivered by Martin Van Buren, focusing on state-level analysis. The student of American political development who wishes to understand how Van Buren became so influential learns a great deal in these pages. With most of his colleagues sounding like a combination of Renaissance political philosopher and preacher, Van Buren sounds like a latter-day political strategist and policy wonk as he anchors this oration – which appears to have taken up most of a Tuesday – in census and tax data. Arguing for a taxpayer test to replace the freehold, Van Buren points to "data, to be obtained in the comptroller's office," showing that the state's taxable personal property amounts to about a third of the state's total taxable wealth. That property, however, was "not now directly represented in any branch" of the legislature because of the freehold qualification. Second, he turned to census data to argue that keeping a freehold test for senate electors would effectively

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constitution. See Chute, *The First Liberty*, at 289-290. In fact, the passage is particularly striking because it reveals the vast distance between our approach to suffrage and that of the early nineteenth century. A Colonel Young argued that "[i]f that is that natural, inherent right to vote, which some gentlemen have urged, it ought to be further extended. In New-Jersey, females were formerly allowed to vote; and on that principle, you must admit *negresses* as well as *negroes* to participate in the right of suffrage." *Reports of the Proceedings and Debates of the New York Constitutional Convention of 1821*, at 191.

[42] This delegate argued against a generic, vaguely-worded taxpayer test, since if a man paid a national tax but no state tax, he would thereby gain the suffrage, and the national government would thereby "have the power of conferring the right of suffrage." Id., 202. He did not make clear whether he had a specific national tax in mind.

disenfranchise 75,000 of the state's 163,000 electors, because they owned only personal property and not real estate.[43]

At the same time, there are strong hints toward an answer to the causal question identified above: where did the local administration of American elections come from? Has it survived the centuries accidentally, unseen and underfoot, or is its past more purposeful? At least one debate directly suggests the latter answer. Though the final fate of this proposal eludes me – it passed an early vote, then disappears from view for a long time, and did not make it into the final constitution – there is some evidence here that local administration of elections was *actively constructed* by state governments in this period. Voter registration lists, compiled locally, were proposed: the legislature would be mandated or encouraged to require "each town and ward" to make "a register of all citizens entitled to the right of suffrage."[44] Debate was short but intense. One delegate urged the measure as conducive to "peace and quietness at the polls," and to counteract "those scenes of iniquity and perjury that had been often witnessed with pain, and which had a powerful tendency to sap the foundation of morals, and the principles of justice." Opponents, however, argued that the "tribunal" compiling such a list would effect "a modification of the elective franchise," something beyond the power of any official.[45]

While fragmentary, these are striking and revealing claims. They tell us that delegates were quite aware of local variations in the interpretation and application of suffrage law; that at least some regarded that uncertainty and variation not only as a problem, but as one which could "sap the foundation of morals;" and that the proposed

[43] Id., 257. Van Buren's speech runs from 255-265.

[44] Id., 203.

[45] Id., 203.

solution was to be implemented not by state government, but by local officials. It did not occur in 1821, but in the long run, of course, that was precisely what happened.

c. "The pride of the men of the mountains," the "metropolitan honors of the lowlands:" Virginia, 1829-1830.

Virginia's eastern landowning élite held disproportionate political power in the state, and westerners sought the 1829-1830 convention as a way of expanding their influence. But new suffrage requirements granting the vote to those owning property worth a lesser value tended to help easterners most; only minor changes in apportionment meant westerners got little that they hoped for. Only in the state's next constitutional convention, that of 1850-1851, did western political power finally increase.[46] Merrill Peterson estimates that when the 1830 constitution was ratified, two-thirds of the state's white men could vote, a "modest expansion of the franchise [which] had no significant effect on the politics and government of the Old Dominion."[47]

While Peterson is unsparing in his descriptions of how white supremacy shaped Virginia's convention, he also has fulsome praise for the overall quality of the proceedings. "As an exhibition of political theory in the thick context of practical political life," he writes, "the Virginia debates of 1829-1830 are unexcelled in American political discourse."[48] They are also unexcelled in volume, running to over 900 tiny-font pages. Here the voluble New Yorkers met their match: Virginians apparently knew that "all eyes were fixed upon" their convention, as the publishers of the *Proceedings and*

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[46] Scalia, *America's Jeffersonian Experiment*, at 12-13.

[47] Peterson, *Democracy Liberty, and Property,* at 281.

[48] Id., 285. On racism, see, for example, *id.* at 281, on how "the logic of democracy thus led to the doctrine of white supremacy...."

Debates put it, and none wanted to waste his turn.[49] Remarkable debates about representation, rights and privileges, and the philosophy of self-rule ensued, as one might expect from a convention featuring James Madison, John Marshall, and John Randolph, among many other luminaries.

What Peterson called the "thick context of practical political life," however, did not include much discussion of local electoral contexts or suffrage administration. In fact, one striking characteristic of the many sections of the *Proceedings* dealing with voting is their highly theoretical cast, even compared to other conventions. One encounters a great deal of learning and a deep frame of reference as speakers wrestle with "whether [suffrage] is a natural, social, civil, or political right,"[50] among other questions. Delegates quote from Shakespeare and Alexander Pope; invoke "the genius of Locke, and Sydney, and Milton;" and refer to Solon, classical Athens, the Roman republic, and Caesar.[51] But there is relatively little about how elections were run, and about what people actually *did* when they voted. Suffrage debates are set in the vivid political context of Virginia life, and arguments about representation often hang on specific ideas about the lives and experiences of those to be represented. (There is a splendid passage in which John Randolph mocks the authority of Jefferson by telling the story of how Jefferson designed an elegant plow, lovely to look at, and honored by the French as the

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[49] *Proceedings and Debates of the Virginia State Convention, of 1829-1830* (1830), at *iii*. The volume has no Table of Contents or Index whatsoever; in reading it I have started from the dozen or so passages excerpted in Peterson.

[50] Id., at 411.

[51] See, for example, id., at 363, where Mr. Nicholas refers to the "ancient republic of Athens, and some of the other Grecian states;" at 54, on Locke; at 157, on "the days of Solon [and] those of George Washington;" and at 532, where John Randolph talked of how the framers had been able to "snatch a grace beyond the reach of art;" Peterson, at 429 n.31, tells us this line comes from Pope's *Essay on Criticism*; and 533, where Randolph speaks of Caesar and Brutus.

"mould-board of least resistance" – but no good to plow with.[52]) But by and large, premises about political identity are either about class – in lengthy and repeated debates over reducing the property test – or, most often, *regional* references, because debates over representation and apportionment especially were very much about the ways of life of eastern and western whites in Virginia. We read of the "Back-Woods vote" and the "hardy peasantry of the mountains;"[53] of the "poor men of the East;"[54] of the "pride of the men of the mountains" and the "metropolitan honors of the lowlands;" of "the growing influence of wealth, numbers, and intelligence in the West, and a returning sense of justice and equality in the East."[55] Somewhat less often, another defining characteristic of political "circumstances" in the state come up: that "[n]early half the population are in bondage – yes, Sir, more than half in the country below the Ridge."[56]

But there is relatively little about towns and counties. We know that county governance was strong – and was a salient issue in the convention – because the county court system in particular was controversial. Westerners apparently detested it, but eastern elites like Randolph "considered the County Court system, and the freehold Suffrage, as the two main pillars in the ancient edifice of our State Constitution."[57] Counties appear in voting disputes, however, most often as pawns in apportionment

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[52] Id., at 533.

[53] Id., at 156, 158.

[54] Id., at 167.

[55] Id., at 665, 664.

[56] Id., at 318.

[57] Id., 532; one debate on the County Courts is at 526-530 and 532-535.

battles. Debates over districts became fights over which counties would go where: by January of 1830, hours were spent in dueling motions moving counties among districts.[58]

As elsewhere, the Virginia debates show that many of the relevant taxes were collected locally. This emerges in a disparaging speech against a taxpayer test, as a delegate named Nicholas mocks the idea that a man who pays "four cents upon a horse," or "a poor rate and county levy" has shown any "interest in the community."[59] Earlier, in a debate over how to proportionately connect taxation and representation in the legislature, one delegate remarked on the range and complexity of different kinds of state and county taxes – for example, on auctions, salt, and (referring to a recent Supreme Court ruling, presumably the 1796 case *Hylton v. U.S.*) carriages.[60] Another debate made clear that the apportionment of state levies was more contentious, however, particularly in terms of slaves, which were of course some of the most valuable "property" in the state.[61]

In one key area, the Virginia convention of 1829-1830 made a crucial contribution to the history of American suffrage practices. Virginia's famous 1776 Bill of Rights made no mention of *how* votes were to be cast.[62] But the constitution adopted in 1830 changed that: "[i]n all elections in this Commonwealth . . . the votes shall be

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[58] See, e.g., id. at 845-847.

[59] Id., 366.

[60] Id., 180; see *Hylton v. United States*, 3 Dall. 171 (1796). *Hylton* required the Court to determine whether a tax levied on carriages by Congress in 1794 was a direct tax – in which case it should have been apportioned according to each state's population – or an indirect tax, which need not be apportioned. The Court determined that the tax was indirect. *Hylton* is important not only because it dealt with the politically-sensitive matter of taxation, but also because it was the first case in which the Court at least implicitly acted as if it could judge the constitutionality of federal statutes.

[61] Id., 169.

[62] Reprinted *id.*, at 895.

given openly, or *viva voce*, and not by ballot."[63] At least one delegate launched a spirited defense of *viva voce* voting, which he understood as part and parcel of a system of properly-limited suffrage. It is one of the best articulations I have seen of the theory of public voting, and deserves quoting at length. In those states that have expanded the suffrage, a Mr. Leigh argued,

> "the ballot has been substituted for the old method of voting viva voce, on the avowed principle, that it is necessary to enable the voter to give his vote with independence, that he should be allowed to vote secretly. Now the introduction of the ballot . . . is a plain distinct acknowledgement, that the Right of Suffrage is extended too far – extended to men who cannot be expected to give an independent vote, openly, in the face of day – to men liable to the influence of others, and desirous to conciliate their favour.... It is a very odd expedient for cherishing the political independence of the citizen, to take away all occasion for the exercise of it...."[64]

Another delegate disagreed, but felt it necessary to concede that he too preferred "the *viva voce* mode of voting, but I am not prepared . . . to pronounce an anathema upon the other. We should, at least, pause and reflect well before we condemn a practice adopted by many of our sister republics," he argued. But, he hastened to add, "there [is] no affinity between the question of the extension of Suffrage and the mode of voting."[65] A decade earlier, remember, New York had required ballots in all state elections, but among Virginians there does not seem to have been serious interest in using paper – or in enabling voters to shield their votes from the ears and eyes of their neighbors.

d. "The love which gentlemen have for the people and the people's rights:" North Carolina, 1835.

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[63] Reprinted *id.*, at 900.

[64] Id., at 406.

[65] Id. at 417.

As in Virginia, Western calls for more political influence sparked the 1835 North Carolina constitutional convention,[66] but again, westerners generally did not get what they wanted. North Carolina's political system, like that of its northern neighbor, was dominated by a disproportionately influential eastern slaveholding population. Easterners came out of the 1835 convention with their power largely intact, although new systems of representation did slightly increase western power.[67] I find in the convention's records little direct discussion of election administration, but the proceedings do help us understand the character of nineteenth-century ideas about popular sovereignty, offering several telling glimpses into ideas about representation, taxation, and voting itself.

In one discussion of electoral reform we find a clear echo of Madison's concern for the local intrigues possible in small election districts. But this time, a delegate named Gaston came to a different conclusion, arguing that breaking large counties into single-member districts would be preferable. "When in a county, there are a number of candidates, they form combinations and enter into intrigues" – "'You run me in your end of the county, and I will press your claims in my neighborhood.'"[68] Enabling the legislature to divide counties into districts would "afford[] the best opportunity of having a full expression of the public voice" – not only because those in the west would increase their representation, but also because thousands of voters who might lose an election in a large county and thereby have no representation would improve their chances at selecting

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[66] For example, see *Proceedings and Debates of the Convention of North-Carolina, Called to Amend the Constitution of the State*, 1835 (1836), at 359, where one delegate "presumed every gentleman on that floor would admit, that if the counties in the East had equalled, in size and population, those of the West, no Convention would ever have been demanded." See also Laura J. Scalia, *America's Jeffersonian Experiment*, at 13.

[67] Id. For more background on North Carolina's 1835 convention, see Chapter Four.

[68] *Proceedings and Debates of the Convention of North-Carolina, Called to Amend the Constitution of the State*, 1835 (1836), at 359.

a legislator.[69] While there is nothing explicit here about specifically local administration of elections, it is an important statement of the instrumental dimension of popular sovereignty and the existence of local interests. Meanwhile, the speech seems to show that while state governments were perfectly comfortable in breaking up the state into small electoral units – here, telling counties and townships how to choose their representatives – they had no visible interest in interfering in how those localities actually ran elections.

A more constitutive side of the debate emerges in the comments of opponents. Smaller districts would "array neighbor against neighbor," bringing about some of the "evil consequences" of Borough Elections – "the warmth of feeling and strife engendered." Another opponent compared the results to "the feuds of the Montagues and Capulets," "angry passions" setting "friend against friend."[70] These delegates debated representation with a sharp concern for the impact of elections on political life as experienced in local conditions.

The local nature of taxation also appeared in debates over districting. Faced with the question of how often to redistrict, delegates revealed that population and taxation worked together in determining apportionment – with the latter appearing to determine composition of the state Senate. Debate centered not on whether ten years or twenty was the best interval for reapportionment, but over which types of taxation should determine districts. One delegate argued that the average of a county's tax contribution should determine its Senatorial representation, rather than its taxes in a given year. Otherwise,

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[69] Id., 358.

[70] A third said that of the then-twenty-four states in the Union, only Louisiana – where "the country [being] so cut up by swamps" made it necessary – used such small districts. Id., 362-363.

"a few wealthy men in a small county, in order to obtain a Senator, might join together and put up a Billiard Table or two...."[71] A colleague took the remark quite seriously, agreeing that more "permanent" sources of revenue like the "land-tax and poll-tax" ought to determine Senatorial representation, rather than what was raised "from Billiard Tables [and] Natural Curiosities." Another delegate made a striking comment regarding local property, taxation, and representation. His county's voters wanted reapportionment soon, since they were about to gain a great deal of property: "the land in [my] county," he noted, "is at present principally owned by Indians," but in a few years it would "become the property of the citizens," who expected as a result to win more power in the state Senate.[72]

Representation and the nature of elections also surfaced in debates over a motion proposing shifting from legislative to popular selection of the Governor. One delegate worried that voters at large would be very unlikely to have any real acquaintance with the candidates, whereas Assemblymen were presumably able to greet and question them personally. He noted the repulsive specter of a popular election in neighboring Tennessee, where "two Candidates were traveling through the State on an electioneering campaign, at expense and trouble to themselves, and to the great annoyance of the People." Another opponent imagined campaigns infecting the politics of the state with partisanship at every level: "we shall soon have our Grand Central Committees, District Committees, County Committees, and Captain's Company Committees," each of which would bring the "freemen of the State . . . into a general array against each other."

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[71] Id., 158.

[72] Id., 158-159.

Eventually, however, "the love which gentlemen have for the people and the people's rights" won out, and the motion for popular election passed.[73]

A final glimpse into ideas about voting practices comes in debate over whether to compel the Assembly to vote *viva voce* when choosing militia officers and justices of the peace. Some speakers restricted their analysis to voting in the legislature, but others clearly did not. For example, one delegate "believed the vote by ballot was introduced, when voters were kept from voting publicly for fear of the merchant's books, for they were in debt," but that had no bearing on the legislature. Another argued that voting by ballot "was productive of prevarication and deception," since one could not ascertain another's vote with certainty. But others supported voice votes in the Assembly, even if they "did not wish to see this practice introduced into our elections generally," as one man put it. The motion succeeded by a two-to-one margin.[74]

e. "Clear and apparent as a sunbeam:" Iowa, 1844.

We have limited data from the Iowa conventions of 1844 and 1846. The first was necessary to get Iowa into the Union, but the proposed constitution was defeated by popular vote in 1845, mostly because Congress had reduced the territory's size in offering it statehood.[75] The latter convention was quite short and made only minor changes prior to re-submitting the constitution to popular vote, which this time succeeded. As the Iowa political scientist Benjamin F. Shambaugh explains in

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[73] Id., at 332, 340.

[74] Id., at 181, 180, 179, 181.

[75] See Benjamin F. Shambaugh, ed., *Fragments of The Debates of the Iowa Constitutional Conventions of 1844 and 1846* (1900), at 260-266, 276-313, reprinting various opinion pieces explaining why the 1844 Constitution failed. For discussion of the two conventions more generally, see Scalia, *America's Jeffersonian Experiment*, at 17.

introducing his edited collection of press commentaries on the conventions, convention participants kept no official records, and no "Madison's Journal" has come to light.[76] That means we are essentially at the mercy of two additional "filters" – the Iowa press decided what was newsworthy at the time, and Shambaugh extracted only what he found significant from their coverage. Still, most of the excerpts are long and detailed – remarkably so, considering that they were first published in newspapers. Stylistically, they are indistinguishable from the more official records of other states.

Shambaugh chooses selections from the *Iowa Standard* and the *Iowa Capital Reporter* for both the 1844 and 1846 conventions. Clearly, voting was an important topic in 1844: one of the appointed standing committees dealt with "Suffrage and Citizenship," and three days later a delegate introduced a resolution "that provision be made so that in all elections in the State of Iowa, the will of the majority shall control."[77] A few days later, the report of the Suffrage and Citizenship committee was taken up. That report itself is not reprinted, but discussion yielded a number of interesting fragments with regard to suffrage practices and local administration.

First, one delegate moved to require that all elections be held *viva voce*. This failed; the convention instead endorsed the report's recommendation that all elections "shall be by ballot." (Interestingly, the convention apparently struggled to agree on whether the General Assembly itself should vote by ballot or voice, as well.[78]) Next, a

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[76] Shambaugh, at *iii*. Unfortunately, the volume has neither a detailed Table of Contents nor an Index, so a student of the Iowa conventions is left to read and skim about four hundred pages.

[77] Shambaugh, ed., at 9, 20. The resolution was "laid over." (The material cited in notes 7-12 are from the *Iowa Standard*.)

[78] Id., at 214. Here a newspaper editorial complains that in one place the document stipulates that Assembly members vote *viva voce*, while another passage has them voting by ballot.

delegate named O'Brien proposed that any "foreigners" who had lived in Iowa for three years and declared the intention to become citizens be permitted to vote – only for state Representatives and County officers.[79] In his county, O'Brien explained, un-naturalized men had been subject to a poll tax,[80] and had therefore asked for the vote. White male immigrants in Illinois, he pointed out, could vote after six months with an oath, and the same should suffice in Iowa. But opponents worried about the national Constitution, which stipulated that those who voted for the more numerous branch of the state legislature must be allowed to vote for President and Vice-President as well, and the motion failed.[81] Nevertheless, two years later one newspaper praised the convention simply for debating the measure, calling it "progress [for] the principle of universal suffrage."[82]

The date of elections came up next. After short debate, the General Elections were moved from August – harvest time – to October, despite the arguments of those who called October a "time of sickness."[83] Weeks later, an intriguing glimpse into the conduct of elections emerged in discussion of "County Organization." The relevant committee had urged that sheriffs be limited to two terms, and some objected along familiar let-the-people-vote lines. But one advocate of the restriction "thought that the patronage and influence of the Sheriff might become such as to interfere with the

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[79] Id., 44.

[80] That is, a "head tax," or a tax not linked to property value. In Iowa, as in other states, discussion of the advisability of "poll taxes" was frequently not linked at all to voting.

[81] Id., 44-47.

[82] Id., 341-342.

[83] Id., 56.

freedom of elections."[84] The delegate did not elaborate – the two-term restriction survived – but he could well have meant that election *administration*, and not just voters' *choices*, would be distorted.

Finally, one comment in an 1845 speech to the Territorial Legislature on re-submitting the constitution for popular ratification (after it failed the first time) reveals unequivocally that such a vote would be locally administered. Rhetorically, representative Wilson asks "have we a right to order polls to be opened in the different counties, townships and precincts, and compel the judges of said election there to receive votes 'for' and 'against the constitution.'[?]" Yes, he replies: "we have not only the right, but . . . it is perfectly *clear and apparent as a sunbeam.*"[85]

I take some license in using this phrase – which is italicized in the official record – as the title of this section. Context makes clear that Wilson was focusing not on a controversy over whether the state could order localities to hold elections, but on the question of *re*-submitting the constitution for popular ratification. Nevertheless, his specific description of how the vote would be held is meaningful. Wilson repeats it later, saying the question before the assembly comes down to "*shall this Legislature give them the opportunity of voting on this change, by causing polls to be opened in each township or precinct throughout the Territory*?"[86]

Clearly, the Iowa delegates were quite aware of and concerned about the *national* aspect of suffrage – that their state's formal franchise qualifications should not violate

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[84] Id., 153. A later critic of the constitution focused on the county and township officers who would *not* be elected, but made no reference to the conduct of elections themselves. Id. at 358.

[85] Id., at 299. Emphasis in original.

[86] Id., 306. Emphasis in original. The territorial Governor's official proclamation of Iowa's entry into the Union referred to "the general election held . . . in all the organized counties...." Id., at 371.

national standards. This is not surprising, given that the purpose of Iowa's convention was to write a constitution so that the territory could become a State. Second, one gets a strong sense from these pages that issues like the state's borders, banking system, separation of powers, and the salaries of various officials were far more important than both formal questions of defining the franchise and practical questions of how votes were to be cast. But whether or not it was Wilson's explicit point, there is also a third truth, audible in his "clear and apparent" language: the infrastructure of voting was local, and that fact was as plain and unobjectionable as sunlight to lawmakers.

f. Conclusion.

There is a broader way in which the "clear as a sunbeam" passage is important. Few though they may be, I believe that such explicit references to election practices in these convention records mark the ways that local administrative control over elections in the U.S. was in a sense *constructed* in this period. To be sure, the first lesson one gets from these materials is that the early nineteenth-century conventions are fundamentally about state control over franchise qualifications. (Indeed, these conventions, like others in American history, occasionally created new suffrage standards for their own ratification, as Roger Hoar explained in his 1917 study *Constitutional Conventions*.[87]) Delegates clearly believed that as authors of the state constitution they, along with their state legislatures, were defining the franchise, and they took that duty seriously.

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[87] Roger Sherman Hoar, *Constitutional Conventions: Their Nature, Powers, and Limitations* (1987) (1917), at 205-213. Hoar lists cases between 1780 and 1868 in which conventions alone, conventions and the legislature together, and the legislature alone either expanded or restricted the eligible voter pool for ratification. Id., 206-207. His conclusion is that in the absence of specific restrictions, a convention's "general authority" includes "the date of the election, the election officials, . . . and even the choice of the particular electorate who shall be employed by the convention to represent the will of the people." Id., 213.

But I encounter a good deal of evidence of a powerful local dimension to suffrage, in various ways – from descriptions of political identity and interest rooted in specific cultural and economic conditions to blunt statements of how votes were purchased in one's own town. We can be sure the constitution-drafters understood that elections were administered at the county and municipal levels, not only because so many of the delegates were politicians themselves, but because they tell us so. In some places, they worry out loud about whether local officials bear too much interpretive and enforcement responsibility.

But they did not take that responsibility away, and aside from debates over paper or voice voting, I find not a single instance where they seriously considered doing so. In fact, in the very act of drafting new standards and rules for who could vote and how votes were to be cast, the Jacksonian conventions gave new life to local administration. Certainly municipalities had run elections before. But one way to read these records is as a serious of interactions between state and local governments. Consider: when delegates in Massachusetts and North Carolina acknowledged the importance of towns and counties in assessing taxes and determining residency; when New Yorkers allowed service as a fireman or highway worker to qualify a man to vote; when New Yorkers and Virginians alike acknowledged the impact of local pressures on voters, then compelled votes to be cast on ballots or by voice, respectively; when the Iowans discussed "causing polls to be opened in each township or precinct;" and when New Yorkers considering requiring "each town and ward" to compile a list of qualified voters, we clearly see a dialogue between state lawmakers and the local officials who they knew would interpret and implement voting rules.

Even as they declared state control over formal franchise qualifications, then, constitution-drafters renewed and reasserted local responsibility for running the voting process. A modern scholar who hopes to find the language of "centralization," "bureaucratic capacity," and "the state" stated explicitly in these debates over the practice of American popular sovereignty will be disappointed. But here we see the local dimension of suffrage as no accident, but rather as a *creation* – and a conscious creation, albeit a somewhat-tacit one – of state governments themselves.

II. "A Closet of Prayer:" The Australian Ballot and the Transformation of American Suffrage.

In *The People's Welfare*, William J. Novak describes prevailing ideas about "well-regulated governance" in eighteenth- and nineteenth-century America.[88] "In contrast to the modern ideal of the state as centralized bureaucracy," Novak writes, "the well-regulated society emphasized local control and autonomy."[89] While acknowledging the limits of such sharp lines, Novak marks the end of that regime at 1877, at which point he argues that the "modern ideal" – the centralized "liberal state" – took over. Novak does not incorporate voting into his analysis, but I believe the history of American suffrage practices – in Chapter Two and in the above discussion of the Jacksonian conventions – confirms his account of the earlier period. Next, I analyze a reform which spread with truly remarkable speed among the states of the U.S. in the second and third decades of Lukas' "modern" era: the Australian ballot. The Australian-ballot reforms

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[88] William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (1996) generally, and particularly at 237-238.

[89] Id., at 237.

divide U.S. political history neatly in half: about one hundred ten years preceded them, and about the same number have passed since. Appropriately, the reforms and the arguments of supporters and opponents suggest a great deal about election practices before and after.

I certainly do not seek to write a full history of the advent of the collection of reforms sometimes called "penal-colony reform," "kangaroo voting,"[90] and, most often, the "Australian ballot." Eldon Cobb Evans, in 1917, and L.E. Fredman, in 1968, have already done so in fascinating and comprehensive books.[91] Political scientists such as Jerrold Rusk, meanwhile, have analyzed the effects of ballot reform on voter behavior.[92] The purpose of this section is to explore the advent of the secret, publicly-produced ballot from the perspective of local administrative responsibility, and as a study in changing American ideas about how popular sovereignty would be exercised. A second purpose is to examine how state lawmakers understood suffrage practices, particularly their local dimension, and to see how and to what degree local administrative responsibility survived this period. For if the Jacksonian era saw important shifts in who was permitted to vote, the Australian ballot actually wrought a greater transformation in American voting practices.

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[90] Critics tended to use the "penal-colony" and "kangaroo" tags. See Eldon Cobb Evans, *A History of the Australian Ballot System in the United States* (1917), at 24. For explanation of the spread of the set of reforms which became known as the Australian ballot, see above, Chapter Two, 36-38.

[91] Evans, *A History of the Australian Ballot System in the United States* (1917); L.E. Fredman, *The Australian Ballot: The Story of an American Reform* (1968).

[92] See Jerrold Rusk, "Effect of the Australian Ballot on Split-Ticket Voting, 1896-1908," 64 *American Political Science Review* 1220 (1970).

States did not even begin to keep good records of legislative proceedings until the end of the nineteenth century,[93] and acquiring those records from the period in question has proven outside the scope of the present project. Instead, I draw on a range of pamphlets and secondary materials in an effort to learn how reformers and state lawmakers thought about suffrage practices.

In the language I've used above, Australian-ballot reformers believed they were enhancing the exercise of American popular sovereignty in both instrumental and constitutive ways, both better measuring the will of the voters and elevating the character of their voting practices. I reach three central conclusions with regard to the Australian ballot's effects on the local dimension of suffrage. First, reform was clearly designed to limit the impact of local contexts – particularly when those contexts contained cash and coercion – on voters' choices. Second, these reforms marked a major expansion of the state role in election administration, with a corresponding diminution in the range of discretionary and interpretive authority in local hands. This change was greater than I had understood. Local officials still ran elections, but did so as agents of state government, to a degree that was almost entirely new in American voting. Third, however, state lawmakers stopped far short of eliminating local responsibility. State governments obviously decreed new rules for running elections, in a way that was fundamentally new. But those rules are aimed at county and municipal governments, with state officials themselves taking on relatively little practical responsibility. Therefore, the Australian-ballot reforms ultimately serve as another paradoxical example

[93] See Scalia, *America's Jeffersonian Experiment*, at 173 n.18.

of state lawmakers constructing our local system of election administration – by asserting *state* control over suffrage practices.

a. "A Closet of Prayer:" The Individualization of American Suffrage.

In a 1996 poem, "My Ancestress and the Secret Ballot," Australian Les Murray contrasted the violence of nineteenth-century Scottish elections with the peaceful suffrage of the Australian colonies. In Scotland, "a corpse stains the dust on voting day;" in New South Wales, "[t]he polling booth will be a closet of prayer."[94] As Mark McKenna writes, the unmistakable religious overtones of Murray's language capture important elements of the ballot-reform movement.

In the previous chapter, I described the instrumental and constitutive implications of voting practices for popular sovereignty. The bulk of Murray's poem is about the more instrumental side of the secret ballot: his ancestor in Scotland was killed "for the way he was known to vote," and the poem explains to the dead man's poverty-stricken wife how confidential voting will eventually help build the welfare state. But the phrase "closet of prayer" captures the constitutive transformation ballot reformers sought to bring about, as well. The phrase's physical aspect – Americans would now vote in little "closets" – and the silent, reflective, solitary activity it defines were both largely new in American voting. Secrecy and a common ballot "will encourage the intelligent sentiment to assert itself," argued one reformer, because it "protects the voter from intimidation."[95]

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[94] Quoted in Mark McKenna, "Building 'a closet of prayer' in the New World: the story of the Australian Ballot," *London Papers in Australian Studies, No. 6* (2002), at 2-3. For a summary of nineteenth-century voting reforms in various countries, see generally John H. Wigmore, *The Australian Ballot System As Embodied in the Legislation of Various Countries* (1889).

[95] Abram Flexner, *The New Ballot Law of Louisville, Kentucky at work and compared with the Massachusetts Law* (1889), at 10, 9.

At the same time that it sought to make voting private, the Australian ballot tried to bring the individual voter into closer contact with his government and put him in more direct control of the state. For that reason, the Australian ballot should be understood as both a privatizing and a centralizing influence in American suffrage.

In his comparative analysis of the standardization of voting practices in democracies, Stein Rokkan argues that in order for a country's elections to be considered "essential instruments of legitimation," "local variations in the arrangements for the elicitation and recording of choices had to be minimized." In country after country, he writes, the "history of the democratization of the suffrage was paralleled" by

> "increasing standardization of administrative procedures in all phases of the electoral process: the establishment of registers; the determination of voting rights; the maintenance of order at the polling stations; the casting of the vote; the recording of the act in the register; the counting of choices; the calculation of outcomes."[96]

Such things are a matter of degree, but in the United States, that level of standardization in election administration simply had not occurred. Variation in registration rules and practices, qualifications of voters, ballot design, and counting procedures varied at both state and local levels through the nineteenth century – indeed, in some ways, into the twenty-first. On the purposes of Australian-ballot reform, however, Rokkan's analysis is insightful. Rokkan's conclusions in terms of popular sovereignty and localism are unequivocal: the secret ballot was aimed at reducing the effects of local contexts on voters, and at enabling the central state to "enter into direct communication"[97] with each voter.

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[96] Stein Rokkan et al., *Citizens, Elections, and Parties: Approaches to the Comparative Study of the Processes of Development* (1970), at 152.

[97] Id., at 35.

As is clear in Jacksonian debates over voter coercion in states like New York and Virginia, nineteenth-century American suffrage theory contained some profound uncertainties. Americans knew that many voters were subject to unacceptable pressure under public-voting systems, but they simultaneously believed that "the vote ought to be open, that each voter ought to be prepared to defend his decision in his day-to-day environments."[98] Eventually, Rokkan argues, the virtues of openness lost out to the need for legitimacy, dignity, and an increased "ritual significance" in voting procedures. (The Australian poet would agree with that language.) Rokkan also describes well an attempt to diminish what I have called the locally-mediated character of elections, writing that secrecy represented

> "a further extension of the tendency for the centralizing nation state to enter into direct communication with each individual subject and to undermine all intermediary powers: the essential effect of the secrecy institution is to accentuate the equality of each voter by isolating him from the hierarchical influences in the local community. Through the secrecy provisions the power of the local aristocracy, the notables and the clergy is further reduced and . . . the tendencies toward centralization correspondingly strengthened."[99]

As he later puts it,

> "the underlying purpose of the introduction of the ballot system was to take the act of voting out of the regular give and take of day-to-day life and enhance its dignity and ritual significance by isolating it from the sordid pressures and temptations of an unequal and divided society."[100]

In secret, the voter becomes "independent of his immediate environment" and acts "exclusively in the abstract role of a citizen."[101] As one contemporary supporter wrote,

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[98] Id., at 152.

[99] Id., at 35.

[100] Id., at 153.

[101] Id., at 154; 35.

"it makes every voter directly responsible to himself for his individual actions."[102] Crenson and Ginsberg agree, concluding that the new ideal "emphasized the solitary and independent citizen," rather than collective participation.[103] This analysis fits the secret-ballot reform into the pattern Lukas articulates in *The People's Welfare.* Lukas argues that in the nineteenth century, the "preferred social unit of governance" was the "self-governed community," but in the twentieth, that preferred unit became the "individual."[104] In the closed voting booth, wrote one reform supporter, "[i]t is each citizen's business to decide according to the dictates of his own conscience how he shall vote."[105]

A colorful image of the privacy rules comes in a small book called *Hill's Political History of the United States*, published in 1894.[106] According to Hill's research, 34 states already employed some version of the Australian ballot – a testament to the astonishing speed with which the reform spread, given that it had been only six years since it was first

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[102] Massachusetts Governor Oliver Ames, quoted in William H. Glasson, "The Australian Voting System: A Sketch of Its History and Principles – Why North Carolina, South Carolina, and Georgia Should Adopt It," *South Atlantic Quarterly* (1909), at 6.

[103] Crenson and Ginsberg, *Downsizing Democracy* (2002), at 46.

[104] Lukas, *The People's Welfare*, at 238, Figure 2.

[105] Glasson, at 9.

[106] Thos. E. Hill, *Hill's Political History of the United States* (1894). Apparently written for a popular audience, Hill's book promises to offer "A Condensed Summary of the Important Political Events in United States History, from the Founding of the Government to the Present Time." The volume does indeed cover a broad, if highly eclectic, list of topics. After the discussion of election law discussed below, for example, the book proceeds directly to explain the "Cause of the Financial Panic, 1893." *Id.*, 125. Hill also offers one of the most colorful lists I've read of nineteenth-century suffrage exclusions. "In several states," he writes, "the voter is denied the privilege of suffrage if he is a pauper, a convict, an Indian, a lunatic, a Chinaman, a duelist, a deserter, a better on elections, a briber, a non-taxpayer, or is unable to read." Id., 123.

introduced in Kentucky and Massachusetts.[107] Hill offers the text of a representative law; unfortunately, he does not reveal what jurisdiction the statute comes from, but its instructions to voters are worth quoting here nonetheless:

> "You will not be allowed to occupy a voting booth with another voter.... If you will declare upon oath that you cannot read the English language, or that by reason of physical disability you are unable to mark your ballot, upon request you will be assisted by two of the election officers, appointed for that purpose, of opposing political parties.... Intoxication will not be regarded as physical disability, and if you are intoxicated you will receive no assistance in marking your ballot."[108]

Reformers might have *hoped* voters would be praying inside those booths. But at least some knew they had to be ready for drunks, too. "No election shall be held in a room in which spirituous or malt liquors are commonly sold," North Dakota's 1891 law sternly instructed election inspectors.[109]

b. "Systematic Organization for the Purchase of Votes:" Coercion, Corruption, and Local Pressures on Voters.

Hill's source's reference to intoxication at the polls reminds us that booze played a major role in the chaotic, often violent elections of the period. Indeed, individuals in the nineteenth-century U.S. were often subjected to intolerable pressure at the polls. The fundamental instrumental aspect of popular sovereignty, reformers argued, was thwarted when men literally feared for their lives on the streets during elections, and when bribery

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[107] Hill, at 122. Ten states did not use the Australian system: Florida, Georgia, Idaho, Kentucky (this is either ironic or a mistake on Hill's part, given that the state had required Louisville to use the secret ballot previously), Louisiana, Montana, North Carolina, Oregon, South Carolina, and Virginia. *Id.*

[108] Hill, at 123-124. Interestingly, the law goes on to guarantee voters two hours off from work without penalty or loss of pay in order to vote, provided they asked their employer on the previous day, and took their hours at their employer's convenience. *Id.*

[109] "The Australian Ballot Act and other acts constituting the Election Laws of North Dakota," Bismarck (1891), at 16.

was a fact of life. "Knives were drawn and freely used, revolvers discharged with a perfect recklessness . . . . The police had they interfered would have stood a chance of being annihilated," reported one observer of a California election.[110]

Virtually every source agrees that the Australian ballot was designed to protect voters – perhaps not from knives and revolvers, but from the possibility of coercion and bribery at the polls. "[N]o one acquainted with the conduct of recent elections," wrote one observer,

> "now attempts a denial . . . that systematic organization for the purchase of votes . . at the polls has become a recognized factor in the machinery of parties; [and] that the number of voters who demand money compensation for their ballots has grown greater with each recurring election...."[111]

"It is hard," writes Evans, "to imagine a system more open to corruption" than that of the U.S. after the Civil War. Where printed ballots were used, they were usually different sizes and colors, so it was a matter of simple observation either to bribe or force someone to vote a certain way. Both occurred all over the U.S., in both rural and urban areas, for decades.[112] In Cambridge, Massachusetts, for example, mill owners stationed clerks at the polls; workers were told that their continued employment depended on how they voted.[113] Parties, meanwhile, had corrupted the process by demanding huge contributions from would-be candidates, in order to finance both the above-board aspects of elections – such as printing and distributing ballots – and the paying of bribes. And parties often

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[110] Quoted in Fredman, at 20.

[111] Quoted in Evans, at 11.

[112] See Evans, at 10-13.

[113] Glasson, "The Australian Voting System," (1909), at 5. Evans, 10-14 is excellent on corruption, as is Fredman, 20-27.

duped voters with poor reading skills by distributing ballots bearing the insignia of their rivals, but a different slate of names.

The secret, state-produced ballot was intended to cure these ills. "[S]afeguarding the suffrage and getting a true expression of the will of the voters" was the goal, wrote one Southern advocate;[114] "protecting the ballot and securing a fair expression of the public opinion," said a supporter of Kentucky's first-in-the-nation law. Having just observed Louisville's 1888 elections, Abram Flexner argued that secrecy enables a man to vote "as he really prefers."[115] The reforms, wrote a third contemporary, were "introduced for the purpose of enabling the voter to express his opinion by the ballot without the interference of others."[116]

Critics, meanwhile, continued the argument seen above in Virginia in 1829, that secrecy was no guarantee of virtue and that public voting was a better bet. As one Englishman put it in arguing against the Australian system, "[n]othing was supposed to prevent misconduct and robbery at night so effectually as gas lamps."[117] And one opponent of reform argued that there would be *more* corruption under the new system, since "it would be easier, safer, and would require less money to corrupt [ballot clerks and inspectors] than to bribe so many electors."[118] But reformers successfully showed that the "gas lamps" of public voting had led to massive, widespread, and damaging

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[114] Glasson, at 10.

[115] Abram Flexner, *The New Ballot Law of Louisville, Kentucky at work and compared with the Massachusetts Law* (1889), at 9; 5.

[116] Thos. E. Hill, *Hill's Political History of the United States* (1894), at 121.

[117] Quoted in Evans, at 21-22 n.4

[118] Evans, 21.

corruption in American elections. The Australian ballot tried to rectify these problems, by the simple means of placing voters in a private context and not a public one.

c. "It is objected that the necessary machinery involves added expense:" Paying for Elections.

I have previously hypothesized that cost and bureaucratic capacity were disincentives for state governments to take over election administration from localities, and I read passages about election costs with interest. But what emerges clearly in the Australian-ballot debates is that counties and towns had *not* been paying many of the major costs of elections: political parties and their candidates did. Certainly parties had funded the printing and distribution of ballots. But it went much further, as one account of the expenses borne by a candidate in 1882 showed: "about $25,000 for manning the polls and supplying booths, $10,000 for printing the tickets, and $8,000 for their distribution, besides other expenses of the campaign."[119] Before the Australian ballot, reformers later said, the party boss's motto was "vote as you please as long as I count."[120]

Reformers saw parties' control as a major source of corruption, not least since parties often demanded "assessments" or contributions from would-be candidates, raising cash for paying voters – and also severely restricting the pool of those who could afford to compete.[121] Neither party consistently supported the reforms – not surprising, given that their core purpose was to abolish the specific practices and the broader political

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[119] Evans, 14.

[120] Quoted in Fredman, *The Australian Ballot*, at 93. The "as long as I count" approach had been ruined by the Australian ballot, but bosses switched to "vote as you please as long as I choose the candidates," so reformers were now pushing for direct primaries.

[121] On this function of parties, see, for example, Fredman, 27-28; Evans, 22 n.3; Glasson, "The Australian Voting System," 6-8.

culture of elections that the parties had built. One contemporary scholar tallied rough records of ballot-reform votes in state legislatures in the late 1880s and found that in most states, no party lines were clearly apparent, though Democrats were slightly more likely to favor reform.[122] But the system became so popular, as one prominent defender of the Australian ballot wrote, that "even the party workers have to profess to like it, whether they do or not."[123] The same author noted, however, that while "the system undoubtedly favors independent voting, it has by no means broken up parties."[124]

It is not clear precisely how the new laws typically distributed the burden of paying election-administration costs – or if they did so with any precision. It appears most likely that the state bore the cost of printing ballots themselves, but everything else was up to counties and municipalities. Evidence is inconclusive: many references to costs under the new system discuss "the state" paying, but this is often meant to contrast with the previous, party-funded regime. Opponents like New York's Governor Hill argued that "the distribution of all ballots by the state would be an enormous expense to the state," while supporters like Richard Henry Dana of Boston contended that "the self-

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[122] See John H. Wigmore, *The Australian Ballot System As Embodied in the Legislation of Various Countries*, Second Ed. (1889), at 205, Appendix VI. Wigmore writes since "in seventeen States no party lines were clearly apparent," and concludes that "[t]he whole record shows how irrational it is to carry national party lines into local reforms." Id. Wigmore offers a more comprehensive (but somewhat tedious) summary of votes in many state legislatures as well. See id., 22-49. Interestingly, Wigmore concludes that Michigan may have been the first state to formally consider adopting the Australian ballot, though the 1885 bill failed. Id., 23.

[123] Richard Henry Dana, *The Australian Ballot System of Massachusetts: Some Fallacious Questions Answered* (1911), at 22.

[124] Dana, *The Australian Ballot System of* Massachusetts, at 8. As I've noted above, scholars such as Argersinger and Disch have described the ironic fact that these anti-party ballot reforms ultimately redounded to the benefit of the major parties. Previously, to act as a party was to qualify as one, as Disch put it, but now only those parties which navigated state-designed processes could get on the single ballot. Argersinger writes that ballot rules effected "the expansion of the role of the state in the political process," an expansion which in turn "permitted the politicians in power to use state authority to promote self-serving conditions to order." Argersinger, *Structure, Process, and Party*, at 146.

respect in voting under the new system is alone worth all the extra expense to the state."[125] Another contemporary advocate spoke of "ballots printed at public expense."[126] The Massachusetts law of 1888 implies that state government carried the cost of ballots, declaring that "State Ballots will be printed by the Secretary of the Commonwealth, and city ballots by the city clerk."[127] But in an introduction to its 1891 law, North Dakota stated in no uncertain terms that "county auditors and commissioners are reminded of the fact that all election machinery is a county charge and must be provided at the county's expense."[128]

And an 1889 survey of voting practices concluded that that while states and territories required that ballot boxes themselves have certain characteristics – Colorado stipulated use of "a circular box of glass enclosed in a wooden frame, with a lid fastened with three unlike locks" – it was up to towns, cites, counties, and school districts to pay for and furnish them.[129]

d. "See that the tables, guard-rail, booths and ballot-boxes are properly placed:" Local Officials as Agents of State Government.

Lacking more comprehensive legislative and historical materials, I cannot state this with confidence as a general rule. But in many states, Australian-ballot reforms

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[125] Evans, at 25, 23.

[126] Glasson, "The Australian Voting System," at 3. It was also Glasson who wrote, "[i]t is objected to the system that the necessary machinery involves added expense." Id., at 10.

[127] Reprinted in Flexner, *The New Ballot Law of Louisville, Kentucky at work and compared with the Massachusetts Law* (1889), at 11.

[128] "The Australian Ballot Act and other acts constituting the Election Laws of North Dakota," Bismarck (1891), at 3.

[129] James H. Blodgett, "Suffrage and Its Mechanism in Great Britain and the United States," *The American Anthropologist*, Jan. 1889, at 70, 71.

fundamentally altered the relationship between state and local election officials. Locally-employed clerks, judges, and supervisors still performed most election-administration functions – more than before, in some places, where they took the place of party staff. But they now did that work essentially as *agents of state government*, in many ways, to a degree that represented a significant departure from previous American election practices. The advent of registration rules in this same period muddies this picture: as I have noted above, registration rules brought about a *devolution* of effective control over the franchise from states down to the counties and municipalities that ran registration systems.

But one cannot read the Ohio election law of 1892, for example, without being struck by the depth and specificity with which state power now penetrated into local voting contexts. Precinct election officers, for example, receive very specific instruction in which state-written oath they are to swear; how to call in all election judges at least three days before the election and supply them with the "sealed packages of ballots, poll-books, tally sheets, and all other necessary papers;" what time to open the polls and how to arrange rails, tables, booths and ballot boxes; how to interview voters and assist them; and which ballots to reject during counting.[130] North Dakota's 1891 law instructed county officials that "the form of ballots under the Australian Election Law [must] be uniform throughout the State, and to this end the department will recommend a form and supply county auditors with samples of same prior to the general election of 1892." The law has forty-one different sections, ranging from "Ballots, how printed" through

[130] Guy Ward Mallon, *The Ohio Election Law: A Manual for the Guidance of Electors and Election Officers* (1892), at 7; 9; 10; and 11-12.

"Election booths, how built" to "In case of spoiled ballot."[131] In Massachusetts, the law defined state and city officials' obligations to inform and instruct voters of upcoming elections, required delivery of certain numbers of ballots at certain times, stipulated how to arrange "voting shelves or compartments," and even included a figure drawing demonstrating how to lay out the room.[132]

Interestingly, E.C. Evans' summary of arguments against the Australian ballot makes no mention of the diminution of local control. In fact, some argued that the "clerks" at elections would *gain* power: voters would no longer be able to acquire, prepare, and bring ballots to the polls, but instead would have to get them from those clerks, giving them "an absolute control of the result of any and every election, for only such ballots as these clerks choose to deliver to voters can be cast or counted."[133] Flexner tells us that in Louisville, local officials apparently had enough leeway to corrupt the voting in one precinct: the "clerk of the election repeatedly left his place to manipulate the hired bands without, and the policemen made no effort to enforce the secrecy which the law requires."[134] Flexner's point is that the law could only be thwarted by dishonesty, because it was neither difficult to comprehend nor to administer. But the story does show that the hands on the ballot boxes were still those of local, and not state, officials.

Indeed, even election laws whose most striking feature is their assertion of close and detailed rules for all aspects of elections are still full of references to locally-based

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[131] "The Australian Ballot Act and other acts constituting the Election Laws of North Dakota," (1891), at 3, 7.

[132] Massachusetts Statute 1888, c. 436, As Amended by Stat. 1889, c. 413; reprinted in Wigmore, at 54-65; 66; 73.

[133] Evans, at 25-26. For summary of the arguments for and against – Evans here lists five for and seven against – see id., 21-26.

[134] Flexner, at 6.

administration. In "each and every county of the state" there would be a board of supervisors, stated Ohio's 1892 law; counties with big cities would have a board of elections; "municipalities where registration is not required, and . . . townships" could be divided into additional precincts as needed.[135] States set new rules for virtually every aspect of elections, but no state bureaucracy carried them out: the laws told county clerks and municipal supervisors what to do.

State lawmakers were eager to remove local variation and local influences and establish direct, unmediated connections with voters; they had come to understand that *how* people voted was essential to achieving that goal. But they still did not create a state election bureaucracy to achieve that goal. Years later, one student of the Australian-ballot reforms concluded that the best way to correct the many ills in American elections – including those utterly uncured by the secret, publicly-produced ballot – would be to create "an electoral office under the civil service."[136] Turn-of-the-century reformers certainly stopped far short of that point.

e. Conclusion.

I wanted to know how local control of elections survived the spread of Australian-ballot reforms among the states. But I am not sure it *did* survive. It may well be that it was in the last ten years of the nineteenth century – not in the more famous periods of suffrage reform, such as the Jacksonian era, or the later impositions of the VRA and then the NVRA – that the balance of power in American voting moved from localities to state

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[135] Guy Ward Mallon, *The Ohio Election Law: A Manual for the Guidance of Electors and Election Officers* (1892), at 17, 28-29.

[136] Fredman, *The Australian* Ballot, at 130.

governments. True, in practice, a hyper-federalized system remained, since state governments chose not to set up full election-administration bureaus – beyond new regulation of party activity and the design and production of ballots, there is again no evidence that they even considered doing so. County, city, town, precinct, and ward officials retained major responsibilities throughout the electoral process. But the records and analyses I've read leave little doubt that the nature of that responsibility was transformed. Previously, the only substantive state direction of the suffrage dealt with qualifications, and even these were often contingent on local factors such as property and tax records and residency. The kinds of instruction Ohio, North Dakota, and Massachusetts lawmakers gave to county clerks feel worlds beyond this. The Australian ballot did not radically alter American voting behavior, and it certainly did not achieve anything like the substantive, instrumental transformations reformers hoped for.[137] Nonetheless, it effected a significant change in the character of American suffrage.

But the paradox of our hyper-federalized suffrage system endured. Reformers decided that "ballots should be taken from the political organizations and put into the hands of the responsible agents of the State."[138] And state legislators did so: they constructed a new, public, decentralized election-administration bureaucracy – in the country's county, city, and town governments.

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[137] See Fredman, 119-130. Fredman notes that fraud survived, major parties retained a great deal of power, the "long ballot" confused many voters, registration rules contributed to disenfranchisement, and "frequent allegations of miscounting, repeating and other abuses" persisted. This is not to mention racist disenfranchisement in the South.

[138] Glasson, "The Australian Voting System," at 8.

CHAPTER 5

"ANYTHING WITH THE APPEARANCE OF A MAN:" INCLUSION, EXCLUSION, AND LOCAL ADMINISTRATION OF U.S. ELECTIONS

This chapter assesses the role local administrative authority over elections has played in the American story of exclusion, inequality, and discrimination in voting. In an introductory section, I return to the importance of examining practices, and not just formal rights and theories, in analyzing inclusion and exclusion in the American context. I also consider why many citizens and students of American voting may be biased against things local in terms of suffrage, and survey current controversies over fairness in American voting which involve local authorities. The second section examines two dark chapters in the history of local administration: the post-Reconstruction backlash in the South, and Progressive-era reforms such as new personal-registration rules. I argue that these discriminatory efforts were driven not by local administration, however, but by a reaction among national élites against universal male suffrage. The final section discusses the history of lax enforcement of suffrage qualifications and the work of political parties to bring in new voters, and concludes that on balance, local administration of U.S. elections has helped push American suffrage towards greater inclusion, not just towards contraction and discrimination.

A conventional narrative of American citizenship tells a story of ever-expanding inclusion. The U.S. was founded with a belief in the sovereignty of "the people," in this account, and our understandings of who constitutes "the people" have grown steadily and

inexorably.[1] Recently, however, scholars have devoted more attention to the powerful tradition of exclusion in American law – to statutes, judicial decisions, and practices which have carefully, rationally, and effectively limited the scope of "the people" throughout U.S. history, particularly along class and ascriptive lines.[2] American election laws have always been permeated by the desire to close some people out of the political community, and progress towards universal suffrage has been neither steady nor swift.[3] Indeed, it may be because there has been so much controversy and change in formal franchise qualifications that scholars have focused on that aspect of American suffrage. State and national constitutions and statutes have received most scrutiny, because most *de jure* restrictions and expansions of the suffrage fall under their authority. Meanwhile, as I've noted above, scholars have focused more on the symbolic messages conveyed by exclusion and inclusion, rather than on the institutions and practices of suffrage itself.[4]

Not all *de jure* restrictions on voting by adult Americans have been eliminated – people convicted of serious crimes are at least temporarily barred from voting in most states, as are the institutionalized mentally ill; there is new energy in movements to allow U.S. residents who are not citizens to vote. But where American suffrage debates once turned on formal barriers such as property ownership, taxpayer status, literacy, race, sex,

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[1] For elaboration and criticism of this view, see Rogers M. Smith, "Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America," 87 *American. Political Science Review* 549 (1993); and Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (1997).

[2] See, for example, Smith, *Civic Ideals*; Michael Lind, *The Next American Nation* (1995); Desmond King, *Separate and Unequal: Black Americans and the U.S. Federal Government* (1997); Eric Foner, *The Story of American Freedom* (1998); Philip Klinkner with Rogers M. Smith, *The Unsteady March: The Rise and Decline of racial Equality in America* (1999); Gary Gerstle, *American Crucible: Race and Nation in the Twentieth Century* (2001).

[3] See Keyssar, *The Right to Vote*, *passim*, particularly the tables in the Appendices, which offer overwhelming evidence of the depth and breadth of the exclusionary tradition in American suffrage law.

[4] See Chapter One, p. 28-29.

and age, most analogous disputes in the last generation have been over institutional inequalities and discrimination among those permitted to participate. Public debates and court cases dealing with apportionment, the shape and, particularly, the racial content of electoral districts, campaign finance, registration rules, procedural reforms aimed at bringing non-voters to the polls, and ballot access often revolve around conceptions of fairness and equality.[5]

What role has local administrative authority over elections played in the American story of exclusion, inequality, and discrimination? I do not believe this question has been confronted directly before. Electoral practices have been "always on the periphery of suffrage reform"[6] – present, but rarely taking center stage. I argued in Chapter Three that we cannot accurately grasp American ideas about popular sovereignty without understanding *how* the U.S. votes. Here, I show that questions about inclusion and exclusion, equality and discrimination – about *who* votes – are also intrinsically connected to the history of local election administration in the U.S. However, I argue that widespread assumptions about that connection are incorrect. In the wake of the election of 2000, and for a combination of reasons, localism seems to have a bad reputation among scholars and much of the public. The record is mixed and complex, but we have a good deal of evidence of a powerful alternative history: the hyper-federalized American suffrage system has in some ways been an engine of inclusion. This tradition is as old as the country itself: despite property, citizenship, and residency rules, Thomas

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[5] The literature on each of these topics is massive, particularly in the law-school community. For analysis and bibliographies, see generally Richard L. Hasen, *The Supreme Court and Election Law: Judging Equality from* Baker v. Carr *to* Bush v. Gore (2003); Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process,* Rev'd Second Ed. (2002); Daniel Hays Lowenstein and Richard L. Hasen, *Election Law: Cases and Materials*, 2nd ed. (2001).

[6] Chilton Williamson, *American Suffrage: From Property to Democracy*, at 272.

Hutchinson wrote, "[a]nything with the appearance of a man" was able to vote in Boston around 1772.[7]

This chapter is organized into three main parts. In the first section, I return to the importance of examining institutional practices, not just ideas and formal rules, in analyzing inclusion and exclusion in the American context. Here I also consider why many scholars – and students of American voting generally – may have a bias against things local when it comes to suffrage, and survey a few current controversies over fairness and inclusion in American voting which involve local authorities. The second main piece examines two dark chapters in the history of the local dimension: the post-Reconstruction backlash against universal male suffrage, and Progressive-era reforms. The final section develops my argument that on balance, local administration of U.S. elections has helped push American suffrage towards greater inclusion, not just towards contraction and discrimination.

I. "Implicit messages are no less significant:" Institutional Practices as Components of Democratic Exclusion.

A fundamental premise of this dissertation is that studies of American suffrage should examine the institutions, processes, and practices of voting, not just supporting political philosophies and aggregate outcomes. This is particularly true in the context of defining the extent of the franchise. The "ballot box and all that goes with it," says William H. Riker, is "the essential democratic institution," and the "first care of the democratic conscience . . . ought to be the widest possible extension of the suffrage."[8] It

[7] Dinkin, *Voting in Provincial America*, at 47.

[8] William H. Riker, *Democracy in the United States* (1965), at 25; 35.

has taken a long time, but we now understand that this "extension" must go beyond formal permission to participate. Systemic inequality and discrimination may be just mild-mannered cousins of *de jure* exclusion, but they are members of the same family and can be just as cruel. A lack of democratic respect can show itself "not only in the laws that deny some individuals the right to vote, but also in the practices that discourage the exercise of that right," as Thompson puts it, for "implicit messages are no less a significant part of institutional meanings."[9]

The disrespectful "messages" that the strong send to the weak, of course, are not the only damage done to excluded individuals. They also lose the chance to influence election outcomes. A number of authorities have demonstrated at least a passing understanding of these dangers, and of the connection between electoral institutions, inequality, and exclusion. Douglas Rae examines parties rather than administration in his assessment of the "proximal consequences of electoral laws," but his conclusion is quite relevant here. Rae writes that formal exclusion aside, "[t]he prejudice of electoral laws . . . in favor of strong elective parties and against weak ones is a very nearly universal fact of political life." (Rae frames this statement in a broad context: amidst a rigorous scientific study, he opens this section by citing a remarkable authority – the word of Christ, as presented by Matthew.[10]) When Walter Dean Burnham wrote sharply of Americans who still believe "that voting is not a right but a privilege for which

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[9] Thompson, *Just Elections*, at 28. Exclusion and inequality, he argues, "persist[] not only in the laws that deny some individuals the right to vote, but also in the practices that discourage the exercise of that right." The "message the electoral process sends," therefore, "is not yet one of equal respect." Id., at 27.

[10] "For whosoever hath, to him shall be given, and he shall have more abundance: but whosoever hath not, from him shall be taken away even that he hath." Matthew 13:12. "The proximal effects of electoral laws upon political parties," Rae writes, "comport with the most literal understanding of Christ's prophecy." Douglas W. Rae, *The Political Consequences of Electoral Laws*, Revised Ed. (1971), at 134.

individuals must demonstrate their worthiness," he was talking not about the literacy test or felony disenfranchisement, but registration rules.[11] Scholars such as Chilton Williamson, J. Allen Smith, and Stein Rokkan have also connected exclusion and discrimination with institutions and procedures facilitating or obstructing voting – our goal should be not just democracy, but "democracy made easy," as Williamson concluded his book.[12]

a. "The mystique of standardization:" Localism's Bad Rap, and Current Controversies.

Since the Progressive era, a clear trend in American voting has been "the increasing intervention of the federal government into the areas of electoral regulation traditionally reserved to the states."[13] That intervention – which has also diminished the scope of local control – has helped bring about more uniformity in electoral processes, as well as the near-elimination of *de jure* exclusions. Particularly in the last forty years, the list of federal statutes and judicial decisions regulating the suffrage in the interest of fairness, equality, and inclusion is long and impressive. The Twenty-Fourth Amendment

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[11] Walter Dean Burnham, "The Turnout Problem," in A. James Reichley, ed., *Elections American Style* (1987), at 109. The rules of the voting game, Burnham writes, "have explicit or implicit political purposes and assumptions," and he calls personal-registration rules a "class-linked political choice." *Id.* The Burkean idea that voting is a privilege, Burnham continues, has not existed outside the U.S. for a century, but endures here, "and the result is a remarkably opaque but very persistent struggle over the franchise – perhaps what one would expect from a political system in some ways so archaic and undeveloped that Samuel P. Huntington has aptly labeled it a 'Tudor polity.'" *Id.*

[12] See Williamson, *American Suffrage,* at 299. Williamson here quotes Alexander H. Stephens, commenting on the Jacksonian diminishment of property tests; Williamson writes that Stephens' words were "taken from Jefferson without proper acknowledgment," but does not give a citation to Jefferson. Smith writes that "[s]ound public policy points . . . in the direction of making the exercise of this right purely voluntary by removing every influence which now militates against free choice." Smith, *Growth and Decadence of Constitutional Government*, at 55-56. In his comparative study of elections, Rokkan lists the "standardization of voting procedures" as one of the six elements of suffrage expansion. Rokkan, *Citizens, Elections, Parties*, at 148.

[13] Argersinger, *Structure, Process, and Party*, at 65.

abolished poll taxes in federal elections in 1964; a year later, the Voting Rights Act put in place numerous new requirements, transforming registration and election-supervision regimes around the country; and a year after that, in 1966, the Supreme Court struck down taxes on voting in state and local elections in the four states where they had survived.[14] The VRA was extended in 1970, and literacy tests abolished; the Twenty-Sixth Amendment extending voting rights to eighteen-year-olds was ratified in 1971; and in 1972, the Court ruled in *Dunn v. Blumstein* that residency tests longer than 30 days for *any* election were impermissible.[15] Major updates to the VRA came in 1982, including the requirement of bilingual ballots in jurisdictions where the Census determined a need for them. The NVRA of 1993 told states how and where to register voters at state agencies, "right down to the layout of the registration form."[16]

In *Bush v. Gore*, the Supreme Court held that standards of equal protection apply to "more than the initial allocation of the franchise:" "[e]qual protection applies as well to the manner of its exercise."[17] The Court's connection of equal-protection analysis to election-administration procedures has not effected a sweeping transformation in

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[14] See *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

[15] *Dunn v. Blumstein*, 404 U.S. 330 (1972). For discussion of these and other developments, see generally Hasen, *The Supreme Court and Election Law* (2003).

[16] Carter et al., *To Assure Pride and Confidence in the Electoral Process: Report of the National Commission on Federal Election Reform* (2002), at 22.

Recent scholarship has shown that the NVRA did not bring about the massive increases in turnout its supporters hoped for. Millions of citizens did register, but aggregate registration actually *declined* by a percentage point between 1992 and 1996, from 78% to 77%. Raymond E. Wolfinger and Jonathan Hoffman, "Registering and Voting With Motor Voter," 34 *PS* 85 (2001), at 85. However, turnout in 1996 among those who registered at DMV offices was seventy percent – lower than the overall turnout rate in that election of 83%, but far higher than predicted by those who thought the relatively cost-free registration process offered by motor-voter would bring in non-voters. Id., at 89. Meanwhile, Wolfinger and Hoffman's data shows that those who used motor voter were disproportionately white and well-off, as predicted. Id., at 90.

[17] Opinion *per curiam*, *Bush v. Gore*, 531 U.S. 98 (2000).

American election practices. (After all, the Court hedged its bets with the now-infamous warning that their judgment was "limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.") However, the decision and the election of 2000 led to the enactment of the Help America Vote Act, or HAVA, in 2002. HAVA established a new federal agency, the Election Assistance Commission (EAC), designed to distribute federal money to states and localities and advise them on electoral "best practices." Though the EAC itself cannot issue mandates, HAVA has the potential to effect a new penetration of federal and state authority into local election administration. A recent survey of state election directors' websites indicates that virtually every state is drafting HAVA-implementing legislation. That legislation sets up "State-Based Administrative Procedures to Remedy Grievances" – complaints in areas such as voting systems' accessibility, counting and recounting standards, provisional voting, and registration, and which are typically lodged against *county* elections staff.[18]

It has been thirty years since Ward Elliott criticized "the mystique of standardization, expertise, crisis, and progress" which he argued had already "played a predominant role in intellectuals' reformist thoughts in the modern era."[19] While I do not share Elliott's disdain for the Warren Court's approach to election law, I do believe he has captured an important truth: many Americans now assume that local control is a toxin to be avoided, particularly when it comes to inclusion and fairness. Briefly, I think there are three reasons for this. The first we could call a "Florida bias" – after the Presidential

[18] See, for example, <http://www.state.sc.us/scsec/t3comp_form.htm>, the South Carolina Secretary of State's posted document listing HAVA Title III, Section 402 complaint procedures. Accessed April 1, 2004.

[19] Elliott, *The Rise of Guardian Democracy* (1974), at *vii*.

election of 2000, which lit up serious problems in a number of counties in the Sunshine State. Those events remain highly "available" as we talk about American suffrage.[20] Second is a "Jim Crow bias." The face of local election administration, for many people, remains that of the Southern officials who implemented profoundly racist policies in the long period between Reconstruction and the V.R.A. These were laws like the literacy or "understanding" test, which "[left] the voting fate of a citizen to the passing whim or impulse of an individual registrar," as a unanimous Supreme Court said in *Louisiana v. U.S.*[21] (I discuss these policies in more detail below.) Third is a "Progressive bias." I believe many Americans have a working prejudice in favor of national standardization and normalization, part of the "political piety"[22] we've inherited from Progressive thinkers like Herbert Croly, who argued that democracy required "an increasing nationalization of the American people in ideas, in institutions, and in spirit."[23] Other Progressives, such as Louis D. Brandeis and Woodrow Wilson, disagreed, particularly on economic matters,[24] but in terms of voting, Croly's preference seems to have won out.

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[20] What psychologists call "the availability heuristic" evaluates the probability of events "by the ease with which relevant issues come to mind." See Amos Tversky and Daniel Kahneman, "Availability: A Heuristic for Judging Frequency and Probability," 5 *Cognitive Psychology* 207 (1973). I've taken this concept's applicability to politics from Kathleen Hall Jamieson, *Dirty Politics: Deception, Distraction, and Democracy* (1992).

[21] *Louisiana v. U.S.*, 380 U.S. 145 (1965).

[22] Schudson, *The Good Citizen,* at 137. Schudson uses this phrase in a comment about election practices more generally: "The late-nineteenth-century decline in campaign parades, barbecues, and brass bands came as part of a self-conscious effort to remove emotion from the political scene. Our political piety is inherited from these Gilded Age and Progressive Era reforms." *Id.*

[23] Herbert Croly, *The Promise of American Life* (1965) (1909), at 271.

[24] On Brandeis, see Melvin I. Urofsky, *Louis D. Brandeis and the Progressive Tradition* (1981). On "Decentralist" and "Nationalist" strands in Progressive political economy, see Michael Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (1996), at 211-221.

As I will show, this is ironic – doubly so, for the suffrage legacy of the Progressive era writ large is not necessarily one of *either* nationalization or greater inclusion.

Writing for the Court in *West Virginia Board of Education v. Barnette*, Justice Jackson worried that "small and local authority may feel less sense of responsibility to the Constitution."[25] Jackson was talking about freedom of expression, but his words are an apt summary of scholarly and public assumptions about local authority and fairness in election administration, as well. Localism in American suffrage has a checkered past, but as I explain below, there is a great deal in the record that is positive.

Standardization may have acquired a "mystique" a long time ago. But the election of 2000 laid bare how much remains un-standardized, and there is today a new interest in variation in election practices – part of what I've called the "rediscovery of psephology." Charges of systematic unfairness and inequality catch the attention of the media, the public, and scholars most often. Some critics conclude that our hyper-federalized system disenfranchises, even if local officials do not act in bad faith. This possibility surfaces in discussions of issues like the great variety of ballots in use, voter assistance, the availability of bilingual ballots, and even the place where ballots are counted.

As Niemi and Herrnson put it in "Beyond the Butterfly,"

> "[a]t the very least, the variety of ballot forms and instructions makes the act of voting relatively demanding – especially for first-time voters, those not fluent in English, the elderly, the visually impaired, and those who simply have moved from one state (or even locality) to another."[26]

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[25] *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

[26] Niemi and Herrnson, "Beyond the Butterfly," at 318.

Editor Jennifer Hochschild seemed to find this discriminatory dimension to be the most important aspect of the article. Niemi and Herrnson, Hochschild summarized, "dissect a surprisingly simple and effective way of ensuring that some voters remain political losers." Variations in balloting procedures, she wrote, "almost always [act] to the detriment of those with the least education and resources and the most need of gaining political influence."[27] While this language stops short of charging state and local officials with discriminatory purposes, to call it a "way of ensuring that some voters remain political losers" comes close. Similarly, the *New York Times* opined that "[t]he sad state of voting rolls may be due to underfunding and mismanagement, but it can create an appearance of ulterior motives."[28]

One of the key jobs of poll workers is to assist voters – the aged, disabled, blind, those with poor language or reading skills, and others for whom casting a ballot is difficult for one reason or another. (Commenting on the complexity of California ballots, Michael Schudson observed that "voting is not only an act of civic engagement but of cognitive challenge."[29]) In the wake of the 2000 election, Judge Richard A. Posner noted the view that no serious harm is done to democracy when those who can't read well enough to follow directions inadvertently spoil their ballots. As Posner put it, "some conservatives may think it rather an excess of democracy for illiterates to hold the electoral balance of power."[30] This is a highly specious theory in more ways than one:

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[27] Jennifer Hochschild, "Introduction and Comments," 1 *Perspectives on Politics* 247 (2003), at 247-248.

[28] "How America Doesn't Vote," (unsigned editorial), *N.Y. Times*, Feb. 15, 2004.

[29] Schudson, *The Good Citizen*, at 3.

[30] Richard A. Posner, "Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation." *Supreme Court Review* (2000), at 58.

many voters who are not "illiterate" cast invalid votes, either because of poor instructions, misleading ballot layout, or machine failure, and such voters do not hold the "balance of power" any more than others do. Posner reports this approach towards literacy – he does not endorse it, but he does not reject it, either. At any rate, it is a striking argument to make in the twenty-first century. It may be a long way from the old formal exclusion of those citizens who lacked the right amount of property, the right pigmentation, or the right gender. But like the old literacy test, the question of whether or how much to assist illiterate voters implicates local officials.[31] And while state and federal law governs many voting-place practices, that still leaves room for local officials to interpret and enforce the law in misleading and potentially-exclusionary ways – as some Florida counties apparently do by posting signs stating "Photo and Signature Identification Required" outside polling places.[32]

Without framing the issue in terms of literacy or fairness, the new chair of the federal Election Assistance Commission recently called the "shortage of election day poll workers" an "emerging crisis." How to rectify that shortage? In one of his first major public addresses, DeForest B. Soaries offered a classic American solution: he asked "corporate America to support people working on polls," by giving time off as they do

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[31] Such lack of concern with illiteracy, meanwhile, may help justify a practice that appears quite common – the lack of provision of adequate voter education materials. As the Florida fight made clear, when ballot design varies across counties, it is more difficult for state officials to provide such materials. However, Florida also suggested, at least to some observers, that state officials understood that difficulty well, and did nothing about it. For critics of Florida Secretary of State Katherine Harris, that inaction reeked of partisan purpose. See the exchange between Harris and Civil Rights Commission Chairperson Mary Frances Berry on voter education during the Commission's hearings on the 2000 election in Florida, reprinted in Thompson, *Just Elections*, at 60.

[32] See "A Bad Sign for Voters" (unsigned editorial), *St. Petersburg Times*, July 22, 2004 (page number unknown). Voters are not actually "required" to bring such identification, since if they do not have it they may sign a statement affirming their identity and still vote. The *St. Petersburg Times* referred to such signs as "misleading," and "an inaccurate interpretation of the law." *Id.*

for jury duty. Chiding critics of electronic voting machines, Soaries said "[t]he greatest threat to voting in this country has less to do with source code and more to do with finding people who don't mind getting up at 4 o'clock in the morning and getting to the firehouse on time."[33]

The Voting Rights Act requires that some of those firehouses be staffed with people speaking languages other than English, at least in some counties and towns. The nation's Hispanic population rose by almost sixty percent in the 1990s, and many counties recently learned that the 2000 census showed them to be in need of bilingual ballots. In Washington State, election workers were "deluged with complaints" from voters who objected to seeing Spanish and Chinese on their ballots. In Pennsylvania, one county initially refused to print bilingual ballots, then agreed to do so after a federal judge found that poll workers had discriminated against Hispanics. "It's been a very emotional issue," said County Commissioner Tim Reiver. "An awful lot of people think this is a bad idea." Some opponents made their case more explicit. "Bilingual ballots are un-American," Jim Lubinskas of the organization U.S. English Inc. told a reporter. "To become a 'naturalized' citizen, you are required to speak English, so it would seem that to vote, you would need a workable knowledge of the English language as well."[34] In national politics, the dispute over English-only ended a few years ago: both Presidential candidates in 2000 carefully peppered their remarks with simple phrases in Spanish, at least for some audiences. And at least some states have used bilingual ballots for over half a century: New Mexican voters could choose the "Boleto Prohibicionista" slate,

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[33] "Time Off Urged for Voting Help," *Los Angeles Times*, May 20, 2004.

[34] See "Bilingual Ballots Increasingly Requested," the Associated Press, March 28, 2003.

among others, on the state ballot employed in 1940.[35] But it appears that in American suffrage, this fight is not over, and the front lines are in county and city governments and local polling stations across the country. Of course, there are federal statutory, judicial, and executive-branch dimensions to this conflict as well. This is clear in a recent agreement between Suffolk County, New York, and the U.S. Justice Department, requiring the county to put in place Spanish-language voting materials and hire bilingual poll workers under the terms of the Voting Rights Act.[36]

Among other things, *Bush v. Gore* was a case about how and where to count and re-count ballots. Judge Posner is among those who have argued that electoral democracy would be better served by *more* localism when it comes to counting ballots. As I've explained above,[37] Posner has urged that ballots be "counted at the *precinct* level to enable as many spoiled ballots as possible to be revoted."[38] Posner goes further, calling punchcard voting technology "a de facto literacy test" for people who are "poorly educated." Indeed, Posner argues that the same is true of other ballot types, "when the votes are counted at the county rather than the precinct level."[39]

Judge Posner here refers to the *place ballots are counted* as a "de facto literacy test," and argues that the exclusion be removed simply by tallying votes in precincts.

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[35] See Albright, *The American Ballot*, at 59, where a facsimile of a state ballot from that year is reproduced. It features the "Boleto Republicano," "Boleto Democrata," and five other ways to vote a straight party ticket – including the "Boleto Prohibicionista" and "Boleto Agricultor-Obrero," for the Farmer-Labor Ticket.

[36] See Robert E. Kessler, "Suffolk Settles Voting Rights Case," *Newsday*, June 30, 2004.

[37] See Chapter One, at 25.

[38] Posner, *Breaking the Deadlock*, at 259; emphasis added. Posner's regression analysis of the sources of spoiled ballots identifies "county-counted" as one of the leading indicators of increased ballot spoilage.

[39] Id. at 259.

Posner is nothing if not an iconoclast, and this endorsement of the local dimension of suffrage flies in the face of prevailing biases in favor of larger governing units as guarantors of fairness. At the same time, his pointed analogy reminds us of some of the darkest days in American voting history.

II. Two Lows for Localism? The Post-Reconstruction Backlash Against Universal Suffrage and The Reforms of the Progressive Era.

Jim Crow policies and the Progressive emphasis on national harmonization, I argue, have contributed to biases against local electoral authority today. In terms of the suffrage, Progressives are often linked with the 1920 ratification of the Nineteenth Amendment formally enfranchising women. But Mugwump reformers – proto-Progressives – helped push the Australian ballot thirty years earlier, and locally-administered personal-registration laws may be Progressivism's greatest legacy in American voting practices. Whether registration's *purposes* were fundamentally exclusionary remains uncertain, but many scholars have condemned the practice's discriminatory *effects*. This section analyzes the connections between these reforms, the local dimension of American voting, and the exclusionary, discriminatory tradition in American thought. I conclude that neither the racist policies of the Jim Crow South nor the systemic discrimination wrought by personal-registration requirements can be accurately blamed on local control itself: state-level actors, racism, and declining faith in universal suffrage among national élites must shoulder the bulk of the blame.

a. "I do not expect an impartial administration of this clause:" The Post-Reconstruction White Backlash.

An archetypal use of local control for invidious exclusionary purposes was the literacy test in the post-Reconstruction South. The "great difficulty" a genuine, uniform literacy test would have presented, as one authority puts it, would have been "that it would also operate on more than a million illiterate whites."[40] The solution, of course, was to rely on local officials to allow whites, but not blacks, to pass the test. As a Virginia delegate said of the literacy test in that state's convention in 1902, "I do not expect an impartial administration of this clause."[41]

Literacy or "understanding" tests were copied from policies "Know-Nothings" used to disenfranchise immigrants in Massachusetts and Connecticut a generation earlier.[42] In the South, of course, such tests were only part of a larger package of measures designed to "eliminate the darkey as a political factor," as Carter Glass told fellow Virginians.[43] Morgan Kousser has written that "cross-fertilization and

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[40] Charles Seymour and Donald Paige Frary, *How the World Votes: The Story of Democratic Development in Elections*, vol. I (1918), 242.

[41] Quoted in Kirk Harold Porter, *A History of Suffrage in the United States* (1971) (1918), at 218. "The Mississippi version" of the test, Riker writes,

> *"adapted to local circumstances*, required that electors be able to read from the state constitution *or* to understand it *or* to interpret it reasonably. The alternatives were, of course, intended to allow registration of wholly illiterate whites while the test itself was to be administered to exclude all Negroes, whether literate or not."

Riker, *Democracy in the United States,* at 53 (emphasis added). Keyssar writes that "[m]any of the disfranchising laws were designed expressly to be administered in a discriminatory fashion, permitting whites to vote while barring blacks. Small errors in registration procedures or marking ballots might or might not be ignored at the whim of election officials; taxes might be paid easily or only with difficulty; tax receipts might or might not be issued." Keyssar, *The Right to Vote*, at 112.

[42] Riker, at 53.

[43] "This plan of popular suffrage," said Glass, will "eliminate the darkey as a political factor in this State in less than five years, so that in no single county of the Commonwealth will there be the least concern felt for the complete supremacy of the white race in the affairs of government." *See* Paul Lewinson, *Race, Class,*

coordination" between Southern states in adopting reforms "amounted to a public conspiracy."[44] Southern lawmakers "frequently admitted, indeed boasted, that such measures as complex registration rules, literacy and property tests, poll taxes, white primaries, and grandfather clauses were designed to produce an electorate confined to a white race that declared itself supreme."[45] Laughlin McDonald's list of "the traditional 'expedients' to obstruct the exercise of the franchise by blacks" adds "onerous residency requirements . . . voter challenges and purges . . . [and] the use of discriminatory redistricting and apportionment schemes...."[46] Confusing election announcements and the deceptive use of multiple ballot boxes for multiple-office elections were also widely employed to keep black votes from counting.[47] Commenting on the discriminatory use of registration rules, Joseph Harris observes that

> "[i]t is a matter of common knowledge that the registration systems of the Southern states are designed to disenfranchise the Negro.... [T]he applicant for registration must prove his qualifications to vote 'to the satisfaction of the registration officer'—a

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and Party: A History of Negro Suffrage and White Politics in the South (1932), at 84-86. Glass told the delegates, "Discrimination! Why, that is precisely what we propose; that exactly, is what the convention was elected for." See Kousser, *Shaping of Southern Politics*, at 59. Describing the evolution of white methods of disenfranchising blacks, Ben Tillman of South Carolina said, "[w]e took the government away. We stuffed ballot boxes. We shot them.... With that system . . . we got tired ourselves. So we called a constitutional convention, and we eliminated . . . all of the colored people whom we could." Tillman made this statement to the U.S. Senate. See Lawrence M. Friedman, *A History of American Law* (1985), at 507. "Give me a convention, and I will fix it so that the people shall rule and the Negro shall never be heard from," said Robert Toombs of the new Georgia constitution in 1890. See Rockefeller Foundation, *The Right to Vote: A Rockefeller Foundation Conference* (1981), at 9. A Tennessee newspaper editorialized in 1889, "[i]t is certain that many years will elapse before the bulk of the Negroes will awaken to an interest in elections, if relegated to their proper sphere, the corn and cotton fields, by some election law...." *Id.* at 15. See generally Michael Perman, *Struggle for Mastery: Disenfranchisement in the South, 1888-1908* (2001).

[44] Kousser, *The Shaping of Southern Politics*, at 39.

[45] Smith, *Civic Ideals,* at 383.

[46] "And where these technically legal measures failed to work or were thought insufficient, the state was more than willing to resort to fraud and violence in order to smother black political participation and safeguard white supremacy." McDonald, *A Voting Rights Odyssey: Black Enfranchisement in Georgia* (2003), at 2-3.

[47] See Seymour and Frary, *How the World* Votes, at 243.

provision which vests such wide discretion in the registration officers that it permits them to refuse arbitrarily to register Negro applicants."[48]

What is striking about such measures is not only that so many of them were locally-administered, but that relatively few were formal, *de jure* eliminations of whole classes of people from the franchise. Southern white élites focused on voting practices and informal barriers, constructing an intricate "maze,"[49] dependent on local administration, through which any blacks bold enough to try to vote would have to pass. As Kousser writes, the Southern states rarely employed any means which constituted an "absolute, unequivocal provision which [banned] a discrete category of persons from the ballot box." Instead, laws focused on increasing the economic and social costs of voting, and on policies which "allowed administrators to discriminate between voters with roughly the same legal qualifications."[50]

This all took place, of course, in the shadow of the Fifteenth Amendment. Because it was too formal, too far removed from suffrage practices, and too little supported by Northerners, the Amendment's guarantee of voting rights to blacks turned out to be hollow. Congress had rejected an alternative text putting in place an affirmative suffrage right for males above twenty-one, rather than banning discrimination in voting "on account of race, color, or previous condition of servitude," as the Amendment eventually did.[51] Resurgent Southern whites skirted that language easily and soon.

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[48] Harris, *Registration of Voters in The United States*, at 312.

[49] Riker, at 53.

[50] Kousser, at n.4, p. 2-3.

[51] Bensel, *Yankee Leviathan*, at 357, citing the *Congressional Globe*, January 29-30, 1869. Bensel argues that each of the three post-war Congresses – the Thirty-Ninth, the Fortieth, and the Forty-First – focused on one particular way of implementing national policy toward the South. The Thirty-Ninth attempted direct

Through the Fourteenth Amendment, the nation's fundamental law had at least begun to recognize African Americans as equal citizens. But as Kenneth Karst writes in his history of American citizenship law, the problem facing blacks for the next century would be "that local law and custom consigned them to a place outside the social boundaries defining membership in the local community."[52] Racial exclusion and local control were linked outside the deep South, as well. An Ohio law passed in 1841 gives us a relatively rare glimpse into the workings of racial suffrage restrictions. The Ohio statute required election officers to contest the eligibility of anyone with a "visible admixture of African blood;" the challenged voter had to provide witnesses and answer questions, and could be barred from the polls at the discretion of the poll-worker. This practice survived for a quarter-century before state courts struck it down.[53]

What role did local administration play in this quintessentially exclusionary period? Town and county officials implemented these measures, and did so in a discriminatory manner; ultimately, national legislative, judicial, and executive-branch action was necessary to confront the problem. But the fact of local administration did not *bring about* restricted suffrage in this period. Primary responsibility for post-Reconstruction restrictions on voting by African Americans cannot rest with the local officials who implemented them. After all, these were state laws, motivated by a tradition of ascriptive discrimination that reached across the region, and, indeed, the nation. But even state government, Southern prejudice, and American racism itself are

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reorganization of the southern political economy, and the Forty-First was to force changes in the South by putting conditions on readmission to the Union. It was the Fortieth which attempted to use suffrage regulation to control the South. *Id.*, at 353.

[52] Kenneth Karst, *Belonging To America: Equal Citizenship and the Constitution* (1989), at 3.

[53] Harris, 311. The case was *Monroe v. Collins*, 17 Oh. St. 665 (1867).

not sufficient explanations. For a powerful *national* trend during this period turned against universal suffrage.

"Among elite thinkers, a retreat from the previous consensus in favor of manhood suffrage was among the most remarkable developments of the late nineteenth century,"[54] writes Eric Foner. By the turn of the century, Kousser observes, the U.S. saw "a recrudescence of antidemocratic theorizing on the question of who was entitled to vote."[55] Daniel T. Rodgers notes that the new discipline of political science displayed "an extraordinary fertility of imagination" in developing new arguments demonstrating "that suffrage was not a right, but a gift of the state."[56] Writing of the "consensus on literacy" as threshold test for competency in voting, Michael Schudson concludes that "the concept of universal suffrage had lost hegemony."[57]

This retreat challenges the conventional narrative of always-increasing inclusion in American suffrage – one reason why the "recrudescence of antidemocratic theorizing" is not as well understood as other episodes. But another reason is the relatively procedural, rather than formal, nature of the new restrictions. Americans are good at

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[54] Eric Foner, *The Story of American Freedom* (1998), at 119.

[55] Kousser, *The Shaping of Southern Politics* (1974) at 250-251.

[56] Rodgers, *Contested Truths*, at 174.

[57] Schudson, *The Good Citizen: A History of American Civic Life* (1998), at 184. See also Michael E. McGerr, *The Decline of Popular Politics: The American North, 1865-1928* (1986), in which McGerr describes "liberal reformers' hostility to universal suffrage after the Civil War." *Id.* at 214. Albert O. Hirschman writes in *The Rhetoric of Reaction* that

> "[f]rom the last third of the nineteenth century to the First World War and beyond, a vast and diffuse literature – embracing philosophy, psychology, politics, and belles lettres – amassed every conceivable argument for disparaging the 'masses,' the majority, parliamentary rule, and democratic government. Even though it made few proposals for alternative institutions, much of this literature implicitly or explicitly warned of the dire dangers threatening society as a result of the trend to democratization."

Hirschman, *The Rhetoric of Reaction* (1991), at 5. See also *id.* at 19-26 (discussing that literature).

talking about "rights," but relatively few people had their "right to vote" legally, formally, and completely removed during this period. But a great many, North and South, saw the difficulty of exercising that right increase exponentially, by design. Local administration was used to discriminatory effect during this period, and no doubt a great many county clerks acted zealously in preventing Southern blacks from voting. But in the context of a powerful, carefully-theorized, national movement away from universal suffrage, it is not accurate to lay all the blame at the feet of local administration.

b. "To elevate and purify the suffrage:" Progressive-era Reforms in the North.

Bucking a classic American preference, many Progressives sought centralization in various policy areas. But turn-of-the-century voting reforms such as registration rules did not centralize administrative authority. Recall the crucial conclusion of the 2002 report of the National Commission on Federal Election Reform: compulsory registration effected "a new decentralization of power to determine the eligibility of voters, devolving from state governments down to the local and county governments that managed this process and maintained the rolls."[58] Meanwhile, Progressives' opposition to corruption and their belief that enlightened policies were harmonized at the national or state level did not add up to a preference for more people to be involved in elections, notwithstanding the passage of the Nineteenth Amendment. "In the North," writes Rodgers, Progressives and other "professional students of political science" "rallied to the idea of . . . educational tests and higher registration laws to elevate and purify the

[58] Carter et al., *To Assure Pride and Confidence in the Electoral Process* (2002), at 27.

suffrage."[59] Robert Wiebe notes that what he calls "exclusionary rules" spread well beyond the post-Reconstruction South, and "[b]y the 1920s a dozen states . . . adopted literacy tests, all but three states tightened their provisions governing registration, and about half of America's counties required personal registration before voting."[60] Indeed, if we consider compulsory literacy and personal-registration rules to be the Progressives' key contribution to American voting, theirs may be a legacy of locally-enforced, exclusionary practices. This section assesses those reforms.

c. "Encourage the intelligent sentiment to assert itself:" Secrecy and Literacy.

I have argued above that the advent of the Australian ballot represented an attempt to privatize American voting by diminishing the impact of polling-place pressures on voters. As with other reforms of this period, scholars are divided as to the secret, state-produced ballot's place in the exclusionary tradition. Commenting on New York's 1894 constitutional implementation of secrecy and voting machines, G. Alan Tarr notes that both required literacy; registration requirements and a ninety-day waiting period for naturalized citizens, Tarr writes, were also part of a nationwide "late-century movement to restrict the franchise."[61] In his history of the Australian ballot, E.C. Evans refers to the reforms as part of a process of "gradual disenfranchisement,"[62] and Kousser lists the Australian ballot as one of the "restrictive measures" employed by Southern

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[59] Rodgers, *Contested Truths*, at 174. Rodgers also mentions "radically shortening the number of elective offices [and] schemes of proportional voting so as to weight independent votes more heavily...." Id.

[60] Wiebe, *Self-Rule: A Cultural History of American Democracy,* at 135.

[61] G. Alan Tarr, *Understanding State Constitutions* (1998), at 108.

[62] Evans, *A History of the Australian Ballot System in the United States*, at 25.

Democrats around the turn of the century.[63] In North and South alike, meanwhile, the major parties were able to move "under the mild cover of procedural reform" to hamstring smaller parties by making sure the new state-controlled ballot would ban "fusion" candidacies.[64]

Rokkan agrees that the "primary motive" for the private ballot was to enable voters "to escape sanctions from superiors." But he also notes "that the provisions for secrecy could cut the voter off from his *peers* as well as his *superiors*." Voter solidarity within the working class would presumably diminish once those voters had no way of confirming that they had voted alike – even absent coercion or fraud.[65] But some lower-class voters apparently felt liberated from pressure by "superiors:" one western Maryland newspaper remarked that the new secret ballot election marked "the first time a poor and timid man could go up and vote as the equal of the greatest."[66] And part of why we know that critics of reform argued that the Australian ballot was unfairly keeping less-educated voters from participating is that advocates like Richard Henry Dana tried so hard to refute them. In his 1911 pamphlet articulating the benefits of Massachusetts' ballot system, Dana argued that the percentage of registered voters going to the polls was higher in

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[63] Kousser, *The Right to Vote*, at 39.

[64] See Argersinger, *"A Place on the Ballot": Fusion Politics and Antifusion Laws*, 85 *American Historical Review* 287 (1980), at 288. Argersinger shows that anti-fusion politics "involved a conscious effort to shape the political arena by disrupting opposition parties, revising traditional campaign and voting practices, and ensuring Republican hegemony – all under the mild cover of procedural reform."

[65] Rokkan, *Citizens, Elections, Parties*, at 35.

[66] Quoted in Argersinger, *Structure, Process, and Party*, at 142.

"manufacturing cities" such as Holyoke, Lowell, Cambridge, and Lawrence than in rural towns.[67]

Other contemporary advocates, however, suggest that at the very least, some reformers wanted to keep less-educated people from the polls. Abram Flexner argued that secrecy "will encourage the intelligent sentiment to assert itself and will give it the opportunity to exercise its just weight." Whether this premise is exclusionary depends on how Flexner is using "sentiment:" his phrase "the intelligent sentiment" could refer either to thoughts within one person, or to a section of society. Context suggests the latter interpretation: Flexner soon contrasts "the intelligent sentiment" with "the purchasable element."[68] A Southern advocate, meanwhile, connected ballot reform's exclusionary potential with racism in blunt language. "The South's reluctance to adopt the Australian ballot," wrote William Henry Glasson in 1909, "was doubtless due to the embarrassing problem of negro suffrage." Illiterate whites, as well as blacks, would have been excluded by secrecy. Glasson condemns the use of violence and intimidation to keep blacks from voting, methods which he regarded as "exceedingly harmful to white integrity." By 1909, both difficulties had been solved:

> "Happily, through the adoption of the constitutional amendments in the Southern States, the ignorant negro vote has been excluded by legal methods which have proved effective, and the political supremacy of the white race has been assured.

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[67] Richard Henry Dana, *The Australian Ballot System of Massachusetts: Some Fallacious Questions Answered*, (1911), at 6-8. Moreover, Dana contended that registration rates had not declined. He claimed that "in the six Boston wards representing the least education," the number of registered voters was higher in the first four years under the new ballot law than the previous four. *Id.*

[68] Abram Flexner, *The New Ballot Law of Louisville, Kentucky at work and compared with the Massachusetts Law* (1889), at 10.

> The fear of negro suffrage now affords no valid argument against giving the voters of all the Southern States the fairest possible form of ballot."[69]

In addition to being still more revealing evidence of the frankness with which Southern whites pursued electoral "supremacy," Glasson's point about the Australian ballot is that it did not *need* to be implemented in an exclusionary way. Lawmakers could decide whether they wanted illiterates to be able to vote or not. Glasson explains that if Southern leaders chose "to continue the ballot in the hand of the illiterate white man, a form of the Australian ballot can be provided, similar to that used in New York State...."[70]

I believe Glasson was referring to New York's 1896 statutory provision of assistance to any voter who would take an oath of illiteracy. The secret ballot often functioned as a *de facto* literacy test,[71] but many ballots included party symbols, or vignettes, to help voters who could not read well. However, in the same period, many states implemented new formal exclusions, to be administered at the polls: *de jure* literacy tests, typically requiring voters to read and explain an excerpt from the state constitution or another official document. By my count, twenty-one states put in place some form of literacy or "understanding" test between 1870 and 1924. Only nine other states, meanwhile, mandated that assistance be available to illiterates, and two of those statutes appear to have been subsequently overturned by constitutionally-enacted literacy requirements. (One such apparent casualty was the 1896 New York law admired by

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[69] William H. Glasson, "The Australian Voting System: A Sketch of Its History and Principles – Why North Carolina, South Carolina, and Georgia Should Adopt It," *South Atlantic Quarterly* (1909), at 11-12.

[70] *Id.*

[71] "Even where literacy was not prescribed, the Australian ballot made it practically a requirement." Schudson, at 183.

Glasson: the statute would presumably have been negated by the constitutional literacy requirement, enacted in 1921. The other was California, where an 1891 statute appears overridden by a 1911 constitutional requirement.) In other words, about three times as many states excluded those with poor reading skills as sought to include them. The twenty-one literacy-test states spanned the nation, from Maine to Mississippi to California. Of course, literacy or "understanding" tests were administered by local officials, who were given a considerable amount of leeway under the literacy laws. Twelve exempted many voters from the new requirements – usually including all those already qualified, people with physical disabilities, and, in the South, veterans and property owners.[72] Presumably, one function of literacy tests would have been simply to deter those with poor reading skills from even showing up. But such exemptions emphasize how much practical authority local officials must have had to determine which residents of their communities belonged to the franchise.

d. Corruption (As Defined by Progressives): Mandatory Personal Registration.

Progressive-era registration rules represent a significant piece in the puzzle connecting local election administration to traditions of exclusion and inequality in American suffrage law. Part of that importance lies in its contemporary relevance: of all the major reforms of the period, only personal registration remains both on the books and controversial: patently-exclusionary measures like literacy tests, poll taxes, and white

[72] I derive this count from state-by-state information available in Keyssar, *The Right to Vote*, at Table A.13, "Literacy Requirements for Suffrage: 1870-1924." Reichley does not list states, but similarly observes that between 1900 and 1926, eleven non-Southern states put literacy tests in place. Reichley, *The Life of the Parties*, at 209.

primaries are gone, while secrecy is now democratic dogma. Second, although registration processes are subject to numerous state and federal laws, registering voters and maintaining the rolls was is still predominantly a county and municipal responsibility. Registration rules remain so variable and fine-grained, therefore, that it is extremely difficult to summarize state-by-state policies – the reason Keyssar gives for his failure to tabulate registration rules in his otherwise-comprehensive appendices.[73] Meanwhile, our best estimates of personal-registration's turn-of-the-century spread focus not on states, but at the county level. Reichley calculates that around 1900, about 30 percent of counties outside the South required some kind of personal registration, while about 24 percent had state-compiled lists. But by 1920, the corresponding figures were 45 percent and 22 percent of counties, respectively.[74]

Two recent books strongly criticize Progressive ideas about the suffrage, and both focus on personal registration. Prior to about 1880, most registration laws had mandated creation of voter lists by town and county officials, but under personal-registration rules, "it became the duty of individual voters to secure their own eligibility," as Crenson and Ginsberg write in *Downsizing Democracy*.[75] Michael Schudson argues in *The Good Citizen* that the Progressive model of citizenship "helped free people from parties, but it also provided new means to exclude some people from voting altogether."[76] Again, this

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[73] Keyssar explains that the decision not to include registration in the tables "was made for reasons of feasibility: state voter registration laws for the last century generally have been complex, lengthy, and subject to frequent changes. A preliminary attempt to produce such a tabular presentation yielded an incomplete document more than fifty pages long." Keyssar, at 325.

[74] Reichley, *The Life of the Parties*, at 208.

[75] Crenson and Ginsberg, *Downsizing Democracy*, at 56.

[76] Schudson, *The Good Citizen*, at 183. Other scholars challenge this critical interpretation of new burdens on voters. Paul Kleppner, for example, acknowledges that literacy tests, registration requirements, and other "new procedural barriers to the exercise of the franchise" were "aimed at limiting the activities of

was a national movement, one which employed local registration officials as its key agent. In the South, of course, black voters were targeted for exclusion; in the North, it was often workers and new immigrants whom "the new registration boards hoped to bar from urban elections."[77] Another study concludes that registration rules "were enacted . . . in order to decrease voting, especially fraudulent voting, but also voting by transients, illiterates, blacks, immigrants, and poor-whites."[78]

Words like "hoped to bar" and "in order to" remain controversial, however. Reviewing primary documents and scholarly assessments, Alexander Keyssar says that historical evidence "does not offer definitive answers" to the fundamental question about registration and balloting reforms: which of the central motivations was primary – a genuine desire to fight fraud, or a less-noble interest in shrinking democracy? Keyssar's own conclusion is that fraud was real – but much less prevalent than reformers said it was, and as likely to be found in rural areas as in the immigrant-dominated cities that were the primary targets of registration requirements. "[W]idespread convictions" about the fallen state of American politics, he writes, "were spawned by germs of fact, cultured in a medium of class and ethnic (or racial) prejudice and apprehension."[79]

Others reach similar conclusions. Progressives, Crenson and Ginsberg argue, "regarded mass mobilization as an impediment to effective government," and fully intended to narrow government's "receptivity to popular activism." Registration was one

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immigrants." But Kleppner argues that such burdens were fundamentally different from the legal "right to vote," which had been won and guaranteed in previous battles. Paul Kleppner, "Defining Citizenship: Immigration and the Struggle for Voting Rights in Antebellum America," in Donald W. Rogers, ed., *Voting and the Spirit of American Democracy* (1992), at 45.

[77] Rodgers, *Contested Truths*, at 174.

[78] Kevin P. Phillips and Paul H. Blackman, *Electoral Reform and Voter Participation* (1975), at 5.

[79] Keyssar, *The Right to Vote*, at 159, 159-162, 162.

means to that end. It aimed to prevent "corruption," *as Progressives defined the term*: fraud, but also machine politics in the cities, built on masses of mostly-poor immigrant and ethnic voters. To be sure, late-nineteenth-century party politics were corrupt by any definition. But Progressives also believed that big-city parties and their working-class, immigrant members were *themselves* "a corruption of the democracy envisioned by the founders." Turn-of-the-century personal-registration procedures carried strong class biases, particularly since municipal offices were only open during business hours, and wage-workers could ill afford to miss time on the clock.[80] Reichley, meanwhile, contends that "the inclination of some Progressives to limit the electorate" was motivated by both partisanship and philosophy. Urban immigrants and their "machines" were likely to vote against Progressives, and such people did not fit the ideal of the well-informed, independent voter.[81]

Registration administered by city and county officials was viewed as a restrictive, discriminatory practice long before the Progressive era. Registration rules proposed for

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[80] Crenson and Ginsberg, at 55-56. More generally, they note, erecting any hurdle to political participation privileges the wealthy and better-educated, who are more likely to have the resources necessary to understand and meet new requirements. *Id.* This account of Progressive-era ideas about voting continues a theme established in the authors' treatment of suffrage expansion in the early U.S. When government relied closely on the active support and cooperation of the people—as "citizen administrators, citizen soldiers, citizen taxpayers"—electoral victory signified far more than popularity. It was proof of the capacity to govern. "The federal government's early and extensive reliance on its people," write Crenson and Ginsberg, "was a factor in its early realization of full white manhood suffrage." By contrast, leaders today try to achieve their policy objectives "without mobilizing voters," by means of litigation, administrative procedures, or privatization. *Id.*, at 47, 48.

[81] Reichley, *The Life of the Parties*, at 208-209. Progressive reforms, he writes, aimed to get rid of this corruption, happily paying the price in "some contraction of democracy." Reichley, at 207. Interestingly, while Reichley generally shares Crenson and Ginsberg's conclusions about the Progressives and registration, he gives a very different assessment of the relationship between Progressivism ideas about the suffrage and those of the founders. Where Crenson and Ginsberg charge Progressives with abandoning the framers' view of "popular participation as an indispensable source of authority and stability for the new government they were creating," Reichley argues that "many Progressives shared the view of most of the Founders that republican government would be unworkable without well-informed, independent voters who cast their ballots for what is best for the nation as a whole." See *Downsizing Democracy*, at 53; *The Life of the Parties*, at 208-209.

Philadelphia in the 1830s were nominally designed to prevent the "gross frauds" which the city had seen in recent elections, but in the state's constitutional convention of 1837, registration was vigorously opposed as a partisan, discriminatory measure, tilted against the poor and city dwellers. Floor speakers argued that "the law was passed as a party measure, designed to cut down the vote of Philadelphia, that it fostered rather than prevented fraud, and that it took away the right of suffrage from the poor and secured it for the rich."[82] Scornful critics attacked a system under which assessors visited houses during the day to count voters. Working men were at their jobs, and were excluded from the rolls; not so for the rich, for whom "the gold and silver door plate with name was enough" to secure a place on the rolls. Finally, opponents introduced an amendment making election laws uniform throughout the state, "knowing full well that a registration law applicable to rural sections as well as to Philadelphia would be bitterly opposed by the rural members, and could not be enacted." The amendment failed.[83]

Particularly in the North, rural-dominated state legislatures imposed cumbersome registration requirements on cities in order to depress immigrant voting.[84] As late as 1927, eleven states in the Midwest, Plains, and West still had on the books registration laws applying only to cities. The most common justification for excusing rural areas from registration was that so many of the voters "are personally acquainted with one another," as a report by the National League of Cities put it. But as the report acknowledged, "some of the worst cases of voting frauds appear occasionally in rural

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[82] Joseph Harris, *Registration of Voters in The United States* (1929), 67-68.

[83] *Id.*, at 68.

[84] See William E. Gienapp, "Politics Seem to Enter into Everything," in Stephen E. Maizlish and John J. Kushma, eds., *Essays on American Antebellum Politics, 1840-1860* (1982), at 24. Gienapp says this happened in the 1850s in Portland, Maine, as in "several other northern cities."

sections."[85] The fact that it took decades for this to be obvious suggests that more than "common sense" and the desire to save money went into the decision to apply the procedure only to cities.

If the purposes of personal-registration rules remain contested, their results seem more clear. While acknowledging that the laws' impact varied with the ability of parties to register their members, Keyssar concludes that "it can be said with certainty that registration laws reduced fraudulent voting and that they kept large numbers (probably millions) of eligible voters from the polls." One third or more of a national drop in turnout during this period was probably attributable to registration rules.[86] Some officials celebrated decreases in the size of the franchise. A Pittsburgh registration commission noted privately in 1907 that "the figures speak for themselves as to the good results obtained under the operation of the Personal Registration Act." Those "good results:" the number of men registered to vote had fallen by over half.[87]

In their acclaimed *Why Americans Still Don't Vote*, Frances Fox Piven and Richard Cloward also conclude that legal and procedural changes around the turn of the century "obstructed the actual ability of many people to vote."[88] Another author attacks

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[85] National Municipal League, Committee on Election Administration, *A Model Registration System* (1927), at 51, 62.

[86] Keyssar, at 158. Crenson and Ginsberg also conclude that together with ballot-design reform, voter registration "disenfranchised millions of immigrants and working-class voters." Crenson and Ginsberg, at 55-56.

Turnout dropped virtually everywhere, meaning that in order for the elimination of fraud to explain the entire decrease, "the [pre-registration] turnouts in virtually *every* county for *every* election must reflect substantial fraud." Gienapp, "Politics Seem to Enter into Everything," at 24.

[87] See Keyssar, at 158-159.

[88] Cloward and Fox Piven, *Why Americans Still Don't Vote And Why Politicians Want it That Way* (2000), at 45-46. Fox Piven and Cloward argue that élites purposefully put such obstructions in place because they feared the increasing ability of lower-income voters to affect government policy. The apparent paradox of greater formal inclusion and increasing barriers to participation – and severely diminished turnout among

the voter-registration system as "an institutional bias . . . at work in our political system" against the urban poor.[89] Fox Piven and Cloward identify "residual procedural obstructions embedded in the voting process" as a key problem with American suffrage today.[90] Political scientists, of course, have conducted a generation of empirical research on registration's effects in the U.S., with virtually all studies concluding that registration requirements are responsible for some systematic reduction of turnout. Fox Piven and Cloward contend that obstacles to participation like personal-registration rules survive precisely because they are a powerful way to limit and control the electorate: registration rules and other burdensome elements of the American electoral process, they argue, have roots in ruling élites' desire to close some citizens out of politics by making it more

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poor whites, blacks, and immigrants – was, in their view, largely a product of changes in "the potential importance of the vote." Large chunks of the electorate were "demobilized" in what amounted to "something like a democratic counterrevolution" *because* of the increasing power of lower-strata voters to shape elections and policy. *Id.* Michael McGerr, meanwhile, writes that Northern registration rules "made voting a bit more difficult in some areas," but did not alone account for the decline in turnout. He views changes in political culture as the more fundamental problem. McGerr, *The Decline of Popular Politics*, at 7. Robert Wiebe concludes that what he calls "the mechanics of exclusion" made only "a contribution" to shrinking turnout: "the sinking of the lower class" was its ultimate cause. Wiebe, *Self-Rule*, at 136.

[89] Penn Kimball, *The Disconnected* (1972), at 2. Writing prior to the decades of organizing and advocacy that improved many registration systems and helped lead to the NVRA of 1993 – Kimball argued that "the failure of the American political system to engage millions of potential voters is the product of the institutional structure by which persons can qualify to vote. That structure discriminates most particularly against the poor." *Id.*, at 2-3. Kimball argues that the problem ran deeper than the fragmentation of the process and the low number of ways to register, problems which have been substantially addressed in legislation since. Kimball contended that we would not see significant improvement in participation "until the federal government takes the initiative to qualify eligible voters rather than place the onus upon individuals thwarted by outmoded state and local regulations." Kimball, 2-3. See also 4-5, where Kimball writes, "[w]hatever its original intent, voter registration operates as an effective system of political control....[T]hose who neither register nor vote are drawn disproportionately from the ranks of the nation's poor, from ethnic minority groups, from disadvantaged residents of our largest urban centers." Indeed, Kimball argues that the American system of leaving it up to voters to figure out how to register themselves to vote belies the very notion that voting is a right, and not a privilege: "[t]he assumption that voting is a privilege to be selectively earned has left the most fundamental act of citizenship at the mercy of a whole series of discretionary obstacles." Id., at 7.

[90] Fox Piven and Cloward, at 16. Phillips and Blackman argue that alienation, boredom, and inertia explain more of the gap between American turnout rates and those of other industrialized democracies than do registration rules. Phillips and Blackman, *Electoral Reform and Voter Participation*, at 2. This comparative analysis is not incompatible with the conclusions of Fox Piven and Cloward.

difficult for them to participate. Moreover, they tackle Walter Dean Burnham's bureaucratic-capacity explanation head-on – remember, Burnham had contended that the U.S. simply lacked the resources to compile registration rolls, but Fox Piven and Cloward argue that "increasingly elaborate bureaucratic machinery did exist" as the electorate broadened in the late nineteenth century. But that machinery "was used to *impede* voting," rather than facilitate suffrage through centralized, streamlined administration of elections.[91] Finally, an international note suggests that others have caught on to registration's exclusionary potential: in Egypt, men are automatically registered, but women must ask to be added to the rolls.[92]

Between about 1880 and 1925, state constitution-writers and statute-drafters in South and North alike used local institutions to restrict the franchise. In different ways and with different purposes, the secret ballot, literacy tests, and personal-registration rules made it difficult or even impossible for many American men who had previously been able to vote to do so. Without question, this is a dark stain on the local dimension of American suffrage. But ultimately, it is hard to blame local administrative institutions for this period of procedural disenfranchisement. At a practical level, one could point fingers at the judicial branch, for failing to aggressively apply the Fifteenth Amendment, or at the

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[91] Id., 293 n.82. Emphasis added. An intriguing perspective on these questions surfaced in Congressional debate over the NVRA, as legislators weighed whether to require the military to automatically register soldiers to vote. See Thompson, *Just Elections*, at 33. Thompson argues that automatic registration is often mis-characterized in American political debates as a step which would diminish the moral autonomy and responsibility of the individual voter. If any such diminishment does occur, he argues, it is easily outweighed by the *increase* in autonomy that comes from "removing a structural obstacle to voting." Id., at 32. As he writes, preserving the opportunity not to register can be understood as "less important than enhancing the opportunity to choose whom to vote for." Id., at 193. Congress decided not to pass automatic registration for soldiers; Thompson argues that selective automatic registration is wrong not because it decreases the moral autonomy of those registered, but because it is inequitable: if it's an advantage, it should be provided to all citizens. *Id.*, at 33.

[92] Yonhyok Choe, *How to Manage Free and Fair Elections* (Göteborg, 1997), at 24 n.6.

bar, for giving them few chances to do so. State legislators obviously come in for their share of responsibility. But the most clear culprit is the powerful national movement against universal manhood suffrage. Local officials acted to restrict the franchise – probably in ways which were discriminatory and unfair, along class, ethnic, and racial lines. But in doing so, they were not challenging the wishes of state or national élites. They were implementing a national ideology.

III. "Even Servants, Negroes, Aliens, Jews, and Common Sailors Were Admitted to Vote:" The Inclusive Tradition in American Election Administration.

Across American history, local election officials have participated in partisan fraud, racist exclusions, systematic discrimination against the poor and new immigrants, and money-grubbing corruption. That much is well understood, and I began this project expecting to demonstrate that the local dimension of American suffrage has been a force for exclusion and inequality. But there is another side to the story, one showing that in different ways, our hyper-federalized suffrage system has helped expand the polity. Evidence is understandably fragmentary, given that most authors have focused on statutes and constitutions rather than practices, and on national and state action rather than local administration. But inclusive practices with a local face are a recurring theme in American suffrage. Sometimes, local institutions have been more inclusive than the law; in other instances, statutes have permitted county and municipal officials to expand the franchise; and local elections themselves have played a key role in securing broader voting rights for some groups, particularly women. This kind of inclusive practice is older than the country itself. Referring to recent elections in North Carolina, a speaker in

Parliament in 1706 complained that "all sorts of people, even servants, Negroes, Aliens, Jews and Common sailors were admitted to vote."[93]

a. "When known to the community and to any degree respected or liked:" Property, Sex, and Citizenship.

American colonial suffrage practices and citizenship policies alike were always more inclusive than their English predecessors. English law stated unequivocally that aliens were not to vote, but differences between categories of subjects blurred in the New World,[94] particularly at the polls. A letter sent back to London in 1664 by Massachusetts Governor Endicott seems to indicate that the Americans believed in qualifications – just not the formal ones, perhaps:

> "...such as vote in elections should be orthodox in religion, virtuous (and not vicious) in conversation, and all those that according to the orders and the customs of the colony, here established, agreeable to the liberties of the charter, having proved themselves to be such in the places where they live, have from time to time been admitted in our elections."[95]

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[93] Kettner, *The Development of American Citizenship*, at 122. Maryland and Pennsylvania had similar experiences, Kettner writes. Kettner finds that in the eighteenth-century American colonies, some tension existed between the local desire to make it relatively easy for aliens to gain the status and privileges of citizenship and London's interest in a more restricted access. Even before the U.S. existed, citizenship and suffrage were already a matter of difference and dispute between centralized and local control and administration.

A 1761 Georgian suffrage law permitted propertied aliens to vote: "every free White Man and no other who has attained to the Age of Twenty One Years and hath been Resident in the Province Six Months and is legally possessed in his own Right of Fifty Acres of Land" was allowed to vote in local elections. Kettner, at 102-103. As Kettner explains, however, English officials believe that "all colonial acts making aliens subjects were purely local 'fictions,' limited in their effect to the specific province concerned." Meanwhile, London had its own procedure for bringing new colonial subjects into the empire, a legal admission procedure administered in the colonies, with records sent to England. As Kettner writes, "[i]n essence, Parliament had delegated its authority to bring strangers into the community of allegiance to the local courts, maintaining only a loose supervisory function by requiring that the names of those adopted as subjects be sent yearly to the Board of Trade." Between 1740 and 1773, almost seven thousand people received subjectship under London's procedure, almost 92 percent of them in Pennsylvania. Kettner, at 103.

[94] See Kettner, at 9.

[95] Quoted in Richard C. Simmons, *Studies in the Massachusetts Franchise, 1631-1691* (1989), at 67.

What is striking about this list – orthodox, virtuous, agreeable, "in the places where they live" – is that as exclusionary and moralistic as they sound to modern ears, these criteria are mostly informal, and judgments would virtually all have been local. That is not to say that anything was permissible, of course: in the same year, Edward Hutchinson was fined ten pounds for voting in the Boston elections, since he was a merchant, not a freeman.[96] In fact, the Massachusetts franchise was restricted in this period by colonial law. Until 1647, the only requirement for political participation in a typical Massachusetts town was church membership. In that year, a new law made men under 24 ineligible; subsequent acts imposed the first property test (1658) and raised the size of the minimum taxable estate required for a vote in town meeting (1670). But these laws usually grandfathered in all current voters, and do not appear to have diminished participation much.[97] Similarly, the Connecticut General Court required in 1679 that only those adult white men with fifty shillings of assessed property could participate in town meetings. This requirement stayed on the books for at least a century, but it "was never enforced after the 1720s and became a dead letter."[98] It became customary in most colonies, if not all, "to allow all adult males, when known to the community and to any degree respected or liked, to vote."[99]

Local authorities could let free blacks vote in some places, even in the South. As W.E.B. DuBois points out, "so far as the letter of the law was concerned, there was not a single Southern colony in which a black man who owned the requisite amount of

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[96] *Id.*

[97] Kenneth A. Lockridge, *A New England Town: The First Hundred Years* (1985) (1970), at 47-48.

[98] Bruce C. Daniels, *The Connecticut Town: Growth and Development, 1635-1790* (1979), at 67.

[99] Williamson, *American Suffrage*, at 49.

property, and complied with other conditions, did not at some period have the legal right to vote." That right was eliminated in Virginia in 1723, when the assembly declared that "no free Negro, mulatto or Indian 'shall hereafter have any vote at the elections of burgesses or any election whatsoever.'" But in North Carolina, a piece of legislation passed in 1734 laid aside a former bar against black voters; it was not reenacted until 1835.[100]

"Anything with the appearance of a man" could vote in Boston around 1772, wrote Thomas Hutchinson. Thomas Paine agreed, noting that as long as a man owned a few household utensils and a chest of tools, he would generally be willing to swear that he met the property qualification; John Adams wrote in 1776 that Massachusetts officials had never been "rigid" in enforcing suffrage requirements.[101] During the late colonial period, many areas employed residency tests, but others did not, and men who owned property in more than one county were commonly allowed to vote in each of them. Thus the idea of scheduling elections on a single day became a source of controversy in New York in 1752.[102] Local officials were not always angels of inclusion and equality, to be sure: particularly when partisan passions were raised, decisions as to who was permitted to vote could be blatantly unfair.[103]

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[100] W.E.B. DuBois, *Black Reconstruction in America 1860-1880* (1977) (1935), at 6.

[101] Dinkin, *Voting in Provincial America*, at 47, 100.

[102] Dinkin, at 35, 123.

[103] An Anglican stood for office in Puritan Boston, the people cried that "popery had come upon them like a scarlet whore," and the election moderator carefully accepted virtually all voters who weighed in against the Anglican candidate, while rejecting many of those who were for him. Dinkin, *Voting in Provincial America,* at 47. Williamson writes that "[u]nqualified persons could vote if they would vote as election officials or other partisans told them to." Williamson, *American Suffrage*, at 49.

Independence did not change much. Summarizing a fierce dispute over the property test for state elections in the 1780 Massachusetts constitution, Williamson writes that such a test might not have had any practical impact. "A strong possibility exists," Williamson wrote, "that the constitution did not change a situation in which adult male taxpayers were voting in both town and colony elections with the support of opinion at large."[104] New Jersey's 1776 constitution established a suffrage qualification, but the standard soon came in for criticism when it became clear that the rule was not keeping many men from voting. Those "who are worth fifty pounds proclamation money" were permitted to vote, and apparently any number of men were willing to swear that they were in fact "worth" that amount. As one challenged voter said, he "valued himself a great deal more than that." Clearly, decisions as to the qualifications of voters were being made at the local level; one critic said that in his own county he knew of two hundred laborers who voted despite not paying taxes.[105]

In South Carolina, numerous unqualified citizens were allowed to vote, "rather from want of information of the Constitution and Existing Law of the State, than from audacity, or intentionally violating the same," as one author put it in 1796. Pennsylvania abolished the freehold qualification in 1788 partly because it was so spottily enforced. And into the nineteenth century, officials in eastern Virginia worked to break "the pre-Revolutionary habit of ignoring the suffrage laws."[106] In New York, proponents of expanded suffrage in 1820 argued that to extend the franchise "would leave us just where

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[104] Williamson, at 103. Elsewhere, local elections helped broaden the franchise in cities from New Haven to Charleston. *Id.*, at 123.

[105] Chute, *The First Liberty,* at 289.

[106] Williamson, *American Suffrage*, at 152-153, 134, 171, 230.

we are now; since every man who can be trusted with a deed, is made a freeholder long enough to vote in elections." Meanwhile, evidence showed that in some towns "all adult male residents on tax lists were being permitted to vote."[107] At the Massachusetts constitutional convention of 1820-1821, debate clearly indicated that uneven local enforcement of the property test erred on the side of inclusion. The property test was "in this town, for a long time, a dead letter," one delegate noted.[108] Age and residence qualifications, another observed, "were commonly allowed upon the assertion of the voter himself."[109] For this reason, Williamson concludes that even before the new constitution abolished the property test in favor of a taxpayer qualification, Massachusetts politics displayed "not a theory but a condition bordering on universal suffrage."[110]

Of course, "universal" only went so far: the female half of the adult population was still excluded, in some states, for another century. But women voted in some elections long before 1920: the history of female suffrage clearly shows that local control of *local* voting rights helped lead to women's suffrage nationally. There were definitely cases in which women were allowed to vote in state and national elections, as well. For example, the suffrage rule in the New Jersey constitution of 1776 – soon famous for allowing men to estimate their personal "worth" – also referred only to "inhabitants." Some local officials allowed female inhabitants owning sufficient property to vote – that is, widows and spinsters, since by law married women owned nothing. This apparently

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[107] *Id.*, 198-199.

[108] *Journal of the Debates and Proceedings in the Convention of Delegates, Chosen to Revise the Constitution of Massachusetts*, 1820-1821, (1853), at 249.

[109] Id., 254.

[110] Williamson, at 177. "[T]he country was more democratic than its institutions," he writes. Id., at 181.

led to conflict between rural areas and towns, since the country people thought it was easier for partisans to drum up the female vote in the cities.[111]

But local elections themselves were the key. In the late nineteenth century, many state courts allowed legislatures to deviate from constitutional suffrage limitations in special elections. In some cases, this led to restrictions, as when only taxpayers or property owners could vote on a bond question. But it also freed up localities in many states to allow women to vote.[112] A significant number of counties, cities, and towns adopted partial suffrage, permitting women to vote in "municipal elections, on liquor licensing matters, or for local school boards and on issues affecting education." This development, Keyssar writes, was uniquely American, "made possible by the *complex architecture* of voting laws."[113]

Presumably, women were then understood to have legitimate expertise and interests in such local issues that they lacked in state and national politics.[114] Not counting the many states and territories which fully enfranchised women prior to the Nineteenth Amendment,[115] fourteen states permitted women to vote in municipal

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[111] Chute, *The First Liberty*, at 289-290.

[112] Keyssar, at 167. In his 1916 history of municipal home rule, Howard Lee McBain noted this variation regarding suffrage qualifications, and actually faulted suffragettes for failing to capitalize on it. Finding no evidence that either pro- or anti-women's suffrage advocates had brought their fight to the cities, McBain comments that "it would seem . . . that the protagonists in the cause of woman's suffrage have been somewhat derelict in their failure to institute campaigns for an extension of the voting right through the medium of freeholders' charters or amendments in the cities" of states where charters had such authority. Howard Lee McBain, *The Law and the Practice of Municipal Home Rule* (1916), at 582-583.

[113] Keyssar, at 186. Emphasis added. "In most states, the suffrage requirements for 'nonconstitutional' elections did not have to be identical to those for offices named in state constitutions; they also could be altered by legislation rather than the cumbersome and difficult process of constitutional amendment." *Id.*

[114] See Dinan, *Keeping the People's Liberties*, at 107.

[115] Twenty territories and states did so between 1869 (Wyoming) and South Dakota (1918). See Keyssar, *The Right To Vote*, Table A.20.

elections or on tax and bond issues prior to 1920, and thirty allowed women to vote in elections dealing with schools.[116] Constitutional-law scholars inquiring into voting rights for women during this period focus on the 1875 case *Minor v. Happersett*, with its emphatic declaration that "if the courts can consider any question settled," it is that "[t]he Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage."[117] But not long after that decision was handed down, women in twenty-five states were voting, at least on local matters such as schools and taxation.[118] Women's experience of voting in local elections – and men's perception that female voters had not wrecked the schools, the liquor stores, or the cities – was essential to the formal, national broadening of female suffrage early in the twentieth century.

The case of non-citizens represents another instance in which state law permitted local officials to act in ways which were effectively more inclusive than national citizenship law. Initially, remember, property ownership, *not* citizenship status, determined eligibility to vote among men; deep into the nineteenth century, long after the abolition of the property qualification, this remained the case. New Hampshire required voters to be citizens in 1814, and half a dozen other states excluded non-citizens from the franchise in the next two decades. New states such as Vermont, Tennessee, and Ohio did not exclude non-citizens from suffrage until 1828, 1834, and 1852, respectively.[119]

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[116] *Id.*, Table A.18; and Table A.17.

[117] *Minor v. Happersett*, 21 Wall. (88 U.S.) 162, 177 (1875).

[118] See Hill, *Hill's Political History of the United States* (1894), at 121, listing states as of 1894. The states included Connecticut, Kansas, New York, Wyoming (where women already had full suffrage rights, including in Presidential elections), Arizona, Delaware, Idaho, Illinois, Indiana, Kentucky, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Vermont, Wisconsin, and Ohio.

[119] Paul Kleppner, "Defining Citizenship: Immigration and the Struggle for Voting Rights in Antebellum America," in Donald W. Rogers, ed., *Voting and the Spirit of American Democracy* (1992), at 45.

Westerners did not immediately follow suit, and most states permitted aliens to vote well into the nineteenth century – at least twenty-two did so in 1875, and it was not until 1926 that no states allowed aliens to vote.[120]

Another group of Americans not formally defined as citizens well into the nineteenth century – Indians – also sometimes benefited from local administration of the suffrage. When Massachusetts lawmakers decided in the 1840s to explore making indigenous people full citizens, they discovered that the legal status of Indians varied from town to town. The town clerk of Pembroke reported that Indians "enjoy the political rights of citizens;" on Martha's Vineyard, two Chappaquiddick Indians who owned taxable property and lived "on the 'white side of the line'" had "the same political rights as other citizens, & frequently vote; ...they are always at the polls at our fall elections."[121]

With regard to non-citizens, then, state law in many places *formally* left decisions as to suffrage qualifications up to local officials. The survival of non-citizen voting in some states for a full century after independence demonstrates at least a tacit confidence among state lawmakers in the ability of county and city personnel to regulate the suffrage. What is further intriguing about the fact of aliens allowed to vote is that they had not been recognized as full citizens – formally defined as members of the American polity – by the *national* state. Nonetheless, they exercised one of the central political

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[120] See Leon E. Aylsworth, "The Passing of Alien Suffrage," 25 *American Political Science Review* 114, 1931.

[121] See Ann Marie Plane and Gregory Button, "The Massachusetts Indian Enfranchisement Act: Ethnic Contest in Historical Context, 1849-1869," 40 *Ethnohistory* 587 (1993), at 590-591.

powers of members of the republic – under suffrage practices controlled by local officials.[122]

Today, non-citizens generally cannot vote, but localities may be leading a reconsideration of that situation. The Amherst, Massachusetts town meeting has twice discussed permitting resident aliens to vote in local elections. Chicago and New York have long allowed non-citizens to vote in school board elections, and some Maryland communities already permit resident aliens to vote in local elections.[123] Most recently, San Francisco has considered allowing non-citizens to vote in school board elections.[124] These decisions apply only to participation in local elections, but the example of women's suffrage shows that once included locally, a group becomes less threatening to state and national lawmakers and therefore more likely to win full voting rights.

b. "Cause young republicans to be qualified for the oath:" Parties, the Franchise, and Participation.

As delegates to the 1830 Virginia convention debated the suffrage, one speaker reminded his fellows that "all our metaphysical reasoning and our practical rules, all our

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[122] As federal courts wrestled with citizenship puzzles prior to the Civil War, suffrage practices took on a fascinating connection with citizenship law. Courts struggled to decide how a person could show their *animo manendi*—intent to remain in the new state to which they moved. Residence alone was not enough. It appears that the *exercise* of the rights of citizenship – particularly the suffrage right – was one way of effectively *securing* one's citizenship, because it evinced the intent to remain. As Supreme Court Justice McLean wrote, "citizenship may depend upon the intention of the individual," and that intention was best revealed by actions: "An exercise of the right of suffrage is conclusive on the subject; but acquiring a right of suffrage, accompanied by acts which show a permanent location, unexplained, may be sufficient." *Shelton v. Tiffin*, 6 How. 163, 185 (U.S., 1848). Cited in Kettner, *The Development of American Citizenship*, at ???.

[123] See Jeff Donn, "Mass. Town considers granting vote to non-citizens," LEXIS AP wire, Oct. 22, 1998; John McIlhenny, "Amherst tries to allow its aliens to vote," LEXIS AP wire, Sept. 4, 2001.

[124] See Jessie Mangaliman, "San Francisco Considers School Board Voting Rights for Non-Citizens," San Jose Mercury News, June 21, 2004. For discussion of various issues connected to voting by non-citizens, see Jamin B. Raskin, "Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage," 141 *University of Pennsylvania Law Review* 1391 (1993).

scholastic learning and political wisdom, are but the arms employed in a contest...."[125] Another delegate put it even more starkly: "in the history of the human kind, of all nations and of all ages, from the earliest tradition to our own times and country, there has never been a single instance of any society of men, of men acting in masses great or small, who forgot self-interest . . . for a moment."[126]

American political actors have pushed to contract or expand the legal franchise, and to decrease or increase the eligible people likely to turn out to vote, for different reasons. In some cases, both restriction and expansion of the polity have been justified by idealism – specific beliefs about the healthy polity and wise policy. But partisan self-interest – the effort to gain or maintain control over government – has almost always been present, if often unacknowledged, in American contests over inclusion, equality, and electoral fairness. Indeed, some place parties at the center of suffrage expansion:

> "The newly enfranchised had about as much to do with the extension of the suffrage as the consuming public has had to do with the expanding market for toothpaste. The parties, assisted by some excited minorities, were the entrepreneurs, took the initiative, and got the law of the franchise liberalized."[127]

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[125] Quoted in Peterson, *Democracy, Liberty, and Property*, at 285.

[126] *Proceedings and Debates of the Virginia State Convention of 1829-1830* (1830), at 167.

[127] E. E. Schattschneider, quoted in Elliott, *The Rise of Guardian Democracy* (1974), at 34. Unfortunately, Elliott does not offer a citation. Elliott continues:

> "The main force behind virtually every democratic reform from the earliest days of the Republic to the time of Franklin D. Roosevelt was partisan advantage. Reforms which were thought to favor the party or parties in power passed.... All parties thought for various reasons to profit by dropping property qualifications; the Republicans sought to consolidate the power they won in the Civil War by enfranchising blacks; Yankee Protestants hoped to curtail the power of urban ethnic and religious minorities by enfranchising women."
>
> *Id.*

In practice, American suffrage has often been more democratic than the law directed – and the presence of partisan officials in positions of local administrative control has been a key reason. This part of the story reminds us that the processes of "inclusion" are not always pretty, and do not always fit democratic ideals of fairness. Particularly in the nineteenth century, local control of elections helped parties to expand the number of people voting by stretching and violating limits on the franchise. Parties have always acted locally in order to increase turnout, as well.[128]

Of course, modern parties organize locally, not just at the state and national levels. In fact, the penetration of partisan organization and voter recruitment into counties and towns occurred almost immediately, well before the institutionalization of national party politics in the Jacksonian era. Partisans quickly understood that they would win elections by bringing voters to the polls – literally. One of the pioneers of Federalist politics, Ebeneezer Foote of Newburgh, New York, organized carriages to bring friendly voters to the polls as early as 1795.[129] A Republican circular of June 25, 1804, urged Virginian sympathizers to "use every possible exertion to advance the Republican-Ticket" in elections to be "held in the several counties" of the state.[130]

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[128] Of course, boosting turnout is not the same thing as moving the boundaries of the franchise: the latter carries deeper philosophical, symbolic, and legal meanings. But *ceteris paribus*, a democracy where many people vote is healthier than one where few do. From a theoretical perspective, meanwhile, I have throughout this work attempted to merge discussion of rights and practices, rather than separating them. For example, I have previously analyzed institutional barriers, such as registration requirements and the lack of assistance to illiterates, that impede voting without actually prohibiting it. The counterpart to such obstacles are institutions and practices that help bring people to the polls who are already legally qualified to vote, but who would not otherwise participate. We have seen above that local elections officials have the potential to enhance the instrumental and constitutive dimensions of popular sovereignty by encouraging people to turn out. Parties have the potential to do the same.

[129] Williamson, at 159. Another wealthy Federalist paid the traveling expenses of supporters where necessary to get them to the polls. Id., at 160.

[130] Reprinted in Arthur M. Schlesinger, Jr., ed., *History of U.S. Political Parties, vol. 1* (1973), at 299.

"Written tickets containing the names of the Electors," the Republicans urged, "should be dispersed over each County, and active and intelligent Citizens in every neighborhood should be prevailed on to attend the election, and to bring as many of their fellow-citizens as possible to give their suffrages."[131] In Connecticut, Republican county managers were instructed to appoint town and district staff. The local partisans would be responsible for copying from town lists the names of "all male inhabitants, who are taxed," calculate the total numbers of "freemen" – obviously, those who could vote – then ascertain how many freemen were "decided federalists," "decided republicans," and how many "doubtful." And these Republicans pressed at the margins of qualification: town managers also had to list those "republicans who are not freemen, but who may be qualified at the next proxies," and each district manager had the duty "to exert himself to cause young republicans to be qualified for the oath."[132]

This began a long period in which "party organizations [became] the chief vehicles for the collective mobilization of the public."[133] Of course, suffrage practices from designing and distributing ballots to staffing polling places enabled major parties to assert their control over elections – and keep turnout high. The causes of those high levels of nineteenth-century participation, and of subsequent declines, are controversial. Turnout numbers, as Altschuler and Blumin point out, are relatively easy to obtain and

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[131] *Id.*

[132] *Id.*, at 302.

[133] Crenson and Ginsberg, at 46. Crenson and Ginsberg here mark the Progressive era as the end of that period, arguing that Progressive reforms and Progressive ideals alike "emphasized the solitary and independent citizen, the self-mobilizing citizen," and tried to "dispense with" parties as mobilizing forces. *Id.*, 45-46.

"reassuringly quantifiable," and have therefore been "overburdened" by scholars.[134] What is clear, however, is that parties worked extremely hard to bring voters to the polls who otherwise would have stayed home, and that shoe-leather work like making lists, visiting voters, and delivering them bodily to the polls predominated. Moreover, Altschuler and Blumin show that what they call the "cultural dimension of political engagement" was intimately bound up with local connections and the geographical shape of nineteenth-century social life. Particularly in rural America, "this world of farms and villages along good country roads may have been *the ideal human landscape for maximizing voter participation.*"[135] Many of the parties' interactions with voters were "transactional," with bribes and booze common currencies. But the transactions had a richer character, as well, since the party served as the political instrument of the citizen who wanted to do his political duty and pursue his interests, but could not or would not invest a great deal of time and attention in politics.[136]

As we have seen, local authorities have frequently interpreted suffrage law in permissive and inclusive ways. In some cases, they did so because of personal estimations of would-be voters' worthiness; in others, it may have been a theoretical disagreement with state legislators, or simply contempt for their authority. But in many instances, it has clearly been raw partisanship. This trend started early, with parties getting around property and residency rules in the earliest U.S. elections. Both Federalists and Democratic-Republicans sought to bring new supporters into politics, and

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[134] Altschuler and Blumin, *Rude Republic*, at 269. Altschuler and Blumin argue that the numbers alone do not tell us that a broader decline in participatory democracy occurred, as many scholars have assumed. For further discussion, see Chapter One, n.5.

[135] Id. at 6; 72. Emphasis added.

[136] Id., 81-82.

both did so "secretly and informally, by allowing unqualified persons to vote." Due to the "excesses of partisanship," in an 1802 election in Trenton, New Jersey "men under age voted, as [did] some Philadelphians, Negroes, slaves, aliens, married women, and persons not worth 50 pounds."[137] New residency requirements could also be surmounted: through the mid-nineteenth century, parties "herded would-be new voters, a number of whom did not meet the legal residency requirements, before politically sympathetic judges."[138]

Determined parties sometimes got around poll taxes, too, simply by paying the fees themselves when they concluded that men would not vote at all if forced to pay the tax. This could be a significant factor in elections: in 1888, the Philadelphia Democratic Committee paid twenty-two thousand dollars in poll taxes, equal to the fees of almost *half* the city's Democratic voters in that year's election.[139] Registration rules, meanwhile, were implemented not just out of a desire to help "intelligent" voters, or rural people at the expense of city dwellers, or the rich at the expense of the poor. They were also, from a very early age, tools in partisan conflict, such that partisan motives for registration laws were often "indistinguishable" from arguments about fraud and corruption.[140] In 1810, Massachusetts Federalists sought to cut down the Republican vote – while avoiding a frontal attack on formal suffrage rights, which would have been very unpopular – by requiring local tax collectors to compile lists of taxpayers to function as a voter-

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[137] Williamson, at 160, 180.

[138] Gienapp, "Politics Seem to Enter into Everything," at 27. See also Argersinger, *Structure, Process, and Party*, at 123. Argersinger shows that despite their titles, Maryland's election "judges" were partisans, appointed by partisans and acting as partisans, ignoring wherever possible requirements that they act in a bipartisan fashion.

[139] Altschuler and Blumin, at 262.

[140] Argersinger, *Structure, Process, and Party*, at 46.

registration list. The list would limit only town elections, but as everyone knew, such a move would certainly affect state elections as well, since they were usually held together.[141] New York Whigs passed a voter Registry Act in 1840, but applied the requirement only to New York City, with the clear purpose of preventing Democrats in the city from voting. The law was so blatantly partisan that it was soon repealed. Connecticut Whigs passed a registration bill in 1839, setting up a registry board for the purpose; Democrats smelled a rat, and soon wrote their own law placing control of registration in the hands of town selectmen and clerks – which the Whigs presumed was designed to help Democrats cheat.[142] In Maryland in the 1870s and 1880s, registration rules were sometimes totally subverted by local registrars, who allowed repeat voting by allies.[143]

Today, claims of outright fraud are relatively rare, and parties focus on getting their partisans out to vote. Many people believe higher turnout overall will help Democrats, but there is little evidence to that effect, and most political science shows otherwise.[144] (The conventional wisdom survives in part because of statements like this gem, from an anonymous "Republican operative" back in 1981: "I don't want everyone to vote. Our leverage in the electorate goes up . . . as the voting populace goes down."[145]) Meanwhile, one of the intriguing questions about American politics today is why neither party supports some of the relatively simple, macro-level changes in election practices

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[141] Williamson, at 177. The act was soon repealed under intense Republican pressure.

[142] *Id.*, at 276, 277.

[143] Argersinger, Structure, Process, and Party, at 124.

[144] See research cited in Thompson, *Just Elections*, at 208.

[145] Quoted in Crenson and Ginsberg, at 258 n.106.

likely to boost turnout and voters' sense of efficacy, like weekend or holiday voting or automatic registration. The parties' relative silence on these topics suggests their reluctance to "activat[e] the politically inert."[146] More targeted get-out-the-vote drives, however, remain as popular as ever, and in the Presidential year of 2004 parties are trying new strategies – like paying local groups a $3 bounty for each new voter registered, as the Missouri Republican Party is now doing.[147] Meanwhile, some counties subsidize parties' efforts, using paid election-day staff to post frequently-updated lists of those who have voted in a given precinct.[148]

The role of partisanship in helping flex American suffrage law at the local level is complex.[149] Both naiveté and cynicism can cloud the picture. It would be wrong to chant, *Animal Farm*-style, "more voters good, fewer voters bad," since it is not at all clear how democracy is strengthened when only *some* people not formally qualified are permitted to vote, while others remain excluded. However, I think we should also resist the opposite conclusion. The act of bringing new voters to the polls is not tainted merely because it is done to seek partisan victory, and at the very least, it appears that parties helped prepare the U.S. for the end of the property test rule by breaking it.

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[146] Crenson and Ginsberg, at 49-50.

[147] See David A. Lieb, "Political Groups Using Incentives to Encourage Voter Registration," Associated Press, June 27, 2004.

[148] See Schudson, *The Good Citizen,* at 2. No party staff checked the list at Schudson's California polling place that day in 1996. As Schudson points out, "the county hired hundreds of clerks to subsidize political parties and other voluntary political organizations. But at our precinct, as at increasing numbers of precincts, when parties choose to subsidize television stations rather than citizenship, this is wasted money and labor." *Id.*

[149] Reichley acknowledges that parties "have all too often in American history been instruments of corruption, preservers of prejudice, burdens on effective government, and disrupters of social harmony." Reichley, at 30. But parties are also conventionally regarded as having "saved the Constitution from itself" by enabling cooperation between Congress and the Executive branch, despite the hostility to parties among the Constitution's authors. See generally Richard Hofstadter, *The Idea of a Party System* (1969).

Meanwhile, the examples discussed here of the major U.S. parties' close, self-interested interaction with election administration at the local level suggest that the parties have played a role in constructing the hyper-federalized American suffrage system. A systematic examination of this question is beyond the scope of this project. But certainly our parties have a long history of working with local institutions and in local contexts to bring in new voters, by hook or by crook. That the dominant actors in American politics have long worked within the hyper-federalized system may explain its survival.

IV. Suffrage Qualifications: Law and Practice.

The relationship between local election administration and the enduring American struggle over exclusion and inequality is multi-dimensional and, indeed, multi-directional. Consider a few of the types of relationships we have seen. Most simply, in the early days of American suffrage, local assemblies and officials allowed men who did not meet colonial standards to vote – but likely excluded others, based on moral judgments such as whether or not those men had "proved themselves" to be virtuous and religiously orthodox. Nineteenth-century county and city officials continued this tradition, flouting state law on property, registration, residency, and other factors in the direction of inclusion when it suited them, often for partisan reasons. In the South, a different phenomenon occurred, as state lawmakers purposefully left substantial discretion with the local officials administering the law, with the explicit expectation that those officials would systematically keep blacks from the polls. An analogous development occurred in the North, where personal-registration rules sought to keep new immigrants and others with relatively low political information and motivation from the

polls. Registration rules increased municipalities' control of the portals of the franchise in some ways, but decreased them in others – when rural-dominated state legislatures applied new rules only to cities, as a way of diminishing their political power. In some states, two generations of women may have participated in local elections prior to achieving national voting rights. The case of aliens is still another phenomenon, as some state lawmakers left formal control of new immigrants' voting rights in the hands of local officials into the twentieth century. Together, these examples indicate that local administration has in some ways helped make U.S. suffrage *practices* more inclusive than U.S. suffrage *law*.

Today, many students of American voting worry that local control of registration and elections may create fragmented, complex voting structures which have systematic discriminatory effects—even if "universal suffrage" is on the books and in the courts, and even where many of the officials implementing them have no desire for them to do so.[150] Meanwhile, a new twist on this story recently emerged in Florida, when county officials openly challenged state government by refusing to purge their voter lists using a new, state-generated list of disqualified convicted felons.

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[150] As Keyssar writes,

> "the history of suffrage should lead us to expect recurrent skirmishing once universal suffrage has been achieved. The effects of a restricted suffrage can be replicated, or at least approximated, by cleverly unequal districting or by complex registration requirements. Even if one person, one vote principles are applied to districting, regulations governing the access of parties to the ballot can influence the outcome of elections; so too can the design of electoral systems...." Id., 323.

Similarly, Palma J. Strand recently observed that "[t]here are ... antidemocratic government practices that are so deeply ingrained that we hardly think of them at all." Strand's example is gerrymandered, single-member, winner-take-all districts, and the electoral college. Palma J. Strand, "Forced to Bowl Alone?" *The Nation*, Feb. 10, 2003, 25-29.

CHAPTER 6

CONVICTS AND COUNTY CLERKS: THE LOCAL DIMENSION OF AMERICAN CRIMINAL DISENFRANCHISEMENT

Most studies of U.S. policies barring people convicted of crime from voting – known as "criminal disenfranchisement" or "felony disenfranchisement" laws – have focused on constitutional interpretation, judicial rulings, and philosophical underpinnings. In this chapter, I evaluate disenfranchisement as a practice in the United States, with particular attention to the work of local officials in implementing the policy. Following a review of the most recent legal decisions and scholarly literature regarding the disenfranchisement of people convicted of crime, the first section discusses the possibility that local officials may apply the policy in a way less restrictive than the laws on the books suggest. The second section places the rise of U.S. disenfranchisement law in historical context, arguing that the policy was put in place during a time when American voting was a radically different practice than it is now, and when disenfranchisement's punitive purposes were more clear and coherent. The third section draws on material from an ongoing survey of state disenfranchisement procedures, and shows that a great deal of responsibility for implementing disenfranchisement policies rests with local officials – particularly the restoration of voting rights to former offenders.

This chapter examines the local dimension of the last surviving formal restriction of the voting rights of adult U.S. citizens. That restriction, of course, consists of state laws barring citizens convicted of crime – usually all felonies – from voting. "Criminal disenfranchisement" or "felony disenfranchisement" law has come under a good deal of scrutiny from legal scholars and reform advocates in the last decade, as the number of

Americans under criminal-justice supervision has soared and as the policy comes to appear increasingly at odds with modern voting-rights jurisprudence. But not until the election of 2000 did criminal disenfranchisement force its way onto the front burner of American political debate. We still do not fully understand important aspects of what happened in Florida, but the state's struggles in 2000 brought national attention to felon disenfranchisement for two reasons. First, while only 537 votes decided the Presidential election in the Sunshine State, about half a million *non*-incarcerated Floridians – that is, one thousand times the margin by which George W. Bush defeated Al Gore – were legally prevented from voting because of a felony conviction.[1] Second, a flawed attempt to "purge" voter rolls prior to the election apparently led the state to bar many non-felons from the polls.[2]

Since 2000, state governments in Connecticut, New Mexico, Nevada, Maryland, and Alabama have all liberalized their disenfranchisement policies in different ways,

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[1] The most sophisticated analysis estimates that 613,514 ex-felons are disenfranchised in Florida. See Christopher Uggen and Jeff Manza, "Democratic Contraction? The Political Consequences of Felon Disenfranchisement Laws in the United States," 67 *American Sociological Review* 777, 797 (2002). The Sentencing Project and Human Rights Watch estimated in 1998 that Florida disenfranchised over 400,000 non-incarcerated citizens. See Jamie Fellner & Marc Mauer, Human Rights Watch & The Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (1998), at 7-8.

[2] The kindest version of the story is this: county clerks needed to clean up their voting rolls, eliminating citizens who had died, moved, or been convicted of a felony. State officials hired a Georgia company called ChoicePoint to do the research. ChoicePoint claims its job was to generate a rough tally of all those who *might* need purging from the rolls, which county officials would verify, voter by voter. But Florida county officials apparently thought they were getting the *final* list, and promptly disqualified everyone on it. In the process, many live, local, non-felonious citizens lost the right to vote – apparently including a disproportionate number of blacks. See Bob Herbert, "Keep Them Out," *N.Y. Times*, Dec. 7, 2000, at A31; Sasha Abramsky, "A Growing Gap in American Democracy," *N.Y. Times*, July 27, 2002, at A11; "Alpharetta firm accused in Fla. Voting rights suit," *Atlanta Constitution*, Jan. 11, 2001, at A3; "Black Voters in Florida deserve some real answers," *USA Today*, January 11, 2001, at A14. A muckraking journalist's account of how Florida "fixed the vote" is in Greg Palast, *The Best Democracy Money Can Buy* (2002), p. 6-43. In July of 2004, the *New York Times* commented that the purge "removed an untold number of eligible voters from the rolls." See "Felons and the Right to Vote," (unsigned editorial), *N.Y. Times*, July 11, 2004, at A12.

though none abolished the practice.[3] Within the federal courts, meanwhile, there appears to be some disagreement as to the legitimacy of the policy. Most recently, the Second Circuit summarily dismissed a Voting Rights Act challenge to New York's felon disenfranchisement law – but recognized that "this is a difficult question that can ultimately be resolved only by a determination of the United States Supreme Court."[4] (The Supreme Court has not yet taken the bait, and has not addressed criminal disenfranchisement since an oblique reference in the 1996 decision *Romer v. Evans*.[5]) The Eleventh Circuit has just decided to review *en banc* a panel ruling allowing a challenge to Florida's indefinite-disenfranchisement law to go forward.[6] And in the summer of 2003, a Ninth Circuit panel held that discrimination in the criminal-justice

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[3] Connecticut allowed probationers to vote; New Mexico scrapped its indefinite-disenfranchisement law in favor of a policy allowing re-enfranchisement after completion of the sentence; Nevada eliminated a five-year waiting period for most former felons; and Maryland allowed some offenders to apply for restoration of voting rights upon completion of their sentence, while nonviolent recidivists have to wait three years, and those convicted of violent crime are still indefinitely disenfranchised. See Jeff Manza and Christopher Uggen, "Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States," 2 *Perspectives on Politics* 491, 499 (2004). Alabama now allows most former felons to apply to the Board of Pardons and Paroles to get their right to vote restored, an easier process than was previously required. See Carla Crowder, "State's Ex-Felons Start to Regain Voting Rights," *The Birmingham News*, April 16, 2004 (page number unknown).

[4] See *Jalil Abdul Muntaqim v. Phillip Coombe et al.*, U.S. Ct. Apps. 2d Cir., Docket No. 01-7260, April 23, 2004. The Second Circuit determined that since the V.R.A. was "silent" on the topic of felon disenfranchisement, the Act cannot be applied to question the policy's validity. *Id.* at 2.

This decision adopted the reasoning of the 1996 case *Baker v. Pataki*, in which the Second Circuit held that felony disenfranchisement does not violate the Voting Rights Act, focusing on what is known as the "plain statement" rule: if a law would have the effect of altering the fundamental constitutional balance between federal and state governments, Congress needs to have made a "plain statement" of its intent in that regard, and it made no such statement. *Baker v. Pataki*, 85 F.2d 919, 922. (2d. Cir. 1996).

[5] The *Romer* Court criticized the 1890 decision *Davis v. Beason* – which upheld state laws denying polygamists the ballot – observing that "[t]o the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law." Perhaps sensing that its decision might be employed by critics of felony disenfranchisement, the *Romer* Court hastened to add that "[t]o the extent *Davis* held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable." *Romer v. Evans*, 517 U.S. 620, 634 (1996).

[6] See *Johnson v. Bush*, __ F. 3d __ (11th Cir. 2003) (2003 U.S. App. LEXIS 25829). The decision to re-hear the case came on July 20, 2004.

system *may* interact with disenfranchisement law in a way that denies minorities an equal chance to participate in elections – and therefore violates the V.R.A. Disenfranchisement, the Ninth Circuit ruled, could be "shifting racial inequality from the surrounding social circumstances into the political process."[7] The high courts of other nations, however, have consistently rejected the policy. Since 2001, constitutional courts in Canada and South Africa, as well as the European Court of Human Rights, have struck down criminal disenfranchisement statutes.[8] Many countries, including most European nations,[9] now permit most or all inmates to vote, and no other democracy bars so many formerly incarcerated citizens from the polls.

Current scholarship examines felony disenfranchisement from a variety of perspectives. Empirical social science tends to focus on the policy's effects on aggregate political behavior. In a forthcoming article, sociologists Jeff Manza and Christopher Uggen contend that state laws disenfranchising non-incarcerated felons have been a boon for Republican candidates in both Senatorial and Presidential contests.[10] Thomas J.

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[7] *Farrakhan v. State of Washington*, U.S. Ct. Apps. 9th Cir., July 25, 2003. Docket No. 01-35032, July 25, 2003, at 10146.

[8] See *Sauvé v. Canada (Chief Electoral Officer),* 2002 SCC 68 (2002); *Minister of Home Affairs v. Nicro et al.,* CCT 03/04 (2004); and *The Case of Hirst v. The United Kingdom (No. 2),* European Court of Human Rights, Fourth Section, March 30, 2004.

[9] As the European Court of Human Rights observed in March 2004, in Europe "there are some 18 countries in which no restrictions are imposed on prisoners' rights to vote; in some 13 countries prisoners are not able to vote, due to operation of law or lack of enabling provisions; and between these extremes . . . loss of voting rights is tailored to specific offences or categories of offences or discretion is left to the sentencing court." *The Case of Hirst v. The United Kingdom (No. 2),* at 14.

[10] See Jeff Manza and Christopher Uggen, "Punishment and Democracy" at 497, concluding that "felon disenfranchisement has provided a small but clear advantage to Republican candidates in every presidential and senatorial election from 1972 to 2000." This detailed and timely article also addresses legal, historical, and racial dimensions of disenfranchisement. The authors first published their findings regarding the electoral impact of American disenfranchisement law in Christopher Uggen and Jeff Manza, "Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States," 67 *American Sociological Review* 777, 794 (2002), which demonstrates that felon disenfranchisement and high

Miles, however, concludes in another recent article that "meager participation by ex-felons where they are eligible [suggests that] disenfranchisement will not systematically affect election outcomes."[11] Within the legal academy, recent disenfranchisement criticism has scrutinized topics such as the meaning of the "social contract" in suffrage law,[12] the connection between disenfranchisement and the terms of Rawlsian liberalism,[13] and the "essentially punitive" nature of indefinite disenfranchisement.[14]

Research and debate over disenfranchisement have been dominated by evaluation of federal and state constitutions and statutes, and by arguments about democratic theory and the purposes of punishment. This chapter examines disenfranchisement as a practice, with particular attention to the role county and town officials play in implementing the policy. Only recently have scholars and reform advocates begun to attend to this aspect of the policy, despite some prominent hints as to its importance. In *Richardson v. Ramirez* (1974), the U.S. Supreme Court quoted a California report showing that "a

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incarceration rates "may have altered the outcome of as many as seven recent U.S. Senate elections and at least one presidential election," all in favor of Republicans.

[11] Thomas J. Miles, "Felon Disenfranchisement and Voter Turnout," 33 *Journal of Legal Studies* 85, 120 (2004).

[12] Afi S. Johnson-Parris, "Felon Disenfranchisement: The Unconscionable Social Contract Breached," 89 *Virginia Law Review* 109 (2003).

[13] Jesse Furman, "Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice," 106 *Yale Law Journal* 1197 (1997).

[14] Pamela S. Karlan, "Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement," Research Paper No. 75, Stanford Public Law and Legal Theory Working Paper Series, Social Science Research Network Electronic Paper Collection (2004), at 3. Karlan argues that disenfranchisement "taints our politics." *Id.* at 28. Very few authors have defended the policy in scholarly publications. See Roger Clegg, "Who Should Vote?," 6 *Texas Review of Law and Policy* 160 (2001). Clegg grounds his case for indefinite disenfranchisement on the belief that voting is "privilege" reserved for "trustworthy, good citizens." *Id.* at 172. See also Christopher P. Manfredi, "Judicial review and criminal disenfranchisement in the United States and Canada," 60 *The Review of Politics* 277 (1998). Manfredi offers a "principled defense" of criminal disenfranchisement based on "the relationship among citizenship, civic virtue, and punishment." *Id.* at 277. For review of leading scholarly examinations of criminal disenfranchisement prior to 2002, see Alec C. Ewald, *"Civil Death:" The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 *Wisconsin Law Review* 1045 (2002).

person convicted of almost any given felony would find that he is eligible to vote in some California counties and ineligible to vote in others."[15] A decade later, in *Hunter v. Underwood* (1985), the Court observed that Alabama Boards of Registrars often had to sift through case law to decide for themselves whether an infraction revealed disenfranchisable "moral turpitude."[16] *Hunter* threw out the infamous Section 182 of Alabama's constitution, but it didn't do away with local discretion. A 1993 Georgia case, *Jarrard v. Clayton County Board of Registrars*, suggests that the decision as to whether an offense reveals enough "turpitude" to warrant the loss of voting rights – in this case, repeat violation of drunk driving laws – was still sometimes *formally* made at the county level.[17] And particularly in the states where disenfranchisement continues after the sentence for those who have not been formally pardoned or otherwise restored to full citizenship, it is county and town officials who are at the point of exclusion – which can involve them in difficult interpretations of state law, as a Nebraska case from 2002 makes clear.[18]

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[15] *Richardson v. Ramirez*, 418 U.S. 24, 34 n.2 (1974).

[16] *Hunter v. Underwood*, 471 U.S. 222, 226 (1985).

[17] *Jarrard v. Clayton County Registrars*, 425 S.E. 2d 874 (Ga. 1993). Of course, the case also shows that such decisions are subject to judicial appeal. Here, the Georgia court held that Jarrard's record of being convicted at least three times of drunk driving "revealed his callous and repeated disregard for the safety and welfare of other people, as well as for the laws of his state," and that therefore "we cannot but conclude that the crime is one involving moral turpitude." *Id.* at 875.

[18] See *Ways v. Shively*, 646 N.W. 2d 621 (2002). John Ways, Jr., sought a writ forcing Dave Shively, election commissioner of Lancaster County, Nebraska, to permit Ways to register to vote. Ways, like all others discharged from the Nebraska State Penitentiary, received a certificate stating that "all his/her civil rights, as provided by law" were restored. *Id.* at 624. But the Supreme Court of Nebraska ruled that this did not entail restoration of voting rights.

I. "I Have No Desire to Move Forward Quickly:" Florida and the Inclusive Potential of Local Administration of Disenfranchisement Law.

Events in Florida in the summer of 2004 have provided a fascinating glimpse into the mechanics of disenfranchisement. As a case study, Florida may be *sui generis* – because of the extraordinarily high salience of the policy after the state government's mistakes in 2000, as well as the state's unusual method of deciding which former offenders will win restoration to the franchise. (I explain this in more detail below.) Nonetheless, Florida illustrates that at least in some instances, county officials will openly flout the instructions of state lawmakers and bureaucrats, applying felon disenfranchisement in a more inclusive way than the law itself directs.

Florida is one of fourteen states that bar some offenders from voting even after they have completed all aspects of their sentences.[19] That means hundreds of thousands of Floridians not under any form of criminal supervision are ineligible to vote – a real headache for the county officials in charge of voter registration and the polls. Accurate "purges" of voter rolls, conducted to remove those who have not voted in many years, have moved away, or have died, becomes more difficult. In early summer of 2004, the Florida Secretary of State's office made available to county officials a list of nearly 48,000 "potential felons." All county officials were required to do before deleting

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[19] For an up-to-date list, see Manza and Uggen, "Punishment and Democracy," at 494 (2004). Some other sources give lower numbers, because some of these states only indefinitely disenfranchise recidivists, violent offenders, or those convicted before a certain year, or require offenders to wait years after completing their sentences to register. Seven states disenfranchise some felons after their sentences are complete; seven disenfranchise all felons indefinitely. There are also wide differences between states' restoration procedures, ranging from a relatively simple bureaucratic procedure to requirement of a full pardon. The states which indefinitely disenfranchise all felons are Alabama, Florida, Iowa, Kentucky, Mississippi, Virginia, and Wyoming. See also Abby Goodnough, "Disenfranchised Florida Felons Struggle to Regain Their Rights," *New York Times*, Sunday, March 28, 2004, p. 1, at 19, where maps show the disenfranchisement policies of all states.

someone from the rolls was to send a letter to the person notifying them of their impending removal and allowing them to challenge the designation. But a number of county officials said they planned to do far more, and would rather leave a "potential felon" on the active voter roll than risk deleting someone who was actually still eligible.

The problem was that the list was not entirely accurate. After the state initially rejected their requests, media organizations sued for access to the names, and the state relented. Newspapers quickly compared the roll to another list – those who have recently had their right to vote *restored* by the state Office of Executive Clemency. In early July, they published their findings: more than two thousand Floridians appeared on both lists, meaning that one state agency listed them as fully eligible, but another considered them ripe for purging.[20] Such confusions highlight the difficulty of disenfranchising people convicted of crime accurately, given the poor technical quality of American voter lists. At the heart of the state's task of identifying potential felons, after all, is the job of determining whether the same John Smith convicted of embezzlement, say, is the same John Smith registered to vote in Palm Beach County. And surprising as it is, neither the state's list of potential felons nor its restoration roll includes positive identifiers like Social Security numbers.[21]

Months before media reports about the list's flaws were published, many county elections officials said they planned to leave the state's "potential felons" on the rolls unless they had very strong reason to do otherwise. "I have no desire to move forward quickly," Pinellas County Supervisor of Elections Deborah Clark told a reporter in May.

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[20] See Bob Mahlburg and John Maines, "State Officials Defend List of Felon Voters," *Orlando Sentinel*, July 3, 2004 (page number unknown). See also Marc Caputo, "Questions Over Felon 'Purge List' Threaten Florida Governor," *Miami Herald*, July 4, 2004 (page number unknown).

[21] Mahlburg and Maines, "State Officials Defend List of Felon Voters."

"I'm really erring on the [side of] the right to vote, there being something considerable before denying that right," said Hillsborough County official Buddy Johnson. "The matching process is not as empirical as it seems." A Citrus County official said she planned to tell voters "we do not know if the list is accurate."[22] "[T]he supervisors are going to go very slow in doing their research," said Orange County Supervisor of Elections Bill Cowles.[23] Later, when the state ordered felons who had registered before all their restoration paperwork cleared to re-register, county officials balked. "We want to make sure people aren't disenfranchised," said Dade County Elections Supervisor Constance Kaplan.[24]

By the end of July, the state had thrown out the list entirely – but not because of a few thousand mistakes or the foot-dragging of county officials. The reason reveals how America's last major restriction of citizens' voting rights is embedded in particular bureaucratic practices and a peculiarly American racial context. For it was race that got Florida's 2004 "potential felon" list thrown out. The state employed race as one of the identifying characteristics used to match people convicted of crime with registered voters, but did so in a badly flawed way. If a voter's first name, last name, and date of birth matched those of a convicted felon, the person was listed for purging – unless the race was different. But the felon database did not list "Hispanic" as a race, so anyone who described himself as an Hispanic was omitted from the purge list. The results were dramatic: only 61 of the 48,000 people on the list were Hispanic, while 22,000 were

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[22] Matthew Waite, "Officials Wary of Felon Purge," *St. Petersburg Times*, May 19, 2004 (page number unknown).

[23] Mahlburg and Maines, "State Officials Defend List of Felon Voters."

[24] "Florida Reverses, Says It Won't Strip 2,500 Ex-Felons of Voting Rights," Associated Press, July 8, 2004.

African American.[25] Secretary of State Glenda Hood scrapped the list after these devastating facts were made public by the media; controversy continues as to whether the state knew of such problems when it published the list, as well as whether Hispanics were not included simply by accident or for more sinister reasons.[26] Some Democrats have been quick to note that while Florida's African American voters are heavily Democratic, many of the state's Hispanics vote Republican. Back in the county elections offices, however, there was simply relief that the purge list was dead. "I think that most supervisors are going to be pleased," said the Orange County supervisor. "Again, we were the ones that said we were going to move very cautiously." Another called it "an unwise policy from day one," while a Dade official said "we would just rather . . . focus our energy on getting everybody to vote."[27]

This story is not complete without an introduction to how rights restoration works in Florida, because that process – the source of the clemency list used to identify some flaws in the "potential felon" roll – is also complicated and unique. Like all the indefinite-disenfranchisement states, Florida does offer former offenders some means by which people convicted of crime can win their rights back. In Florida, some have their rights restored relatively promptly, after filling out a short form. But many others must wait for a special hearing in Tallahassee. Four times a year, Governor Jeb Bush and three colleagues sit as a clemency board to consider these offenders' restoration applications.

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[25] Ford Fessenden, "Florida List for Purge of Voters Proves Flawed," *New York Times*, July 10, 2004 (page number unknown).

[26] See "State Knew of Problems with Felons List Since 1998," Associated Press, July 20, 2004; David Kidwell, "Election Officials Knew of List Errors," *Bradenton Herald*, August 2, 2004.

[27] Coralie Carlson, "Elections Supervisors Relieved to Disregard Felon Voter List," Naples Daily News, July 12, 2004.

Governor Bush and the other board members have recommendations from the state Parole Commission regarding each former offender, but they do not always follow them. The special clemency board sometimes makes explicitly moral judgments about the individuals before them, and talks with them: Bush asked one man, "How's the anger situation going?" The question is not rhetorical – it is entirely up to Bush and his colleagues whether each person's rights will be restored, and these conversations may well matter a great deal. He tells another, "I'm praying that you're not going to start drinking again." This is not the "local" dimension of voting rights in the U.S. – it's even more micro, the *personal* dimension of suffrage, reminiscent of colonial times. Not only do a few members of the government decide whether or not an individual citizen gets to vote, sit on a jury, hold public office, and be eligible for licensed professions, but they make such judgments based on individualized, explicitly moral evaluations.[28]

Florida's experience in 2004 shows us that some local officials feel quite intensely their obligation to protect each person's voting rights, and that when push comes to shove, they may be willing to ignore or even flout state instructions they fear may wrongly exclude even a single voter. And other evidence also suggests that local officials err on the side of including possible felons. In researching whether disenfranchisement affects electoral outcomes, Thomas J. Miles uncovered almost a dozen newspaper stories showing that "at least in some jurisdictions, ineligible ex-felons have little trouble registering to vote and casting ballots."[29] The *Miami Herald*'s exhaustive analysis of the 2000 election concluded that more than 1,200 felons cast

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[28] See Abby Goodnough, "Disenfranchised Florida Felons Struggle to Regain Their Rights," *New York Times*, Sunday, March 28, 2004, p. 1, 19.

[29] Miles, *Felon Disenfranchisement and Voter Turnout* (2004), at 116-117 n. 50-52.

ballots in Florida.[30] And since 1940, fewer than 40 people have been convicted for voting illegally in Florida, whether because they were un-restored felons, non-citizens, or non-residents.[31]

But other evidence suggests that local officials do not always play such inclusive roles. The Brennan Center for Justice conducted a telephone survey of all of New York's counties, and determined that over half the local boards were asking former offenders for documents proving they had completed their sentences – in violation of state law. A study of Minnesota counties revealed confusion as to restoration rules and voters' status. And an Idaho newspaper concluded that almost a third of Idaho's counties did not know the state's disenfranchisement law, and some were not letting eligible former offenders vote.[32]

In 1996, the Department of Justice described American disenfranchisement law as "a national crazy-quilt of disqualifications and restoration procedures."[33] The D.O.J. had state law in mind. But while we do not yet have a systematic, empirical assessment of whether local officials act in a more or less exclusionary way than state law directs them

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[30] "Felons lose bid to alter vote ban," *Miami Herald*, July 19, 2002, at 1B. See also Manza and Uggen, "Punishment and Democracy" (2004), at 495. Manza and Uggen note that "it is possible that some felons are slipping through the cracks, improperly registering and voting because of poor bookkeeping practices in state voter registration systems. In fact, follow-up canvasses of a few hotly contested elections with recounts – including the Florida recounts of the 2000 Presidential election – reveal evidence of such activity." See also *id.* at 503 n.44, listing articles reporting examples.

[31] Jennifer Liberto, "Voter Fraud Penalties Minimal," *St. Petersburg Times*, July 19, 2004.

[32] See Brennan Center for Justice, "Resource Guide for State Felony Disenfranchisement Studies," Fall 2003, at 4-5. Copy on file with the author. See also "Felons and the Right to Vote," *New York Times*, July 11, 2004, p. A12, which noted the Brennan Center's finding that "local elections offices often did not understand the law, and some demanded that felons produce documents that do not exist."

[33] Department of Justice, Office of the Pardon Attorney, *Civil Disabilities of Convicted Felons: A State-by-State Survey* (1996), at 1.

to, we have enough evidence to conclude that in some important respects, the pieces of that metaphorical crazy-quilt are actually counties and towns.

II. Private Voting, Public Punishment: The Practice of Disenfranchisement in American History.

Particularly in the last decade, political scientists, historians, and legal scholars have engaged in an exploration of disenfranchisement's theoretical underpinnings. But we still know relatively little about disenfranchisement as a set of institutional procedures. This section makes two points about the practice of disenfranchisement from a historical perspective. First, most states put in place disenfranchisement laws during the nineteenth century, a time when what Americans actually *did* when they voted was radically different from what it is now. This is an under-appreciated aspect of the policy's history. Second, the implementation of the earliest North American disenfranchisement laws made it quite clear that the sanction was a *punishment*, whereas modern American law and practice is decidedly unclear on that point.

a. Private Voting: Nineteenth-century Suffrage Practices and Disenfranchisement.

Many critics of disenfranchisement have argued that the policy is a relic of an age when citizens, legislators, and courts simply had different theories of voting rights than they do now. (In fact, the practice of barring people convicted of crime from political life goes back to medieval times, when serious criminals were sometimes declared to be outside the law's protections entirely, or subject to "civil death."[34]) Most U.S. laws were

[34] See Howard Itzkowitz & Lauren Oldak, "Note: Restoring the Ex-Offender's Right to Vote: Background and Developments," 11 *American Criminal Law Review* 695, 724 (1973).

put in place in the nineteenth century, when a great many adults were barred from voting. That era's prevailing theory of voting rights is aptly summed up in a judicial decision from 1873, in which a New York federal court held that if they wished, state governments could declare

> "that no person should vote until he had reached the age of thirty years, or after he had reached the age of fifty, or that no person having gray hair, or who had not the use of all his limbs, should be entitled to vote...."[35]

For its part, the late-nineteenth-century U.S. Supreme Court accepted laws barring bigamists from voting, even endorsing the frank legislative purpose of "withdraw[ing] all political influence" from those who might want to change existing laws.[36] Of course, the twentieth-century Court has explicitly repudiated that approach, holding that "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."[37] The Court has repeatedly declared the right to vote to be "fundamental," and reviewed restrictions on the franchise under its most exacting standard, "strict scrutiny."[38] Numerous critics have pointed out that disenfranchising

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[35] *U.S. v. Anthony*, 24 F. Cas. 829 (No. 14459) (C.C.N.C. N.Y. 1873).

[36] *Murphy v. Ramsey*, 114 U.S. 15, 43 (1885).

[37] *Carrington v. Rash*, 380 U.S. 89, 94 (1965).

[38] See, for example, *Reynolds v. Sims* 377 U.S. 533, 555, 561-562 (1964) (holding that the right to vote is "the essence of a democratic society," "a fundamental matter in a free and democratic society," and that because the right to vote is "a fundamental right . . . preservative of all rights," any "alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized"); *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964) (holding that the "individual's constitutional right to cast an equally weighted vote" is among the list of "fundamental rights" which cannot be limited); *Harper v. Board of Elections* 383 U.S. 663, (1966) (calling the right to vote "precious" and "fundamental"); *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 626-627, 632 (1969) (holding that statutes distributing the franchise "constitute the foundation of our representative society" and therefore in any review of a state law restricting suffrage "the Court must determine whether the exclusions are necessary to promote a compelling state interest"); *Dunn v. Blumstein*, 404 U.S. 330, 335 (1972), (holding that durational residence laws are unconstitutional unless a state can demonstrate not only that a "substantial and compelling reason" exists for a "a challenged statute [which] grants the right to vote to some citizens

convicts because they have violated a "social contract," or because they are regarded as untrustworthy or as threats to the "purity of the ballot box"[39] falls well short of the practicality of that high standard, since none of these arguments even allege that the state has a specific practical purpose it cannot fulfill without barring offenders from the polls.[40]

But amidst this argumentation about political thought and constitutional standards, there has been far less focus on the *practice* of voting during the era when most states' disenfranchisement laws were put in place as a component of those laws' history. Disenfranchisement law took hold in the mid- and late-nineteenth century, an era when voting was a very different activity than it is now: balloting was public, not private; voters were subject to mild and severe forms of coercion, including open bribery and violence; there were primitive registration systems or none at all; fraud was the norm; and the ballots and even the voting booths themselves were often supplied by partisans, rather than the state.

Consider, for example, the Australian ballot. By 1888, when the secret, state-produced ballot began its rapid spread across the country, thirty-three states had

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and denies the franchise to others," but also that such laws are drawn with "precision," "tailored" to achieve compelling objectives.

[39] This phrase was used in the often-cited Alabama decision *Washington v. State*, 75 Ala. 582, 585 (1884), and re-appears regularly in the disenfranchisement debate.

[40] Because of what amounts to a constitutional quirk, the Supreme Court has held that disenfranchising convicts has an explicit constitutional warrant and therefore does not need to meet the "strict scrutiny" or "compelling state interest" standard. See *Richardson v. Ramirez*, 418 U.S. 24 (1974), in which the Court held that because the "express language" of the obscure and generally ignored Section Two of the Fourteenth Amendment apparently permits states to bar convicts from voting, the Equal Protection Clause in Section One "could not have been meant to bar outright a form of disenfranchisement that was expressly" allowed by the following section. *Richardson,* 418 U.S. at 25. The second section of the Fourteenth Amendment refers to voters disenfranchised for "participation in rebellion, or other crime." U.S. Constitution, Amend. XIV, §2. But it does so in explaining that states which disenfranchise for any *other* reason will lose a proportionate slice of their Congressional representation. The formula was written to allow recalcitrant Southern whites to disenfranchise black men, but punish them politically if they did so, and was never enforced. Despite the sentence's invidious purposes and utter incompatibility with modern suffrage principles, the *Richardson* Court breathed new life into a phrase lying deep within that sentence.

implemented their first felon disenfranchisement law.[41] (Connecticut's 1818 statute appears to have been the first post-independence law; some states had disenfranchised only for specific crimes before they initiated blanket disenfranchisement of felons or the incarcerated.) In a time of public voting – occasionally *viva voce* voting – it is easy to imagine legislators' concern that people convicted of crime might corrupt the electoral process by committing fraud. Eldon Cobb Evans implies that such an awareness played a role in the rise of the secret, state-produced ballot in Australia. Nineteenth-century Australia, he writes, "included many gold-seekers, bent upon gain, and a large class of criminals. In this environment the vices of the *viva voce* method flourished even more than in England."[42]

In the U.S., one obscure Kentucky case from 1887 – coincidentally or not, the year before Louisville began using the secret ballot – brings together voting practices and criminal disenfranchisement. The case, *Anderson v. Winfree*,[43] involved an election for county judge which had been conducted *viva voce*, with clerks keeping records of how each of six thousand men voted. Initially, it was decided by thirty votes; a recount eliminated illegal votes for both men, whittling the difference down to fifteen; and a judicial recount further narrowed the margin of victory to three. The case consisted almost entirely of whether two voters, Warner Duguid and Jack Smith, should have been ineligible because they had served time for grand larceny, a crime not named in

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[41] This count is derived from data in Angela Behrens, Christopher Uggen, and Jeff Manza, "Ballot Manipulation and the 'Menace of Negro Domination': Racial Threat and Felon Disenfranchisement in the United States, 1850-2002," 109 *American Journal of Sociology* 559, 565-566 (Table 2: "Origins of and Changes to State Felon Disenfranchisement Laws") (2003).

[42] E.C. Evans, *A History of the Australian Ballot System in the United States* (1917), at 17.

[43] *Anderson v. Winfree*, 85 Ky. 597; 4 S.W. 351 (1887).

Kentucky's infraction-specific disenfranchisement law.[44] The court engaged in an intriguing analysis of how *viva voce* and secret voting differed in terms of the court's ability to ascertain how each man voted. The judges confined their analysis of criminal disenfranchisement law to interpretation of concepts such as "infamous crime," and did not speculate as to whether the men were to be kept from voting lest they corrupt the process. Nevertheless, the status of three other voters in the case made clear the possibilities: men identified only as "Carter, Croft, and Glover" had been recorded as voting for *both* candidates, and the judges had to assay various records and witnesses to ascertain the truth.[45]

We do not know how important such contexts were to the legislators who wrote the laws. As one leading scholar has lamented, "studies of state legislatures' reform and/or repeal of criminal disenfranchisement laws do not exist."[46] Another hypothesizes that the policy may have been implemented in response to the elimination of the property test, since "abolishing property tests revealed that they had served a number of indispensable functions, such as holding down the voting strength of free blacks, women, infants, criminals, mental incompetents, un-propertied immigrants, and transients."[47] One intriguing recent article analyzes juxtaposes criminal-justice data and legislative histories and concludes that "the racial composition of state prisons is firmly associated with the adoption of state felon disenfranchisement laws," with increasing nonwhite

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[44] *Anderson v. Winfree*, at 352.

[45] *Anderson v. Winfree*, at 353-354; 353.

[46] Andrew Shapiro, "Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy," 103 *Yale Law Journal* 540, 564 n.146 (1993).

[47] Ward E. Y. Elliott, *The Rise of Guardian Democracy* (1974), at 43.

inmate populations linked to bans on felon voting.[48] Meanwhile, my own research into the proceedings of early-nineteenth-century constitutional conventions turned up only a pair of references to criminal disenfranchisement. While they offer revealing glimpses into the political thought of the period, neither alludes to specific voting practices.[49]

My sense is that as a *causal* matter, the core reasons nineteenth-century lawmakers adopted criminal disenfranchisement emerged from their assumptions about the wisdom of limiting the privilege of voting only to those who were most qualified. However, I believe it is also true that the way disenfranchisement made sense to

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[48] Angela Behrens, Christopher Uggen, and Jeff Manza, "Ballot Manipulation and the 'Menace of Negro Domination': Racial Threat and Felon Disenfranchisement in the United States, 1850-2002," 109 *American Journal of Sociology* 559, 596 (2003).

[49] A Mr. Hoyt of Deerfield voiced skepticism towards a blanket ban on offenders, telling his fellow Massachusetts conventioneers that a property test

> "would deprive many persons of the privilege of voting, who were possessed of but little property, whom the assessors in their discretion usually omit to assess. In regard to persons under guardianship, he said there were some who pay taxes and ought to have a right to vote; for instance, a man put under guardianship for intemperance, who becomes temperate, but yet requires a rod to be held over him to keep him from relapsing."

See *Journal of the Debates and Proceedings in the Convention of Delegates, Chosen to Revise the Constitution of Massachusetts*, 1820-1821 (1853), at 555.

New York, meanwhile, was *not* in the category of states passing felony disenfranchisement laws while voting by voice. The constitution of 1821 declared in Article II, §2 that "Laws may be passed, excluding from the right of suffrage, persons who may have been, or may be convicted of infamous crimes." But Article II, §4 states that "All elections by the citizens, shall be by ballot, except for such town officers, as may by law be directed to be otherwise chosen." See *Reports of the Proceedings and Debates of the New York Constitutional Convention of 1821* (1970) (1821), at 661.

Finally, one North Carolina delegate in 1835 opposed criminal disenfranchisement for whites, but supported the restriction for blacks. During debate over whether free blacks who met the property test should be allowed to vote, a delegate named Gaston rejected the argument that

> "wherever a man is convicted of perjury, forgery, conspiracy, or larceny, he ceases to be a freeman, and loses the right of voting. Such was not his conception of the law. When a man has been thus convicted, he is no longer a competent witness, but he is still a freeman, and of course, has a right to vote."

Gaston attempted to dissolve opposition to voting by black freemen by raising the property qualification for them, and also by adding this phrase: "nor shall any free negro, mulatto, or person of mixed blood, as aforesaid, be permitted to vote at any election, who shall have been convicted of an infamous offense." See *Proceedings and Debates of the Convention of North-Carolina, Called to Amend the Constitution of the State*, 1835 (1836), at 357, 352.

nineteenth-century Americans had a great deal to do with the way their elections were conducted. To be sure, disenfranchisement is not exclusively linked to nineteenth-century voting practices: a lot of legislative and judicial activity has taken place since 1888, and in fact Utah and Massachusetts have both put inmate disenfranchisement in place for the first time in the last five years. Meanwhile, the policy has roots in North America that go back well before 1821: colonial Americans disenfranchised some offenders, as well. But these seventeenth-century policies reveal another striking difference between early disenfranchisement practices and its use today.

b. Public Punishment: Early American Disenfranchisement.

In *Anderson v. Winfree*, the Kentucky court declared that "[i]t is the perpetration and conviction of the infamous crime, and not the degree of punishment, that renders the perpetrator infamous," and therefore disenfranchised.[50] The truth, however, is that by 1887 American criminal disenfranchisement law had already broken free of its early American roots *as a punishment*. As the legal anthropologist Sally Engle Merry has written, "the texts of the law must be made socially real: enacted, implemented, imposed."[51] In colonial America, disenfranchisement was made socially real when enacted as punishment, because it was usually inflicted during public sentencing. That gave the practice a public dimension lacking from today's policies, which separate the offender from the franchise silently and automatically: disenfranchisement is now technically a "collateral consequence" of conviction, rather than part of one's sentence.

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[50] *Anderson v. Winfree*, 4 S.W. 351, 353 (1887).

[51] Sally Engle Merry, *Colonizing Hawa'i: The Cultural Power of Law* (2000), at 218.

English colonists in North America transplanted much of the mother country's common law regarding the civil disabilities of convicts, and supplemented it with statutes regarding suffrage. As towns were incorporated, new citizens required approval by town meetings, usually based on religious conformity and property ownership.[52] Plymouth would not admit as a freeman "any opposer of the good and wholsome laws of this colonie," and in one town a would-be freeman needed the testimony of his neighbors that he was of "sober and peaceable conversation."[53] Plymouth in 1651 provided that any person judged to be 'grosly scandalouse as lyers drunkards Swearers & C. shall lose theire freedome of this Corporation."[54] In Massachusetts, disenfranchisement was authorized as an additional penalty for conviction of fornication or any "shamefull and vitious crime."[55] Many colonial laws addressed directly the question of how long the loss of the ballot would last, and this too was sometimes up to judicial discretion. Under Connecticut law anyone "fyned or whipped for any scandalous infraction" could be restored to his rights when "the courte shall manifest their satisfaction."[56] In both Massachusetts and Connecticut, the decision to restore voting rights was left to the court, but in pre-Revolutionary Rhode Island, anyone convicted of bribing an election official

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[52] Albert E. McKinley, *The Suffrage Franchise in the Thirteen English Colonies in America*, (1905), 384-385.

[53] Cortland Bishop, *History of Elections in the American Colonies* (1893), at 54.

[54] Bradley Chapin, *Criminal Justice in Colonial America, 1606-1660* (1983), at 54.

[55] Bishop, at 56.

[56] See *Blue Laws of Connecticut: The Code of 1650; Being a Compilation of the Earliest Laws and Orders of the General Court of Connecticut* (1822), at 98. This 1650 statute merits quoting in full: "It is ordered by this Courte and decreed, that if any person within these Libberties have been or shall be fyned or whipped for any scandalous offence, hee shall not bee admitted after such time to have any voate in Towne or Commonwealth, nor to serve in the Jury, untill the courte shall manifest theire satisfaction." *Id.*

was "forever thereafter . . . excluded from being a Freeman, or voting, or bearing an public Office, whatsoever, in this Colony."[57]

These examples indicate that disenfranchisement has a long history in the U.S., but they also illuminate important differences between the practice of colonial and contemporary disenfranchisement. Originally, the removal of criminals from the suffrage had a visible, public dimension: either entire communities of freemen made the determination, or it was a discrete element in punishment implemented only after the deliberation of a court. Moreover, crimes subject to the penalty of disenfranchisement were either linked to voting itself, as in Rhode Island, or defined as egregious violations of the moral code. Modern disenfranchisement laws – automatic, invisible in the criminal justice process, considered "collateral" rather than explicitly punitive, and applied to broad categories of crimes with little or no common character – do not share these characteristics.[58]

Of course, another great difference between colonial and modern American suffrage is the prominent role state and federal courts now play in safeguarding individuals' voting rights. Under that protection, however, lies a great deal of variation in voting practices generally, as we have seen in registration practices, ballot design, polling locations, provision of voter assistance, and counting and recounting standards, among other areas. In the case of people convicted of crime, the practical point of exclusion is not now in the sentencing court or the community, nor even in state

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[57] McKinley, at 459.

[58] By contrast, modern German disenfranchisement law appears quite similar to the American colonial model. In Germany, post-sentence disenfranchisement is never automatic, may only be applied by the sentencing judge for certain serious infractions, and can last only two to five years following incarceration. See Nora V. Demleitner, "Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative," 84 *Minnesota Law Review* 753, 760-761 (2000).

constitutions and statutes where the laws themselves reside. Disenfranchisement is now made "socially real" in two places: state bureaucracies, and local elections offices.

III. "I need to be able to tell the clerks what to do:" Contemporary Disenfranchisement Practices in the United States.

"There is a stunning lack of information and transparency surrounding felon disenfranchisement across the country," the *New York Times* recently editorialized.[59] This spring, I began a survey of state and selected county elections officials in order to learn more about how disenfranchisement and rights-restoration work in the United States.[60] The survey, which is continuing, has been conducted by mail, e-mail, and phone; thirty states' elections offices have responded, mostly on paper, and I am now beginning a telephone survey of counties in several states. (The mail component of the survey is attached as an Appendix.) In this section, I discuss some preliminary findings.[61] Data are still coming in, and the material can be fascinatingly and frustratingly difficult to organize, because state practices are so diverse that natural and conventional categories do not always work. Something unexpected and unique appears in almost each piece of mail and each conversation.

This section consists of three sub-sections. The first discusses background and context, and gives the flavor of some survey results. The second outlines the modal

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[59] "Felons and the Right to Vote," *New York Times*, July 11, 2004, p. A12.

[60] This research is funded in part by a grant from the Sentencing Project. All survey materials are available on request from the author. I am grateful to the Sentencing Project, and also to the many state and local officials who have taken the time to answer my questions, particularly during the run-up to a Presidential election.

[61] Unless otherwise noted, sources for all material in this section is from paper surveys, e-mails, or phone interviews between the author and a given state's Secretary of State's office or other elections official.

procedures at the "front end" of disenfranchisement: the steps by which states initially remove a convicted person from the rolls. The third gives some sense of the great diversity in state practices at the restoration stage, which has become a controversial aspect of disenfranchisement today.

a. "Kind of a case by case basis:" General Characteristics.

A few prefatory and contextual points should be made here. First, about three-quarters of disenfranchised offenders are not in prison. These citizens are either sentenced to probation instead of prison, out on parole, or – as with about thirty-five percent of the disenfranchised – have completed their sentences entirely.[62] Meanwhile, well over half of U.S. states disenfranchise at least some offenders who are not incarcerated.[63] Therefore, the most serious practical "problem," for most local elections clerks, is that whether or not they are legally eligible to cast ballots, the vast majority of would-be voters in question are out in society, not behind bars.

Meanwhile, "felony disenfranchisement" is not as accurate a term as "criminal disenfranchisement," because several states do not use felony as the cut-off point. Five states responding to my survey noted directly or implicitly that they may legally disenfranchise some misdemeanants – Indiana, South Carolina, Mississippi, Illinois, and Montana – and a recent study of state laws concluded that almost twice as many states nationally may do so.[64] Another complication is how to classify states. Studies

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[62] Manza and Uggen, "Punishment and Democracy," at 495.

[63] Manza and Uggen, at 494. Their count is that thirty-four states do so.

[64] Montana law says that incarcerated felons may not vote, but the state elections office told me that the voter registration form requires the prospective voter to swear that he "is not incarcerated." About six years ago, one authority concluded that the laws of Alaska, Alabama, Georgia, Iowa, Maryland,

comparing disenfranchisement law in the U.S. with similar policies in other countries run into a simple problem: there *is* no national policy, and state laws range from the most inclusive or lenient standard (incarcerated criminals retain voting rights in Maine and Vermont) to the most restrictive (some convicts can never have their rights restored in several states, barring an outright pardon or reversal of their conviction). But even these descriptions omit important distinctions.

Fascinating and revealing details emerge within state bureaucracies themselves. Consider, for example, the practices of Oregon and Pennsylvania. Oregon's disenfranchisement policies challenge the assumption that one is disenfranchised for *committing* a felony, or for being *convicted* of a felony, or even for being *incarcerated* for a felony. For Oregon disenfranchises only felons under Department of Corrections (DOC) supervision. Most felons wind up there, but since 1997, those convicted of a felony in Oregon and sentenced to less than 12 months' custody go to the county jails. Therefore, "they do not enter DOC custody and will not lose their voting privileges," as a staffer at the Oregon Secretary of State's office explained. "Felons may generally vote except when in DOC custody," she wrote, without giving an indication of how often this happens. Meanwhile, it is legal for even DOC inmates to *register* to vote.[65] In Pennsylvania, this is not the case. As a member of the Secretary of State's office explained, Pennsylvania law does not explicitly bar convicts from voting. Instead, "it implicitly does so by precluding an individual who is confined in a penal institution from

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Mississippi, New Mexico, Tennessee, and Washington stated that "infamous crimes," crimes involving "moral turpitude," or offenses from a specific list bring about loss of the vote. *See* Virginia E. Hench, "The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters," 48 *Case Western Reserve Law Review* 727, 795-797 (1998)

[65] Oregon publishes and distributes relatively comprehensive voter-assistance flyers for released prisoners, and instructs the DOC in what information to communicate to those leaving DOC custody.

being deemed a resident of the district where the institution is located and from being deemed a 'qualified absentee elector.'" In other words, as a matter of law, Pennsylvania disenfranchises incarcerated felons by barring them from *registering*, not from *voting*.

Tennessee may take the prize as the state where formal disenfranchisement law is most chronologically complex. Tennessee is often described simply as a state which used to disenfranchise indefinitely, but since 1986 no longer does so. This account does not capture the policy, under which, as a state webpage explains, "[t]he manner in which a person may restore a lost voting right depends on the crime committed and the year in which the conviction occurred." In fact, Tennessee now has *five* different laws, covering five different periods between 1973 and the present.[66] Nevada, meanwhile, is categorized as a state which recently changed its laws to automatically re-enfranchise most offenders, but so far that is not what is happening. State law now says that those honorably discharged before and after July 1, 2003 may be in different categories, and may need to show county clerks different kinds of evidence of their good standing. But some recidivists, those convicted of violent crimes, and those convicted of federal felonies are not eligible, and many the county clerks seem unsure which documents to accept as proof of eligibility from any of these offenders. As a Deputy Secretary of State told me with some frustration, "right now, it's kind of a case by case basis," adding, "I need some legal research, so I can tell the clerks what to do."[67] Meanwhile, at least a few other states' responses left some uncertainty as to which offenders are formally excluded. Advocacy

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[66] See <www.state.tn.us/sos/election/webcon1.htm>.

[67] Interview with Rhonda White, July 21, 2004. White also told me, "I spoke with an older woman with an old, old federal conviction, for putting bad information on a mortgage application. The [Clark County] clerk told *her* the DA told *him* the new state law did not affect federal convictions. [Meaning she was still totally ineligible, barring Presidential pardon.] This was one of two people who had been turned away by Clark County, and 'they're pretty hot.'"

reports usually list Louisiana as a state which only bars incarcerated felons from voting,[68] but the Secretary of State's office indicated that not until "completion of probation" does the Department of Public Safety and Corrections notify convicts that most of their rights have been restored. California formally disenfranchises those on parole as well as in prison, but the voter registration card requires only that they swear "they are not in prison for a felony conviction." And in a remnant from the post-Reconstruction era, Mississippi still employs an extraordinarily long, colorful list of specified crimes bringing about the sanction – Bigamy, Forgery, Receiving Stolen Property, and "Unlawful Taking of Motor Vehicle" are still on the list, but as recently as 2001, the state Attorney General ruled that burglars would no longer be disenfranchised.

Disenfranchisement as a practice is properly understood as hyper-federalized. Formally, the 1993 Georgia case *Jarrard* appears to be the exception that proves the rule: state government, not local authorities, generally determines which offenders are legally barred from voting. But at the same time, in *practice* it is overwhelmingly county officials (town staff in most of the Northeast, parish officials in Louisiana) deciding how to handle voter-registration applications and requests for absentee ballots, and they who must decide whether and how to investigate each voter's status – usually with little or no state or federal supervision.

This is most clear with regard to determining voter eligibility. How do county officials figure this out? States as diverse as Louisiana, Wyoming, and Massachusetts clearly explained state law, but told me that they simply do not know what the parish, county, and municipal authorities, respectively, are doing to check. Remember, even

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[68] See, for example, http://www.sentencingproject.org/brief/pub1046.pdf>.

local officials in states barring only incarcerated felons should have some way of checking voters' status, since imprisoned pre-trial detainees always remain eligible, and most or all misdemeanants usually do. In that category, officials in Massachusetts, Hawaii, Oregon, New Hampshire, and North Dakota responded that it's up to local officials whether and how to investigate voter status when they receive an absentee-ballot request with a return address that may be a prison. "This is a small state, so people often know who has been in jail," wrote a New Hampshire official. "County election officials would exercise due diligence to verify eligibility," wrote a Hawaii staffer. North Dakota is in a class of its own: since the state has no voter registration, physical appearance at the polls is the only proof of eligibility required; the official I spoke to had never heard of an absentee-ballot request from a state prison in fourteen years of service. In states barring people from voting after incarceration – such as Colorado, Connecticut, North Carolina, and Oklahoma – local officials bear even more responsibility, since not only absentee ballots but the most routine walk-in voter-registration requests may come from people still under supervision, and the state criminal-justice bureaucracy may not have notified local officials of their status. In Colorado, felons in prison and on parole are not eligible, but probationers and former inmates are; proof of eligibility "is decided at the county level by the county clerk." How? "I don't have the answer to that question," a staffer at the Secretary of State's office wrote.

Whether or not one approves of the laws in principle, and whether or not they operate fairly and consistently in practice, one fact emerges clearly in this research: in the United States, state and county officials appear to be spending a good deal of time and effort to disenfranchise people convicted of crime. That work begins with a conviction.

b. Disenfranchisement.

Most states responding to the survey have a relatively straightforward process by which the people at the "front lines" of American voting – county clerks – are informed of criminal convictions. With variations, it goes something like this. At monthly or quarterly intervals, county, state, and federal courts, the Department of Corrections, sheriffs (in Indiana), or the State Police (Virginia), notify state elections officials of criminal convictions. In states with comprehensive, functional voter databases, convictions are checked against voter rolls, and counties notified; in other states, the information goes straight to local officials. Sometimes county clerks of court also convey conviction information directly to their own elections boards. Finally, the county boards check conviction lists against their own voter rolls, and purge registrations as appropriate. "Since registration records are maintained at the various county election board offices," an Oklahoma official explained, "it is the Secretary of each county election board office who actually processes the cancellation." California, Minnesota, Montana, North Carolina, and Virginia, among others, are good examples of this type of process.

There are quite a few exceptions, however. Among states disfranchising only the incarcerated, a few indicated that they had no systematic reporting system. Michigan, North Dakota, and Oregon all did so, with Michigan indicating that it is simply "not necessary," and others indicating that local officials could investigate odd-looking absentee-ballot requests as they wished. Kansas may be the only state disfranchising former inmates which lacks any reporting system, and they will begin using one in 2005.

c. **Restoration.**

Rights restoration, however, is a different story. Restoration processes have aroused greater controversy among advocacy groups – and, recently, county officials in Florida and Nevada – than has initial disenfranchisement. Presumably, this is because of the belief that barring an eligible person who *wants* to vote is worse than wrongly *failing* to purge a person who *may* someday try to vote. Certainly, the former is far more likely to lead to a lawsuit. In this area, local officials exercise a great deal of discretion and responsibility, because very few states have any kind of centralized procedure to inform county staff of the end of a person's incarceration or sentence – and many lack even a simple way for them to check. Minnesota explains that restoration information is centralized with the "state court administrator," but offers no information about how the process occurs. Delaware has some of the country's most restrictive policies, but also has one of the most technologically and bureaucratically coherent policies: county officials must check every registration applicant against a statewide criminal-justice database, and follow the appropriate steps if a record appears. Virtually no other states described such a centralized procedure, despite my asking about it specifically.

Conventionally, states are divided into three or more groups: those automatically restoring rights after prison; those doing so after incarceration and probation, or after incarceration, probation, and parole; and those who never do so automatically. But these categories do not capture the range of restoration practices in place. For example, one can argue that only one state has truly "automatic" restoration: with no registration requirement, all one has to do after leaving prison in North Dakota is walk to the polling place. Meanwhile, some states with relatively lenient or inclusive policies – such as

Nevada – now have particularly burdensome or obscure standards of proof. And at least on paper, indefinite-disenfranchisement states like Kentucky and Wyoming make restoration sound like a simple matter of filing a form with the right office.

One possible dividing line is between states which require only that the would-be voter swear that she is not ineligible because of a criminal conviction, and those requiring some documentary proof. Many states with different terms of disenfranchisement require only an oath. Among incarceration-only states, Indianans must swear the same affidavit as everyone else, saying "I am not currently in prison following conviction." In Montana, the former inmate "swears on the voter registration card that he or she is not incarcerated." Oklahoma, a full-sentence disenfranchisement state, uses only a universal oath: "[t]he applicant need not provide 'proof' that he/she is again eligible for registration, but must sign a sworn oath, which states in part . . . If I have been convicted of a felony, a period of time equal to the sentence has expired, or I have been pardoned."[69] Similarly, in Missouri, where the offender is disenfranchised during all aspects of the sentence, one must simply swear to a county official that he is no longer under sentence. And in Utah and Illinois, there appears to be no oath requirement at all.

In my survey, at least eleven states indicated some documentary requirement. The list cuts across conventional categories: it includes Hawaii, which bars only incarcerated felons from voting; Connecticut, which excludes only those incarcerated and on parole; Arkansas, which adds probationers to the list; and Virginia and Iowa, which indefinitely disenfranchise felons. In Connecticut, the would-be voter "must present proof of release [from the DOC] from confinement and/or discharge of parole."

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[69] Oklahoma's written survey response continues, "[v]oter registration applications are not 'investigated' to determine whether the applicant has provided correct information...."

Interestingly, in North Carolina and Idaho – both full-sentence states – there is neither an oath nor a documentary requirement. In North Carolina, "the county board of elections will assume the allegation of citizenship is correct.... We do not cross check the current DOC database with SEIMS [the statewide voter database]." In Idaho, the norm is for local officials to "[t]ake the individual's word when they sign the registration card, under oath, that they have no 'legal disqualifications.'"

Another variable is whether or not those completing sentences are *informed* of their restored rights. This too cuts across categories: most incarceration-only states do nothing, while several post-incarceration states are relatively active. In Indiana, the "state DOC is now required to give prisoner notification" of rights restoration after incarceration; Oklahoma's DOC "may provide some information," but there is no statutory mandate that it do so; Oregon distributes a short flyer; and Montana's Secretary of State "works with advocates for prisoners to release information to the media." North Carolina and Nevada both have such advocacy groups' materials on file, and sent them to me; Connecticut takes no state action, but is aware of voters' rights groups which do.

Survey results also cast doubt on the list of states conventionally defined as employing "lifetime" or "permanent" disenfranchisement. (I prefer the more neutral term "indefinite," since what such policies mean is that the "default" in terms of a convicted person's voting rights is disqualification, while eligibility *can* be restored via some means.) For example, Delaware, Maryland, and Tennessee are usually not now listed on the indefinite-disenfranchisement roll, since they have shifted to automatic eligibility for most former offenders or a waiting period – three years in Maryland, five in Delaware. But at the same time, some offenders in each of these states – those convicted of murder,

rape, and, in Delaware, other "sexual crimes" – are never eligible to have their rights restored. Tennessee's state law reads more like an indefinite-disenfranchisement state than an automatic-restoration one. Those convicted of murder, rape, treason or vote fraud are never eligible, and even those who *are* eligible must complete their maximum sentence and obtain "a judgment from circuit court . . . that restores full rights of citizenship."

This is a time of potentially sweeping change in many states' election procedures, and my survey inquires about whether state officials expect any changes in disenfranchisement or restoration policies. Almost none mentioned HAVA, although the statewide voter rolls that statute requires will almost certainly affect each state's practices. Only New Hampshire noted that "we expect to comply with better notification through HAVA changes, and funding." The survey question did not raise HAVA specifically, and followed several questions about criminal disenfranchisement; presumably, those responding simply did not connect these two topics, although the link will certainly be important in some states.

Finally, as noted above, some sources indicate that scores and even hundreds of former felons may be voting illegally. But there is also evidence that at least as many offenders who are eligible may not try to vote because they believe they are barred from voting. As a staffer from Missouri told me, "we get felons calling all the time" who don't know they are eligible to vote. As Manza and Uggen put it, "many former offenders who are actually eligible to vote may be inadvertently taking themselves out of the political

process because they misunderstand the details of the laws governing voting rights in their state."[70]

IV. A Troubled Practice.

The *New York Times* recently editorialized that "even if it were acceptable as policy, denying felons the vote has been a disaster because of the chaotic and partisan way it has been carried out."[71] In this dissertation, I have viewed such statements with skepticism, at least in terms of what looks like "chaos" to observers seduced by "the mystique of standardization." In this case, however, the neo-Progressives at the *Times* appear to have it right. Our fragmented system of enforcing criminal disenfranchisement law should concern those on "both sides" of the disenfranchisement debate – those who worry most about fraudulently-cast votes by ineligible offenders, and those concerned about illegal vote denial or overly burdensome requirements preventing participation. This is particularly true given that the vast majority of the disenfranchised are no longer incarcerated (or, in the case of probationers, never were). The states which seem likely to have the least error-prone policies are those where only inmates are disenfranchised, and where local officials are able to investigate any absentee-ballot requests from addresses they recognize as those of prisons. By contrast, almost none of the states where former inmates are barred from voting appear to have in place systems which both facilitate voting by everyone eligible and prevent the ineligible from registering. Whether because

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[70] Manza and Uggen, "Punishment and Democracy," at 495.

[71] "Felons and the Right to Vote," *New York Times*, July 11, 2004, p. A12. A noteworthy detail: as in its previous editorial criticism of criminal disenfranchisement, the Times many times assaults "felon disenfranchisement" and the practice of "denying felons the vote," but the editors do not make explicit whether they believe all laws should be repealed, or only those barring *non-incarcerated* offenders from voting.

of lack of available information, benign ignorance, or other motives, it appears certain that local officials in some states are asking for documentary proof which is legally unnecessary or nonexistent, while others are failing to investigate the status of non-incarcerated voters who may in fact remain ineligible under state law. The ongoing experiences of Florida and Nevada indicate that different towns, counties, and parishes in the same state, meanwhile, may be employing different procedures, particularly in terms of restoration. The lack of high-quality voter databases, together with the complexities of disenfranchisement law, may make consistent enforcement impossible.

If American felony disenfranchisement practices were more like their colonial predecessors, local variation might make more sense. If the town or county were responsible for deciding who was included in the polity, leaving significant discretion in restoring rights with local officials would be justifiable. Such case-by-case variation might also be warranted if judges administered disenfranchisement as an additional penalty, although that would require judges, not county clerks, to handle restoration. But such localism is far from modern policy – and never appears in arguments for barring offenders from the polls. In fact, defenders of disenfranchisement invariably turn to *super*-national theories, like the demands of the original "social contract" or moral imperatives of punishment. Arguments of "national" scope include Constitutional defenses of disenfranchisement and arguments holding that the policy does not run afoul of the Voting Rights Act. And of course, federalist arguments play an important role, given that formal disenfranchisement law is set by state constitutions and statutes. But no defense of disenfranchisement even acknowledges local variation in its application. Critics of U.S. law have observed that a person convicted of crime can gain or lose the

right to vote simply by crossing a state line. In practice, they may have the same experience crossing the *county* line.

CHAPTER 7

CONCLUSION

I have tried to show that crucial, constitutive elements of American suffrage have always been and remain highly localized. What does this tell us about American political development? Karen Orren and Stephen Skowronek have defined "development" as "a durable shift in authority relations among political institutions," meaning "a change in the direction of controls, enforceable at law, among the discrete agencies of governance that comprise a political order."[1] In a strictly legal or formal sense, one could argue that American suffrage developed most sharply away from local control at any of a few different points: with the Jacksonian conventions, when statewide qualifications were articulated; in 1868 and 1870, with the Fourteenth and Fifteenth Amendments; or with the Voting Rights Act of 1965.

But the framework I have developed here leads to two quite different conclusions. First, an appreciation of voting rights as practices suggests that American suffrage took its biggest developmental step towards its modern form between 1888 and 1892, when most states put secret-ballot laws in place. A second conclusion, however, is that American suffrage has never truly "developed" in a way that fits Orren and Skowronek's definition. Certainly, in terms of legally-enforceable "authority relations," the state and federal governments control what counties and municipalities do. Nonetheless, all along the serial election process – in voter registration, ballot design and election-technology selection, poll supervision and voter support, counting and re-counting procedures, and

[1] Karen Orren and Stephen Skowronek, "What is Political Development?", paper presented at the Annual Meetings of the American Political Science Association, San Francisco, Aug.-Sept. 2001, at 4.

paying for it all – local officials in most U.S. states still play essential roles. As I've argued above, even the Australian ballot laws unequivocally left local officials in charge of their implementation, and subsequent personal-registration rules effectively brought about "a new decentralization of power to determine the eligibility of voters," as the National Commission on Federal Election Reform put it.[2] And just as reports of Mark Twain's death were greatly exaggerated, scholars in each generation seem to believe that *now*, at last, the suffrage debate in the U.S. really is over, the right to vote nationalized and guaranteed to all. Most recently, the Voting Rights Act of 1965 and the National Voter Registration Act of 1993 each appeared to complete the nationalization of American voting – until the election of 2000 laid bare the depth and importance of local variation that endures. "He lives in one world of theory and in another world of practice," wrote Albert Shaw of "the American" in 1887.[3] By emphasizing what Americans actually *do* when we vote, I have tried to bring theory and practice closer together.

The fundamental premise of this dissertation is that practices matter, and I believe I have demonstrated that to be true in numerous ways. But scholars and reformers alike should remember that procedures alone will not make a democracy strong, or self-government fully effective. The great English conservative Edmund Burke made this point sharply, mocking those who criticized virtual representation and other aspects of England's late-eighteenth-century voting system:

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[2] *To Assure Pride and Confidence in the Electoral Process*, at 27.

[3] See William J. Novak, *The People's Welfare*, at 237, quoting Albert Shaw, "The American State and the American Man," *Contemporary Review* 1 (1887). Novak writes, "Shaw chalked up this contradiction [American rhetoric of laissez-faire amid a 'profusion' of state regulatory legislation] to an unequaled capacity in the American 'for the entertainment of legal fictions and kindred delusions. He lives in one world of theory and in another world of practice.'"

> "This is like the unhappy persons who live, if they can be said to live, in the statical chair – who are ever feeling their pulse, and who do not judge of health by the aptitude of the body to perform its functions, but by their ideas of what ought to be the true balance between the several secretions."[4]

(The "statical chair" was a device invented by the Venetian physician Sanctorious for weighing people and determining the amount of "insensible perspiration" lost by the body, such as after certain foods were eaten.[5]) They may lack Burke's vivid metaphor, but leading voting-rights lawyers sometimes acknowledge that for reformers whose ultimate objective is policy change, focusing on procedures may not pay off much. Writing recently of successful challenges to vote dilution, Lani Guinier asked rhetorically "[h]ave we focused exclusively on the electoral process without any sustained exploration of the governance process?"[6] The two ought to be intimately connected, of course – not least in terms of turnout, which increases when voters believe their votes will have some effect on law-making. Indeed, political scientist Mark N. Franklin's comparison of turnout in twenty-nine countries demonstrates that when it comes to predicting increased rates of voting, the *salience* of an election – that is, its perceived importance and impact on policy – simply dwarfs the effects of more procedural variables like compulsory, Sunday, and postal voting rules.[7] And Franklin reaches the remarkable and provocative conclusion that the linkage between "election outcome" and

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[4] Edmund Burke, "Speech on the State of the Representation;" cited in Pitkin, *The Concept of Representation*, at 155.

[5] Pitkin, at 283.

[6] Lani Guinier, "Development of the Franchise: 1982 Voting Rights Amendments," in Karen McGill Arrington and William L. Taylor, eds., *Voting Rights in America: Continuing the Quest for Full Participation* (1992), at 107.

[7] See Mark N. Franklin, "Electoral Participation," in Lawrence LeDuc et al., eds., *Comparing Democracies* (1996), at 227. Two different models conclude that the effect of electoral salience is up to four times greater than the next strongest predictor – compulsory voting – and five or six times as great as allowing voters to cast ballots by mail and on Sunday. *Id.*

"policy outputs" in the U.S. is so uniquely tenuous that he subsequently analyzes the same data with the U.S. removed.[8] Even a procedurally "perfect" election, then, might not by itself move American government significantly closer to the democratic ideal, particularly given deep problems in turnout levels across socioeconomic groups, dissatisfaction with the major parties, and low levels of voter information.

This caveat aside, the local dimension of suffrage has been a crucial part of U.S. voting history and remains central to the exercise of popular sovereignty and the American story of inclusion and exclusion in citizenship practices. Certainly, local variation in American voting continues to interest journalists, advocates, and the public. In July of 2004, the National Museum of American History opened an exhibit titled "The Machinery of Democracy," explaining that "voting methods in the United States . . . are as varied as the individual states and their local election districts." How and by whom votes are counted, the curators commented, "are issues as important as who votes."[9] The *Washington Post* recently ran an intriguing story on voting by elderly people with dementia and other degenerative brain illnesses; because there is virtually no case law covering voting by non-institutionalized people with such illnesses, "poll workers and nursing home operators are deciding which patients are competent to vote."[10] And an investigation by the *Kansas City Star* found that lacking good voter rolls, county officials

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[8] Switzerland also won this dubious honor. *Id.*, at 223-224. As Franklin explains, "[i]n these two countries, public policy outputs evidently rest on many imponderables apart from the outcome of legislative elections, reducing the stakes of such elections (and hence the benefits of voting) compared to what they would be where the linkage was tighter." *Id.* at 224.

[9] See <http://www.americanhistory.si.edu/vote/index.html> (accessed Sept. 14, 2004; see also <http://www.americanhistory.si.edu/vote/patchwork.html>, where the exhibit describes and illustrates the "patchwork" of American voting practices. An interactive map allows viewers to check how their county votes.

[10] Shankar Vedantam, "Dementia and the Voter," *Washington Post*, Sept. 14, 2004, p. A1.

have mistakenly allowed hundreds of Missouri residents to vote more than once in different counties in recent years.[11] Some of those contacted by the paper's reporters – who tracked down the repeaters' names in county poll books – ruefully acknowledged their fraudulent intentions, but others claimed to have voted twice accidentally, and a few even defended the practice.[12] These stories, like many others, treat local variation as a national headache.

Throughout this dissertation, I have tried to counter what sometimes seems a reflexive distrust of things local, emphasizing the historically-grounded, constitutive, and potentially redemptive elements of the U.S.'s hyper-federalized suffrage system. Of course, nothing is gained by being Panglossian about serious inconsistencies and flaws: we should have better voter databases in order to prevent double voting, and states should try to clarify their policies on voting by those with illnesses that seriously limit mental function. (Still, given the enormous difficulty of drafting and enforcing such a policy, a system in which local poll workers enforce the rules while erring heavily on the side of inclusion may well beat any other option.[13]) While error-prone voting machines should obviously be eliminated, the fact that different localities use different machinery is not in itself a bad thing. The implementation of HAVA will go a long way toward fixing many problems.[14]

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[11] See Greg Reeves, *On Person, One Vote? Not Always*, Kansas City Star, Sep. 5, 2004, p.1. The problem, Reeves wrote, is that "[t]housands of people who have moved are registered to vote in two places, and a hodgepodge of databases makes it difficult to track them down and remove them."

[12] *Id.* "I own property and pay taxes in both places. I feel I have the right," said Leslie McIntosh, who voted in Kansas City, Kansas, as well as Kansas City, Missouri.

[13] Many states have laws on the books terminating the voting rights of people whose mental illness places them under the legal care of a guardian, the *Post* reports, but "those laws are often arcane – and unevenly enforced." See Vedantam, "Dementia and the Voter."

As I have explained above, my historical survey of American suffrage practices suggests that the space in which citizenship operates in U.S. elections has always been local space.[15] Nineteenth- and twentieth-century statutes and judicial opinions have greatly reduced the amount of legal room in which counties and cities work, but physical places (schools, firehouses, churches, town halls) and locally-defined practices remain crucial to the character of American voting rights and the constitution of American popular sovereignty. Lawmakers and reformers today should try hard to sustain this local dimension of suffrage, particularly where it involves practices which draw voters out into their communities. For example, weekend or holiday elections might not boost overall turnout (some would rather travel than vote), but would be worth doing simply to improve the experience of participation by increasing the number of polling-place workers and giving voters more time – which should decrease lost-vote percentages and increase voters' sense of efficacy. Absentee balloting is here to stay, of course, but in my view little would be gained and much lost by measures such as voting on-line and by phone, which further distance voters from each other. And of course, to focus on possible state and national reforms alone would miss the point: local officials themselves should take advantage of their influential positions, doing all they can to recruit both voters and polling-place volunteers and to enhance the voting experience. We may not be able to bring back the barrels of rum toddy that politicians of George Washington's generation used to liven up election day, but when Americans vote together in their

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[14] In Missouri, officials asked about double voting looked forward to HAVA implementation, which they noted would link the state elections office with the Departments of Revenue, Health, and Corrections, as well as "all 116 local election jurisdictions." Reeves, *id.*

[15] I paraphrase Crenson and Ginsberg here; they wrote of how centralization and bureaucracy have reduced "the space in which citizenship can operate." See *Downsizing Democracy*, at 45-46.

communities, they are best able to feel the celebratory and communal nature of the national civic ritual.

APPENDIX

SURVEY OF STATE CRIMINAL DISENFRANCHISEMENT POLICIES AND PRACTICES, SPRING 2004

Please respond in as much detail as you can, either on this sheet or separately. If your office does not know the answer to any question, or the answer is "not applicable" for some reason, please simply indicate that fact. You are invited to attach additional materials, including state publications or directions to documents published on the web.

Thank you.

I. Disqualification.

As you know, state laws differ. In some states, virtually no one convicted of crime forfeits voting rights, or only those who break election law do; others disqualify only those convicted of listed offenses, those who've committed "infamous" crimes, or those revealing "moral turpitude;" others disqualify those convicted of crimes defined as felonies.

1. In your state, *what person or office formally determines* that an individual is disqualified from voting because of a criminal conviction?

2. *How* is that determination made?

3. Is the fact of a person's ineligibility *communicated* to state, county, and municipal elections officials? If so, *how* and *when* does this occur?

II. Restoration.

Again, state laws differ as to how and when people convicted of crime regain eligibility to vote.

1. What *person or office formally determines* that a disqualified person's eligibility to vote has been *restored*?

2. In the *absence* of some action to inquire about eligibility by a formerly-disqualified person, does *any state or local official communicate* with that person to explain the restoration process, *or* to inform them that they have been restored to eligibility? Or must the individual in question initiate the process?

3. *In practice*, are eligibility determinations made at the *state* level, or do *county, city, or town* elections officials sometimes determine whether a formerly-disqualified voter is now eligible?

4. *What conditions must be met* in order for a disqualified voter to become eligible? For example, are there particular *procedures*, or particular kinds of *proof*, that a formerly-disqualified person must obtain or provide in order to have eligibility restored?

5. *How* do the appropriate state, county, or municipal officials *determine* whether those conditions have been met?

III. Recent or future changes.

1. Have there been *recent changes* in criminal disfranchisement law or policy in your state, either through constitutional, statutory, regulatory, or other means?

2. Do you *anticipate* changes in the near future – again, either as the result of state or federal law or administrative decisions?

Again, thank you for your time. Should you have questions, please contact me via e-mail (aewald@polsci.umass.edu) or phone (413-528-8482). Please return, either in enclosed envelope or separately, to:

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