THE CONTESTED RIGHT TO VOTE

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THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES. By *Alexander Keyssar.* New York: Basic Books. 2000. Pp. xxiv, 467. $30.

I. INTRODUCTION

For those who believe the United States is a representative democracy with a government elected by the people, the events of late 2000 must have been more than a little disconcerting. In the election for our most important public office — our only truly national office[1] — the candidate who received the most popular votes was declared the loser while his second place opponent, who had received some 540,000 fewer votes, was the winner.[2] This result turned on the outcome in Florida, where approximately 150,000 ballots cast were found not to contain valid votes. Further, due to flaws in ballot design, thousands of other Florida ballots almost certainly failed to reflect the intentions of the voters who cast them. The number of uncounted ballots and votes arguably misrepresented by the butterfly ballot was far greater than the difference in votes between the first-place and second-place presidential candidates in the state. Studies later found that between four and six million votes were lost nationwide in the 2000 election, with 1.5 to 2 million votes lost due to faulty voting equipment and confusing ballots. Several states had higher rates of spoiled presidential ballots than Florida.[3]

The 2000 election also generated two Supreme Court decisions with problematic implications for the right to vote in presidential elections. In *Bush v. Palm Beach County Canvassing Board*,[4] a unanimous

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1. Anderson v. Celebrezze, 460 U.S. 780, 795 (1983) ("[T]he President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation.").

2. The final results for the 2000 presidential election gave Al Gore 50,999,897 votes, or 48.38% of the total and George W. Bush 50,456,002, or 47.87%. Gore's margin was 543,895. *See* http://fecweb1.fec.gov/pubrec/2000presgeresults.htm (last visited Jan. 30, 2002).

3. REPORT OF THE CALTECH/MIT VOTING TECHNOLOGY PROJECT, VOTING: WHAT IS, WHAT COULD BE 7-9, 17 (2001) [hereinafter CALTECH/MIT STUDY].

4. 531 U.S. 70 (2000).

Court indicated that the Florida Supreme Court lacked authority to protect the rights of voters by extending the period for conducting manual recounts of disputed presidential ballots.[5] *Bush v. Gore*[6] flatly declared that "[t]he individual citizen has no federal constitutional right to vote in presidential elections." Rather, "the state legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself"[7] — which, indeed, had been the plan of Florida's Republican legislature if the recount ordered by the state supreme court had resulted in a victory for Vice-President Gore.[8] *Bush v. Gore* held that the Florida Supreme Court's effort to require a statewide manual recount of the undervote ballots[9] — that is, those ballots cast by voters that the ballot-counting machinery determined contained no vote — was unconstitutional.

Yet, *Bush v. Gore* may have also ushered in a dramatic extension of federal constitutional protection of the right to vote when the Court held that the Equal Protection Clause of the Fourteenth Amendment applies to the mechanics of election administration — a subject traditionally left to the states, and often delegated by the states to local governments. The Court found that the Florida recount order was constitutionally flawed because it failed to address the differences in standards used by local election officials in evaluating similarly marked ballots.[10]

Neither the dismissal of the presidential popular vote and Florida's uncounted voters, nor the new federal constitutional review of local election administration — nor the combination of the two — would come as a surprise to a reader of Alexander Keyssar's[11] magisterial history of the right to vote in the United States. Published before the 2000 election, *The Right to Vote*'s major themes are sharply reflected in the 2000 election's legal issues and their judicial resolution.

Keyssar's central point, captured in his subtitle, is the deeply "contested" nature of the vote in the United States over more than two centuries. Keyssar directly challenges the "Whig interpretation"[12]

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5. *Id.* at 77.

6. 531 U.S. 98 (2000).

7. *Id.* at 104.

8. *See, e.g.*, ABNER S. GREENE, UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY 163-67 (2001).

9. *See* Gore v. Harris, 772 So. 2d 1243 (Fla. 2000).

10. Bush v. Gore, 531 U.S. at 105-09.

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12. P. xvii. The "Whig interpretation" of the expansion of the right to vote in America has been previously flagged and challenged. *See* Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 336-37 (1989). The phrase "Whig interpretation" comes from Herbert Butterfield's critique of those histories of England which treated English history as consisting of gradual but inevitable reform and progress. *See* HERBERT BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY (1951). A leading

of the history of the right to vote, with its "triumphalist presumption" (pp. xvii, 68-70) of a steady, inexorable, "unidirectional" (p. xviii) enlargement of the franchise. Instead, Keyssar demonstrates that the history of the suffrage has been marked by both forward and backward movement. Efforts to enlarge the polity and include previously excluded groups have been countered by doubts about democracy, resistance to suffrage expansion, and adoption of measures reducing the opportunity to vote. In the 1960s, however, a corner was apparently turned, and today nearly all adult citizens are entitled to vote. Even so, the earlier history continues to leave its mark on our political process.

The 2000 election and *Bush v. Gore* nicely embody our conflicted heritage: the eighteenth century provisions that vest selection of the president in an Electoral College chosen according to rules set by state legislatures; the emergence of the presidential popular vote, along with administrative practices that often operate to impede the ability to vote; and the late twentieth century effort of the Supreme Court to promote the equal treatment of voters. The public debate over the recount also brought forward to the present some of the past conflicts over the scope of the franchise — with the rhetoric of "make every vote count" echoing earlier democratic calls to widen the vote, and the disdain manifested by some commentators and judges[13] for voters who failed to follow instructions on how to punch out their chads or were bewildered by the butterfly ballot recalling previous public assertions about the unfitness of some groups for the ballot.

Although the central thrust of Keyssar's study is his persuasive challenge to the assumption of a progressive unfolding of voting rights, his book ends on a relatively upbeat note, emphasizing the broad availability of the franchise today. His concern is to show how hard it was and how "very long" (p. 316) it took to get to this point in our history. Examining this history will be the focus of Part II of this Review.

Yet, although Keyssar's book is titled *The Right to Vote*, both his history and current legal doctrine raise questions about whether and to what extent voting is a right at all. Initially, as Keyssar demonstrates, voting was not seen as a right, but as a privilege to be provided to those thought best qualified to participate in governing the community. Even as the franchise was expanded, the vote continued to retain something of its foundation in government-bestowed privilege. Today, the vote comes closer to being a right of all members of the political community. Yet, as I will suggest in Part III, voting's status as a right is

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"Whig" treatment of the right to vote in the United States is CHILTON WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760-1860 (1960).

13. *See, e.g.*, Bush v. Gore, 531 U.S. at 119 (Rehnquist, C.J., concurring) ("No reasonable person would call it . . . a 'rejection of legal votes' . . . when electronic or electromagnetic equipment . . . fails to count those ballots that are not marked in the manner that . . . voting instructions explicitly and prominently specify.").

still contested. Some groups remain unenfranchised. There is no right to have decisions made by popular vote. Most importantly, even where voting is provided, a wide variety of political considerations and institutions — federalism, legislative districting, ballot access rules, the costs of administration, campaign finance law — operate to constrain voters' choices. Government still gets to shape the role of voting in the political system even if it has less control over who gets to vote. The significance of popular voting in our political process remains a matter of politics as much as it is a matter of rights.

II. THE EVOLUTION OF THE FRANCHISE

Keyssar divides the history of voting in America into four long periods: (i) the colonial era, when the most important qualification for voting was ownership of property; (ii) the first democratic ascendancy, running from the end of the eighteenth century to the eve of the Civil War, when property qualifications were largely eliminated and most adult white male citizens (and some noncitizens) were enfranchised; (iii) a "slow Thermidor" between the Civil War and the Second World War when various restrictions and procedures rolled back some of the gains of the antebellum period and to a considerable degree offset the suffrage expansions produced by the Fifteenth and Nineteenth Amendments, and (iv) a resurgence of democratic commitments after World War II, which led to a broader suffrage and significant federal legislative and judicial protection of the vote.

A. *Before the Revolution*

"[T]he lynchpin of both colonial and British suffrage regulations was the restriction of voting to adult men who owned property" (p. 5). Voting was not a natural right but a state-granted privilege — as the term "franchise" suggests[14] — and that privilege was extended only to those believed capable of providing sound governance for the polity. For people of that era, only property ownership could assure the capacity of the voter to decide questions of community governance. Property supplied independence; those without property were presumed to be economically dependent on and subservient to others. As a result, they would be subject to political manipulation and control by their economic patrons and social betters.[15] The propertyless, with the rest of the community, would be better off with virtual representation

14. As Keyssar explains, "in early English usage, the word *franchise* referred to a privilege, immunity or freedom that a state could grant, while the term *suffrage* alluded to intercessory prayers." P. 9.

15. *See* Steinfeld, *supra* note 12, at 342-48 (describing contemporary views concerning economic, social and political relationships of dependence and governance).

by the propertied. As Keyssar slyly notes, the concern that the propertyless lacked "will" and would simply be tools for a wealthy elite was sometimes joined with the opposite fear that the propertyless might have too much will and use their votes to advance their own interests (p. 11). But the dominant focus was on the connection between property and the capacity for independent judgment. The property test and other colonial era franchise rules[16] limited the vote to about sixty percent of adult white males, albeit with considerable variation from colony to colony, within colonies, and over time.

B. *The First Democratic Ascendancy*

Over the first half of the nineteenth century, property requirements were progressively relaxed and ultimately abolished. While many of the states initially replaced property ownership with a tax-payment requirement, by 1855 all but six states had dropped their insistence that voters pay taxes, and in several of the states that retained the tax-payment test the amount of tax required was quite minimal. As a result, the vast majority of the states enfranchised most of their adult white male residents.

The Revolution and its aftermath were critical to changing views about the nature of the suffrage.

> [T]he political and military trauma of breaking with a sovereign power, fighting a war, and creating a new state — served to crack the ideological framework that had upheld and justified a limited suffrage. The concept of virtual representation was undermined; the notion that a legitimate government required the 'consent' of the governed became a staple of political thought; and a new, contagious language of rights and equality was widely heard. (pp. 24-25)

Property ownership requirements came to be seen as inconsistent with the claims of nonowners — Revolutionary War veterans, militiamen, propertyless taxpayers, and others — who were subject to government regulation, and, thus, had a stake in the political process.

The growing sense that voting was the means of self-government and not just a privilege of propertied independence combined with

16. These requirements included religion, race, gender, residency, and citizenship, although the rules varied considerably across the colonies and were not always spelled out in law. On occasion, property ownership trumped other concerns, so that nonresident property owners, or property-owning blacks and women could vote in some colonies at least for some elections. P. 6. On the other hand, religious, racial or gender requirements tended to define the political community and resulted in the disfranchisement of some property owners. P. 6. Some of these exclusions might also be connected to the notion of independence. Thus, most colonies barred women from voting "because they were thought to be dependent on adult men." P. 6.

Voting rules might also vary within a colony, with qualifications to vote in local elections, especially in the larger cities, differing from qualifications to vote for colonial or provincial officers. P. 6.

economic and social change. With the onset of urbanization and industrialization, more men earned a living without owning property. Even on the farm, more men owned smaller holdings or worked the land as lessees or tenant farmers, not freeholders. As a result, a growing portion of adult white men were unable to meet property ownership requirements. At the dawn of the republic, property tests might have been able to coexist with emerging political egalitarian beliefs because Americans visualized their nation as one in which property, and, therefore, the suffrage, was broadly distributed. By the mid-nineteenth century, the only way to provide the broad suffrage the democratic ideology of the times required to an increasingly propertyless population was by abolishing property-ownership requirements.

"Democracy ascendant" (p. 26) had other consequences. Religious tests were dropped, some states liberalized their residency requirements, and a handful of states enfranchised resident aliens who had "declared" an intent to seek citizenship.[17]

Yet, voting did not become a right, either descriptively or normatively, even for adult white men. A dozen states "preserved a link between economic status and enfranchisement" (p. 61) by denying the right to vote to paupers. By receiving public relief, paupers "had surrendered legal control of their own time and labor" (p. 62) and were legally dependent. The pauperage exclusion reflected the continuing, albeit diminished, power of the pre-Revolutionary independence model of voting. In many states, the franchise was also withheld from men who had committed "infamous crimes."[18] Voting, thus, remained to some extent a privilege of the morally qualified and the economically independent, although independence was defined in terms of the absence of dependency on the state rather than the ownership of capital. Voting was also largely a privilege of white males. Racial exclusions hardened, with all but five states limiting the franchise to whites. And in 1807, New Jersey, the one state that had permitted women to vote, limited the franchise to men. With the demise of property tests, race and gender had become more salient for voting.

Moreover, suffrage was a state matter, not an aspect of national citizenship. The federal Constitution largely sidestepped the question of the vote. Only one branch of the federal government — the House of Representatives — was popularly elected. Rather than set federal voting criteria, the Constitution provided that qualifications for voting for members of the House of Representatives would vary from state to state according to each state's qualifications for voting for the "most

17. *See* pp. 32-33. Between 1848 and the start of the Civil War, six states in the Upper Midwest and the West, seeking to encourage new settlement as well as to acknowledge the importance of resident aliens to their communities, adopted "declarant" alien suffrage.

18. By the eve of the Civil War, two dozen states disfranchised men who had committed serious crimes, although "such provisions were neither universal nor uniform." P. 63.

numerous Branch of the State Legislature."[19] The members of the Senate were chosen by the state legislatures and not by the voters.[20] The President and Vice-President were elected by an Electoral College consisting of electors appointed by each state "in such manner as the legislature thereof shall direct."[21] Voting was in no sense a federal constitutional right.

Keyssar argues that the expansion of the vote in this period was due, in part, to the failure of contemporary leaders to foresee the future development of a large industrial working class. Although industrialization, urbanization, and immigration had begun, the social consequences of these developments were not yet "clearly or widely visible" (p. 69). There were artisans, mechanics, and shopkeepers, but no large urban proletariat. Although agriculture witnessed a growth in the percentage of smallholders and tenant farmers, there was no European-style landless peasantry — or rather there was one, but it was black, largely enslaved, and, barred by racial exclusions even if economic barriers to voting were lifted. The elimination of economic tests was intended to enfranchise the lower middle class, craft workers, and yeoman farmers, not the industrial working class or the peasantry; according to Keyssar, the suffrage would not have been so widened if there had been a large industrial working class or free peasantry.[22]

In correcting for the traditional assumption of an innate American commitment to democracy, Keyssar may not give sufficient credit to the decisions by thousands of officeholders, convention delegates, and referendum voters in many states to voluntarily extend the franchise from themselves to others not entitled to vote. Without the prodding of Congress, the President, the courts, or, for the most part, massive public protests[23] — the factors that drove the franchise extensions of

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19. U.S. CONST. art. I, § 2, cl. 1.

20. U.S. CONST. art. I, § 3, cl. 1. One hundred and twenty-five years later, the direct election of Senators followed the same pattern. Instead of adopting a federal voting rule, the Seventeenth Amendment provided that the qualifications for voting in Senate elections are the same as those "requisite for the most numerous branch of the State legislatures."

21. U.S. CONST. art. II, § 1, cl. 2.

22. *See* pp. 67-70.

23. The most dramatic exception to the general pattern of peaceful expansion of the suffrage was the so-called Dorr War in Rhode Island. Pp. 71-76. Rhode Island continued to be governed by its colonial charter, which limited the vote to "freemen" who owned real estate valued at $134 or rented property for at least $7, into the 1840s. In the eighteenth century, three-quarters of the adult males met the requirements, but due to rapid urbanization and industrialization by the 1830s substantially less than half the adult white men could vote. Many of those excluded were factory workers and immigrants, including many Irish Catholics. Propertied opposition repeatedly blocked charter reform efforts. "The conflict came to a boiling point in 1841" when mechanics and workingmen formed a new, militant organization, convened their own People's Convention, and there drafted a constitution providing the vote to all adult white men who met a one-year residency requirement. P. 72. In January 1842 a clear majority of Rhode Island adult white males voted to ratify the new constitution. The charter government, however, refused to yield and passed laws imposing

the post-World War II period — elected representatives repeatedly proposed to extend the franchise to those who had not elected them, with those actions often confirmed by already-enfranchised voters. By 1855 voting was more than a privilege of the propertied or associated with a special capacity for political decisionmaking. Instead, voting was to a considerable degree an attribute of membership in the political community. The pauperage, felony, race, and gender restrictions — as well as the less controversial rules requiring residency, and, in most states, citizenship — were as much definitions of the political community as qualifications for voting.

Still, Keyssar supports his more jaundiced view by pointing out that the first efforts to curtail the franchise began around 1855 in just those states where industrialization and immigration were most politically salient.[24] His critical analysis gains further traction from the history of the suffrage after the Civil War.

C. *"Slow Thermidor": From the Civil War to World War II*

The heart of Keyssar's study is the "slow Thermidor" (p. 80) between the Civil War and World War II when faith in democracy was challenged by doubts about the ability of ordinary people to exercise the vote intelligently, and class, ethnic, and racist prejudices gave rise to new restrictions on the franchise.

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harsh penalties on those who participated in elections and meetings under the People's Constitution. For several weeks in 1842, the "People's" government and the charter government contended for power. On May 18, the People's governor, Thomas Dorr, and a small group of armed followers "attempted to exercise their sovereign power by assembling in front of the state arsenal and demanding that it be turned over to them. When their demands were refused, they attacked the arsenal, but both of their cannons misfired, and the Dorrites were then beaten back .... Over the course of the next few months, radical suffrage advocates attempted a few other military escapades (resulting in several deaths), with similar disheartening and tragicomic results." P. 74. The charter government, backed by federal troops, remained in control. But chastened by events, it adopted new franchise requirements permitting all native-born adult males (including blacks) to vote if they met a minimal taxpaying requirement. Foreign-born naturalized citizens, however, were obliged to meet a property test and a lengthy residency requirement. In addition, only property owners were allowed to vote in Providence municipal elections.

24. Connecticut in 1855 and Massachusetts in 1857 became the first states to adopt literacy tests. Massachusetts confirmed the anti-immigration intent of the test by also adopting the nation's first grandfather clause — an exclusion from the test for all citizens who had previously voted. P. 86. In 1859, Massachusetts passed a measure requiring newly naturalized citizens to wait two years until they could vote. This was subsequently repealed.

Keyssar also cites Rhode Island's Dorr War as supporting his thesis that the franchise was extended to the propertyless only because there was no industrial working class. As he notes, Rhode Island had the most urbanized and industrialized workforce in the United States, and one of the highest rates of immigration. In Rhode Island, white male suffrage would have enfranchised the working class, not the middle class. Consequently, Rhode Island's landowners resisted suffrage expansion more intensely than did their counterparts in any other state. *See* p. 71.

The right of black Americans to vote was a central issue in this period. Blacks demanded the ballot as a means of protection against hostile white Southerners, as an expression of their new status as free citizens, and as an acknowledgment of their loyalty and of the sacrifices black soldiers had made for the Union cause. However, racism, sometimes thinly veiled by references to the lack of political experience and education of the formerly enslaved, initially led most states to reject efforts to repeal racial tests for voting.[25] This led to the first federal involvement in state suffrage questions. Initially, Congress took "an oblique approach." The Fourteenth Amendment provided that a state that denies the vote to its adult male citizens "except for participation in rebellion, or other crime" would have its representation in Congress reduced. This was a "clear constitutional frown at racial discrimination" (pp. 90-91), and one likely to affect the South far more than the North due to the concentration of blacks in the Southern states.[26] But by not flatly barring discrimination, the Fourteenth Amendment also "tacitly recognized the right of individual states to erect racial barriers."[27]

Intense Southern hostility to freed blacks, including violent opposition to black efforts to vote,[28] drove the Republicans in Congress to take a more radical approach to protect black voting rights. The Reconstruction Act of 1867 authorized federal military rule for the region and made re-admission of the secessionist states contingent on their ratification of the Fourteenth Amendment and adoption of state constitutions that permitted blacks to vote on the same terms as whites. Resistance to black enfranchisement remained powerful, however. Faced with Democratic electoral gains in the North and fearing that "control of the national government might be slipping from their grasp" (pp. 93-94), Congressional Republicans moved to entrench the

25. Between 1863 and 1870, black enfranchisement was defeated in fifteen Northern states and territories, passing in just two Northern states with small black populations. *See* p. 89.

26. The representation clause was also a response to the de facto elimination of the notorious three-fifths clause by the abolition of slavery. Formerly enslaved blacks would now be fully counted in determining the allocation of seats in the House of Representatives and votes in the Electoral College. This would sharply increase the representation of the South. Unless steps were taken to enfranchise blacks, one perverse effect of the Civil War would be to strengthen the national political power of the unrepentant whites in the former Confederacy.

27. P. 91. Moreover, by its express reference to adult "male inhabitants" in setting the baseline for full enfranchisement, the Amendment implicitly confirmed the disfranchisement of women. In addition, in the twentieth century, the Supreme Court interpreted the "rebellion or other crime" proviso as a constitutional justification for the disfranchisement of convicted felons. *See* Richardson v. Ramirez, 418 U.S. 24 (1974). For further discussion of the disfranchisement of felons, see *infra* Section III.A.

28. In New Orleans, "one of the most flagrant incidents of violence" occurred when advocates of black suffrage attempted to hold a constitutional convention. Thirty-four blacks and four whites were killed, with scores of others wounded. P. 91.

voting rights of Southern blacks — and to add black voters to the Republican base in both the North and the South — with an additional constitutional amendment. Radical Republicans pushed for a broad affirmation of the right to vote. Indeed, the Senate passed Senator Wilson's proposal to ban any denial of the vote to a citizen based on "race, color, nativity, property, education, or creed" (p. 91). Ultimately, however, Congress adopted a much more limited measure banning discrimination based only on race, color, or previous condition of servitude.

Senator Wilson and his allies had argued that an amendment phrased in terms of race and slavery alone would be circumvented. Their concerns were ultimately vindicated by the course of events in the South. Congress initially responded vigorously to the "politicized vigilante violence" (p. 106) against black candidates and voters and their white Republican allies by making interference with voting a federal offense, punishable in federal court, and authorizing the President to deploy the army to defend the electoral process. As part of the settlement of the disputed election of 1876, however, federal troops were withdrawn from the South. In 1878, Democrats won control of Congress and further reduced the federal role in protecting black and white Republican voting rights against white Democratic "Redeemers." The next dozen years were a "period of limbo and contestation" (p. 108), with Southern Democrats using gerrymandering, complicated ballot configurations, administrative devices, and occasional violence and fraudulent vote counts to curtail black voting, but blacks, in alliance with white Republicans and some groups of poor and upcountry white Democrats, continued to contest elections, vote, and win office.

The beginning of the end came in 1889-91 when, although the Republicans were back in power, the federal government failed to pass voting rights enforcement legislation. This "signaled to the South that the federal government was not prepared to act energetically to guarantee the voting rights of blacks" (p. 110). When Democrats subsequently regained control of the federal government, "they amplified that signal by repealing the enforcement acts of the 1870s" (p. 111). The Southern states then moved systematically to disfranchise black voters. A wave of constitutional conventions resulted in poll taxes, cumulative poll taxes (requiring that back taxes as well as current taxes be paid as a condition to voting), literacy tests, lengthy residence requirements, elaborate registration systems, and disfranchisement on conviction of a host of petty crimes.

These provisions had the potential to exclude poor whites as well as blacks. To protect whites, "[m]any of the disfranchising laws were designed expressly to be administered in a discriminatory fashion .... 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" (p. 112).

Literacy tests permitted officials to determine whether the potential voter's "understanding" of the tested reading was adequate. Some states relied on grandfather clauses, which exempted men from the literacy, tax or other requirements if they had performed military service or if they or their ancestors had been entitled to vote before 1866. When the Supreme Court held the grandfather clause to be a palpable violation of the Fifteenth Amendment,[29] many Southern states came to rely on the whites-only Democratic Party as a means of effectively excluding blacks from politics.[30] Moreover, many Southern Democratic leaders were happy to exclude poor whites as well as blacks. "[T]he late-nineteenth-century effort to transform the South's electorate was solidly grounded in class concerns as well as racial antagonisms" (p. 114). The poll tax, the literacy tests and the other new measures could be used to produce a more "qualified" and more conservative electorate, and to weaken the political power of white Populists, small farmers, industrial workers, Republicans and other groups.[31] These measures, thus, reflected and shaped political struggles among whites, as well as the conflict between whites and blacks. Both black and white voting were sharply reduced. Immediate post-Reconstruction turnout levels of 60 to 85 percent dropped to 50 percent for whites and plummeted to single digits for blacks (p. 115).

A similar, albeit less drastic, pattern arose in the North in response to the emergence of a substantial urban industrial working class, often composed of immigrants and their children. Many old-stock Americans began to voice deep concerns about the future of American gov-

29. *See* Guinn v. United States, 238 U.S. 347 (1915); *see also* Lane v. Wilson, 307 U.S. 268 (1939). The invalidation of the grandfather clause was an unusual action by the Supreme Court to vindicate the antidiscrimination principle in voting. More commonly the Court stayed out, accepting that nonracial tests like the poll tax did not implicate the Fifteenth Amendment, and treating local restrictions on voting as essentially beyond the Court's purview. *See, e.g.*, Giles v. Harris, 189 U.S. 475 (1903); *see also* Richard H. Pildes, *Democracy, Anti-Democracy and the Canon*, 17 CONST. COMMENT. 295 (2000) (discussing the significance of *Giles* in early twentieth century voting rights jurisprudence).

30. The Supreme Court initially found that federal constitutional and statutory protection of elections or the vote applied only to general elections and not to party primaries, which were seen as "in no sense elections for an office, but merely methods by which party adherents agree upon candidates." Newberry v. United States, 256 U.S. 232, 250 (1921). The Court did find that a state law expressly disqualifying nonwhites from voting in party primaries violated the Equal Protection Clause of the Fourteenth Amendment, Nixon v. Herndon, 273 U.S. 536 (1927), but a party's decision, by party resolution, to restrict party membership and, thus, qualification to vote in party primaries, to whites, did not violate either the Fourteenth or the Fifteenth Amendment. Grovey v. Townsend, 295 U.S. 45 (1935). Only in 1944 did the Court find that the constitutional ban on racial discrimination applies to party restrictions on primary voting. Smith v. Allwright, 321 U.S. 649 (1944).

31. Many of these whites strongly resisted the disfranchising legislation. Pp. 112-13. On the other hand, many poor and lower-middle-class whites supported these suffrage exclusions. *See* p. 114.

ernment if industrial workers, particularly immigrants — seen as poor, ignorant, indifferent to American traditions, supportive of corrupt ethnic-based party machines, or committed to alien and radical beliefs — were able to use their votes to shape the political process. New franchise restrictions were justified as necessary to "purify" the electorate (p. 127) and protect against fraud.

Avoiding a direct challenge to the elimination of property tax requirements for state elections,[32] many states adopted, or authorized local adoption, of tax-payment requirements in local elections, particularly bond issues, and in some special districts.[33] More states adopted pauperage exclusions barring recipients of public aid or residents of poorhouses and charitable institutions from voting,[34] lengthened durational residency requirements (which particularly burdened mobile manual workers),[35] and, like their Southern counterparts, expanded felon disfranchisement laws.[36] The tide also turned against alien suffrage. Within a few years after World War I citizenship was everywhere a requirement for voting. Indeed, several states made it more difficult for naturalized citizens to vote, either by requiring them to present their naturalization papers to local election officials or by establishing waiting periods after naturalization before the new citizen could vote.[37]

As in the South, a significant new substantive restriction on the franchise was the literacy test. Like the property requirement of the colonial era, the literacy test could be seen as improving the quality of electoral decisionmaking by providing for educated voters and, with tests in English, increasing the likelihood voters would be familiar with American values and institutions. Unlike the property test, the literacy test was ostensibly class-neutral, although the literacy exclusion in fact tended to operate on both class and ethnic lines. For that very reason, literacy tests were strongly opposed by low-income people, the foreign-born, and the parties representing them. Although literacy tests were widespread, they were far from universal. Still, by the mid-1920s, thirteen northern and western states — which tended to be states with

32. Indeed, several states with residual property or tax requirements from the pre-Civil War era abolished those restrictions. P. 130.

33. *See* pp. 130-34.

34. *See* pp. 134-36. The pauperage exclusion could have real bite in times of class conflict. In one notorious case, striking textile workers in New Bedford, Massachusetts who "sought public relief to help tide them over months without income," were threatened with disqualification from voting. P. 135.

35. *See* pp. 146-51.

36. *See* pp. 162-63.

37. *See* p. 138.

large immigrant populations and strong Republican parties[38] — as well as eight southern states, had adopted literacy tests.

At least as important as the substantive criteria for voting were new procedures. The late nineteenth century witnessed the rapid-fire adoption of two measures — the secret ballot and pre-election day registration — which made it more difficult for poorer, working class, foreign-born and uneducated people to vote. Both the secret ballot and registration systems were intended to prevent fraud and corruption. But, as Keyssar notes, the secret ballot also operated as a de facto literacy test for illiterate voters who now had to vote on their own.[39] Registration requirements particularly burdened working people who were often unable to get to the registration office during the limited days and hours when registration was permitted, and who then had to reregister if they changed residences, even if they moved only a short distance within the same city but to a different precinct. As in the South, voter registration laws were open to administrative discretion and abuse. Many registration laws "emerged from a convergence of partisan interest with sincere concern about electoral fraud" (p. 156), as conservative, rural-dominated state legislatures at times limited registration requirements to the large immigrant-dominated cities and adopted rules aimed at urban voters.[40] In many cities, voter turnout dropped, sometimes sharply, after registration systems were adopted.[41]

The rollback of the franchise did not proceed nearly as far in the North as it did in the South. A much more competitive party system, the partial incorporation of immigrant and working class voters into the political process, and a more fluid and heterogeneous social structure resulted in a milder pattern of exclusion than the "draconian, sweeping and violent" (p. 170) actions in the South. Nevertheless, both North and South engaged in "the legal contraction of the franchise"

38. *See* p. 145. New York, with the largest immigrant population in the nation, passed a constitutional requirement instituting a literacy test in 1921. "[P]rospective voters were obliged either to pass a stringent English-language reading and writing test administered by the Board of Regents or present evidence that they had at least an eighth-grade education in an approved school." P. 145. The test effectively reduced the voting rolls, as "roughly 15 percent of all those who took the English-language literacy test between 1923 and 1929 . . . [failed] and it seems safe to assume (as did contemporaries) that many more potential voters did not take the test because they thought they had little chance of passing." P. 146.

39. *See* pp. 142-43.

40. *See* pp. 156-57. Specific registration requirements — the length of the registration period, its proximity to the date of an election, the size of registration districts, whether registration was considered "permanent" or whether the voter had to register periodically even if he hadn't moved; the necessity of documentary evidence of eligibility — varied from state to state, within states, and over time. These rules were often shaped by partisan political concerns, and in turn affected the degree to which registration requirements were serious obstacles to voting. *See* pp. 156-57.

41. *See* pp. 158-59.

(p. 170). The principal exception to this pattern of retrenchment was the Nineteenth Amendment,[42] but even the enfranchisement of women was shaped by the anti-democratic impulse of the era. Although much of the resistance to women suffrage reflected concerns about the impact of women voting on family life — it might cause divisions between husbands and wives — and on women themselves — participation in the rough and tumble of political life would topple women from the pedestal on which men sought to place them[43] — opposition was also consistent with "the generally declining faith in democracy .... To some degree ... the resistance to enfranchising women was a resistance to enfranchising any new voters at all" (p. 194). Some suffragists sought to link up their cause to the class and ethnic biases of the era, arguing that votes for educated, middle class native-born white women would offset the votes of illiterate blacks and foreigners.[44] For a time many women's suffrage advocates supported literacy tests.[45] The alliance with conservative forces, however, did little to advance the vote for women. Rather, the drive for women suffrage gained significant political momentum only after it shifted to the left and linked up with the Progressives' social reform agenda and the interests of immigrants and labor.

In the end, like the propertyless after the Revolution, and blacks after the Civil War, women benefitted from a war. In 1918, President Wilson, citing the "sacrifice and suffering and toil" (p. 216) made by women for the American effort in World War I, came out strongly in favor of a federal suffrage amendment. Recognition of women's contributions to the war also proved critical to ratification. However, the provision of votes for women had little immediate impact on American politics, on thinking about the franchise, or on other voting rules.

D. *World War II and After: The Return to Democracy*

"The equilibrium in voting laws was decisively disrupted by World War II" (p. 244). The rise of totalitarianism abroad, and, especially, the racist ideology of our Nazi opponents, "spawned a popular embrace of democracy more vigorous than any that had occurred since the most optimistic moments of Reconstruction.... [T]he war against Germany and Japan (and then the cold war) led many Americans to renew their identification with democratic values" (p. 245). The tension between our democratic commitments and widespread disfran-

42. Another pro-democratic development, which Keyssar does not discuss, is the adoption of the Seventeenth Amendment, providing for the popular election of United States Senators.

43. *See* p. 191.

44. *See* pp. 190-91.

45. *See* pp. 199-200.

chisement, particularly of blacks, became a political issue. So, too, the massive mobilization of millions of adult men again raised the question of why those who were required to serve their country and risk loss of life were unable to vote. Black leaders and returning black war veterans "sought to make good on the nation's rhetorical promises" by seeking the vote.[46] "The rejections that these veterans often encountered — ranging from closed registration offices to grotesquely rigged literacy tests to violent beatings — attracted widespread national attention" (p. 250). The 1947 report of President Truman's Committee on Civil Rights found that the international interests of the United States in the Cold War were threatened by racial discrimination at home, and called for federal action to eliminate the poll tax and prevent racial discrimination in voting.

Although the President and Congress were slow to act — there would be no federal voting rights legislation for another decade — the Supreme Court struck the first significant blow by invalidating the white-only primary.[47] In the one-party South, the white primary had been a front line of defense against black political participation. The elimination of the white primary provided blacks with a greater incentive to register, and placed greater weight on — and gave greater exposure to — the literacy test, the poll tax, discriminatory registration procedures, and the intimidation of black registrants and voters. Black registration began to rise, as did black (and Northern white) pressure for federal intervention. In 1957, Congress passed the first federal civil rights law in more than eighty years, providing a legal basis for the Justice Department to participate in voting rights cases. The Civil Rights Act of 1957 and a second measure adopted in 1960 "had few teeth and little impact" (p. 260). However, by 1960 the popular campaign against voting (and other forms of) discrimination had become a mass movement, marked by sit-ins, freedom riders, marches, rallies, petitions, and widespread voter registration drives. The "growing militance of the black freedom movement" (p. 262) in turn spawned a massive, and often violent, Southern white resistance.

At the urging of President Lyndon Johnson, the federal government finally, and decisively, intervened with the Voting Rights Act of 1965, which suspended literacy and other tests; authorized the use of federal examiners to enroll voters; and, to preclude new discriminatory measures, required "covered jurisdictions" — defined by their prior use of now illegal tests plus low voter turnout — to obtain federal "preclearance" before changing their electoral rules and procedures. Subsequently amended in 1970, 1975, and 1982 — and broadened to provide, inter alia, new protections for language minorities,

46. *See* p. 250.

47. *See* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

and to address voting measures that were discriminatory in effect, not just in intent — the Voting Rights Act contributed to an immediate and substantial increase in black voting. This period also witnessed the ratification of two new constitutional amendments that expanded the franchise.[48] The Twenty-fourth Amendment prohibited the use of poll taxes in federal elections.[49] The Twenty-sixth Amendment lowered the voting age — which had been twenty-one since the colonial era — to eighteen. Like so many other expansions of the franchise, it too was a response to war — in this case, the unpopular Vietnam War, and the exposure of eighteen-year-olds to the draft.[50]

But the most significant development in constitutional law was not amendments to the constitutional text but the change in the Supreme Court's jurisprudence. Before the 1960s, the Court had consistently rejected the idea of a general constitutional right to vote. The point is best illustrated by the Court's 1875 decision in *Minor v. Happersett*,[51] denying a woman's claim, under the newly-ratified Fourteenth Amendment that, as a citizen of the United States and the state of Missouri, she was entitled to vote in federal and state elections. The Court agreed she was a citizen but dismissed the idea that voting was a right of citizenship, finding that voting was a matter for state determination subject only to specific constitutional limitations, such as the Fifteenth Amendment. Although *Minor*'s holding concerning women was overturned by the Nineteenth Amendment, the Court adhered to *Minor's* approach to voting until the 1960s, upholding registration re-

48. The Twenty-third Amendment's provision for the District of Columbia to cast electoral votes in the presidential election ought to be counted in this tally as well. Interestingly, and consistent with the Constitution's general eighteenth century approach to the selection of the Electoral College, the amendment does not provide for a popular vote for the electors chosen by the District. Rather, the District's electors shall be appointed "in such manner as the Congress may direct." U.S. CONST. amend. XXIII, § 1.

49. The Twenty-fourth Amendment ultimately had little significance since two years after its ratification the Supreme Court, in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), held unconstitutional all poll taxes, in state as well as federal elections. *See infra* text accompanying note 56.

50. *See* pp. 277-81. The path to the eighteen-year-old vote was complex. Congress initially acted by statute, tacking the lowered voting age on to the 1970 amendments to the Voting Rights Act. The measure fragmented the Supreme Court, with four justices finding that Congress had authority under the Fourteenth Amendment to lower the voting age in both federal and state elections; four justices finding that Congress had no authority to set the voting age in any elections; and Justice Black finding that Congress had authority under Article I, Section 4 of the Constitution to lower the voting age for federal but not state elections. Justice Black's opinion became the judgment of the Court. *See* Oregon v. Mitchell, 400 U.S. 112 (1970). Faced with the prospect of different voting ages for different elections, Congress immediately passed a constitutional amendment lowering the voting age for all elections, and, in "the most rapid [process] in the history of the republic," the requisite thirty-eight states quickly ratified it. P. 281.

51. 88 U.S. (1 Wall.) 162 (1874).

quirements,[52] lengthy durational residency laws,[53] the poll tax,[54] and the literacy test.[55]

In the 1960s, the Court changed direction and held voting to be a fundamental right for the purposes of the Equal Protection Clause of the Fourteenth Amendment. Applying strict scrutiny, the Court invalidated the poll tax;[56] tax payment requirements for voting in municipal bond issues[57] and school board elections;[58] and durational residency requirements longer than fifty days.[59] The Court flatly barred property ownership and tax payment requirements,[60] and indicated it would look closely and suspiciously at tests justified in terms of improving the quality of electoral decision-making.[61] The Court also upheld Congress's authority to ban literacy tests nationwide.[62]

Notwithstanding the elimination of many restrictions on voting, many observers in the 1970s and 1980s noted that turnout remained low, and they blamed the voter registration system.[63] Voting rights activists sought reforms that would remove the need for the voter to trek to an inconvenient registration office, at a specified time during the work day, and to do so again whenever he or she moved.

To address these concerns, President Clinton signed the National Voter Registration Act ("NVRA") into law in 1993.[64] The federal voter registration law required states to offer, inter alia, registration by mail, "agency registration" — that is enrollment at a variety of public facilities, including welfare offices, libraries, and motor vehicle bu-

52. Mason v. Missouri, 179 U.S. 328 (1900). Like many early registration requirements, Missouri's requirement applied only to the state's larger cities such as St. Louis, Kansas City and St. Joseph.

53. Pope v. Williams, 193 U.S. 621 (1904).

54. Breedlove v. Suttles, 302 U.S. 277 (1937).

55. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

56. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

57. City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969).

58. Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969).

59. Burns v. Fortson, 410 U.S. 686 (1973); Marston v. Lewis, 410 U.S. 679 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972).

60. *Harper*, 383 U.S. at 666 ("Voter qualifications have no relation to wealth nor to paying . . . any . . . tax."). *Harper* also spelled the end of the pauperage exclusion. Within a few years these were either repealed or treated as dead letters. Pp. 271-72.

61. *See Dunn*, 405 U.S. at 354-60; *Kramer*, 395 U.S. at 631-33; Carrington v. Rash, 380 U.S. 89 (1965).

62. Oregon v. Mitchell, 400 U.S. 112, 131-34 (1970) (Black, J.); *id.* at 144-47 (Douglas, J., dissenting in part); *id.* at 216-17 (Harlan, J., dissenting in part); *id.* at 231-36 (Brennan, J., dissenting in part); *id.* at 282-84 (Stewart, J., dissenting in part).

63. *See, e.g.*, FRANCES FOX PIVEN & RICHARD CLOWARD, WHY AMERICANS DON'T VOTE (1989).

64. 42 U.S.C. § 1973gg (1994).

reaus — and "motor voter" registration, that is the attachment of registration forms to the application for a driver's license. Although the NVRA applies only to registration to vote in federal elections, the states chose to modify the rules for their own elections to avoid the cost and difficulty of maintaining separate federal and nonfederal registration systems. Within two years, the law resulted in a net addition of nine million new registrants, or about 20% of the unregistered — although there was no significant impact on voter turnout (pp. 314-15). In most states, voters are still required to register some time before election day as a precondition for voting, although a very small number of states have either eliminated registration requirements outright or permitted same day registration. But the NVRA was a "critical step in dismantling the multiple impediments" (p. 315) previously adopted. It also constituted yet another move towards the nationalization of voting requirements.

III. VOTING AS A RIGHT?

Keyssar concludes his study on the "partially happy" note that "nearly all adult citizens of the United States are legally entitled to vote" (p. 316). However, even after the plethora of constitutional amendments, federal statutes, and judicial decisions of the last several decades, we still have something less than universal suffrage. More importantly, notwithstanding the extensive focus on who can vote, which has been central to both Keyssar's study and legal analysis, we have given relatively little attention to what voting is supposed to accomplish, and what the role of voting in the political process is supposed to be.

A. *Continuing Limitations on Who Can Vote*

Despite increased access to voting, we do not yet have universal adult suffrage in the United States. Felon disenfranchisement laws, residency requirements, and a citizenship test continue to limit the number of adults eligible to vote, while our election machinery burdens the ability of legally qualified voters to actually cast their ballots and have them counted.

Currently, 4.2 million adult citizens — or about 2.1% of the voting age population — are denied the franchise on account of current or prior felony conviction. Every state but two disfranchises incarcerated felons; twenty-nine states prevent convicted felons from voting after their release from prison or jail, but while they are on parole or probation; fourteen states continue disfranchisement for some period beyond the term of incarceration, probation and parole. Eleven states disfranchise felons for life; nine for a single felony conviction. One-third of the people disqualified by a felony conviction are felons who

have completed their sentences, and more than another third are on probation or parole. Less than thirty percent are currently incarcerated.[65] According to one recent study, in those states that permanently deny felons the right to vote "the impact on the electorate is sizable," ranging from 3.2% of the voting age population in Maryland to 6.2% in Alabama and Florida.[66]

It is difficult to see how the disfranchisement of felons, particularly those who have served their time, could survive strict judicial scrutiny. The Supreme Court, however, has determined that strict scrutiny does not apply. In *Richardson v. Ramirez*[67] — decided in 1974, or after the Court had declared the vote to be a fundamental right — the Court held that the Fourteenth Amendment's provision reducing the representation in Congress of a state that denies the vote to its adult male citizens "except for participation in rebellion, or other crime" implicitly authorizes disfranchisement for conviction of a crime. Thus, a remnant of the nineteenth century vision of the vote as state-granted privilege was carried forward by the late-twentieth century Court.

The disfranchisement of convicted felons bears particularly heavily on African Americans, especially African-American men. Nationally, 6.57% of voting age blacks are disqualified by the felon exclusion. As 95% of felons are male, the felony disfranchisement rate for black men is approximately 13%. In some states, the numbers are much higher. In Florida, for example, 13.77% of voting age African Americans, and, thus, about one-quarter of voting age black men, are disqualified.[68] In *Hunter v. Underwood*,[69] the Supreme Court held unconstitutional an Alabama law, adopted as part of the general program of suffrage reduction in 1901, that disfranchised persons convicted of certain misdemeanors. Based on historical evidence, the Court found that the measure was aimed at blacks, with the misdemeanors triggering disfranchisement selected because of the assumption that those crimes were committed primarily by blacks. It is not clear if *Hunter* is limited to the use of misdemeanors. Moreover, *Hunter* relied on proof of racially discriminatory intent, and such intent will often be difficult to prove.[70] Voting rights activists have ar-

65. John Mark Hansen, Task Force on the Federal Election System, *Disfranchisement of Felons* (July 2001), *in* NATIONAL COMMISSION ON ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS (Aug. 2001).

66. *Id.* at 1.

67. 418 U.S. 24 (1974).

68. *See* Hansen, *supra* note 65, at 1.

69. 471 U.S. 222 (1985); *see also* McLaughlin v. City of Canton, 947 F. Supp. 954 (S.D. Miss. 1995) (Mississippi's disfranchisement of misdemeanants violates equal protection clause).

70. *See, e.g.*, Cotton v. Fordice, 157 F.3d 388 (5th Cir. 1998) (finding that later reenactment of felon exclusion supersedes the previous provision and removes the discriminatory taint from the original Redeemer Era version).

gued that felon disfranchisement laws run afoul of the discriminatory impact test of the Voting Rights Act.[71] But the courts have been reluctant to so find.[72]

A second, even less legally controversial, prerequisite for voting is residency. The Supreme Court has indicated that a residency requirement "may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny."[73] But the effects of state and local government decisions are not limited to residents. Millions of commuters, migrant workers, and second home owners are subject to local taxation, law enforcement, and land use regulation, and depend on locally-provided public services in communities where they spend considerable time on a regular basis but are unable to vote. Moreover, in this era of easy mobility, affluence, and early retirement, with many households maintaining more than one home,[74] it is sometimes difficult to determine someone's community of residence. Both the definition of residence for voting purposes and the denial of the vote to someone with significant ties to a community because he or she is also a resident of another community are increasingly contested.[75]

Perhaps the largest group of people in the United States not entitled to vote are noncitizens. In 2000, there were approximately 28.4 million foreign born people in the United States, accounting for about 10.4% of the population. About 10.6 million, or 37% of this group, are naturalized, leaving about 18 million noncitizens, of whom about 16 million are of voting age.[76] Like other residents, aliens are subject to state and local regulation, taxation, and law enforcement, and depend

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71. *See, e.g.*, Andrew L. Shapiro, Note, *Challenging Criminal Disfranchisement Under the Voting Rights Act: A New Strategy*, 103 Yale L.J. 537 (1993).

72. *See, e.g.*, Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996); Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986).

73. Dunn v. Blumstein, 405 U.S. 330, 344 (1972); *accord* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 68-69 (1978) ("[O]ur cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders.").

74. U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY, GENERAL CHARACTERISTICS OF U.S. HOUSEHOLDS (1995) (1.8 million households, constituting 1.9 % of all households, maintain two residences as homes).

75. *See, e.g.*, Fred Bayles, *"Seasonal" Residents Fight for Expanded Rights: Having a Say vs. Having to Pay Splits Several Vacation Towns*, USA TODAY, May 23, 2000, at 6A; John Flesher, *Part-time Residents Feel Taxed by Laws*, GRAND RAPIDS PRESS, Aug. 13, 2000, at A27; Blaine Harden, *Summer Residents Want a Year-Round Voice*, N.Y. TIMES, May 30, 2000, at A1; *Part-Time Residents Seek Full-Time Say*, RECORD (Northern New Jersey), Aug. 21, 2000, at A03; *see also* CONN. GEN. STAT. ANN. § 7-6 (West 1999) (authorizing nonresident taxpayers to vote in certain local elections); May v. Town of Mountain Vill., 132 F.3d 576 (10th Cir. 1997) (upholding constitutionality of local decision to enfranchise nonresident property owners).

76. U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: MARCH 2000, THE FOREIGN-BORN POPULATION IN THE UNITED STATES (Jan. 2001).

on states and localities for basic public services, including public safety, sanitation, and education. Whatever the possible justification, in terms of a potential conflict of national loyalties, for excluding noncitizens from participating in national governance, it seems more difficult to explain — certainly if strict judicial scrutiny is applied — the exclusion of resident aliens from voting in state and local elections.

In the past, as many as sixteen states authorized aliens to vote.[77] Indeed, the Supreme Court in *Minor v. Happersett* cited the enfranchisement of aliens as grounds for rejecting the argument that the suffrage is a right of citizenship.[78] Today, in an echo of an older tradition — before the nationalization of voting rules — in which localities often had different suffrage criteria than their states,[79] a handful of school districts permit aliens whose children are in local schools to vote in community school board elections, and at least one locality permits aliens to vote in municipal elections.[80] With these exceptions, however, resident aliens are unenfranchised, even at the state and local level. This presents no current constitutional issue. The Supreme Court has found that the "exclusion of aliens from basic governmental processes is not a deficiency in the democratic process but a necessary consequence of the community's process of political self-definition."[81] One arguably ironic consequence of the Court's new doctrine that voting is a presumptive right of adult resident citizens is the elimination of any constitutional claim to voting by noncitizens.

Apart from formal limitations on the franchise, the Florida 2000 election demonstrated to all Americans the ongoing significance of state and local administrative decisions, particularly ballot design and the selection and maintenance of voting machinery, in making the right to vote effective (or ineffective). *Bush v. Gore* simultaneously opened the door to federal constitutional review of state and local administrative decisions, and then tried to shut it by declaring that the Court's consideration was "limited to present circumstances, for the problem of equal protection in election processes generally presents many complexities."[82] The Court specifically keyed its decision to "the special instance of a statewide recount under the authority of a single state judicial officer"[83] — a relatively rare occurrence. The Court's fo-

77. *See* Table A-12.

78. 88 U.S. at 162, 177 (1874).

79. *See* pp. 6, 20-21, 30-31, 166-68, 186.

80. P. 310. Several foreign countries also permit resident aliens to vote in local elections. *See* p. 310.

81. Cabell v. Chavez-Salido, 454 U.S. 432, 439-40 (1982).

82. 531 U.S. 98, 109 (2000).

83. *Id.*

cus on intrastate disparities may limit the case's relevance to administrative practices that burden all voters in a state.

Nevertheless, despite the Court's effort to limit the decision's effect, *Bush v. Gore*, coupled with the national reaction to the spectacle of tens of thousands of uncounted and miscounted votes in Florida, appears to be having an impact in prodding states to upgrade their vote-counting machinery.[84] As with the elimination of property requirements in the nineteenth century, and the reform of voter registration in the late twentieth century, voting administration reform may result from political actions, or — given *Bush v. Gore* — a twenty-first century interplay of litigation and legislation. Still, until Congress and the states give serious attention (and funding) to the machinery and procedures for tabulating votes, it is likely that millions of votes will continue to be lost each election day.[85]

B. *Beyond Equality: The Substantive Meaning of the Right to Vote*

Both the historical development of the right to vote and contemporary constitutional doctrine have focused primarily on the equal availability of the vote, and equal treatment of those eligible to vote, rather than the right to vote per se. Even as the equal right to vote has expanded, the substantive meaning of the right to vote has remained undeveloped and the relationship between voting and other mechanisms that shape our political process and structure our democracy remains contested.

Thus, there is no general constitutional right to vote, that is, to have political decisions made, or political officials chosen, by popular vote. The election of members of Congress follows from specific provisions in the constitutional text. As *Bush v. Gore* has reminded us, there is no right to vote for president and vice-president. There is no federal constitutional right to vote for the governor of one's state,[86] or to have an elected local government.[87] Arguably, the republican form

84. *See* B.J. Palermo, *Suits Push Three States to End Punch-Card Voting: California Decision is the Latest Action*, NAT'L L.J., Mar. 4, 2002, at A1.

85. *See* CALTECH/MIT STUDY, *supra* note 3.

86. Fortson v. Morris, 385 U.S. 231 (1967). The Supreme Court has held, however, as a matter of statutory interpretation, that the preclearance provisions of the Voting Rights Act apply to a state's decision to convert an elected position into an appointed one. Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

87. *See, e.g.*, Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978). Moreover, the rules of universal suffrage and one person, one vote do not apply to certain elected local governments that exercise only special, limited powers. Ball v. James, 451 U.S. 355 (1981). Such districts, including water storage districts, transportation finance districts, *see, e.g.*, So. Cal. Rapid Transit Dist. v. Bolen, 822 P.2d 875 (Cal. 1992), and business improvement districts, Kessler v. Grand Cent. Dist. Mgmt. Ass'n, Inc., 158 F.3d 92 (2d Cir. 1998), may use property ownership or tax payment criteria in determining who may vote for their governing boards.

of government secured to the states by the Guarantee Clause requires the election of state legislatures, but given the Supreme Court's unwillingness to give content to that Clause — exemplified by the nineteenth century case in which the Supreme Court refused to consider the legitimacy of actions taken by Rhode Island's limited-suffrage freeholder government against proponents of the more democratic "people's constitution"[88] — even that proposition cannot be stated with certainty.[89]

Nor, despite the Supreme Court's equation of the right to vote with the right to an equally weighted vote, is there a right to have elections decided by popular majorities. A supermajority voting requirement, in which a sufficiently large minority can block the wishes of the majority, is constitutionally valid as long as the requirement is not targeted against a distinct group.[90]

Even when voting is allowed and widely available and majority rule prevails, it may not be clear what the right to vote means. The right to vote may imply a right to have choices. The Supreme Court has held "the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot."[91] Yet the Court has also held that the states can use ballot access laws to narrow voters' choices and thereby promote the two-party system and political stability, by making it difficult — but not impossible — for third parties and independents to get on the ballot.[92] Nor does the voter have the right to vote for any candidate he or she wants; or, more precisely, as the Supreme Court held in *Burdick v. Takushi*,[93] there is no right that the state "record, count and publish" individual votes.[94] *Burdick* upheld Hawaii's refusal to count

88. Luther v. Borden, 48 U.S. (7 How.) 1 (1849). *Luther* grew out of the struggle over the franchise in Rhode Island that culminated in the Dorr War; *see supra* note 23. During that conflict, two different governments — one elected under the limited-suffrage colonial era charter, and the other under a more democratic "people's constitution" — contended for power. In *Luther*, the Supreme Court refused to review the legitimacy of punitive actions taken by the charter government against those purporting to act under the people's constitution.

89. In addition, there is certainly no federal constitutional right to have decisions made by voter initiative, or subject to voter referendum, although the Constitution is not a barrier to direct democracy. *See* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912). The Supreme Court has occasionally celebrated the democratic values of state or local measures authorizing voters to resolve legislative decisions directly through their ballots. *See, e.g.*, Vill. of Eastlake v. Forest City Enter., 426 U.S. 668 (1976); James v. Valtierra, 402 U.S. 137 (1971).

90. Gordon v. Lance, 403 U.S. 1 (1971).

91. Williams v. Rhodes, 393 U.S. 23, 31 (1968).

92. *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997); Munro v. Socialist Workers Party, 479 U.S. 189 (1986); Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 403 U.S. 431 (1971).

93. 504 U.S. 428 (1992).

94. *Id.* at 441.

write-in votes. The Court emphasized that the right to vote is not simply — or not solely — a personal right of the voter to express his or her views on electoral matters but is rather a "right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system."[95] Given the difficulties inherent in aggregating multiple individual preferences into a collective political decision "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections."[96]

Similarly, the Court has recognized that legislative apportionment implicates the right to vote and has held that districting schemes that make it more difficult for racial minorities to elect representatives violate that right.[97] But the Court has also upheld legislative gerrymanders that create large numbers of politically uncontested one-party districts if the resulting legislature roughly mirrors the strength of the two parties in the state as a whole.[98] The stability of the two-party system and political control over the structure of the political process have, thus, been treated as important constitutional values that structure and limit the right to vote.

To be sure, a state's or locality's use of structural mechanisms like multimember districts with district-wide elections that make it difficult for minority groups to win representation have been held to bear on the right to vote, and, on occasion, to be unconstitutional.[99] In other cases, however, the Court has shied away from finding a connection between the structure of an elected government, even when it bears on the ability of minorities to elect representatives, and the right to vote.[100] Moreover, our most pervasively used electoral structure — single-member districts with plurality voting rules, as opposed to multimember districts with some form of proportional representation — makes it more difficult for minorities, particularly geographically dispersed minorities, to win representation. Yet it is also constitution-

95. *Id.*

96. *Id.* at 433.

97. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960). On the other hand, districting plans that give great attention to race in order to enable racial minorities to elect representatives in proportion to their numbers may be held unconstitutional as unduly race-conscious. *See, e.g.*, Shaw v. Reno, 509 U.S. 630 (1993).

98. Gaffney v. Cummings, 412 U.S. 735 (1973); *cf.* Davis v. Bandemer, 478 U.S. 109 (1986) (gerrymandering that "consistently degrade[s]" a party's influence in the state as a whole is subject to constitutional challenge).

99. *See, e.g.*, White v. Regester, 412 U.S. 755 (1973).

100. Holder v. Hall, 512 U.S. 874 (1994). Moreover, structural changes that reduce the decisionmaking authority of elected officials have been held not to implicate the right to vote within the meaning of the Voting Rights Act's preclearance provision. *See* Presley v. Etowah County Comm'n, 502 U.S. 491 (1992).

ally unexceptionable.[101] The right to vote has implications for the structure of government, but, just as important, the structure of government — and the constitutionally permissible preference for a less representative government — has implications for the substantive meaning of the right to vote.

The relationship between the right to vote and the financing of election campaigns is even more confused. On the one hand, the Court has found that voters have a substantive interest in learning the identities of those who donate to candidates and the amounts those donors contribute. Notwithstanding the potential infringement on freedom of speech and association, campaign reporting and disclosure laws "aid the voters in evaluating those who seek . . . office."[102] On the other hand, the norms of universal suffrage and equal treatment of voters have been held to have no bearing on the amounts of money candidates and interest groups can spend on elections.[103] The ban on wealth tests and the "one person, one vote" rule for legislative apportionment may be constitutionally required to protect the equal right to vote in elections but a governmental goal of "equalizing the relative ability of individuals and groups to influence the outcome of elections" may not justify limitations on campaign expenditures.[104]

The Court's difficulties in grappling with these issues and in resolving the connections between the right to vote and other political mechanisms are understandable since these questions present multiple, and often conflicting, legitimate concerns. As Keyssar observes, "universal suffrage is a necessary but not sufficient condition for a fully democratic political order" (p. 322). Democracy requires not just wide participation and equal treatment of voters but mechanisms for aggregating large numbers of diverse preferences into a collective result that reflects majority sentiment, respects minority interests, commands public support, and produces an effective, accountable government. A democratic commitment to near-universal suffrage and "one person, one vote" apportionment does not necessarily require easy ballot access rules, controls on gerrymandering, proportional representation of minorities, or limits on campaign spending. On the other hand, the uncertain health of American democracy today — low turnout, the widespread gerrymandering of legislative districts, the concern that the two-party system fails to represent the full range of legitimate political interests and points of view, the central role of

101. *Cf.* City of Mobile v. Bolden, 446 U.S. 55 (1980) (holding that there is no right to proportional representation).

102. Buckley v. Valeo, 424 U.S. 1, 66-67 (1976).

103. *Id.* at 49 n.55.

104. *Id.* at 48.

money in our political campaigns — suggests that our current political rules may not be the optimal ones for promoting democracy, either.

After more than two hundred years, the battles over the legal right to vote are now largely, if not quite entirely, ended. Keyssar's book provides a comprehensive account of both the extent and intensity of that struggle and the nature of its contemporary resolution. But the meaning of the right to vote and the connection between the vote and other American political institutions remain unresolved. In the near future, the political and legal battles over the vote may focus on the few remaining groups not entitled to vote and on the machinery necessary for the effective translation of the votes that are cast into votes that are counted. But critically important battles will also address those rules and structures — legislative districting, ballot access, campaign finance — that affect the choices presented to voters, and the broader question of how voter decisions are translated into political outcomes. Keyssar's study, and the multiple conflicting concerns presented by these issues, suggest that an early resolution is not likely, and that the future of American democracy is likely to be as contested as its past.