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# Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority

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## INTRODUCTION

Who should vote in the modern democratic state? The question implicates the core of democratic government—popular political participation. And the vote is the archetypical participatory mechanism. For centuries, voting was a privilege limited to few, but democratic norms now require that electoral inclusion be presumed, and exclusion justified.<sup>1</sup> Accordingly, few exclusionary rules remain. Among them are citizenship, law-abidingness, and minimum age requirements. The last of these, all but ignored by legal and political theorists, is this article's focus.

The age of electoral majority has declined, over time and across the globe. At the beginning of the twentieth century, the average voting age worldwide was just under twenty-four; today, it is just over seventeen. More than a dozen nations have recently lowered local, state, or national voting ages to sixteen.

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<sup>1</sup> The Supreme Court has invalidated exclusions based on occupation, income, marital status, and property ownership/tax payment. See *Oregon v. Mitchell*, 400 U.S. 112, 140-41 (1970) (Douglas, J., concurring in part and dissenting in part) (listing cases). See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2d ed. 2009) (chronicling the imposition and subsequent lifting of voting restrictions over time in the United States). For extended analyses of specific exclusions, see, for example, RON HAYDUK, *DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES* (2006); JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 *STAN. L. REV.* 1147 (2004).

Others, including Australia and the United Kingdom, are seriously considering doing the same. The voting age in every U.S. state is eighteen, but the United States is not among the growing number of democracies deliberating the electoral inclusion of some cohort of their younger citizens. It should be.

Presumably, eighteen is a proxy for voters' attainment of desirable characteristics—e.g., maturity of judgment, knowledge of civics, and understanding of political processes. Yet there has been no sustained scholarly effort to examine whether age eighteen is a good, or even good-enough, indicator of the attainment of those or other relevant characteristics. Academic inattention persists<sup>2</sup> despite widespread acceptance that the franchise is the core of modern representative democracy; its “free and unimpaired [exercise] preserv[es] . . . other basic civil and political rights.”<sup>3</sup>

I argue that presumptive electoral inclusion places on the state the burden of justifying the exclusion of a category of persons. Assessing the legitimacy of any exclusion requires a minimum standard for electoral inclusion. That standard legitimately includes competence. Assessing competence likewise first requires a conception of it, but none currently exists. Classic democratic theory describes the decision making of the ideal citizen-voter as both well informed and rational. The decision making of the actual citizen-voter, however, is often neither. The classic account thus cannot define competence, which contemplates a minimum standard of adequacy, not an aspirational ideal rarely attained. I thus argue for a conception of electoral competence first, informed by behavioral decision theory and studies of voter decision making, and second, characterized by the reliable attainment of the relevant cognitive processes (cognition/learning, information processing, and decision making) and maturity of judgment.

Converging research from several disciplines within the developmental sciences has established a reliable connection

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<sup>2</sup> Stefan Olsson, *Children's Suffrage: A Critique of the Importance of Voters' Knowledge for the Well-Being of Democracy*, 16 INT'L J. CHILD. RTS. 55, 55 (2008) (“That children should not have the right to vote is something that most people think . . . is so obvious that almost none of the prominent democratic theorists have given it any serious consideration. It is a non-issue.”).

<sup>3</sup> *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (“[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”); see also *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”).

between age range and the attainment of certain cognitive competencies. Research in developmental psychology and cognitive and social neuroscience explains not only that adolescents make notoriously bad decisions under certain conditions, but also why it is they do so. This research explains that by midadolescence, when making unpressured, considered decisions—like those required to privately cast a ballot in an election that has unfolded over time—their cognitive competencies are mature.

States can thus no longer justify the electoral exclusion of midadolescents by claiming that they lack the relevant competencies. Absent other legitimate bases for their exclusion, the democratic presumption of inclusion obliges the states to adjust downward the age of electoral majority.

In the United States, the individual states retain broad power to establish electoral qualifications, subject to certain constitutional and other federal law constraints.<sup>4</sup> The Twenty-Sixth Amendment, for example, prohibits states from setting the age of electoral majority above eighteen.<sup>5</sup> No constitutional or other federal law provision, however, prohibits states from lowering the age of electoral majority; each state retains that power.<sup>6</sup> Yet other than a few states that allow seventeen-year-olds to vote in a primary election so long as they will turn eighteen in time for the general election,<sup>7</sup> no state has

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<sup>4</sup> *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 50-51 (1959) (“The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised absent of course the discrimination which the Constitution condemns.” (citations omitted)). The U.S. Constitution gives state legislatures the authority to establish “[t]he Times, Places and Manner of holding Elections for [U.S.] Senators and Representatives,” but it reserves to Congress the right to “at any time by Law make or alter such Regulations, except as to the Place of chusing Senators.” U.S. CONST. art. I, § 4, cl. 1; *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) (recognizing the franchise as a conditional fundamental right by providing that “once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment”); *id.* at 670 (holding that state laws restricting individuals’ right to vote will be subject to the Court’s strict scrutiny).

<sup>5</sup> U.S. CONST. amend. XXVI, § 1 (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”).

<sup>6</sup> U.S. CONST. art. I, § 2 & amend. XVII (providing that in statewide elections for congressional representatives and senators, “the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature”); *Lassiter*, 360 U.S. at 51 (“[W]hile the right of suffrage is established and guaranteed by the Constitution, it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.” (citations omitted)).

<sup>7</sup> See *infra* Part I.C.4.

exercised—nor seriously considered exercising—its power to lower the voting age.

The Twenty-Sixth Amendment's exclusion of individuals under eighteen from explicit constitutional protection undermines constitutionally grounded arguments for lowering the voting age. Any court that held the enfranchisement of citizens younger than eighteen constitutionally compelled would thus depart from well over a century of established precedent.<sup>8</sup> Constitutional compulsion, however, is not the sole—or even primary—justification for most state action.

I argue here that the core democratic principle of inclusion (embraced by democracy theorists and political entities, and from which derives the concept of “universal . . . suffrage”)<sup>9</sup> places on states the burden of justifying electoral exclusions. Moreover, in light of decades of research on voter decision making and significant advances across various scientific disciplines in knowledge of cognitive and psychological development, the time has come to revisit and if warranted, readjust, the age of electoral majority.

We can surmise the reasoning of one who believes that the voting age merits little attention<sup>10</sup>: (a) age is a reasonable—

<sup>8</sup> The Supreme Court has held that explicit protection of certain classes of individuals in the Constitution's text excludes the extension of that protection to other classes of individuals not listed. For example, the Court held that the Fourteenth Amendment's Reduction-of-Representation Clause did not extend voting protection to women, since it explicitly listed “male inhabitants” of states. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1873); *id.* at 174 (observing that its Reduction-of-Representation Clause reduces the federal representation of states that disfranchise male citizens twenty-one years of age and over, and asking “if suffrage was necessarily one of the absolute rights of citizenship, why . . . inflict the penalty for the exclusion of males alone?”). Similarly, the Court held that the Fourteenth Amendment's exemption from sanction of states that disfranchise “male citizens twenty-one years of age and over, except for participation . . . in crime,” affirmatively sanctioned the exclusion of felons from the vote. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974) (“[T]he exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment.”).

<sup>9</sup> See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III), at art. 21 (Dec. 10, 1948) (“Everyone has the right to take part in the government of his country . . .”); ANTHONY H. BIRCH, *THE CONCEPTS AND THEORIES OF MODERN DEMOCRACY* 93-94 (2d ed. 2001) (concluding that disputes in modern democratic states about whom should be represented have “now been resolved[, and that] . . . [i]t is now accepted everywhere, . . . that all adult citizens should be represented through the electoral system”).

<sup>10</sup> A handful of theorists who do examine the voting age group all minors into a single homogenous category, discounting age-related distinctions among them. These theorists reach one of two conclusions. First, because minors are incompetent, their disfranchisement is legitimate. See, e.g., LUDVIG BECKMAN, *THE FRONTIERS OF DEMOCRACY: THE RIGHT TO VOTE AND ITS LIMITS* 119 (2009) (arguing in what may otherwise be the most sustained and comprehensive theoretical treatment of electoral exclusion, that “suffrage entails responsibilities that are not in the child's best interests”); ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 126 (1989) (asserting that “[s]o far as I am aware, no one seriously contends that children should be full members

perhaps the only reasonable—proxy for the development-related attainment of the capacities required for competent voting; (b) the setting of any voting age will inevitably involve some slippage (i.e., will exclude some individuals below the set voting age who will have nonetheless attained voting competence and include others who will not have attained such competence despite having reached the set voting age), but that is the nature of proxies, and of bright-line legal rules more generally;<sup>11</sup> and (c) because age eighteen is a common proxy for legal competence generally, and there appears to be community consensus for this notion, eighteen seems to be as good a proxy for electoral competence as any.<sup>12</sup>

This reasoning, while superficially plausible, suffers serious flaws that this article exposes and corrects. Here, I briefly highlight those flaws, as well as the core elements of my argument.

First, this reasoning ignores the presumption of electoral inclusion to which persons subject to a democratic government's authority are entitled. Presumptive inclusion is a broadly accepted normative commitment flowing from basic principles of democratic theory. While the presumption does not foreclose the possibility of legitimate exclusions, it does shift to the state the burden of justifying electoral exclusion.<sup>13</sup>

Second, assessing whether a state has met its justificatory burden requires some principled criteria or

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of the demos that governs the state. An eight-year-old child can hardly be enlightened enough to participate equally with adults in deciding on laws to be enforced by the government of the state," but failing to discuss older children or adolescents). Or, second, despite minors' incompetence, their interests should be registered through the use of some proxy voting method. *See, e.g.,* Olsson, *supra* note 2, at 55 (arguing that parents should be designated their children's representatives for purposes of voting); Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1463, 1502 (1998) (proposing that children's interests can be registered by "creat[ing] proxies, so that their interests and voting power are expressed through others"). Two scholars, legal theorist David Archard and political theorist Francis Schrag, do consider age-related differences among those younger than eighteen, although each author only briefly addresses the issue. *See* DAVID ARCHARD, *CHILDREN: RIGHTS AND CHILDHOOD* 103 (2d ed. 2004) (discussed *infra* note 295); Francis Schrag, *Children and Democracy: Theory and Policy*, 3 POL., PHIL. & ECON. 368-70 (2004) (discussed *infra* note 162).

<sup>11</sup> *See* Paul Arshagouni, "But I'm an Adult Now . . . Sort of": *Adolescent Consent in Health Care Decision-Making and the Adolescent Brain*, 9 J. HEALTH CARE L. & POLY 315, 333 n.110 (2006) ("Wherever one draws a bright line, there will inevitably be a certain number of individuals who in truth should have fallen on the other side of the line. Epidemiologically, these are known as false positives and false negatives. The greater the number of false positives and false negatives, the less usefulness we have for a given bright line rule.").

<sup>12</sup> In other words, some individuals younger than eighteen will have attained the relevant competence yet be denied the franchise, and other individuals who have reached eighteen but failed to attain the relevant competence will nonetheless be extended it.

<sup>13</sup> *See infra* Part II.A.

standards for inclusion. Democracy theory and liberal constitutional principles have long supported two such criteria: ongoing interest in and connection to the political community and electoral decision-making competence.<sup>14</sup>

Because no principled conception of electoral competence exists, I develop a concept of it here, informed by behavioral-decision research on voter decision making and by research from various disciplines in the developmental sciences on adolescent cognitive development. I argue for a definition of electoral competence as *the attainment and application of adultlike cognitive-processing capacities in the electoral context*. These capacities include the abilities to acquire information and knowledge, to assess and process information, and to make and justify a decision.<sup>15</sup>

And third, although age eighteen may have been the best available proxy for electoral competence when it became the national voting age in 1972, research in the developmental sciences in the intervening years lays the groundwork for a better-informed assessment of the attainment of voting competence. I survey research in behavioral and developmental psychology and in cognitive and social neuroscience. This research has expanded our understanding of the development of a full range of cognitive capacities. It establishes that adolescents reliably reach adultlike cognitive-processing capacities by ages fifteen or sixteen, but that numerous factors (e.g., situations involving high levels of emotion or stress, peer pressure, or time pressure) will predictably compromise their cognitive performance. Adolescent cognitive-processing competence is thus domain- or context-specific.<sup>16</sup>

While scientific research cannot dictate policy, it can inform policy. Armed with more nuanced understandings of both voter decision making and the development of adolescent cognitive processing and decision making, I conclude that voting is the sort of decision-making context in which midadolescents will reliably demonstrate competence.<sup>17</sup> In light of midadolescent electoral competence, states fail to meet their justificatory burden in the absence of other reasons for continued midadolescent electoral exclusion.

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<sup>14</sup> See *infra* Part II.B.

<sup>15</sup> See *infra* Part III.A.

<sup>16</sup> See *infra* Part III.

<sup>17</sup> See *infra* Part III.B.

The article proceeds in three parts. Part I situates the U.S. voting age within a conceptual, historical, and modern global context. It first explains why the voting age in the United States was originally set at twenty-one. It goes on to document the lowering of the voting age to eighteen in the mid-twentieth century. Finally, it describes and explains the growing global trend of lowering the voting age to sixteen. Part II identifies and justifies basic voting criteria. It argues that democratic principles require members of a political community to be presumptively entitled to political/electoral participation. Members may nonetheless be excluded from participating if they fail to possess certain characteristics—namely, ongoing interest in and connection to the relevant community, and electoral competence. Part III argues for a conception of electoral competence informed by political- and behavioral-decision theorists' understanding of voter decision making, and psychologists' understanding of the cognitive processes required to competently make decisions in the electoral context. It then demonstrates that the converging research of developmental scientists in several disciplines provides new evidence of the age-related attainment of relevant cognitive processes.

This article concludes that there is strong empirical evidence that the cognitive processes required for competent voting reliably mature by age sixteen. A reexamination of the voting age is necessary to account for the evolution of our understanding of electoral competence and its achievement. Only then can the modern democratic state ensure that the continued disfranchisement of a category of citizens remains consistent with its foundational political commitments.

## I. CONCEPTUAL, HISTORICAL, AND MODERN GLOBAL CONTEXT

This part discusses the political and historical forces that initially set the U.S. voting age at twenty-one, the age of legal maturity in the English common-law tradition. The voting age remained unchanged in the United States for more than two centuries. Concerted efforts to lower it began in 1942, when Congress lowered the age of conscription from twenty-one to eighteen. Those efforts bore fruit in 1971, when a war that was especially unpopular with young people sparked a nationwide movement to lower the national voting age to eighteen. In the four decades since, the voting age has received



essentially no attention domestically. It has, however, become an increasingly visible issue abroad, and a growing number of countries have lowered their voting ages from eighteen to sixteen or are considering doing so. This part concludes by surveying the contemporary global context and examining the factors that are driving this downward trend.

A. *England and the British Empire Through the Eighteenth Century*

The primary historical influence on early American voting rules was, unsurprisingly, the English common-law tradition. Arguments made during a series of important debates in mid-seventeenth-century England, both in favor of and against widespread suffrage, have echoed at voting rights debates ever since; they provide a conceptual framework for the discussion of democratic inclusion that follows in Part II.

The age of majority has fluctuated throughout history. Under Roman law, the age of majority was fourteen for males, and twelve for females.<sup>18</sup> The law presumed that by age fourteen, males would have attained the intellectual capacities necessary to exercise full citizenship, which required “understanding and judgment as to acts in law, in particular in relation to property rights.”<sup>19</sup> In France, Germany, and throughout the northern parts of Europe between the ninth and eleventh centuries, the age of majority for males was fifteen.<sup>20</sup> Though nearly identical to the Roman age of majority, the requisite capacities in northern Europe that signaled legal maturity were not intellectual but instead physical—namely, the physical ability to participate in warfare.<sup>21</sup>

The age of majority for English knights, who fought on behalf of the crown, increased during the Middle Ages.<sup>22</sup> Legal historians attribute the increased age requirement to the changing characteristics of war making. Armies increasingly included mounted cavalry, which required knights skilled in the use of horses in battle—skills that required a lengthy training period to develop. Along the same lines, improvements

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<sup>18</sup> T.E. James, *The Age of Majority*, 4 AM. J. LEGAL HIST. 22, 23-24 (1960).

<sup>19</sup> *Id.* at 25.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (“The test applied in selecting this age seems to have been different from that applied in Rome[—]namely, the capacity to bear arms.”).

<sup>22</sup> James observes that there is no “clear authority” that the English age of majority in the ninth and tenth centuries was fifteen, but concludes that it is a reasonable assumption. *Id.* at 26.

in defensive armor also increased the armor's weight, requiring additional strength by those wearing it.<sup>23</sup> Young men thus became eligible for knighthood at twenty-one, because not until then would they have completed the training and acquired the strength and endurance required of the armored warriors who fought in the heavy cavalry.<sup>24</sup>

English suffrage originated in 1215, when English barons forced King John's accession to the Magna Carta.<sup>25</sup> Initially the exclusive privilege of the English nobility, the franchise gradually expanded to other property owners.<sup>26</sup> Early suffrage provisions imposed only residence and property ("freehold") qualifications.<sup>27</sup> Nothing explicitly restricted the franchise to males, or to people of a certain age; these restrictions were so sufficiently obvious that they remained unstated well into the nineteenth century.<sup>28</sup>

English historical and common law traditions eventually became law throughout the British Commonwealth, and indeed in much of the Western world.<sup>29</sup> However arbitrary its genesis may seem in retrospect, age twenty-one remained firmly entrenched as the age of legal and electoral majority for centuries in England, as well as in the nations across the globe that incorporated English traditions.<sup>30</sup>

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<sup>23</sup> *Id.* at 22-23, 30; see also WILLIAM ARTHUR SHAW, *THE KNIGHTS OF ENGLAND: A COMPLETE RECORD FROM THE EARLIEST TIME TO THE PRESENT DAY OF THE KNIGHTS OF ALL THE ORDERS OF CHIVALRY IN ENGLAND, SCOTLAND, AND IRELAND, AND OF KNIGHTS BACHELORS, INCORPORATING A COMPLETE LIST OF KNIGHTS BACHELORS DUBBED IN IRELAND VOL. I ii-iii* (1906), available at [http://openlibrary.org/books/OL7047747M/The\\_Knights\\_of\\_England](http://openlibrary.org/books/OL7047747M/The_Knights_of_England). For "tenants in socage" (generally farmers who held land of feudal lords, to whom they owed rent), however, the age of majority remained fifteen (or sometimes fourteen). James, *supra* note 18, at 30.

<sup>24</sup> James, *supra* note 18, at 28.

<sup>25</sup> M.T. CLANCHY, *ENGLAND AND ITS RULERS: 1066-1307*, at 190-92 (3d ed. 2006).

<sup>26</sup> Beginning in late fourteenth-century England, "franchise" referred to a political privilege or entitlement granted at the will of the governing body, who was the ultimate sovereign—"a special privilege or exclusive right to perform some public function, granted by a sovereign power to any person or body of people." OXFORD ENG. DICTIONARY (2d ed. draft rev. 2010), available at <http://www.oed.com/> (search "franchise"). A well-known 1430 English statute extended to "forty-shilling freeholders" the right to elect members to parliament's House of Commons. DONALD GRIER STEPHENSON, JR., *THE RIGHT TO VOTE: RIGHTS AND LIBERTIES UNDER THE LAW 35-36* (2004); CHILTON WILLIAMSON, *AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY 1760-1860*, at 5-6 (1960).

<sup>27</sup> The Reform Act of 1832 was the first English voter qualification statute that explicitly specified that the franchise extended only to "male person[s] of full age" who met other qualifications. WENDELL W. CULTICE, *YOUTH'S BATTLE FOR THE BALLOT: A HISTORY OF VOTING AGE IN AMERICA 72* (1992).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 2.

<sup>30</sup> James, *supra* note 18, at 22, 33. James characterizes the common law age of majority of twenty-one as "a curious development from the older systems requiring

### 1. Concepts of Electoral Inclusion: The Putney Debates

The early franchise extended only to a tiny fraction of Englishmen. Following the end of the English Civil War in the mid-seventeenth century, soldiers who had fought in Oliver Cromwell's victorious parliamentary army joined with political activists known as *Levelers* to demand equal ("level") political rights.<sup>31</sup> Among their then-radical demands were the elimination of the freehold requirement and the adoption of near-universal male suffrage.<sup>32</sup> The group submitted a proposed "Agreement of the People" to Cromwell and other parliamentary officers, who then met with them in 1647 to discuss the proposal. The men held a series of meetings in Putney, near London, and their discussions were memorialized as what became known as the Putney Debates.<sup>33</sup>

The debates frame modern concepts of political inclusion and justifiable limits to inclusion. The concerns underlying the moderates' arguments for limited suffrage have helped justify and define modern boundaries of democratic inclusion; the Levelers' arguments in favor of widespread suffrage echo, too, as the standard justifications for presumptive democratic inclusion and universal suffrage.<sup>34</sup>

The more moderate spokesmen who defended narrow property-based suffrage made two basic arguments. First, because voters' choices eventually shaped the laws that would bind everyone in the community, it was important for voters themselves to have "a permanent fixed interest in th[e]

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military service." *Id.* at 33. Twentieth-century authors of a U.S. government report would later dismiss as "historical accident" the seemingly fortuitous connection between the physical strength needed to carry medieval armor and the minimum voting age. BIRCH EVAN BAYH, *LOWERING THE VOTING AGE TO 18*, S. DOC. NO. 92-96, at 5 (1st Sess. 1971).

<sup>31</sup> STEPHENSON, *supra* note 26, at 34.

<sup>32</sup> *Id.* at 35.

<sup>33</sup> *Id.* at 34-35. The Levelers' commitment to political equality derived from their religious beliefs, but their public arguments aimed for broad, secular appeal. WILLIAMSON, *supra* note 26, at 64-65.

<sup>34</sup> STEPHENSON, *supra* note 26, at 34-35 ("To one extent or another, every voting rights debate for more than 200 years afterwards echoed the debates at Putney."). See generally BECKMAN, *supra* note 10, at 8 (recounting, more generally, arguments made in Britain against universal suffrage and noting that "the arguments employed in relation to contemporary exclusions owe much to the structure of the arguments of the past"); but cf. WILLIAMSON, *supra* note 10, at 64-68 (arguing that those who "have concluded that the Putney and other debates of this period represent the debut of modern democratic thought in Britain" overlook other democratic influences, such as the religious foundations of many early claims to political equality).

Kingdom . . . [and to] comprehend the local interest . . .”<sup>35</sup> A property-ownership requirement guaranteed that would-be voters possessed these characteristics. Property gave a man a personal stake in and knowledge of the community. The relatively permanent and ongoing nature of property ownership meant that the freeholder would himself be affected by and subject to the community’s laws, both current and future.<sup>36</sup> The freeholder’s interests were thus linked to, if not identical with, those of the community, and he could be trusted by his fellow citizens to vote in a manner reasonably consistent with its interests—distinguishing him from transients who, lacking the rootedness that came with property ownership, could be “here today, and gone tomorrow.”<sup>37</sup>

Second, only “men freed from dependence upon others” could be trusted to vote.<sup>38</sup> The landless, servants, and women would too easily be influenced or manipulated by those they were economically dependent on.<sup>39</sup> Economic independence alone could guarantee that persons’ votes would reflect intellectual independence.<sup>40</sup>

The radicals who argued in favor of universal suffrage, on the other hand, tapped into the antimonarchical and growing egalitarian sentiments of the post-Civil War, pre-Enlightenment years.<sup>41</sup> They argued that all men equally possessed certain “natural rights” by virtue of their humanity—rights neither derived from, nor dependent on, the government or property ownership. “Has not the meanest He,”

<sup>35</sup> STEPHENSON, *supra* note 26, at 36-37 (quoting Statement of Commissary General Henry Ireton, in 1 THE CLARKE PAPERS, NEW SERIES XLIX, 299-303 (C.H. Firth ed., 1891)). Ireton was Oliver Cromwell’s son-in-law and a senior military officer in the parliamentary army who led a moderate faction within the military. He was the primary author of the *Declaration of the Army*, which made more modest demands of Parliament. *Id.* at 34.

<sup>36</sup> JACK R. POLE, *PATHS TO THE AMERICAN PAST* 245 (1979).

<sup>37</sup> WILLIAMSON, *supra* note 26, at 64 (citing Statement of Commissary General Henry Ireton, in *PURITANISM AND LIBERTY: BEING THE ARMY DEBATES (1647-9) FROM THE CLARKE MANUSCRIPTS WITH SUPPLEMENTARY DOCUMENTS* 58 (A.S.P. Woodhouse, ed., 2d ed. 1951)).

<sup>38</sup> KEYSSAR, *supra* note 1, at 5 (quoting Statement of Commissary General Henry Ireton, in *PURITANISM AND LIBERTY*, *supra* note 37, at 82).

<sup>39</sup> STEPHENSON, *supra* note 26, at 37 (quoting Statement of Colonel Rich, in THE CLARKE PAPERS, *supra* note 35, at 315) (arguing that in the Roman Republic, “the people’s voices were bought and sold, . . . and thence it came that he that was the richest man . . . made himself a perpetual dictator”). At a time when much voting was conducted *viva voce*—not by secret ballot—the economically vulnerable might understandably hesitate to cast a vote that would displease their economic superiors. *Id.* at 38-39, 47. At the time of the U.S. founding, voting in some locales, particularly in the South, continued to be an oral and public act. KEYSSAR, *supra* note 1, at 23-24.

<sup>40</sup> KEYSSAR, *supra* note 1, at 38-39.

<sup>41</sup> STEPHENSON, *supra* note 26, at 40; WILLIAMSON, *supra* note 26, at 62-67.

asked one of their leading spokesmen pointedly, "as much a life to live as the greatest He?"<sup>42</sup> Men, regardless of station or education, were equally endowed with "human reason."<sup>43</sup> In light of their fundamental equality, no man could legitimately be made subject to the will of another without giving his consent, nor could a man legitimately be made subject to the laws of a government, unless he "first by his own consent . . . put himself under that Government."<sup>44</sup> Those "bound by laws in which they have no voice at all" are a people "enslave[d]."<sup>45</sup>

The arguments made by the radical Levelers and their moderate counterparts were not original; indeed, many of the ideas that swirled at Putney could be traced to ancient thinkers.<sup>46</sup> The considerable influence of the Putney Debates on American political thought more likely derived from two factors: first, the timing of the debates resulted in their dissemination throughout the American colonies in the decades preceding the American Revolution, as colonists increasingly chafed at their political inequality with respect to their mother country; second, the debates' emergence out of Britain itself magnified their importance in the American colonies, given that colonists identified with the British or as British. The intellectual maelstrom of the period immediately following the English Civil War thus became the more "immediate origin[]" of American political thought and was "more instructive and influential in understanding" later American political developments than more historically distant antecedents.<sup>47</sup>

## 2. The American Colonies

The rhetoric at Putney had enduring influence but little immediate effect, either in England or in the American colonies. Instead, English law retained property and income qualifications for nearly three more centuries.<sup>48</sup> The English

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<sup>42</sup> STEPHENSON, *supra* note 26, at 37-38 (quoting Statement of Colonel Thomas Rainborough, in THE CLARKE PAPERS, *supra* note 35, at 300-01, 304); WILLIAMSON, *supra* note 26, at 64 (quoting Statement of Colonel Thomas Rainborough, in PURITANISM AND LIBERTY, *supra* note 37, at 53).

<sup>43</sup> WILLIAMSON, *supra* note 26, at 65.

<sup>44</sup> STEPHENSON, *supra* note 26, at 38 (quoting Statement of Colonel Thomas Rainborough, in THE CLARKE PAPERS, *supra* note 35, at 299-303).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 33.

<sup>47</sup> *Id.*

<sup>48</sup> England expanded the franchise to include all men twenty-one and older who met a six-month residence requirement in the Reform Act of 1918. CULTICE, *supra* note 27, at 72.

age of legal and electoral majority would remain unchanged even longer—well into the twentieth century.

When England established the thirteen American colonies in the seventeenth and eighteenth centuries, however, it imposed on them no uniform voting rule.<sup>49</sup> Each colonial assembly thus enacted voter qualification rules that would govern elections within its respective territory.<sup>50</sup> Although the colonies' rules varied, they all adopted property-based electoral systems that reflected prevailing British practice.<sup>51</sup> They also retained twenty-one years as the near-universal age of electoral majority.<sup>52</sup> An occasional and singular exception to general voter requirements was militia service, and some colonies occasionally enfranchised militiamen younger than twenty-one.<sup>53</sup> This exception was in keeping with longstanding opinion (whose endurance seems to come more from its emotional appeal than its logical integrity) that those who risked their lives defending their country earned a voice in its governance.<sup>54</sup>

### B. *United States, Through the Twentieth Century*

This section traces the political history of the U.S. voting age from the founding through the twentieth century. American revolutionaries echoed the Levelers' claim that political membership was a birthright, and that voting was the fundamental political act. It was an ideology that made citizenship and suffrage inseparable.<sup>55</sup> Just as the Levelers'

<sup>49</sup> STEPHENSON, *supra* note 26, at 41-47.

<sup>50</sup> *Id.* at 41-45. "[W]ithin some colonies, some cities possessed charters issued by the Crown." *Id.* at 42. In these cities, royal decree, not the colonial assembly, established the rules governing the franchise. *Id.*

<sup>51</sup> *Id.* at 41.

<sup>52</sup> CULTICE, *supra* note 27, at 2. Several colonies adopted rules allowing men who failed to meet certain qualifications to vote upon reaching an age higher than twenty-one. In Massachusetts and New Hampshire, for example, nonfreemen and those not members of the church could vote upon reaching age twenty-four. *Id.* at 4.

<sup>53</sup> *Id.* at 2-3. The Virginia House of Burgesses in 1619, for example, pronounced that every male over sixteen was to serve in the militia, pay taxes, and vote. *Id.* at 3.

<sup>54</sup> AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 19 (2005); Amar noted that "[i]n classic republican theory, the rights of collective self-government stood shoulder to shoulder with the responsibilities of collective self-defense." *Id.*; see also KEYSSAR, *supra* note 1, at 36. More pragmatically, men denied the franchise might balk at the call to military service. *Id.* at 12-13; Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1348 (2003).

<sup>55</sup> JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 45 (1991) (arguing that the Putney "debates have a permanent significance, especially for American political thought," and that "[t]he future American citizen was born in the course of these exchanges").

ideas echoed in support of expanding the franchise, however, the opponents of widespread suffrage at Putney remained equally important to the political evolution of the nation. Political theorist Judith Shklar has noted that the moderates' "arguments were repeated over and over again whenever yet another group of Americans demanded the right to vote."<sup>56</sup>

The Constitution submitted to the states for ratification contained no uniform national suffrage law.<sup>57</sup> The Framers' omission was intentional: not only were they themselves ideologically divided, but they also feared that any national suffrage law they proposed would generate sufficient controversy to derail ratification altogether.<sup>58</sup> The states, as had the colonies before them, thus retained the power to determine voter-qualification standards for both state and national elections,<sup>59</sup> and all retained twenty-one as the age of electoral majority.<sup>60</sup>

The Fourteenth Amendment, ratified after the Civil War in 1868, formally extended the benefits of citizenship to African Americans, and its Reduction-of-Representation Clause sought to secure their enfranchisement, albeit indirectly.<sup>61</sup> It warned that a state disfranchising "any of the male inhabitants . . . being twenty-one years of age, and citizens of the United States, . . . except for

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<sup>56</sup> *Id.*

<sup>57</sup> KEYSSAR, *supra* note 1, at 18.

<sup>58</sup> *Id.* at 18-20. Alexander Hamilton explained,

To have reduced the different qualifications in the different States to one uniform rule, would probably have been as dissatisfactory to some of the States, as it would have been difficult to the Convention. The provision made by the Convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every State; because it is conformable to the standard already established, or which may be established by the State itself.

THE FEDERALIST NO. 52, at 290 (Alexander Hamilton) (E.H. Scott ed., 1898).

<sup>59</sup> The Framers sought, however, to make the House of Representatives the federal legislative body most responsive to, and representative of, the common citizen. Article I thus provides that "the People of the several States" who meet "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature" shall elect the members of the House. U.S. CONST. art. I, § 2. In this way, the Framers ensured that the most liberal electoral standard adopted by a given state would apply to state voters' selection of their House delegates.

The Constitution also imposes age qualifications for various federal offices: twenty-five-years-old for the House, thirty for the Senate, and thirty-five for the presidency. *Id.* art. I, § 3 & art. II, § 1. Tench Coxe argued that the Constitution's age requirements obligated the wealthy or politically connected individual, otherwise able to ascend to federal office at an early age, to first gain necessary experience and also to demonstrate "his merits to his country—a more rational ground of preference surely than mere property." Tench Coxe, *An Examination of the Constitution for the United States (II)*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 141 (Paul Leicester Ford ed., Da Capo ed. 1888) (1787-88).

<sup>60</sup> CULTICE, *supra* note 27, at 12.

<sup>61</sup> U.S. CONST. amend. XIV, § 2, amended by U.S. CONST. amend. XXVI, § 1.

participation in rebellion, or other crime,” would lose representation in Congress and in the electoral college.<sup>62</sup> The clause was interpreted as establishing something of a national voter-qualification norm, divesting the states of the power to disfranchise twenty-one-year-old male law-abiding citizens.<sup>63</sup>

The voting age received no national attention to speak of until the United States entered World War II at the end of 1941.<sup>64</sup> Soon after declaring war, Congress began to debate amending the Selective Service and Training Act to lower the draft age from twenty-one to eighteen. As they debated that measure, legislators made another proposal—a constitutional amendment to lower the national voting age, also to eighteen.<sup>65</sup> Republican Arthur Vandenberg introduced the measure in the Senate, invoking again the idea that “if young men are to be drafted at 18 years of age to fight for their Government, they ought to be entitled to vote at eighteen years of age for the kind

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<sup>62</sup> *Id.*; see also Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in Bush v. Gore*, 29 FLA. ST. U. L. REV. 587, 589-93 (2001) (discussing the Reduction-of-Representation Clause).

<sup>63</sup> *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 174-75 (1874) (relying on the clause’s explicit mention of “male” citizens to support its conclusion that the Fourteenth Amendment did not require extending the franchise to women).

Two years after ratifying the Fourteenth Amendment, the states ratified the Fifteenth, which sought to prevent the disfranchisement of newly freed African American men. The amendment states that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV, § 1. It was hugely, but only briefly, successful. Nearly a million African American men voted, but once Union occupation of the South ended, southern states used a variety of legal and extralegal practices to again disfranchise African Americans. A whole range of barriers, both formal and informal, continued to limit the political participation of African Americans and others formally entitled to vote. Social and economic barriers such as poverty and illiteracy, as well as seemingly innocuous aspects of election administration (e.g., preregistration procedures, identification requirements at polling stations, choice of election day and hours) have presented, and continue to present, hurdles to political participation. DENNIS F. THOMPSON, *JUST ELECTIONS* 28 (2002).

Over the following decades, activists sought both to enfranchise women and reenfranchise African American men. The passage of the Nineteenth Amendment in 1920 accomplished the former; U.S. CONST. amend. XIX; years of litigation and the passage of the Voting Rights Act of 1965 went a long way toward accomplishing the latter. THOMPSON, *supra*.

<sup>64</sup> CULTICE, *supra* note 27, at 7, 13-14. The first “serious” consideration given to a proposal to lower a statewide voting age from twenty-one to eighteen probably occurred at the Missouri Convention in 1820. *Id.* at 7. After the end of the Civil War, delegates to the New York Constitutional Convention of 1867 considered a similar proposal; both conventions rejected the proposals. *Id.* at 7, 13-14.

<sup>65</sup> Republican Senator Arthur Vandenberg, from Michigan, and Democratic Congressman Jennings Randolph, from West Virginia, introduced joint resolutions proposing the constitutional amendment. S.J. Res. 166, 77th Cong. (1942); H.R.J. Res. 354, 77th Cong. (1942).



of government for which they are best satisfied to fight."<sup>66</sup> Congress lowered the draft age to eighteen in the fall of 1942 but adjourned without taking action on the proposed amendment.<sup>67</sup>

Between 1942 and 1944, members of Congress introduced more than a half-dozen similar joint resolutions to lower the national voting age;<sup>68</sup> in the states, lawmakers began doing the same.<sup>69</sup> Georgia became the first state to lower its statewide voting age to eighteen, amending its constitution in 1943, just one year after eighteen-year-olds became eligible for the draft.<sup>70</sup> Between 1945 and 1952, state lawmakers introduced nearly 100 bills in their legislatures proposing reductions in the voting age, and federal lawmakers sent more than a dozen bills to congressional committees.<sup>71</sup> It was more than ten years after Georgia's constitutional amendment, however, before any other proposals would succeed. Then, in 1955, Kentucky became the second state to lower its voting age.<sup>72</sup> When new states Alaska and Hawaii adopted their constitutions soon thereafter, they adopted compromise voting ages of nineteen and twenty, respectively.<sup>73</sup>

Unlike earlier movements to enfranchise African American and women citizens, the disfranchised—young people themselves—were not at the forefront of the youth-vote movement. The nation's youth did not begin to mobilize until the early 1960s, when the nation's involvement in the Vietnam War galvanized their efforts.<sup>74</sup> Student organizations on college

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<sup>66</sup> 88 CONG. REC. 8316 (1942) (statement of Sen. Arthur Vandenberg); 88 CONG. REC. 8507 (statement of Rep. Jennings Randolph).

<sup>67</sup> CULTICE, *supra* note 27, at 22.

<sup>68</sup> *Id.* at 20, 22.

<sup>69</sup> *Id.* at 24-25.

<sup>70</sup> *Id.* at 25-26.

<sup>71</sup> *Id.* at 30.

<sup>72</sup> *Id.* at 55. In 1954, President Dwight Eisenhower, a former military general, became the first U.S. president to endorse a constitutional amendment extending the vote in federal elections to eighteen-year-olds. Eisenhower's reasoning was to the point: "[I]f a man is old enough to fight he is old enough to vote . . . ." KEYSSAR, *supra* note 1, at 225.

<sup>73</sup> CULTICE, *supra* note 27, at 59-60.

<sup>74</sup> See *Lowering the Voting Age to 18: Hearings Before the Subcomm. on Constitutional Amendments of the Comm. on the Judiciary*, 90th Cong. 23 (1968) (statement of Rep. Spencer Oliver). As of 1968, approximately 25 percent of U.S. troops, and nearly 30 percent of U.S. casualties, had been younger than twenty-one years old. *Id.* In 1968, students founded Let Us Vote (LUV) on the campus of the University of the Pacific in Stockton, California. Within months, the organization expanded to include chapters at more than three thousand high schools and four hundred colleges across the country. CULTICE, *supra* note 27, at 97-98. LUV joined the Youth Franchise Coalition, comprising twenty-three civil rights and educational organizations working to extend voting rights, both at the state level and through a federal constitutional amendment. *Id.* at 98.

campuses and in high schools then joined various civil-rights organizations already working to extend voting rights to eighteen-year-olds.<sup>76</sup>

In an effort to bypass the cumbersome process of amending the U.S. Constitution, Congress in 1970 moved to lower the nationwide voting age through federal legislation.<sup>76</sup> Lawmakers, before voting to extend the Voting Rights Act, which was set to expire, inserted into the Act a provision lowering the voting age to eighteen in both federal and state elections. President Richard Nixon, who explained that he supported a lower voting age not because eighteen-year-olds were old enough to fight, but because “they were smart enough to vote,” signed the amended Act into law.<sup>77</sup> As he did so, however, Nixon expressed skepticism that Congress’s power extended beyond regulating federal elections to also include setting voter qualifications for statewide elections.<sup>78</sup>

Nixon’s skepticism was well-founded, and four states immediately challenged the law.<sup>79</sup> The case *Oregon v. Mitchell* split the Supreme Court.<sup>80</sup> Four justices would have held that Congress was without power to set voter qualifications for *either* federal or state elections.<sup>81</sup> Four justices would have held that Congress had power to set voter qualifications for *both* federal and state elections.<sup>82</sup> Justice Hugo Black, the swing vote, believed that Congress had the power to set voter qualifications in federal—but not state—elections.<sup>83</sup> His plurality opinion, upholding the provision in part and invalidating it in part, became the judgment of the Court.<sup>84</sup>

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<sup>76</sup> CULTICE, *supra* note 27, at 99.

<sup>76</sup> The amendment extended the Voting Rights Act and, in addition to its provision lowering the voting age, abolished residency requirements over thirty days for national elections and prohibited literacy tests for a period of five years. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314.

<sup>77</sup> CULTICE, *supra* note 27, at 115.

<sup>78</sup> The Voting Rights Act was set to expire if Congress failed to pass the amendments extending it. Unwilling to allow that to happen, Nixon signed the amendment, indicating that he was “leaving the decision on the disputed provision to what I hope will be a swift resolution by the courts.” *Id.* at 139.

<sup>79</sup> The states were Arizona, Idaho, Oregon, and Texas. *See Oregon v. Mitchell*, 400 U.S. 112, 112 (1970).

<sup>80</sup> The justices filed five separate opinions in the case. *Id.* at 115.

<sup>81</sup> They were Justices Blackmun, Harlan, and Stewart, and Chief Justice Burger. *See id.* at 152 (Harlan, J., concurring in part and dissenting in part); *id.* at 281 (Stewart, J., concurring in part and dissenting in part).

<sup>82</sup> They were Justices Brennan, Douglas, Marshall, and White. *See id.* at 229 (Brennan, J., concurring in part and dissenting in part); *id.* at 135 (Douglas, J., concurring in part and dissenting in part).

<sup>83</sup> *Id.* at 117.

<sup>84</sup> *Id.*; *see also* CULTICE, *supra* note 27, at 172-73.

*Oregon v. Mitchell* thus left intact the provision in the Voting Rights Act lowering the voting age to eighteen in federal elections, but by invalidating the same provision's application to the states, returned the voting ages for statewide elections to their respective pre-1970 status quo. The forty-seven states that did not permit eighteen-year-olds to vote scrambled either to modify their voting systems to accommodate two voting lists—one for federal elections and another for state elections—or to change their laws to lower the voting age in both federal and state elections.<sup>85</sup> Modifying state voting systems presented significant administrative challenges and promised to be expensive.<sup>86</sup> Lowering the voting age statewide required amending state constitutions, and in every state but Delaware, constitutional amendments required voter referenda.<sup>87</sup> Because of the requirements of their constitutional amendment processes, only fifteen states could possibly have changed their statewide voting ages in time for the November 1972 elections.<sup>88</sup>

Spurred by the prospect of election-day chaos, in March 1971 Congress hurriedly approved the proposed Twenty-Sixth Amendment.<sup>89</sup> The amendment provided that the right of citizens "eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."<sup>90</sup> The state legislatures all met in session or special session to ratify the amendment, and they did so in record time. The Twenty-Sixth Amendment became law—in time for the 1972 elections—when Ohio became the thirty-eighth state to ratify it in June 1971.<sup>91</sup>

Significantly, World War II did not spark the voting-age debate in the United States alone: it ignited a "global suffrage age reduction movement."<sup>92</sup> By the early 1970s, the world was nearly evenly divided; sixty-nine countries had voting ages of twenty-one or older, while sixty-eight countries had adopted

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<sup>85</sup> CULTICE, *supra* note 27, at 180-81.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 185.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 191.

<sup>90</sup> U.S. CONST. amend. XXVI, § 1.

<sup>91</sup> CULTICE, *supra* note 27, at 191.

<sup>92</sup> After lowering the age of conscription, U.S. allies also confronted pressures to enfranchise their youngest soldiers; several did so, at least temporarily. *Id.* at 78. During both world wars, for example, Britain, Canada, and several other Commonwealth members lowered the wartime voting age from twenty-one to nineteen, restoring their voting ages to twenty-one after the wars. *Id.* at 76. In 1936, Russia became the first European nation to permanently lower its voting age to eighteen. *Id.*

voting ages of less than twenty-one (with fifty-two of those adopting eighteen as the national voting age).<sup>93</sup>

### C. *Global Context, into the Twenty-First Century*

This section surveys the continuing expansion of the franchise to younger citizens in other countries, and the status of the voting age in the United States. More than a dozen countries have lowered local, state, or national voting ages to sixteen, driven primarily by efforts to increase youths' political engagement and counter the disproportionate political influence of older citizens (who vote at higher rates than the young, and whose numbers have grown as a result of demographic factors). Other nations have begun to consider doing the same. In the United States, a handful of state legislatures have considered proposals to lower statewide voting ages, but the issue has not generated widespread attention.

At the beginning of the twentieth century, the average age of the electoral majority worldwide was just under twenty-four years.<sup>94</sup> Approximately half of Europe's nations (including Britain, France, and Italy) set the age of electoral majority at twenty-one, and half at an older age.<sup>95</sup>

Today, most nations have adopted some form of representative democratic government.<sup>96</sup> Over 80 percent have set the voting age at eighteen without exception.<sup>97</sup> Twelve countries extend the franchise to sixteen-year-olds, although two do so only for those who are employed, and three only for those who are married.<sup>98</sup> Five countries have set the voting age

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<sup>93</sup> *Id.* at 79. More than a dozen of the countries that retained twenty-one as the voting age allowed individuals younger than twenty-one to vote under certain circumstances—e.g., those serving in the military, those who were married, or those participating in provincial or local elections. *Id.* at 78-79.

<sup>94</sup> *Id.* at 76.

<sup>95</sup> *Id.* The original nineteenth-century constitutions of more than a dozen European nations, for example, set the age of electoral majority at twenty-five years; several other nations set it at thirty. *Id.* at 89.

<sup>96</sup> Of 195 independent countries, 117 qualified as "electoral democracies" in 2011, according to a widely cited annual survey conducted by Freedom House, an independent watchdog organization. FREEDOM HOUSE, FREEDOM IN THE WORLD 2012: THE ARAB UPRISINGS AND THEIR GLOBAL REPERCUSSIONS 29, available at [http://www.freedomhouse.org/sites/default/files/inline\\_images/FIW%202012%20Booklet--Final.pdf](http://www.freedomhouse.org/sites/default/files/inline_images/FIW%202012%20Booklet--Final.pdf).

<sup>97</sup> See *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2123.html> (last visited Mar. 9, 2012).

<sup>98</sup> Countries permitting sixteen-year-olds to vote include Austria, Bosnia and Herzegovina, Brazil, Croatia, Cuba, Dominican Republic, Ecuador, Guernsey, Indonesia, Isle of Man, Jersey, Nicaragua, and Slovenia. *Id.* Bosnia and Herzegovina, Croatia, and Slovenia permit only employed sixteen-year-olds to vote; otherwise, the

at seventeen.<sup>99</sup> The average voting age worldwide is between seventeen and eighteen years.<sup>100</sup>

In Western democracies and the Commonwealth nations, countries that have lowered or are considering lowering the voting age are doing so to counteract the aging of their electorates and to increase more generally the political participation of young people. These continue to be the nations with which the United States is most closely aligned politically, and I discuss them at greater length below.

### 1. Canada and Australia

Canadian political parties all allow members as young as fourteen to vote for the parties' candidates for Canadian prime minister.<sup>101</sup> The national voting age for all other elections, however, is eighteen.<sup>102</sup>

Over the last decade, the Canadian Parliament has considered numerous proposals to lower the national voting age to sixteen, the most recent coming before the House of Commons in 2005.<sup>103</sup> The bill's supporters advanced their proposal as an instrumental measure that would reverse declining voter participation and reengage youth in the nation's politics.<sup>104</sup> Members of Parliament from each of the four federal

voting age is eighteen. *Id.*; Danish Youth Council, *DUF Factsheet: The Suffrage Age—in Europe 2* (Jan. 2011), [http://duf.dk/uploads/tx\\_templavoila/Suffrage\\_in\\_Europe.pdf](http://duf.dk/uploads/tx_templavoila/Suffrage_in_Europe.pdf). The Dominican Republic and Indonesia permit married individuals regardless of age to vote; otherwise the voting age is eighteen in the Dominican Republic and seventeen in Indonesia. *The World Factbook*, *supra* note 97. Hungary allows married individuals aged sixteen or seventeen to vote. Danish Youth Council, *supra*, at 2. In Sweden and Finland, sixteen-year-olds may vote in parochial church council elections. *Id.* at 1; see also BRAZIL: A COUNTRY STUDY 300-01 (Rex A. Hudson ed., 1997), available at <http://countrystudies.us/brazil/>.

<sup>99</sup> Countries permitting seventeen-years-olds to vote include Indonesia, North Korea, Seychelles, Sudan, and Timor-Leste. *The World Factbook*, *supra* note 97.

<sup>100</sup> See generally *The World Factbook*, *supra* note 97 (listing most nations' voting ages between seventeen and nineteen).

<sup>101</sup> House of Commons Debates (Hansard), No. 47 (Feb. 1, 2005), at 1735 (Can.), available at <http://www.parl.gc.ca/content/hoc/House/381/Debates/047/HAN047-E.PDF> (statement of Private Member Mark Holland on Canada Elections Act) ("We give youth the opportunity at leadership conventions to select the leaders of our respective parties, who become prime ministers. That certainly is something that we all think is acceptable. In fact, in all of our nominations youth as young as 14 are allowed to select who their local candidate will be.").

<sup>102</sup> *The World Factbook*, *supra* note 97.

<sup>103</sup> Press Release, House of Commons, All-Party Team Pushes for Youth Voting Rights (Dec. 14, 2004), available at [http://www.epsb.ca/board/march22\\_05/item07.pdf](http://www.epsb.ca/board/march22_05/item07.pdf).

<sup>104</sup> See House of Commons Debates (Hansard), No. 47, *supra* note 101, at 1730 (statement of Private Member Mark Holland on Canada Elections Act). Holland, who sponsored the bill, suggested that because younger people lack the vote, legislators

political parties, including the caucus leaders of each party, joined in bipartisan support of the proposal, but the bill failed to pass the House.<sup>105</sup>

The Australian federal government, also with the goal of increasing voter engagement and participation, raised the possibility of lowering the national voting age to sixteen in a 2009 green paper.<sup>106</sup> As of this writing, however, the proposal has not advanced further in the lawmaking process.

Like the United States, Australia is a federal democracy, and its six states retain power over state voting rules. The

ignore them and their issues, which contributes to their disengagement. He argued that “[b]y the time they get to 18, . . . they are often disengaged and they are not in a general education environment any more. Their patterns have already been established.” *Id.* Younger adolescents still in school could join a political party, participate in debates, and engage with legislators and candidates for office in a meaningful way. Because they still live at home (as opposed to high-school graduates who have gone to college or moved out of their parents’ home), it would be easier for them to register and actually vote. Early voting and political engagement will potentially establish a lifetime pattern; Holland claimed that “if we can get them to vote once they will vote again and again.” *Id.*

<sup>105</sup> An Act to Amend the Canada Elections Act (Voter and Candidate Age), Bill C-261, 38th Parl. (Can. 2004), available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2333564&Language=E&Mode=1>. The House of Commons rejected the bill on June 5, 2005. House of Commons Debates (Hansard), No. 111 (June 8, 2005) at 1915 (Can.) available at <http://www.parl.gc.ca/content/hoc/House/381/Debates/047/HAN047-E.PDF> (voting down the bill in a division of the house); see also Press Release, House of Commons, All-Party Team Pushes for Youth Voting Rights (Dec. 14, 2004), available at [http://tools.bcweb.net/images/85b55e52596ed161adfc246c839071ca/14dec04\\_release\\_voting\\_age.pdf](http://tools.bcweb.net/images/85b55e52596ed161adfc246c839071ca/14dec04_release_voting_age.pdf); House of Commons, Arguments for Bill C-261: Bill aims to reverse declining voter participation by involving youth early (Dec. 14, 2004), available at [http://tools.bcweb.net/images/85b55e52596ed161adfc246c839071ca/14dec04\\_release\\_voting\\_age.pdf](http://tools.bcweb.net/images/85b55e52596ed161adfc246c839071ca/14dec04_release_voting_age.pdf). Several years earlier, a Canadian sixteen-year-old and seventeen-year-old challenged their disfranchisement as unconstitutional. An Edmonton federal court rejected their claim, upholding the restriction as a reasonable legislative balance between safeguarding the fundamental right to vote and ensuring sufficient maturity to do so. *Fitzgerald v. Alberta*, 2002 ABQB 1086 (Can.).

<sup>106</sup> Austrl. Gov’t, *Electoral Reform Green Paper: Strengthening Australia’s Democracy* (Sept. 2009), available at [http://www.dpnc.gov.au/consultation/elect\\_reform/strengthening\\_democracy/docs/strengthening\\_australias\\_democracy.pdf](http://www.dpnc.gov.au/consultation/elect_reform/strengthening_democracy/docs/strengthening_australias_democracy.pdf). The stated purpose of the Green Paper was “to encourage public debate about options for improving and modernising Australia’s electoral system.” *Id.* at 5; see also Sue Neales, *Move to Lower Voting Age*, MERCURY (Hobart, Austl.) (Sept. 23, 2009, 1:01 PM), [http://www.themercury.com.au/article/2009/09/23/99171\\_tasmania-news.html](http://www.themercury.com.au/article/2009/09/23/99171_tasmania-news.html); Emma Rodgers, *Proposal to Lower Voting Age to 16*, ABC NEWS (Sept. 24, 2009, 8:08 AM), <http://www.abc.net.au/news/stories/2009/09/23/2694432.htm>.

The Australian Green Party, one of the nation’s five significant political parties, supports lowering the voting age to sixteen. See MARK RODRIGUES & DIANE SPOONER, PARL. OF AUSTRALIA, *BILLS DIGEST: ELECTORAL AND REFERENDUM AMENDMENT (MODERNISATION AND OTHER MEASURES) BILL 2010 (JUNE 24, 2010)*, available at <http://www.aph.gov.au/binaries/library/pubs/bd/2009-10/10bd191.pdf>. Another political party, the Australian Democrats, have recently urged the state of South Australia to lower its voting age to sixteen. The Democrats have little presence in the national Parliament, though. *Democrats Urge S.A. to Lower Voting Age*, AGE (Austl.) (Apr. 14, 2008), <http://news.theage.com.au/national/democrats-urge-sa-to-lower-voting-age-20080414-25ys.html>.

Victorian Electoral Commission (VEC), which manages state and local elections in the state of Victoria and also conducts electoral research, published a study of the age of electoral majority in a 2004 research paper.<sup>107</sup> The VEC concluded that research conducted both in the United Kingdom and in Germany suggested that many of the arguments for excluding sixteen- and seventeen-year-olds from the franchise “might not be valid.”<sup>108</sup> It then noted numerous advantages to lowering the voting age. Foremost among them, the VEC noted that “lowering the voting age to an age when people are still in school would allow more effective education programmes due to them being more relevant to students’ immediate lives,” and thus potentially “reduce voter ignorance overall.”<sup>109</sup> Consistent with reported studies, the research paper suggested that participating in elections at a young age could establish lifelong participatory habits and reduce the likelihood of apathy at later ages.<sup>110</sup> The VEC concluded that “democracy will be enhanced by the inclusion of additional viewpoints.”<sup>111</sup>

## 2. Continental Europe

A growing number of Western European nations have either lowered their voting ages or are considering doing so. In general, supporters of the change view it as a policy instrument to increase youth political representation and civic engagement, counterbalance the overrepresentation of older voters among the electorate (caused by the higher turnout of older voters and the aging of the population), and improve democracy more generally.

In 2009, a group comprising members of Parliament from nine European countries proposed that the Parliamentary Assembly of the Council of Europe study whether to “lower[] . . . the voting age to sixteen in all [forty-seven] member

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<sup>107</sup> CHRISTOPHER GRIBBIN, VICTORIAN ELECTORAL COMM’N, LOWERING THE VOTING AGE: A DISCUSSION OF THE ISSUES FROM THE VICTORIAN ELECTORAL COMMISSION’S PERSPECTIVE (2004), available at <http://www.vec.vic.gov.au/files/RP-LoweringtheVotingAge.pdf>.

<sup>108</sup> *Id.* at 10.

<sup>109</sup> *Id.* at 10-11.

<sup>110</sup> *Id.* at 11. The VEC reasoned that if voter involvement begins “when people are young and enthusiastic, . . . fewer young people may develop an attitude of ‘politicians don’t care about me’ which continues into later life.” *Id.*

<sup>111</sup> *Id.* Among the initiatives advanced by a Youth Summit held in 2008 was a proposal to lower the voting age to sixteen. Susanna Dunkerley, *Youth Speak: Make the Voting Age 16*, ADVERTISER (Austl.), Apr. 14, 2008, at 7, available at 2008 WLNR 6923734.

countries . . . .”<sup>112</sup> The proposal expressed the signers’ concern over current low voting rates among young voters across Western Europe and observed that the aging of the population would only worsen youths’ marginalization in political processes. It argued that the trends threatened “the future stability of European democracy,” and that lowering the voting age could help reengage young people in the democratic process.<sup>113</sup>

Austria lowered its national voting age to sixteen by constitutional amendment in 2007, becoming the first European Union nation to do so.<sup>114</sup> In large part, the change sought to counterbalance the increasing percentage of voters aged sixty-five and older, whose numbers have been growing due to declining birth rates. Because individuals under eighteen could not vote at all, and because older citizens vote at rates higher than do younger citizens, the growing demographic imbalance prompted concerns that government would become less responsive to the interests of the nation’s young people. Sixteen- and seventeen-year-olds voted for the first time in the 2008 national elections.<sup>115</sup> Although the Austrian government does not track voter participation by age, one government-funded study found that sixteen- to eighteen-year-olds voted in the 2008 national elections at the same rate as the rest of electorate—approximately 73 percent.<sup>116</sup>

Several states in Switzerland and Germany have lowered the voting age for local elections to sixteen; nearly half of the sixteen German states have done so. In Norway, the ombudsman for children has published a report advocating

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<sup>112</sup> Expansion of Democracy by Lowering the Voting Age to 16, PARL. EUR. DOC. (COM 11895) ¶ 8 (2009), available at <http://assembly.coe.int/Documents/WorkingDocs/Doc09/EDOC11895.pdf> (as presented by Denmark Parl. Mem. Mogens Jensen et al., May 4, 2009). The group that presented the proposal included members of Parliament from Austria, Denmark, Germany, Luxembourg, Norway, Portugal, Turkey, Ukraine, and the U.K. *Id.*

<sup>113</sup> *Id.* ¶ 5.

<sup>114</sup> Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl No. 1/1930, as last amended by Bundesgesetzblatt [BG] BGBl I No. 27/2007, art. 26, ¶ 1 (Austria); Franz Fallend, *Austria*, 47 EUR. J. POL. RES. 902, 907 (2008); *World Briefing Europe: Austria: Voting Age Lowered to 16*, N.Y. TIMES (June 6, 2007), <http://query.nytimes.com/gst/fullpage.html?res=9501E4DC1E30F935A35755C0A9619C8B63>.

<sup>115</sup> *Austria, in a First, Allows Children to Vote*, N.Y. TIMES (Sept. 25, 2008), <http://www.nytimes.com/2008/09/25/world/europe/25iht-austria.4.16485539.html>.

<sup>116</sup> ULRIKE KOZELUH, SORA INST. FOR SOC. RES. & ANALYSIS, POST ELECTION STUDY—VOTING WITH 16: MAIN RESULTS FOR THE NATIONAL ELECTIONS IN AUSTRIA 2008 (English-language Summary 2009), available at [http://www.sora.at/fileadmin/downloads/wahlen/2009\\_wahlen-mit-16\\_summary-english.pdf](http://www.sora.at/fileadmin/downloads/wahlen/2009_wahlen-mit-16_summary-english.pdf).



lowering the national voting age to sixteen.<sup>117</sup> As a pilot project, the Norwegian Parliament has authorized twenty municipalities to enfranchise sixteen-year-olds in municipal and county elections in 2011.<sup>118</sup> Finland, too, has recently appointed a government group to study the issue.<sup>119</sup>

### 3. The British Islands

In the British Islands, the self-governing Crown dependencies—the Isle of Man and the Bailiwicks of Guernsey and Jersey—lowered their voting ages from eighteen to sixteen in 2006, 2007, and 2008, respectively.<sup>120</sup> In both Scotland and Wales, Parliamentary Assemblies voted in 2008 in favor of lowering the voting age to sixteen.<sup>121</sup> Neither is currently able to implement the change, however, since the authority to establish voter qualifications, even for local elections, rests with the central U.K. Parliament in Westminster.<sup>122</sup> The Scottish Parliament has called on Westminster to transfer to Scotland the legislative and executive power needed to effectuate a change in the voting age.<sup>123</sup> It passed legislation in 2009 to lower

<sup>117</sup> REIDAR HJERMANN, WHAT'S THE POINT?: A BOOKLET ON THE RIGHT TO VOTE FOR 16-YEAR-OLDS 2-3, 11 (2010), available at [http://www.barneombudet.no/sfiles/0/82/9/file/bo\\_stemmerett\\_english\\_web.pdf](http://www.barneombudet.no/sfiles/0/82/9/file/bo_stemmerett_english_web.pdf).

<sup>118</sup> *Id.*

<sup>119</sup> See, e.g., *Voting Age May Be Lowered to 16 in Finnish Municipal Elections*, HELSINKI TIMES (June 8, 2010, 11:18 AM), <http://www.helsinkitimes.fi/htimes2/domestic-news/politics/11365>.

<sup>120</sup> *Island's Voting Age Lowered to 16*, BBC NEWS (Feb. 7, 2006, 1:07 PM), [http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/isle\\_of\\_man/4690678.stm](http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/isle_of_man/4690678.stm).

<sup>121</sup> Robbie Dinwoodie, *SNP in Move to Lower Voting Age to 16: Change in Law Required*, HERALD (Glasgow, Scot.), June 13, 2008, at 7, available at 2008 WLNR 11182161 (detailing how Scotland lowered the voting age to sixteen); *Record of Plenary Proceedings*, NAT'L ASSEMBLY FOR WALES (Feb. 6, 2008), <http://www.assemblywales.org/bus-home/bus-chamber/bus-chamber-third-assembly-rop.htm?act=dis&id=81636&ds=2/2008> (approving by a vote of 44–4 a motion stating “that the National Assembly for Wales . . . [b]elieves that in order to engage young people in the democratic process, 16-year-olds should be entitled to vote”); *AMs Call to Lower Voting Age*, WALES ONLINE (Feb. 6, 2008), <http://www.walesonline.co.uk/news/wales-news/2008/02/06/ams-cal-to-lower-voting-age-91466-20440924/>.

<sup>122</sup> Dinwoodie, *supra* note 121. The U.K. Parliament has devolved designated powers to the governments of Scotland and Wales, retaining others. See *Which Responsibilities are Devolved?*, CABINET OFFICE, <http://www.cabinetoffice.gov.uk/content/which-responsibilities-are-devolved> (last visited Mar. 9, 2012). The power to set electoral rules is among those retained by the U.K. Parliament in Westminster. See Dinwoodie, *supra* note 121; see also *Voting at 16*, WELSH NAT'L ASSEMBLY, <http://exploretheassembly.org/lang/en-uk/get-involved/elections-etholiadau/voting-at-16> (last visited Sept. 4, 2010) (acknowledging that, despite the Welsh National Assembly's vote in favor of lowering the voting age, “deciding on the age of voting isn't one of the Devolved Fields, so it is down to Westminster to decide”).

<sup>123</sup> Press Release, Scottish Government, *Voting Powers* (Dec. 6, 2008), available at <http://www.scotland.gov.uk/News/Releases/2008/06/12104807> (quoting Scottish

the voting age to sixteen in pilot health board elections, and the pro-independence Scottish government permitted sixteen- and seventeen-year-olds to vote in a referendum on Scottish independence in 2010.<sup>124</sup>

In Westminster, members of Parliament's House of Commons have introduced four bills to lower the voting age in the last six years, suffering defeats by increasingly narrow margins.<sup>125</sup> Former British Prime Ministers Tony Blair and Gordon Brown both announced their support while in office for lowering the voting age.<sup>126</sup>

In 2002, the Electoral Commission, an independent commission charged by the British Parliament to review public election law and policy, began a review of minimum voting and

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Minister for Parliamentary Business Bruce Crawford as "call[ing] upon the UK Government to transfer responsibility for the electoral franchise to the Scottish Parliament"); see also Dinwoodie, *supra* note 121; David Maddox, *SNP Demands Power to Cut Voting Age to 16*, SCOTSMAN (Edinburgh, Scot.), June 13, 2008, at 12, available at 2008 WLNR 11165896.

<sup>124</sup> Health Boards (Membership and Elections) (Scot.) Act, 2009 (A.S.P. 5), § 2, sched. 9(1), available at [http://www.opsi.gov.uk/legislation/scotland/acts2009/pdf/asp\\_20090005\\_en.pdf](http://www.opsi.gov.uk/legislation/scotland/acts2009/pdf/asp_20090005_en.pdf); Tom Peterkin, *Referendum Voting Age to Be Cut to 16*, SCOT. ON SUNDAY, Sept. 20, 2009, at 1, available at 2009 WLNR 18588698; *Bid to Lower Referendum Voting Age*, BBC NEWS (Sept. 19, 2009, 5:12 PM), [http://newsvote.bbc.co.uk/go/pr/fr/-/2/hi/uk\\_news/scotland/8264446.stm](http://newsvote.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/scotland/8264446.stm).

<sup>125</sup> Tory Lord Lucas of Crudwell introduced a bill in 2003, and Liberal Democrat Stephen Williams, Labour Party's Julie Morgan, and Liberal Democrat Jo Swinson introduced bills in 2005, 2007, and 2009. See Early Day Motion 1472, 2008-09, H.C. (May 12, 2009), available at <http://www.parliament.uk/edm/2008-09/1472> (2009 Bill); Voting Age (Reduction) Bill, 2007-08, H.C. Bill [54/3] (Gr. Brit.), available at <http://www.publications.parliament.uk/pa/cm200708/cmbills/022/08022.1-i.html> (2007 Bill); Early Day Motion 801, 2005-06, H.C. (Oct. 19, 2005), available at <http://www.parliament.uk/edm/2005-06/801> (2005 Bill); Greg Hurst, *Ministers Contemplate Cut in Voting Age to 16*, TIMES (London), Feb. 14, 2003, available at <http://www.timesonline.co.uk/tol/news/politics/article876843.ece> (2003 Bill). The House defeated the 2005 bill introduced by Liberal Democrat Stephen Williams by a margin of eight votes. 440 PARL. DEB., H.C. (6th ser.) (2005) 141 (U.K.), available at <http://www.publications.parliament.uk/pa/cm200506/cmhansrd/v0051129/debtext/51129-07.htm> (voting down Bill 136-128).

<sup>126</sup> Brown urged the House of Commons to consider the issue in a 2007 speech on constitutional reform. 462 PARL. DEB., H.C. (6th ser.) (2007) 819 (U.K.), available at <http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070703/debtext/70703-0004.htm> (statement of P.M. Gordon Brown). After an independent commission studied the issue but found insufficient cause for change, Brown noted that the commission "couldn't make up its mind, so it's come back to us. I personally would like to see the voting age reduced to 16." Tomos Livingstone, *I'd Like to See the Voting Age Lowered to 16*, SAYS BROWN, WESTERN MAIL (Wales), July 24, 2009, available at <http://www.walesonline.co.uk/news/wales-news/2009/07/24/i-d-like-to-see-the-voting-age-lowered-to-16-says-brown-91466-24228229/>; see also Andrew Grice, *Blair Will Give Vote to 16-Year-olds*, INDEP. (London), May 4, 2004, at 1, available at <http://www.independent.co.uk/news/uk/politics/blair-will-give-vote-to-16-year-olds-562185.html>; Joanna Moorhead, *Sweet 16: Would You Give the Vote to Them?*, INDEP. ON SUNDAY (London), May 9, 2004, (Features), at 16-17, available at 2004 WLNR 10422645.

candidacy ages.<sup>127</sup> The commission undertook its review in response to declining election turnouts, noting that the citizens least likely to vote in the United Kingdom are the youngest group of eligible voters—eighteen- to twenty-four-year-olds.<sup>128</sup> Its review followed those of independent commissions from England, Scotland, and Wales that had all recommended lowering the voting and candidacy ages as a way of increasing young people's interest and participation in government.<sup>129</sup>

The commission reached five major conclusions.<sup>130</sup> First, while the fact that a clear majority of countries have a voting age of eighteen does not conclusively preclude the adoption of a lower age in the United Kingdom, it does shift the burden of persuasion to those seeking the change.<sup>131</sup> Second, the age at which young people attain various legal rights and responsibilities varies; therefore, while this information is useful, the nation should assess the age of electoral majority in its own context.<sup>132</sup> Third, there is no consensus on the definition of "maturity" and "what it means in relation to electoral participation and minimum voting and candidacy ages."<sup>133</sup> Fourth, in research the commission conducted, young people reported that they did not vote primarily because they were insufficiently informed; the commission also noted that citizenship education was only in its infancy in the U.K.<sup>134</sup> And finally, while the majority of direct respondents to the commission's public consultation paper favored a reduction of the voting age to sixteen, the general public favored retaining the current age of

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<sup>127</sup> THE ELECTORAL COMM'N, AGE OF ELECTORAL MAJORITY: REPORT AND RECOMMENDATIONS 3 (2004) [hereinafter U.K. ELECTORAL COMM'N 2004 REPORT], available at [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0011/63749/Age-of-electoral-majority.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0011/63749/Age-of-electoral-majority.pdf).

<sup>128</sup> *Id.* at 7.

<sup>129</sup> *Id.* at 8 (citing the reports of commissions in England, Scotland, and Wales that had made such recommendations in reports published in 2002). In a paper published in 2003 reporting its research and seeking public comment, the commission also noted that the Human Rights Commission in Northern Ireland also recommended a reduction in the voting age, to seventeen. THE ELECTORAL COMM'N, HOW OLD IS OLD ENOUGH?: THE MINIMUM AGE OF VOTING AND CANDIDACY IN UK ELECTIONS 29 (2003).

A coalition of organizations in the U.K. launched *Votes at 16* in January 2003. Coalition membership includes political parties and a range of organizations concerned with democracy and young people. See Alex Folkes, *The Case for Votes at 16*, 41 REPRESENTATION 52 (2004); VOTES AT 16 COALITION, 16 FOR 16: 16 REASONS FOR VOTES AT 16 (2008), available at <http://www.electoral-reform-scotland.org.uk/downloads/16for16.pdf>; VOTES AT 16 COALITION, <http://www.votesat16.org.uk> (last visited Jan. 27, 2012).

<sup>130</sup> U.K. ELECTORAL COMM'N 2004 REPORT, *supra* note 127, at 59-62.

<sup>131</sup> *Id.* at 59.

<sup>132</sup> *Id.* at 59-60.

<sup>133</sup> *Id.* at 60.

<sup>134</sup> *Id.*

eighteen, and there was “no significant or even consistent majority of young people calling for the right to vote . . . .”<sup>135</sup>

The commission concluded that “there does not seem to exist a sufficiently strong argument that change now would affect the level of political engagement between young people and the political process,” and looking for “clear evidence on which to base any change in the current voting age, . . . [the commission] to date has found insufficient justification for such change.”<sup>136</sup>

The commission planned to revisit the issue again in 2010 or 2011, and said that two factors in particular could “change the social context to a sufficient degree to make a lower voting age appropriate in the future.”<sup>137</sup> The first factor was the continued development of citizenship education across the United Kingdom (public schools had only recently introduced a new citizenship-education program).<sup>138</sup> The second factor was whether there was any change in public opinion regarding the preferred general age of majority.<sup>139</sup> At the time of this writing, the commission has not yet revisited the issue. The Labour Party in 2008 submitted to Parliament a bill to lower the voting age to sixteen for all U.K. elections. Although the bill garnered some support from other parties, opponents successfully blocked its progression through Parliament.<sup>140</sup>

#### 4. The United States

The voting age everywhere in the United States is eighteen, although nineteen states permit seventeen-year-olds to vote in primaries if they will turn eighteen in time for the general election.<sup>141</sup> Nothing suggests imminent change. A number of state legislatures in recent years have considered—and rejected—occasional bills or proposed constitutional

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<sup>135</sup> *Id.* at 61.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 62.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *New Bid to Lower the Voting Age to 16-year-olds Is Blocked*, BIRMINGHAM POST (U.K.), June 7, 2008, at 4, available at 2008 WLNR 10745322.

<sup>141</sup> See *17-year-old Primary Voting Fact Sheet*, FAIR VOTE: CTR. FOR VOTING & DEMOCRACY, <http://www.fairvote.org/17-year-old-primary-voting-fact-sheet> (last visited Apr. 17, 2012) (listing Alaska, Hawaii, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oregon, Virginia, Vermont, and Washington as allowing seventeen-year-olds to vote in primaries or caucuses under state law). Most recently, the Maryland legislature in its 2010 session passed a provision permitting persons younger than eighteen to vote in certain primary elections. 2010 Md. Laws ch. 271.

amendments that would lower state or local voting ages.<sup>142</sup> The Massachusetts legislature has not yet voted on a proposal to lower the voting age to seventeen, but in 2009, three of the four Democratic U.S. Senate candidates in Massachusetts supported the measure.<sup>143</sup> A proposal that would permit sixteen-year-olds to vote in limited circumstances, such as for school-district elections, is also pending before the Michigan legislature.<sup>144</sup>

## II. PRINCIPLES OF DEMOCRATIC ELECTORAL INCLUSION

Voter qualification rules determine the categories of individuals included in and excluded from an electorate. This part looks to democratic and liberal theories to identify standards for establishing these rules and assessing their legitimacy.

Part II.A introduces the principle of presumptive inclusion, advanced by democracy theorists and widely accepted as a foundational normative commitment of democratic states. Presumptive inclusion places on the state the burden of justifying electoral exclusions.

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<sup>142</sup> States that have considered proposals to lower the voting age are Arizona (2001, 2002, 2008, and 2009 proposals to lower age to sixteen); California (2004 proposal to lower voting age to fourteen, with votes of fourteen- and fifteen-year-olds counting for one-quarter vote, and votes of sixteen- and seventeen-year-olds counting for one-half vote); Hawaii (2004 proposals to lower voting age to sixteen and seventeen); Illinois (2008 and 2010 proposals to lower voting age to seventeen); Iowa (2004 and 2008 proposals to lower voting age to seventeen in school-district elections); Michigan (2004 proposal to lower voting age to seventeen, in addition to 2008 proposals to lower voting age to sixteen for all elections, and for school-district elections); Minnesota (2002, 2004, and 2009-2010 proposals to lower the voting age to sixteen or seventeen); Texas (2001 and 2003 proposals to lower voting age to fourteen); Washington (2006 and 2008 proposals to lower voting age to sixteen); and Wisconsin (2009-2010 proposal to lower voting age to seventeen). See *Election Reform Legislation*, NAT'L CONF. OF STATE LEGIS., <http://www.ncsl.org/legislatures-elections/elections/2001-2010-database-of-election-reform-legislation.aspx> (last visited Mar. 9, 2012).

<sup>143</sup> *3 of 4 Democrats Running for Ted Kennedy's Senate Seat Say They Support Lowering Federal Voting Age*, MASSLIVE.COM (Nov. 30, 2009, 2:00 PM), [http://blog.masslive.com/breakingnews/print.html?entry=/2009/11/3\\_of\\_4\\_democrats\\_running\\_for\\_t.html](http://blog.masslive.com/breakingnews/print.html?entry=/2009/11/3_of_4_democrats_running_for_t.html). The candidates who expressed support for lowering the statewide voting age were Martha Coakley, Alan Khazei, and Stephen Pagliuca. *Id.* Martha Coakley won the Democratic primary but lost the election to Republican candidate Scott Brown. See Matt Viser & Andrea Estes, *Big Win for Brown: Republican Trounces Coakley for Senate, Imperils Obama Health Plan*, BOS. GLOBE, Jan. 20, 2010, at 1, available at [http://www.boston.com/news/local/massachusetts/articles/2010/01/20/republican\\_trounces\\_coakley\\_for\\_senate\\_imperils\\_obama\\_health\\_plan/](http://www.boston.com/news/local/massachusetts/articles/2010/01/20/republican_trounces_coakley_for_senate_imperils_obama_health_plan/). In 2002, the Massachusetts legislature placed under indefinite study a bill approved by the Cambridge City Council lowering the local voting age to seventeen. The state legislature's approval was required to enact the bill. Ricarose Roque, *Voting Age Bill Stuck in State Legislature*, TECH, Oct. 18, 2002, at 1, 28, available at <http://tech.mit.edu/V122/PDF/N48.pdf>.

<sup>144</sup> See S.J. Res. B, 95th Leg., Reg. Sess. (Mich. 2009), available at <http://www.legislature.mi.gov/documents/2009-2010/jointresolutionintroduced/Senate/pdf/2009-SIJR-B.pdf>.

Inclusion in democratic/electoral processes is presumptive, but it is not absolute. Part II.B examines democratic exclusions and the conditions that render them justifiable. It evaluates longstanding standards that have generally required, for inclusion in the electorate, both (1) ongoing connection to the community and (2) vote decision-making competence. Individuals lacking these characteristics (or indicia of them) are commonly excluded from political participation.

While these standards for inclusion (or some variation of them) have long enjoyed near-universal acceptance, few democracy theorists have sought to justify them. In other words, the basic standards for inclusion have widespread intuitive appeal and seem correct, but it has been difficult to say *why* they are correct.

I advance a new argument that the twin standards for inclusion can derive, not solely from democratic principles, but also from the foundational commitment to individual liberty of the liberal constitutional democratic state.

Part III turns to the standard that is of central relevance here—electoral decision-making competence. This section first develops a conception of electoral competence, since none currently exists, and next assesses the age range by which young would-be voters have reliably attained that competence.

#### A. *Presumptive Electoral Inclusion*

There are many conceptions of democracy, and each has normative implications for the democratic legitimacy of a given political system.<sup>145</sup> Assessing the nature of political inclusion required for democratic legitimacy thus first requires a conception of democracy itself. The conception advanced below is a fairly typical one that describes the minimum requirements for a democratic system—i.e., the type of political participation required to render a process democratic, and the scope of political inclusion required to render a community democratic.

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<sup>145</sup> See, e.g., DAVID HELD, *MODELS OF DEMOCRACY* (3d ed. 2006) (cataloguing and discussing conceptions of democracy, including classical Athenian democracy, deliberative democracy, and the cosmopolitan model); David Collier & Steven Levitsky, *Democracy with Adjectives: Conceptual Innovation in Comparative Research*, 49 *WORLD POL.* 430, 450 (1997) (surveying conceptions of democracy). Some theorists view democracy as an inherently ambiguous and contestable concept. See, e.g., WILLIAM E. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 10 (Princeton Univ. Press 2d ed. 1983) (1974).

## 1. Defining Democratic Inclusion and Democratic Participation

A typical account of democracy provides that, *in order for a political system to qualify as democratic, the people subject to its laws must collectively authorize them.*<sup>146</sup> A democratic government thus derives its authority from the “the people” who are the individual members of the political community. Although minimalist, this normative account supplies a particular conception of “the people” who are entitled to political participation,<sup>147</sup> and it implies a conception of political participation itself.

Under this account, the people are the *legal subjects* of a government.<sup>148</sup> This conception is narrower than that advocated

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<sup>146</sup> Although this is a fairly conventional conception of democracy, this formulation draws directly from the nearly identical definitions of political philosopher David Estlund and political theorist Albert Weale. For Estlund, “[d]emocracy [is] the authorization of laws collectively by the people who are subject to them [and] is inseparable from voting.” DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 66 (2008). Weale’s formulation of democratic legitimacy is that a government must, at a minimum, guarantee that “important public decisions on questions of law and policy [will] depend, directly or indirectly, upon public opinion formally expressed by citizens of the community, the vast bulk of whom have equal political rights.” ALBERT WEALE, *DEMOCRACY* 18 (2d ed. 2007).

Political theorist Iris Marion Young is among those who articulate a conception that is decidedly more robust, embracing a “minimalist understanding of democracy . . . [in which] democratic politics entails a rule of law, promotion of civil and political liberties, [and] free and fair election of lawmakers.” IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 5 (2000).

Political scientist and economist Joseph Schumpeter has famously adopted what remains an atypical conception of the minimum requirements for a democratic political system. To Schumpeter, democracy exists so long as there is widespread political competition. He argues against “defin[ing] democracy by the extent of the franchise.” JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 276 n.16 (Taylor & Francis e-Library 2003) (1943). He thus denies the centrality to democratic systems of a widespread franchise, decrying what he terms the “classic[al] doctrine of democracy.” *Id.* Schumpeter believes that typical voters lack sufficient political knowledge to make reliable decisions, denies the possibility of a “uniquely determined common good,” *id.* at 251, and argues that the expression of a public opinion “from the infinitely complex jumble of individual and group-wise . . . volitions . . . of the ‘democratic process,’ . . . lacks not only rational unity but also rational sanction.” *Id.* at 253.

<sup>147</sup> Political theorists refer to the question of “what persons have a rightful claim to be included in the demos” as the “problem of inclusion.” ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL* 98 (1982) [hereinafter DAHL, *DILEMMAS*]; see also DAHL, *supra* note 10, at 119. See generally BECKMAN, *supra* note 10, at 10-15 (discussing various aspects of the “problem of inclusion”).

<sup>148</sup> See, e.g., ESTLUND, *supra* note 146, at 66 (defining the people entitled to authorize laws as “collectively[,] the people who are subject to them”). Weale defines it as “the vast bulk of . . . citizens of the community,” where “citizen” appears to refer to the legal dimension of citizenship. Weale acknowledges that citizenship is not always a necessary condition for securing political rights such as the franchise, but he observes that “it is invariably the principal basis.” WEALE, *supra* note 146, at 208; see also

by some theorists, who argue that “the people” should include “[e]veryone who is *affected* by the decisions of a government [and who] should [thus] have the right to participate in that government.”<sup>149</sup> The broader conception is the more inclusive of the two, but also the less useful. Because there are innumerable ways in which governments’ decisions affect people, the scope of the *affected by* conception is difficult to delimit. And since causal connections cross national borders, species membership, and time, the conception’s implementation (i.e., the method by which the preferences of geographically scattered or remote persons, other species, future generations, et cetera, would be identified and registered) poses nearly insurmountable challenges.<sup>150</sup> The narrower, legal conception of “the people” delimits the notion of “affected” by extending rights of participation only to those individuals who are *legal subjects* “bound by” or “subject to the government and its laws.”<sup>151</sup> The scope of government’s authority to directly regulate an individual’s behavior or status thus bounds the relevant conception of “affected.”<sup>152</sup>

This account of democracy also requires “the people” to authorize the laws that govern them. Members of a political community can participate in and influence government’s decisions in any number of ways.<sup>153</sup> Voting is one method, but others include political demonstrations, participatory town

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MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 62 (1983) (“[T]he denial of [citizenship] is always the first of a long train of abuses.”).

<sup>149</sup> ROBERT A. DAHL, AFTER THE REVOLUTION: AUTHORITY IN A GOOD SOCIETY 64 (1970) [hereinafter DAHL, AFTER THE REVOLUTION] (emphasis added); DAHL, *supra* note 10, at 119-20. Dahl concludes, however, that the broad form of the principle is unhelpful, as it offers a “diffuse galaxy of uncountable possibilities.” DAHL, AFTER THE REVOLUTION, *supra*, at 66.

<sup>150</sup> Robin Eckersley, *Deliberative Democracy, Ecological Representation and Risk: Towards a Democracy of the Affected*, in DEMOCRATIC INNOVATION: DELIBERATION, REPRESENTATION AND ASSOCIATION 119 (M. Saward ed., 2000) (arguing that democratic inclusion should extend to anyone, “irrespective of social class, geographic location, nationality, generation, or species”); Robert E. Goodin, *Enfranchising All Affected Interests, and Its Alternatives*, 35 PHIL. & PUB. AFF. 35, 55 (2007) (concluding that the all-affected principle, if taken to its logical conclusion, would justify extending political participation to “[v]irtually . . . everyone in the world—and indeed everyone in all possible future worlds”).

<sup>151</sup> DAHL, *supra* note 10, at 123.

<sup>152</sup> The legal conception of the all-affected principle is consistent with the goal of “symmetry” espoused by some modern theorists who argue that democracies should aspire to achieve symmetry between those entitled to participate in a decision and those bound by it. HELD, *supra* note 145, at 290. The idea of democratic symmetry echoes the Aristotelian conception of a democratic system as one where “all rule each and each rule all.” ARISTOTLE, THE POLITICS § 1370a (T.A. Sinclair trans., London, Penguin Books 1981).

<sup>153</sup> See generally BIRCH, *supra* note 9, at 159-69 (presenting a typology of political power).



meetings or deliberation, canvassing, community or Internet organizing, letter/op-ed writing, et cetera.<sup>154</sup> Whatever the relative merits or efficacy of other forms of political activity, pragmatic and equitable concerns generally require eventual resort to a model that registers the collective will as the aggregation of individuals' preferences, as expressed through their vote decisions. Participatory or deliberative processes, for example, may aim to achieve consensus of some sort, but they are also apt to result in continued disagreement (even when numbers do not make such deliberation impractical). Voting provides a method for reaching legitimate, collectively binding decisions by registering and weighing equally individuals' expressed preferences.<sup>155</sup> Voting has thus long been the primary means by which "the people" authorize the laws—sometimes directly, by voting on policy questions, but more commonly indirectly, by electing legislators.<sup>156</sup>

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<sup>154</sup> *Id.* at 105 (listing "the main forms of political participation"). Civil society theorists have argued more generally that widespread citizen participation in a range of organizations and associations—not only political associations, but also churches, athletic clubs, etc.—contributes to democracies' flourishing. See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000). The deliberative model of democracy places at the core of democratic processes not voting, but instead reasoned public deliberation aimed at achieving rational consensus. See, e.g., Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY* 17, 22 (Alan Hamlin & Phillip Pettit eds., 1989) (arguing that political decisions are legitimate "if and only if they could be the object of free and reasoned agreement among equals"); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 32 (William Rehg, trans., MIT Press 1996) (1992) (arguing that political legitimacy requires "the 'concurring and united will of all' free and equal citizens").

<sup>155</sup> See, e.g., ROBERT E. GOODIN, *REFLECTIVE DEMOCRACY* 12, 227 (2003) (acknowledging that processes of deliberation will likely end in a vote and observing that aggregation is not intrinsically bad, but instead what is objectionable about a merely aggregative model is the "mechanistic meat-grinder aspect of the aggregation of votes into collective decisions"). James Fishkin has argued in favor of methods that integrate the deliberative model into representative democracy. JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* 1 (1991). Fishkin is perhaps best known for advocating "deliberative" polling, a form of opinion poll in which a small but representative group of citizens gathers, receives briefing materials on a specific issue (policies, candidates, etc.), deliberates, and is then polled. The polling and their deliberations are publicly broadcast. The process aims to reveal what public opinion would be on a given issue, were the public well-informed and engaged. *Id.* at 81; see also JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* (1995).

<sup>156</sup> Both Goodin and Fishkin allow that representation, "direct or indirect" or by "authorizing" laws, does not delegitimize democracy. See *supra* note 155. Not all democratic theorists agree. Radical democrats, for example, treat direct democracy as normative and tend to view political representation as inconsistent with democratic values, because it "impairs the community's ability to function as a regulating instrument of justice . . ." BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 145-46 (1984). These ideas echo Rousseau's account of unmediated popular rule, which required that citizens assemble and decide law and

I thus adopt from democratic theory and advance here the (quite modest) normative premise that a democratic government derives its authority from the individuals governed by it—i.e., the individuals subject to and bound by its laws. Those individuals are the legal subjects of the political system and thus members of the political community. They are “the people” who must collectively authorize the laws in order for that government to claim democratic legitimacy. Correspondingly, an individual’s status as a legal subject of the government, and thus a member of the political community and one of “the people,” presumptively entitles the individual to participate in the governance of a democratic system. This is what I will call the democratic principle of presumptive inclusion.

The next sections first develop the normative implications of the principle of presumptive inclusion, and then they explore its boundaries. Every political system excludes some individual members of “the people” from the most basic form of political participation—electoral participation.<sup>157</sup> The “demos,” which comprises those persons within a given community entitled to political participation through the franchise,<sup>158</sup> never includes all of “the people.” I explore whether and when democratic exclusion is legitimate, then make the new argument that liberal democratic theory can provide justification for the exclusion from the demos of certain categories of “the people.”

## 2. Implications: Presumptive Inclusion and the Burden of Justifying Exclusion

The previous section argued that the individual members of a political community—“the people”—have presumptive claims to inclusion in the demos. Presumptive inclusion, however, neither mandates electoral participation nor precludes the possibility of legitimate exclusions. In a democratic process, the aggregation of individuals’ votes

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public policy in furtherance of the common good, without the mediation of political representatives. Robert A. Nisbet, *Rousseau and Totalitarianism*, 5 J. Politics 93, 102-03 (1943) (“When the people, having been adequately informed, hold its deliberation, and the citizens have had no communication among themselves, the whole number of individual opinions will always result in the General Will, and the decision will always be just.” (quoting JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* bk. 2, ch. 3)).

<sup>157</sup> See *infra* notes 166-92 and accompanying text.

<sup>158</sup> More broadly, the term *demos* can indicate the members of a populace, but I use its narrower construction, in which it refers to people within a given community entitled to political participation through the franchise. *Demos Definition*, OXFORD ENG. DICTIONARY.COM, <http://www.oed.com/view/Entry/49859> (last visited Mar. 9, 2012).

determines the collective preference.<sup>159</sup> But aggregated votes will accurately reflect collective community preference so long as some critical mass of the people—sufficiently representative of the whole—participate. Because the number of voters is typically large, the aggregation of votes will accurately reflect the collective preference even without the actual participation of every member of the community. Democratic legitimacy thus requires widespread electoral inclusion, but it survives tolerable levels of nonvoting and does not foreclose the possibility of some legitimate exclusion.

Their presumed inclusion entitles legal subjects to political participation through the franchise, absent some legitimate reason<sup>160</sup> for treating them unequally by excluding them from it.<sup>161</sup> Would-be voters subject to a government's authority thus ought not bear the burden of demonstrating that they merit full political participation. To the contrary—the state bears the burden of demonstrating the legitimacy of its exclusion.<sup>162</sup>

The report of the U.K. Electoral Commission described above is a recent and explicit example of official failure to assimilate the principle of presumptive inclusion.<sup>163</sup> The commission's report almost certainly represents the most comprehensive and balanced examination of the voting age to be conducted by any public entity to date. Yet, the commission

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<sup>159</sup> But see, for example, YOUNG, *supra* note 146, at 6, for a sustained argument that “voting equality is only a minimal condition of political equality,” and arguing for “additional and deeper conditions of political inclusion and exclusion, such as those involving modes of communication, attending to social difference, representation, civic organizing, and the borders of political jurisdictions;” see also Susan E. Clarke, *Splintering Citizenship and the Prospects for Democratic Inclusion*, in THE POLITICS OF DEMOCRATIC INCLUSION 210, 211-13 (Christina Wolbrecht & Rodney E. Hero eds., 2005) (“[I]nclusive citizenship encompasses opportunities for collective problem solving and deliberation.”).

<sup>160</sup> What some of these legitimate reasons might be is the subject of Parts II.B.1 and II.B.2, *infra*.

<sup>161</sup> Elizabeth Fraser, *Democracy, Citizenship and Gender*, in DEMOCRATIC THEORY TODAY: CHALLENGES FOR THE 21ST CENTURY 75 (April Carter & Geoffrey Stokes eds., 2002) (“Democracy . . . has progressively come to imply the rightness of universal suffrage . . . . So, any barriers to participation, or any exclusions, have explicitly to be justified.”).

<sup>162</sup> Part II.B, *infra*, discusses criteria for inclusion. Francis Schrag argues broadly that contemporary democratic theorists who argue for universal suffrage cannot adequately account for the exclusion of children. He thus argues for a system of universal suffrage in which the voting age would be lowered “substantially,” and where younger children's interests would be represented either by a proxy vote exercised by their parents, or by an appointed “Guardian” who would represent the interests of all children. Schrag, *supra* note 10, at 376.

<sup>163</sup> See *supra* notes 127-39 and accompanying text; see also Part I.C.3.

presumed the legitimacy of youth exclusion.<sup>164</sup> Observing that most countries currently retain a voting age of eighteen, the report explicitly shifted the burden of persuasion to those seeking to change the status quo by lowering the voting age to sixteen.<sup>165</sup> In other words, the commission has imposed on proponents of the enfranchisement of sixteen- and seventeen-year-olds the burden of demonstrating their entitlement to political inclusion. In so doing, it relieved the state of the obligation of justifying its exclusion. Presumptive inclusion requires the reverse: the burden rests firmly with the state to justify voter qualifications that operate to exclude any category of persons subject to its authority.<sup>166</sup>

### B. *The Boundaries of Electoral Inclusion*

The previous section argued that the state bears the burden of justifying electoral exclusions. At the same time, no demos is fully inclusive, and every democracy has adopted voter qualification rules that exclude some members of the community from electoral participation. In this section, I first describe the two basic voting criteria that electoral qualification rules typically—

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<sup>164</sup> Presumptive electoral inclusion embodies the norm of universal suffrage. I avoid using the term *universal suffrage*, however, because, as conventionally used, it describes an electoral system that imposes reasonable restrictions on the franchise, not one that is literally universal. Scholars routinely claim that nearly all of the world's nations are democracies, and that all democracies now provide for universal suffrage, although no democratic nation allows everyone to participate in elections. See, e.g., TATU VANHANEN, *DEMOCRATIZATION: A COMPARATIVE ANALYSIS OF 170 COUNTRIES* 65 (2003) (concluding that more than 85 percent of all countries “provided for universal suffrage”); see also BECKMAN, *supra* note 10, at 2; DAHL, *DILEMMAS*, *supra* note 147, at 97; KEYSSAR, *supra* note 1, at xxvi (“[T]he United States was one of the last countries in the developed world to attain universal suffrage.”); L. MASSICOTTE ET AL., *ESTABLISHING THE RULES OF THE GAME: ELECTIONS LAWS IN DEMOCRACIES* 26 (2004).

The use of *universal suffrage* to refer to what is actually less-than-universal suffrage is widely enough understood that it does not result in confusion, but it is an error nonetheless. It subtly infuses a normative judgment—that certain exclusions from the franchise are justifiable and thus ought not count as democratic deficits—into what purports to be a descriptive term (“universal suffrage”). Doing so risks an elision of both the fact and significance of exclusion. Decisions about whom to include and exclude from political participation require normative arguments. A political system should turn to normative principles to explain why a certain exclusion from the franchise is a justified exclusion; it should not simply redefine exclusions—just because they happen to be common—as nonexclusions.

<sup>165</sup> U.K. ELECTORAL COMM’N 2004 REPORT, *supra* note 127, at 59.

<sup>166</sup> I reiterate here that this is not a constitutional analysis of voter qualifications. It is instead a normative analysis of the obligations of the liberal democratic state, grounded in political and democracy theory. Were the analysis grounded in the obligations imposed on the federal and state governments by the U.S. Constitution, it would be necessary to consider at some length the standard to which the state would be held in order to satisfy its burden of justifying its rules.

and legitimately—aim to ensure. I then propose a new justification of these criteria grounded in liberal democratic theory.

### 1. Identifying Criteria for Electoral Inclusion: Interest and Competence

Few political theorists explicitly address the basic voting criteria (e.g., connection to, or interest in, a given political community) that explain and may legitimize specific electoral exclusionary rules (e.g., rules excluding nonresidents from the franchise, because they will presumably lack this connection or interest).<sup>167</sup> Theorists have tended more generally to argue in the political liberal tradition that distinctions made between groups of individuals, in order to be just, must be reasonable and consistent with norms of equal treatment.<sup>168</sup>

Identifying and justifying the basic criteria that all voters should satisfy, however, are important endeavors. Criteria can serve as a useful standard, both for establishing voter qualification rules and against which to evaluate the legitimacy of existing rules.<sup>169</sup>

Those theorists and activists who have sought to identify basic voting criteria have reached near consensus, even across the centuries.<sup>170</sup> Most have designated criteria that exclude from the demos individuals who lack (1) a significant

<sup>167</sup> THOMPSON, *supra* note 63, at 20 (“[T]he electoral process should provide citizens with equal opportunities to have their votes equally counted, unless respectful reasons justify unequal treatment. The reasons are respectful if they could be mutually accepted by free and equal citizens.”); *see also* BECKMAN, *supra* note 10, at 12; Donald W. Rogers, *Introduction: The Right to Vote in American History*, in *VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY* 3 (Donald W. Rogers ed., 1992).

<sup>168</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 273-74 (1977).

<sup>169</sup> DAHL, *DILEMMAS*, *supra* note 147, at 98 (concluding simply that there is “no definitive answer” to questions involving which criteria, if met, would establish the legitimacy of any given exclusion); *see also* BECKMAN, *supra* note 10, at 9 (suggesting that the reluctance of political scientists to undertake the task might be due to its “not be[ing] perceived as interesting enough or because the issue has been associated with seemingly intractable normative and conceptual muddles”). Beckman argues for a set of criteria, consistent with the liberal tradition, in the recently published *Frontiers of Democracy*. *Id.* at 8. Beckman applies his criteria to common voting rules disfranchising criminals, noncitizens, and minors. *Id.* He does not, however, apply his criteria to minors of different ages. *See id.*

<sup>170</sup> Beckman groups existing voter qualifications as requiring “competence, belonging [in the relevant community], and independence.” BECKMAN, *supra* note 10, at 8. Weale argues that the franchise may be limited to those with a commitment through a “nexus” to the community “rooted in the circumstances of the lives of individuals.” WEALE, *supra* note 146, at 215. He argues generally that “[t]he general principles of interest, qualification and commitment through a nexus to the community therefore provide a basis for the allocation of the franchise.” *Id.* at 217. Youths’ lack of qualification, or competence, Weale concludes, is “[t]he sole ground for excluding children from the vote.” *Id.* at 214.

and ongoing connection to the community and (2) vote decision-making competence.<sup>171</sup>

While basic voting criteria have largely remained constant, notions of reliable indicia of them reflected in specific voter qualification rules have changed significantly. For example, the seventeenth-century moderates at Putney sought to ensure that voters would cast their ballots in a manner consistent with community interests, and believed that only voters with a “permanent and fixed” interest in the community and its future would reliably vote in this way.<sup>172</sup> To them, property ownership was the best indicator that a potential voter possessed the requisite interest.<sup>173</sup> Today, not property ownership but instead citizenship, residence, and law-abidingness qualifications all seek to ensure the same criteria—ongoing community interest and connection. Next, the Putney moderates sought to ensure that voters would vote in a manner that reflected independent intellectual judgment. To them, intellectual independence could not exist in the absence of economic independence. Dependent voters, they reasoned, might be unwilling to vote in a way that accurately reflected their best independent judgment if doing so risked displeasing those to whom they were economically beholden. Today’s voting rules do not inextricably link economic and intellectual independence/judgment. But to the same end, states have adopted voter qualification rules that allow the disfranchisement of adults deemed mentally incompetent. The voting age, however, is the primary voter qualification rule whose aim is to ensure that voters have developed the requisite intellectual independence and decision-making competence.

The next subsection briefly examines the justifications for these two basic voting criteria.

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<sup>171</sup> See *supra* Part I.A.1 (recounting arguments made at the seventeenth-century Putney Debates). Two centuries after the Putney Debates, John Stuart Mill advocated these same basic standards for inclusion—interest in community and decision-making competence. To ensure that voters had the requisite competence and to improve the quality of voting generally, Mill (somewhat infamously) proposed literacy and mathematical tests as voting criteria, as well as the allocation of additional votes to those with higher levels of education. John Stuart Mill, *Considerations on Representative Government*, in JOHN STUART MILL: ON LIBERTY AND OTHER ESSAYS 329-31 (J. Gray ed., 1991) (1861).

<sup>172</sup> See *supra* Part I.A.1.

<sup>173</sup> See *supra* Part I.A.1.

## 2. Criteria for Electoral Inclusion in the Liberal Constitutional Democracy: A Noninstrumental Justification

To the extent that *democracy* implies absolute majority rule,<sup>174</sup> no nation is—nor aspires to be—fully democratic.<sup>175</sup> A system's commitment to the democratic principle of popular rule coexists with, and is tempered by, other commitments. The United States is a liberal constitutional federal democracy. The democratic principle requires that those subject to a government's authority collectively authorize its laws.<sup>176</sup> But constitutionalism restrains popular sovereignty, limits the power of government, and establishes procedures for legitimate rulemaking;<sup>177</sup> and, pursuant to constitutionalism, federalism aims to achieve an optimal balance between local and centralized governance. The nation's foundational value and core political commitment, however—and that which undergirds the others—is individual liberty.<sup>178</sup>

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<sup>174</sup> The etymological origin of *democracy* is the Greek *demokratia*, or “popular government” (combining *demos*, “the commons” or “the people,” and *kratos*, “rule” or “authority”). *Democracy definition*, OXFORD ENG. DICTIONARY.COM, <http://www.oed.com/view/Entry/49755> (last visited July 28, 2012).

<sup>175</sup> ROBERT A. DAHL, ON POLITICAL EQUALITY 7 (2006). Dahl explains that an “ideal” can serve two purposes—one empirical, one moral—and that the two are often confused. Although the “democratic ideal” may describe a system that is in some sense perfect, the function of “ideal” here is strictly definitional or descriptive. It does not necessarily follow that the more perfectly democratic, the better. The ideal system is not necessarily the *best* system. It may be, but deciding that the ideal is desirable is distinct from defining what the ideal is. The former is a normative judgment; the latter a descriptive definition. *Id.*

<sup>176</sup> For a discussion of more participatory or republican democratic models (in which the electorate participates in making policy decisions) and more protective ones (in which the primary function of democracy is to protect individuals' liberty by constraining the power of government), see David Miller, *The Competitive Model of Democracy*, in DEMOCRATIC THEORY AND PRACTICE 133 (G. Duncan ed., 1983).

<sup>177</sup> Constitutionalism thus ensures that our individual and collective “better selves” will constrain our “more impulsive selves”—an instrument for “the people sober to keep in check the people drunk.” Karol Edward Soltan, *Introduction to CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS* 6 (Stephen L. Elkin & Karol Edward Soltan eds., 1999).

<sup>178</sup> Liberalism is the broad political philosophy that served as the nation's founding principle—“that all men are created equal,” that among their inalienable rights are the rights to “Life, Liberty, and the pursuit of Happiness,” and that government is instituted “to secure these rights, . . . deriving their just powers from the consent of the governed . . .” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Constitution's Preamble declares the document's purpose to include “secur[ing] the Blessings of Liberty to ourselves and our Posterity . . .” U.S. CONST. pmbl.

Political theorist Stephen Macedo describes as a “truism” the idea that the liberal tradition is the foundation of the nation's political identity. STEPHEN MACEDO, LIBERAL VIRTUES 5-6 (1990). For a discussion of individual liberty as the nation's core value, see Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L. REV. 1055, 1068-75.

Classical liberals consider individual liberty to be *the* central value of the liberal state,<sup>179</sup> whereas modern liberals consider it part of a more complex core aimed at ensuring that “[e]ach person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.”<sup>180</sup> Individual liberty is a core value for classical and modern liberals alike, however, and is thus a least common denominator of sorts.<sup>181</sup>

While individual liberty is the nation’s core value, different conceptions exist of what that liberty itself entails.<sup>182</sup> The thinnest of these is negative liberty—freedom as noninterference.<sup>183</sup> Negative liberty permits a person to define and pursue his or her ultimate life course. And, as I have argued elsewhere, if liberty is the state’s core value, then safeguarding individuals’ liberty must be its primary end.<sup>184</sup> Basic, life-deciding liberty is thus the minimum entitlement of individuals in the liberal state.<sup>185</sup>

The complement of the individual’s basic life-deciding liberty is the absence in every other person of a liberty to decide that individual’s life course.<sup>186</sup> Each person thus has a claim, or right, to have the state withhold from all other persons—popular or majority wishes notwithstanding—the right to be “other-determining.”<sup>187</sup> This restraining function is one of the core purposes of constitutionalism and the institutional arrangements through which it limits popular and governmental power.

<sup>179</sup> See, e.g., F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 257-58 (1960).

<sup>180</sup> JOHN RAWLS, *POLITICAL LIBERALISM* 291 (expanded ed. 2005).

<sup>181</sup> Hamilton, *supra* note 178, at 1169-70.

<sup>182</sup> Three conceptions of individual liberty are most prominent—negative liberty, positive liberty, and republican liberty. For a brief description of each, see Samantha Besson & José Luis Martí, *Law and Republicanism*, in *LEGAL REPUBLICANISM: NATIONAL AND INTERNATIONAL PERSPECTIVES* 3, 14-15 (Samantha Besson & José Luis Martí eds., 2009); Hamilton, *supra* note 178, at 1070.

<sup>183</sup> Isaiah Berlin describes “[p]olitical liberty in this sense [as] simply the area within which a man can act unobstructed by others.” ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 122 (1969).

<sup>184</sup> Hamilton, *supra* note 178, at 1073.

<sup>185</sup> *Id.* at 1074.

<sup>186</sup> This is the correlativity thesis advanced by Wesley Newcomb Hohfeld, the influential cataloguer of legal rights. See generally WESLEY NEWCOMB HOHFELD, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, in *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 65 (Walter Wheeler Cook ed., 1919).

<sup>187</sup> Just as one party’s liberty correlates to another party’s absence of liberty in Hohfeld’s analysis of legal relations, a claim correlates to a duty. *Id.*; see also PAVLOS ELEFTHERIADIS, *LEGAL RIGHTS* 107-14 (2008) (discussing Hohfeld’s model of legal relations). The term “other-determining” in this article simply refers to the ability to determine or control the life course of another person.



These liberal political values and the institutional structures that actualize them have important implications for electoral inclusion/exclusion. One of these values is the democratic principle of presumptive inclusion, which aims at a minimum to secure individuals' consent to being governed and to ensure that the laws directly or indirectly reflect the collective preference, defined as the aggregated preferences of the individual members of the political community.

By registering a vote, an individual expresses his or her will or preference. A vote can be thought of as representing (1) the allotment or share of the individual's influence over governance,<sup>188</sup> (2) the individual's transfer or surrender to the government of some corresponding share of the individual's liberty (i.e., a transfer of power or authority) for the purpose of effectuating and enforcing the combined wills of the people, and (3) tacit acceptance that, once transferred to it, the government's exercise of its accumulated authority is legitimate and binding, whether or not consistent with the individual's preference.<sup>189</sup>

Every person governs and is governed in equal measure under this liberal democratic conception of the franchise.<sup>190</sup> No one person wields greater influence than another in the development of rules, and the resulting rules bind all equally.

The categorical exclusion from the franchise of some members of the political community through voter qualification rules disrupts this symmetry. Excluded individuals are governed, yet they are denied a corresponding/offsetting share in influence over governance. In this sense, voter qualification rules that exclude some community members are democratic deficits. There is nonetheless general agreement that certain exclusionary rules can be legitimate,<sup>191</sup> particularly when they ensure that voters meet the two basic criteria for inclusion—the relevant community interest, and competence. Rarely addressed, however, is why these criteria themselves are justified.

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<sup>188</sup> There are, of course, other means by which individuals might influence governance. See, e.g., BIRCH, *supra* note 9, at 159-63 (discussing various forms of direct and indirect methods by which individuals might influence decisions of government agencies).

<sup>189</sup> The abstaining nonvoter, not prevented from voting by external or illegitimate forces, might be thought to have implicitly transferred her quantum of influence or individual liberty to the people as a whole, deferring and agreeing to the collective judgment. This type of nonvoting thus does not necessarily represent a democratic deficit.

<sup>190</sup> This is the Aristotelian symmetrical conception of democratic legitimacy. See ARISTOTLE, *THE POLITICS OF ARISTOTLE* § 1275a8 (E. Barker trans., New York, Oxford Univ. Press ed. 1958).

<sup>191</sup> BECKMAN, *supra* note 10, at 5.

One justification for the criteria is instrumental—i.e., without a connection to (and knowledge of) the community, and without adequate intellect and judgment, individuals cannot be relied upon to cast votes consistent with community interests. This justification can explain the *ex ante* exclusion of certain individuals from the franchise. The instrumental justification for the criteria for inclusion is insufficient, though, and the following two examples illustrate why.

First, assume that an individual lives and works outside the political community and otherwise has no personal connection to it. Nonetheless present within it on Election Day, she casts a well-informed and public-minded vote. Why shouldn't her vote be counted? The instrumentalist rationale justifies the outsider-voter's *ex ante* exclusion by assuming that she is more likely than an insider-voter to cast a bad vote. It does not explain or justify, however, the *ex post* exclusion of the outsider-voter's good vote.

Second, assume that a member of the political community lacks electoral competence.<sup>192</sup> The instrumental justification for excluding incompetent voters is weaker than the instrumental justification for excluding the outsider-voter. One might reason that the outsider-voter is more likely to cast a vote that considers short-term but not long-term consequences, or otherwise vote in a manner predictably at odds with the interests of the political community. The votes of incompetent individuals, however, will presumably be distributed randomly. Their random votes should thus cancel each other out and accordingly have no effect on electoral outcomes.

I argue that a noninstrumental justification can explain and legitimize the exclusion of both the "good" outsider-voter and the incompetent voter. Recalling the liberal democratic conception of a vote's meaning, these voters' ballots denote (1) a share of influence over governance, *but not* (2) the transfer or surrender of a corresponding share of individual liberty to the government *or* (3) acceptance of the government's resulting legitimate authority over them. The outsider-voter does not surrender a share of her liberty to the government or necessarily accept the government's legitimate authority over her because she remains beyond its reach, outside the political community. The incompetent voter has influenced governance, albeit without the capacity to do so purposefully. She does not

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<sup>192</sup> In Part III, *infra*, I argue for a conception of electoral competence, but here let us simply assume the absence of the relevant competence, however it is conceived.

surrender liberty nor accept the legitimacy of government's authority over her, however, because she presumably lacks the capacity to (even implicitly) do either.

The outsiders' and incompetent voters' net influence over others would thus exceed that of others over them, and the degree by which the members of the political community are governed exceeds that by which they govern. By withholding the franchise from the community outsider and the incompetent individual, then, the state prevents the unequal distribution of liberty that would otherwise result and thus performs its liberty-preserving obligation.<sup>193</sup>

Whether citizenship, residency, law abidingness, etc. are sufficiently reliable indicia of community interest/connection so as to justify various voter qualification rules is debatable. Those debates, however, are beyond the scope of this article. But whether age eighteen is a sufficiently reliable indicator of electoral competence so as to justify rules excluding younger members of the political community from the franchise (recalling that the burden of justifying exclusion rests with the state) is the heart of this article's inquiry.

### III. ELECTORAL COMPETENCE

Part II argued that the state bears the burden of justifying electoral exclusion, but that it may legitimately adopt standards that would exclude those who lack the requisite community connections/interest or the requisite electoral competence. This part argues for a conception of the competence to which the state may hold voting members of the political community.

Democracy theorists today tend to shy away from the concept of competence, perhaps partly because political elites have historically, and notoriously, invoked the supposed incompetence of various groups—including women, African Americans, and the poor—to justify their categorical disfranchisement.<sup>194</sup>

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<sup>193</sup> See ELEFTHERIADIS, *supra* note 187, at 108-09.

<sup>194</sup> Marion Smiley, *Democratic Citizenship*, in CITIZEN COMPETENCE, *supra* note 177, at 371, 380 ("[T]he very undemocratic history of the concept of competence in Western politics . . . has led most democratic theorists to steer away from the language of competence in discussions of citizenship."). Smiley argues that the concept has reflected "inadvertent and unselfconscious biases . . . [as well as intentional] political machination." *Id.* at 381; see also ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 278-80 (1988) (demonstrating the use of the concept of competence to justify the ongoing disfranchisement of African Americans and immigrants).

Some conception of competence, though, must underlie voting-age requirements. The connection/interest-related criterion cannot explain age-based exclusion. One might argue that the young are not members of the political community at all, and are thus not among those presumptively entitled to electoral inclusion. The argument fails, because while they may receive different treatment than do their elders when they violate government's mandates, the young are nonetheless equally subject to them. One might alternatively argue that the young lack the requisite interest in, and connection to, the governance of the political community and are thus legitimately excluded. That argument, too, fails. As community residents (and the generally more vulnerable among them), the young have the same, if not greater, interests as their elders in issues of public concern—including public health, safety, and education.<sup>195</sup> And as young people, they are more likely to bear the long-term consequences of public policy. The young are, therefore, members of the political community, with significant interest in that community and ongoing connections to it.

It is thus young people's lack of the relevant competence that must justify their electoral exclusion. There can be little dispute that newborns lack that competence, or that the typical person acquires it at some point over the course of his or her development. Age and cognitive development are predictably correlated.<sup>196</sup> There is, then, a temporal element to the attainment of electoral competence, for which age is arguably the most reasonable proxy. The impracticality of widespread individual competence assessments, moreover, makes an age-based qualification reasonable.

A voting-age qualification thus helps ensure that voters will satisfy the criterion of electoral competence. What electoral competence entails, however, remains ill-defined, even among voting experts. One expert, for example, justified young people's ongoing exclusion by stating that youth "under 18 do not have any competence to vote, [and they possess essentially] no knowledge. If they're lucky, they have taken one civic course."<sup>197</sup> He added later, "[they are not] mature enough to

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<sup>195</sup> Indeed, the Supreme Court asserted in *Brown v. Board of Education* that "education is perhaps the most important function of state and local governments." 347 U.S. 483, 493 (1954); see also *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a state.").

<sup>196</sup> See *infra* note 260 and accompanying text.

<sup>197</sup> Marilyn Rauber, *Vote Early—And Young: It's the Goal of Plans to Lower the Voting Age to 16, or Even 14*, RICH. TIMES-DISPATCH, June 13, 2004, at A9,

make voting judgments because they don't have any historical perspective and they don't have any comparable civic responsibility."<sup>198</sup> These statements imply possible elements of a standard of competence: certain factual (perhaps civics-related) knowledge, maturity of judgment, historical perspective, life experience, civic responsibility, etc. But are these the correct, or even among the correct, elements of the criterion of voting competence? And how can we assess whether young people have actually achieved these (or some other) elements of competence? This part answers these questions.

Part III.A develops a new, cognitive-process-driven conception of electoral competence, informed by political science, behavioral decision research (including research on voter decision making), and developmental psychology. Part III.B describes the course of development of the relevant cognitive-processing capacities, reviewing research in developmental psychology and social and cognitive neuroscience. This research explains that, as well as why, adolescent decision-making competence is context-specific. By midadolescence (around age sixteen), young people have attained adultlike cognitive-processing capacities. The domains in which they reliably and competently exercise these capacities are limited, but these situations include those allowing for unpressured, considered decision making. I conclude by arguing that privately casting a ballot in an election that has unfolded over time is such a domain.

#### A. *Conceptualizing Electoral Competence*

In this section, I first consider the voting rights of adults with cognitive impairments and explain why it is reasonable to apply a different—more lenient—standard of electoral competence to adults with cognitive disabilities than to youth. I then examine whether political/civic knowledge ought to figure into a concept of electoral competence and conclude that it ought not. I conclude by deriving a cognitive-process-driven conception of electoral competence.

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available at 2004 WLNR 1566663 (quoting Curtis Gans, Director of the Center for the Study of the American Electorate at American University).

<sup>198</sup> Pam Belluck, *The Voting Age: Sixteen Candles, but Few Blazing a Trail to the Ballot Box*, N.Y. TIMES, Aug. 26, 2007, (Week in Review), available at <http://www.nytimes.com/2007/08/26/weekinreview/26belluck.html>.

## 1. Adults with Cognitive Impairments and the Competence Assessment Tool for Voting

Many democratic systems disfranchise the cognitively impaired.<sup>199</sup> Nearly forty U.S. states, for example, have constitutional or statutory provisions prohibiting people with cognitive impairments from voting.<sup>200</sup> Beginning in the 1990s, however, states began imposing procedural protections to guard against the unwarranted deprivation of various rights of cognitively impaired persons under guardianship, including the right to vote. Over thirty states now provide for individualized judicial determinations of whether persons under guardianship nonetheless retain the competence to vote.<sup>201</sup>

In a 2001 case in which a group of cognitively impaired adults challenged their categorical disfranchisement under Maine law, a federal district court articulated a standard for voting competence that has since been widely cited and incorporated into a Competence Assessment Tool.<sup>202</sup> The standard articulated in *Doe v. Rowe* requires simply that potential voters have “the mental capacity to make their own decision by being able to understand the nature and effect of the voting act itself.”<sup>203</sup>

Using the *Doe* standard, psychiatrists developed the Competence Assessment Tool for Voting (CAT-V), a questionnaire administered to individuals to assess their voting capacity.<sup>204</sup> The questionnaire is brief (seven questions) and asks respondents to imagine that it is election day for the office of state governor. It then asks questions aimed to

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<sup>199</sup> The federal Voter Registration Act limits states’ discretion to disfranchise voters but exempts state decisions to do so “by reason of criminal conviction or mental incapacity.” 42 U.S.C. § 1973gg-6(a)(3)(B) (2006). For discussions of the voting rights of cognitively impaired adults generally, see Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917 (2007); Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644 (1979). For a list of state provisions addressing the voting rights of adults with cognitive impairments, see Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931, app. A & B (2007). For an overview of the electoral laws of other nations governing the voting rights of the elderly and cognitively impaired, see Jason H. Karlawish & Richard J. Bonnie, *Voting by Elderly Persons with Cognitive Impairment: Lessons from Other Democratic Nations*, 38 MCGEORGE L. REV. 879 (2007).

<sup>200</sup> Hurme & Appelbaum, *supra* note 199, at app. A.

<sup>201</sup> *Id.* at 933.

<sup>202</sup> *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001).

<sup>203</sup> *Id.* at 51 (citing Def. Mot. for Summ. J. at 8, No. 1:00 CV 00206 (Mar. 8, 2001)).

<sup>204</sup> The study was reported in Raymond Raad, Jason Karlawish, & Paul S. Appelbaum, *The Capacity of Vote of Persons with Serious Mental Illness*, 60 PSYCHIATRIC SERVS. 624 (2009).

ascertain respondents' understanding of the nature of voting ("What will the people of [person's state] do today to pick the next Governor?"<sup>205</sup>) and the effect of voting ("When the election for governor is over, how will it be decided who the winner is?"<sup>206</sup>). The test then provides information about two hypothetical candidates and asks the respondent to compare them, choose one, and then discuss the potential consequences to the respondent of that candidate's election.<sup>207</sup>

If the *Doe* standard or something like it defines electoral competence, then a large category of young people—including many preadolescents—could very well qualify as competent to vote. Still, young individuals (who may or may not have attained electoral competence) and cognitively impaired individuals (who have attained the age of presumptive electoral competence) differ in significant respects relevant to voting.

Age-qualified individuals with mental impairments are members of the in-group that has presumptively attained the development-related cognitive capacities required for electoral competence. The function of a standard by which to determine their competence is to assess whether the nature of individuals' cognitive impairments are such that the presumption of competence ought not apply to them—i.e., their impairments have prevented them from developing the relevant cognitive capacities, or have caused them to lose the relevant capacities. The state, however, must overcome two presumptions before being justified in disfranchising a cognitively impaired adult. First, it bears the burden of justifying electoral exclusion. Second, all age-qualified individuals are members of the group that has satisfied the presumption of electoral competence. Adults with cognitive impairments should receive the benefit of that presumption. In other words, evidence of electoral incompetence must be persuasive in order to justify the competence-related disfranchisement of an age-qualified individual.

The purpose of a standard by which to measure the electoral competence of young people, on the other hand, is to assess as an initial matter their acquisition as a group of the array of cognitive capacities required for competent voting. Thus while the *Doe* standard might suffice to indicate adequate electoral competence despite cognitive impairment, it is not

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<sup>205</sup> *Competence Assessment Tool for Voting (CAT-V)*, PSYCHIATRYONLINE.ORG, [http://ap.psychiatryonline.org/data/Journals/PSS/3878/pss\\_60\\_05\\_624\\_02.pdf](http://ap.psychiatryonline.org/data/Journals/PSS/3878/pss_60_05_624_02.pdf) (last visited Feb. 11, 2012).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

necessarily adequate to assess the initial development-related attainment of the array of cognitive capacities required for electoral competence.

The next subsections develop a normative standard of electoral competence, beginning by considering whether competence properly includes political or civics knowledge.

## 2. Electoral Competence and Political/Civics Knowledge?

Rousseau believed that a well-informed citizenry was necessary to determine and implement the public good.<sup>208</sup> Modern democracy theorists, too, have argued that informed and watchful citizens help ensure a responsive, accountable government.<sup>209</sup> There are several reasons, however, for excluding factual knowledge from our conception of electoral competence.<sup>210</sup>

First, voluminous data methodically gathered since the 1930s<sup>211</sup> have consistently shown the typical citizen to be far

<sup>208</sup> See Nisbet, *supra* note 156, at 102-03.

<sup>209</sup> Theorists have argued that citizens can perform this function even if they do little more than vote out of office those representatives who underperform. See SCHUMPETER, *supra* note 146, at 272 (“[E]lectorates normally do not control their political leaders in any way except by refusing to reelect them . . .”). Probably the best-known account of a theory of what is now termed “retrospective voting” is MORRIS FIORINA, *RETROSPECTIVE VOTING IN NATIONAL PRESIDENTIAL ELECTIONS* (1981). Political theorists note that several of Fiorina’s empirical assumptions were mistaken. See, e.g., MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS XI* (1996); RICHARD R. LAU & DAVID P. REDLAWSK, *HOW VOTERS DECIDE: INFORMATION PROCESSING DURING ELECTION CAMPAIGNS 72* (2006). Delli Carpini and Keeter use public-opinion surveys to highlight various characteristics of better-informed citizens, such as their improved abilities to “connect their enlightened self-interest to specific opinions about the political world,” concluding that “informed citizens are better citizens in a number of ways consistent with normative and pragmatic notions of what constitutes good citizenship.” DELLI CARPINI & KEETER, *supra*, at 19.

<sup>210</sup> To argue that political knowledge ought not figure into our conception of electoral competence is not to say that political knowledge is unimportant. Delli Carpini and Keeter have identified broad categories of information likely to be relevant to voting, which citizens would thus ideally be familiar with. These are

- (1) [T]he rules of the game (the institutions and processes of elections and governance);
- (2) the substance of politics (the major domestic and international issues of the day, current social and economic conditions, key policy initiatives, and so forth);
- and (3) people and parties (the promises, performances, and attributes of candidates, public officials, and the political parties).

DELLI CARPINI & KEETER, *supra* note 209, at 14.

<sup>211</sup> *Id.* at 62-67. Delli Carpini and Keeter gathered national survey data to assess Americans’ political knowledge over time. They note that the most comprehensive collection of public-opinion surveys dates to the 1930s; this collection is held at the Roper Center for Public Opinion Research at the University of Connecticut. *Id.* at 66; see also *Public Opinion Archives*, ROPER CTR., UNIV. OF CONN.,



removed from the ideal citizen of classic democratic theory.<sup>212</sup> Instead, “a large segment of the public has been and remains woefully ignorant about virtually every aspect of American politics.”<sup>213</sup> Studies find that public ignorance extends to knowledge of basic civics and government.<sup>214</sup>

Widespread voter ignorance alone arguably renders infeasible the adoption of specific factual knowledge as a component of voting competence. Incorporating even basic levels of civics or political knowledge into a conception of electoral competence theoretically justifies voter qualification rules that would operate to disfranchise a significant proportion of the current (aged eighteen and over) electorate. Rates of disfranchisement would be unequally distributed across the population based on differences in knowledge among

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<http://www.ropercenter.uconn.edu/> (last visited Jan. 27, 2012). The American National Election Studies is a national research resource that has surveyed voting, public opinion, and political participation during national elections since 1948. The University of Michigan Institute for Social Research (joined in 2006 by Stanford University) conducts the surveys, which have been funded by the National Science Foundation since the 1970s. Press Release, Univ. of Mich. News Serv., NSF Awards \$10 Million for American National Election Studies (Feb. 26, 2010), available at <http://ns.umich.edu/htdocs/releases/story.php?id=7542>.

<sup>212</sup> See Richard R. Lau & David P. Redlawsk, *Voting Correctly*, 91 POL. SCI. REV. 585, 585 (1997) (“[O]nly a tiny minority of the citizens in any democracy actually live up to these ideals. Interest in politics is generally weak, discussion is rare, political knowledge on the average is pitifully low, and few people actively participate in politics beyond voting.”); see also RICK SHENKMAN, *JUST HOW STUPID ARE WE?: FACING THE TRUTH ABOUT THE AMERICAN VOTER* 22 (2008).

A number of political scientists have suggested, however, that flaws in the way pollsters conduct public-opinion surveys can lead to the underreporting of political knowledge. See, e.g., Melissa K. Miller & Shannon K. Orr, *Experimenting with a “Third Way” in Political Knowledge Estimation*, 72 PUB. OP. Q. 768 (2008); Jeffrey J. Mondak, *Developing Valid Knowledge Scales*, 45 AM. J. POL. SCI. 224 (2001); Jeffrey J. Mondak, *Reconsidering the Measurement of Political Knowledge*, 8 POL. ANALYSIS 57 (2000); Markus Prior & Arthur Lupia, *Money, Time, and Political Knowledge: Distinguishing Quick Recall and Political Learning Skills*, 52 AM. J. POL. SCI. 169 (2008). Some have found that the number of correct responses increased somewhat when respondents were discouraged or prevented from responding “don’t know,” Miller & Orr, *supra* at 775-76, 779; given an incentive to respond correctly (such as one dollar for each correct answer), Prior & Lupia, *supra* at 169; or given extra time in which to respond (such as twenty-four hours as opposed to one minute), *id.* at 169, 171.

<sup>213</sup> Stephen C. Craig & Michael D. Martinez, *Voter Competence*, in *THE ELECTORAL CHALLENGE: THEORY MEETS PRACTICE* 62, 65 (Stephen C. Craig & David B. Hill eds., 2010).

<sup>214</sup> See SUSAN JACOBY, *THE AGE OF AMERICAN UNREASON* 299-300 (2008) (reporting the results of surveys conducted by the National Constitution Center); Mark M. Blumenthal, *The Political Professionals Respond*, in *THE ELECTORAL CHALLENGE*, *supra* note 213, at 83 (“[One] can almost never underestimate the level of information about politics and government possessed by the voters who typically decide the outcome of elections.”).

At least one study suggests that teens are even less knowledgeable than their elders: whereas about 50 percent of adults could name the three branches of government, for example, only 41 percent of teenagers could do so. JACOBY, *supra*, at 299-300.

various groups that have held steady over time—rates would likely be higher among women than men, African Americans than whites, high school graduates than college graduates, low-income earners than high-income earners, and people under thirty than those sixty-five and older.<sup>215</sup>

Public educational policy should certainly endeavor to ensure that citizens will possess basic categories of civics and political knowledge. Formal requirements aimed at ensuring well-informed voting, however, would likely result in a better-informed electorate, but also a less representative and democratic one.

Excluding a factual-knowledge component from a conception of electoral competence is also reasonable in light of variability in the instrumental utility of political knowledge itself.<sup>216</sup>

First, the utility of political knowledge is situational; its value will depend on the decision-making context.<sup>217</sup> A voter's intimate knowledge of campaign-finance legislation, for example, does not help him or her decide whether to vote in favor of a proposed school-redistricting plan. It is thus difficult to identify with any certainty the knowledge required for competent voting in a given election, and knowledge requirements are likely to change from one election to the next.

Second, the utility of political knowledge is collective, in that the greater the aggregate amount of such knowledge, the greater the likelihood that the citizenry's decisions will accurately reflect the will of the people.<sup>218</sup> Because random or

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<sup>215</sup> *Public Knowledge of Current Affairs Little Changed by News and Information Revolutions: What Americans Know: 1989-2007: Summary of Findings*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS (Apr. 15, 2007), <http://people-press.org/report/319/public-knowledge-of-current-affairs-little-changed-by-news-and-information-revolutions>.

<sup>216</sup> DELLI CARPINI & KEETER, *supra* note 209, at 12-16 (1996). Delli Carpini and Keeter define "political knowledge" as the range of factual information about politics retained in memory. *Id.* at 10. "Factual information" refers to (correct) knowledge, distinct from opinions, values, and other cognitive processes like reasoning. *Id.* at 10-11. Retained factual information provides a context for understanding, assimilating, and assessing newly acquired information. *Id.* at 337 n.3.

Delli Carpini and Keeter also argue that the instrumental value of knowledge is *relative*, in that, all other things being equal, more information is better than less information. *Id.* at 14-15. Behavioral decision research, discussed *infra* Part III.A.3, provides some evidence to the contrary. *Id.* Belief in the relative value of knowledge, however, also suggests that citizens ought to become relatively "better" voters over time (in that they more accurately identify and vote consistently with their own interests); lifelong accumulation and assimilation of information enables voters to refine their opinions and interests and vote accordingly. *Id.*

<sup>217</sup> *Id.* at 14.

<sup>218</sup> *Id.* at 15.

uninformed views cancel each other out, the “miracle of aggregation” generally results in collective decisions that reflect those beliefs that are well informed and coherent.<sup>219</sup> Thus, while a broadly informed *public* is critical to the functioning of a democratic system, broadly informed *citizens* are less critical.

Finally, individuals may have a variety of goals when making their vote decisions. Not all voters necessarily seek to cast a vote for the candidate who “would, if elected, produce a better outcome set from [the voter’s] point of view.”<sup>220</sup> Some voters may have less instrumental goals, regarding their vote as a “speech-act” with primarily expressive or symbolic (rather than instrumental) value.<sup>221</sup> This use of one’s ballot is not irrational, given the negligible real-world influence of the individual’s vote on an election’s outcome. Since individual voters may want to cast their ballots so as to express any number of messages, values, or beliefs, this possible use of the vote, too, weighs against substantive standards of voter knowledge.

When considering both limited voter knowledge and arguments against adopting knowledge requirements as a condition of electoral competence, questions arise as to how (relatively uninformed) voters do go about making their vote decisions and how electoral competence ought to be defined and assessed. I address these questions in the next subsections by providing a descriptive account of voter decision making drawn from behavioral decision and cognitive performance research then arguing for a standard of electoral competence that is cognitive-process driven rather than knowledge based.

### 3. Normative Decision Theory and Actual Voter Decision Making: Insights from Behavioral Decision and Cognitive Performance Research

Normative decision theory prescribes a decision-making model whose rules lead the individual decision maker “to

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<sup>219</sup> Some studies have shown that errors do not always cancel each other out; instead, voters might share misperceptions that reflect lopsided biases. In these cases, low levels of political knowledge might indeed skew election results. Craig & Martinez, *supra* note 213, at 77-78, 81-82.

<sup>220</sup> ALVIN GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD 323 (1999). Goldman is a philosopher who has studied voting and voter knowledge as part of a larger project aimed at identifying the social practices and institutions “that would best advance the cause of knowledge.” *Id.* at 79.

<sup>221</sup> See, e.g., GEOFFREY BRENNAN & ALAN HAMLIN, DEMOCRATIC DEVICES AND DESIRES 130-31, 136-47 (2000) (developing an expressive view of voting behavior in which individuals consider voting to be primarily a “speech-act,” as opposed to serving other instrumental interests).

choos[e] the option with the highest expected utility,” based on the individual’s beliefs and values.<sup>222</sup> It describes decision making as a logical process that involves (1) identifying the relevant options, (2) predicting the possible outcomes associated with each option and the probability of each outcome’s occurrence, (3) determining the relative value/utility of each outcome, and (4) combining the probabilities of occurrence and the utility of each option to identify (and choose) the option that maximizes expected value.<sup>223</sup>

Just as they rarely possess optimal levels of political knowledge, individuals also rarely make decisions using the value-maximizing, decision-making model.<sup>224</sup> Normative analysis is thus just the starting point of behavioral decision research. That research instead recognizes that people are not always rational, that they can make choices that are rational without using rational processes, and that they may have goals other than making the most rational choice in a given decision-making context.<sup>225</sup>

Empirical political scientists Richard Lau and David Redlawsk have extensively researched voters’ decision making and conclude that “classic democratic theory sets unrealistic standards for ideal citizens at least in part because it holds unrealistic expectations about the very nature of human cognition.”<sup>226</sup> Individuals’ limited cognitive-processing abilities allow them to absorb and process only a small fraction of the barrage of information to which they are typically exposed, including political information.<sup>227</sup> Limited information combined with limited time and motivation can impede rational decision making.<sup>228</sup>

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<sup>222</sup> Baruch Fischhoff, *Assessing Adolescent Decision-Making Competence*, 28 DEV. REV. 12, 13 (2008). See generally REID K. HASTIE & ROBYN M. DAWES, RATIONAL CHOICE IN AN UNCERTAIN WORLD (2001); SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 79-83 (1993).

<sup>223</sup> Eric Amsel et al., *Anticipating and Avoiding Regret as a Model of Adolescent Decision Making*, in THE DEVELOPMENT OF JUDGMENT AND DECISION MAKING IN CHILDREN AND ADOLESCENTS 119, 120-21 (Janis E. Jacobs & Paul A. Klaczynski eds., 2005). See generally HASTIE & DAWES, *supra* note 222; Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEV. REV. 1 (1992).

<sup>224</sup> LAU & REDLAWSK, *supra* note 209, at 22.

<sup>225</sup> Fischhoff, *supra* note 222, at 13.

<sup>226</sup> LAU & REDLAWSK, *supra* note 209, at 29.

<sup>227</sup> *Id.* at 73-74. Thus:

Citizens do not have all the information about politics that is required of them by classic democratic theory; neither do they process that information in as logical a way as those theorists hoped, in large part because of strict cognitive limitations. It is not so much that people do a particularly bad job of

From a behavioral economics perspective, voter ignorance makes good sense:<sup>229</sup> the cost to voters of acquiring information about electoral politics (policy issues, candidates' platforms, etc.) outweighs the expected benefit (the increased likelihood of casting a vote that accurately reflects voters' values/preferences).<sup>230</sup>

In lieu of incurring the cost of educating themselves, voters generally rely on more readily available "information shortcuts" such as party affiliation and a candidate's or party's past performance.<sup>231</sup> These shortcuts (more broadly referred to by theorists today as *heuristics*<sup>232</sup>) substitute for more complete information, allowing voters to make decisions reasonably consistent with their preferences while expending relatively little effort.<sup>233</sup> Heuristics that voters commonly use in political

processing political information, of course, but rather that we do an equally bad job of processing any other type of complex information.

*Id.*

<sup>228</sup> In contrast to the rational actors identified in economic decision-making models, people tend to be what political scientist Herbert Simon terms "boundedly rational information processors." Herbert Simon, *Rational Choice and the Structure of the Environment*, 63 PSYCHOL. REV. 129, 136 (1956). The actual decision-making process generally aims not to "maximize" or identify the optimal option, but instead more modestly to "satisfice" or identify an adequate or satisfactory option. See generally Herbert Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955). Individuals' desire to make a good decision thus competes with their desire to expend minimal cognitive effort in making that decision. LAU & REDLAWSK, *supra* note 209, at 29.

<sup>229</sup> In his now classic treatise, economist Anthony Downs famously described voters as rationally ignorant. ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 246 (1957).

<sup>230</sup> *Id.* at 246-52.

<sup>231</sup> *Id.* at 238-44.

<sup>232</sup> Cognitive psychologists have identified three categories of *judgment heuristics* that decision makers use in order to simplify complex decisions and avoid burdensome information gathering and analysis. They are (1) *availability*—judging probability, frequency, and causality by how easily concrete examples come to mind (e.g., when a voter encounters an unfamiliar candidate who is a Democrat, the voter's first thought may be that Democrats favor higher taxes, and she may then apply that attribute to the new candidate), Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124-27 (1974); (2) *representativeness*—assigning new information to broader preexisting categories (such as stereotypes or other schema) with which it best fits (e.g., applying stereotypes based on gender, race, or age to fill in an impression of a candidate, or partisan schemata to do the same), *id.* at 1127-28; and (3) *anchoring and adjustment*—using preexisting knowledge or judgment as a starting point or presumption, then adjusting by reviewing new information (rather than independently and fully evaluating new information), *id.* at 1128-30. People generally *categorize* new information into a preexisting schema or group with certain default characteristics. Categorization is cognitively efficient because it allows people to ignore details of the new information and assign to it the default values already associated with the schema. LAU & REDLAWSK, *supra* note 209, at 26.

<sup>233</sup> Kahneman, *supra* note 232, at 1124; see also LAU & REDLAWSK, *supra* note 209, at 13. Samuel Popkin elaborates on Downs's model in *THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS* (2d ed. 1994). He argues that, despite decades of studies that show low levels of civics and political knowledge, people acquire a great deal of information in their daily lives, such as information about the economy or their communities, which they then apply to political

decision making include party affiliation, group endorsements, person stereotypes such as gender, race, or age, and poll results indicating candidate viability.<sup>234</sup>

Researchers have studied the effectiveness of heuristic use as a decision-making strategy. In what has become a widely used method for evaluating an individual's vote decision, Lau and Redlawsk identify "a *correct vote decision as one that is the same as the choice that would have been made under conditions of full information*," given the subjective beliefs and values of the individual voter.<sup>235</sup> Voter ignorance, they argue, poses a less serious concern for democracy if people vote correctly most of the time, despite low levels of information and knowledge.<sup>236</sup> They found "that limited information decision strategies not only may perform as well as, but in many instances may perform better than, traditional rational . . . decision strategies."<sup>237</sup>

Cognitive psychologists have conducted research in other decision-making contexts that confirms that in some cases, excess information—i.e., a volume of information that is beyond an individual's cognitive-processing capacity—hurts decision making, presumably by confusing individuals or otherwise making it more difficult for them to identify and retain salient information.<sup>238</sup> In certain decision-making contexts, a greater amount of preexisting knowledge can hinder rational analysis of a new set of facts.<sup>239</sup> In making judgments, people generally bring to bear their prior knowledge; in many contexts, this improves decision making. But in decision-making tasks calling for "decontextualized" reasoning—which

decision making. *Id.* at 22-30. Popkin incorporates insights from cognitive psychology to explain the ways in which voters process and weigh the information they have gained. In general, voters incorporate information selectively, assembling "narratives" (often based on their assessment of personal information or behavior rather than professional record) that tend to fit within a preexisting frame or point of view, and weighing more heavily newly available information. *Id.*

Political scientists recognize the universality of voters' heuristic-based judgment- and decision-making strategies—the "cognitive shortcuts, rules of thumb for making certain judgments or inferences with considerably less [effort] than the complete search for alternatives and their consequences that is dictated by rational choice." LAU & REDLAWSK, *supra* note 209, at 25. Lau and Redlawsk observe that "[p]olitical heuristic use is nigh onto universal." *Id.* at 236.

<sup>234</sup> Particularly in primaries, poll results can inform voters which candidates seem to be gaining consensus support and which seem to be hopelessly behind. *Id.* at 233-35.

<sup>235</sup> *Id.* at 74-75 (emphasis added).

<sup>236</sup> *Id.* at 74.

<sup>237</sup> *Id.* at 226.

<sup>238</sup> *Id.* at 212.

<sup>239</sup> See generally Deanna Kuhn et al., *Developing Reason*, 10 THINKING & REASONING 197 (2004) (reporting studies).

requires evaluation only of evidence presented—real-world knowledge hampers analysis. Decontextualized reasoning improves the evaluation of causation—e.g., a jury’s evaluation of evidence in order to reach a verdict—and deductive reasoning generally.<sup>240</sup>

Preexisting knowledge and beliefs can hinder cognitive performance in other ways. They can lead, for example, to “undue certainty in one’s judgments.”<sup>241</sup> Persons with preexisting beliefs or theories tend to subject new information to inconsistent standards of evidence in order to protect their preferred theories.<sup>242</sup> Cognitive psychologist Deanna Kuhn concludes that “the causal reasoning of average adults regarding everyday matters is in fact highly fallible. People frequently make unwarranted inferences with unwarranted certainty . . . .”<sup>243</sup> “Undue certainty” in one’s beliefs in turn “underlies the rigidity in thinking that is a major contributor to human strife.”<sup>244</sup>

At least in some contexts, then, less knowledge leads to more objective analysis and thus improves cognitive performance.<sup>245</sup> Research confirms common wisdom that, with age and experience, people can become less open minded, less objective when analyzing new evidence, and generally more “set in their ways.” Knowledge can lead to cognitive biases that

<sup>240</sup> To give an example from one recently reported study, adults examined the following syllogism involving deductive reasoning:

Syllogism 1

Premise 1: All living things need water.

Premise 2: Roses need water.

Conclusion: Roses are living things.

Deanna Kuhn, *Jumping to Conclusions*, 18 SCI. AM. MIND 44, 49 (2007). Although the conclusion does not follow logically from the premises, 70 percent of adults studied accepted the syllogism as valid. Compare it with the second syllogism presented to them, identical in form to the first:

Syllogism 2

Premise 1: All animals of the hudon class are ferocious.

Premise 2: Wampets are ferocious.

Conclusion: Wampets are animals of the hudon class.

*Id.* at 50. Only 20 percent of adults accepted this conclusion as valid, with 80 percent (correctly) rejecting it. What explains the difference in performance? Researchers posit that, because adults know the conclusion of Syllogism 1 to be true in the real world, they easily accept it, although it does not follow logically from the premises. They were able to analyze Syllogism 2 more accurately, “however, because no obfuscating real-world knowledge” clouded their analysis. *Id.* at 49-50.

<sup>241</sup> *Id.* at 50. This sort of misplaced certainty “reflects a failure” of metacognition, or “knowing what [one] know[s].” *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 51.

<sup>244</sup> *Id.* at 50.

<sup>245</sup> *Id.* at 49-50.

impede analysis. Youth and inexperience may, perhaps counterintuitively, contribute to superior cognitive performance.

Objective reasoning can improve with practice, however, even into adulthood. Other studies conducted by Kuhn and her colleagues demonstrated that both children and adults became more careful and critical causal reasoners when given frequent opportunities to practice evaluating evidence.<sup>246</sup> “Early adolescents [and young adults who initially] show[ed] faulty multivariable causal reasoning” also showed significant improvement after engaging with similar problems over the course of several months.<sup>247</sup>

Therefore, for most voters, the cost of acquiring and processing full political information prior to casting a vote is prohibitive, or at least generally outweighs the benefits of doing so. The typical voter nonetheless generally reaches rational and “correct” decisions by acquiring and processing smaller, readily available bits of meaningful information that function as serviceable substitutes for full information. Finally, some research suggests that less preexisting knowledge or experience can, in some instances, improve objective analysis of new information.

In the next subsection I propose a normative standard of electoral competence that accounts for this more nuanced understanding of voter knowledge and voter decision making.

#### 4. In Support of a Cognitive-Process-Driven Conception of Electoral Competence

I argue for a standard of competence that is process driven rather than knowledge based. As discussed above, incorporating factual knowledge into a normative standard of electoral competence risks disfranchising much of the current electorate and is unnecessary to ensure correct vote decisions. Even without requiring specific knowledge, however, it is possible to identify the cognitive processes, or mental operations, involved in—and required for—competent voting.

Cognitive processes include (1) learning and retrieving information; (2) encoding, which involves forming a mental representation of information or a situation; and (3) thinking, which is the goal-directed application and “coordination of

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<sup>246</sup> *Id.* at 51.

<sup>247</sup> *Id.*; see also DEANNA KUHN, EDUCATION FOR THINKING 91-101 (2005) (summarizing studies).



inferences”<sup>248</sup> and includes various forms of reasoning.<sup>249</sup> When thinkers deliberately constrain their inferences so as to conform to what they believe are appropriate inferential norms, they engage in reasoning.<sup>250</sup> Forms of reasoning include deductive, inductive, and analogical reasoning, as well as decision making and problem solving.<sup>251</sup> Reasoning supplies a person with reasons for his or her beliefs and actions, or justifiability. The ability to appropriately apply and coordinate various reasoning processes is a fundamental aspect of “[r]ationality, [which] in its oldest[ and] broadest . . . sense . . . [requires] good reasons for one’s beliefs and actions.”<sup>252</sup>

Rationality does not necessarily require applying formal logic to a set of premises or adhering to a normative, value-maximizing decision-making process. These formal cognitive processes will indeed provide “good reasons” for one’s conclusions, but, as developmental psychologist David Moshman asserts, “Even in the absence of formal proof, we often have *good enough reason to choose* one belief or course of action over another. There is much more to rationality than formal logic.”<sup>253</sup>

Consider a typical voter: in order to cast a nonrandom vote, she must go through the process of acquiring some relevant knowledge/information. In an election in which numerous candidates are vying for a number of offices, for example, the typical voter is unlikely to have gathered full information about all the candidates for each office. The voter might learn from the election ballot itself only the names and party affiliations of candidates seeking a certain local office.

Our typical voter has thus learned a limited amount of information. After acquiring that information (itself a cognitive process), the voter applies additional cognitive processes to it. The voter may recall that Republicans generally favor lower taxes. She makes the inference that the Republican candidate is more likely to favor lower taxes than the Democratic candidate, and infers further that electing a Republican to office makes it more likely that taxes will be reduced. She believes that a tax

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<sup>248</sup> DAVID MOSHMAN, *ADOLESCENT PSYCHOLOGICAL DEVELOPMENT: RATIONALITY, MORALITY, AND IDENTITY* 25-26 (2d ed. 2005).

<sup>249</sup> James P. Byrnes, *Cognitive Development During Adolescence*, in *BLACKWELL HANDBOOK OF ADOLESCENCE* 227, 228 (Gerald R. Adams & Michael D. Berzonsky eds., 2003).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 227.

<sup>252</sup> MOSHMAN, *supra* note 248, at 16.

<sup>253</sup> *Id.*

reduction would help her and other middle-class workers like her. She also notes that the Democratic candidate is a woman, and surmises that this candidate might be even more liberal and pro-government spending than the typical Democrat. As a result, she votes for the Republican candidate. Although the voter has not made a particularly well-informed decision, she has arguably made a minimally competent one, and one likely to be correct (i.e., consistent with the decision she would have made had she possessed full information).

Therefore, our typical voter acquired relevant information about the candidates, retrieved relevant encoded information from her long-term memory, and applied deductive reasoning to reach conclusions about the candidates that led her to make a choice that she could justify with a good-enough reason. I thus begin by suggesting that *a minimally competent voting decision involves the appropriate application and coordination of various reasoning processes to make a choice that could be justified by a good-enough reason.*

This definition of competent voting might usefully be refined further. One possible refinement would require that instead of employing merely “appropriate” reasoning processes, competent voting employs “mature” reasoning processes. Requiring “mature” reasoning processes may go too far, though. While the level of thinking of many individuals continues to develop through and beyond adolescence, developmental psychologists have determined that there is no universal state of maturity attained by all, or even most, adults. Instead, the development of thinking in and beyond adolescence is highly variable, depending on individual interests, activities, and contexts.<sup>254</sup> A “mature” cognitive-processing requirement for electoral competence, then, like a factual-knowledge requirement, would exceed the capacities of—and thus disfranchise—many current voters.

A more pragmatic standard for electoral competence could modestly require “adultlike” cognitive-processing capacities—i.e., the minimum levels of thinking and processing attained by developmentally normal adults.

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<sup>254</sup> *Id.* at 24 (observing that while the concepts and forms of reasoning of many individuals continue to develop after childhood, “postchildhood developmental changes in thinking are not tied to age and do not culminate in a state of maturity”). *Cf.* Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1016-17 (2003).

The resulting standard of electoral competence thus provides that *a minimally competent voting decision involves an adultlike application and coordination of various reasoning processes to make a choice that could be justified by a good-enough reason.*

The next section surveys recent research on adolescent development and concludes that adolescents reliably attain the relevant cognitive-processing abilities by age fifteen or sixteen.

### *B. Assessing Electoral Competence*

Researchers who study cognitive development cannot precisely identify every context in which developmentally normal citizens are likely to have decision-making competence, given both individual and situational, or context-specific, variability.<sup>255</sup> But, scientists have made two critical findings. First, by midadolescence, individuals have the cognitive capacity to make competent decisions. Second, certain situations and factors can hinder the decision-making abilities that adolescents otherwise possess.<sup>256</sup>

This section first canvasses research on adolescent cognitive development from various disciplines in the developmental sciences. I then conclude that the factors that characterize the vote decision-making context (time for deliberation, the absence of peers, etc.) render voting the type of domain in which midadolescents will capably exercise the relevant cognitive-processing capacities.

#### 1. Cognitive and Socio-Emotional Development: Insights from Behavioral Psychology and Developmental Neuroscience

Adolescence, the developmental period between childhood and adulthood, is characterized by increases in both *rational* decision-making capacity and *irrational* risk-taking behavior.<sup>257</sup> Developmental neuroscientists have begun developing a neurologically based model that has the potential to explain the simultaneous increases in adolescents' risk taking and poor decision making on the one hand, and improved cognitive ability

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<sup>255</sup> MOSHMAN, *supra* note 248, at 13.

<sup>256</sup> See *infra* notes 271-74 and accompanying text.

<sup>257</sup> B.J. Casey et al., *The Adolescent Brain*, 28 DEV. REV. 62, 63 (2008); Charles Geier & Beatriz Luna, *The Maturation of Incentive Processing and Cognitive Control*, 93 PHARMACOLOGY, BIOCHEMISTRY & BEHAV. 212, 216 (2009).

on the other.<sup>258</sup> A brief discussion of relevant aspects of adolescent development follows, first from the perspective of behavioral science and then from that of developmental neuroscience.<sup>259</sup>

Cognitive capacity, including learning and reasoning from facts and information processing, improves more or less linearly throughout childhood, reaching adultlike levels by midadolescence.<sup>260</sup> Researchers have consistently found “[t]he logical reasoning and basic information-processing abilities of 16-year-olds” to be “comparable to [or essentially indistinguishable from] those of adults.”<sup>261</sup> By midadolescence, thinking processes are adultlike. According to developmental psychologist David Moshman, “[n]o theorist or researcher has ever identified a form or level of thinking routine among adults that is rarely seen in adolescents.”<sup>262</sup>

Despite their apparently advanced cognitive abilities, universal characteristics of adolescent behavior include increased propensities for impulsivity, risk taking, and sensation seeking.<sup>263</sup> Early behavioral decision models attributed these behavioral characteristics to cognitive deficiencies that caused adolescents to misperceive risks and fail to appreciate

<sup>258</sup> Casey et al., *supra* note 257, at 63 (discussing cognitive and neurobiological hypotheses that fail to adequately account for adolescent decision-making behavior). Developmental psychologist Laurence Steinberg recently emphasized the importance—to all disciplines within developmental science—of research in developmental neuroscience, suggesting that this research has the “potential to structure a new, overarching model of normative . . . adolescent development.” Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 *BRAIN & COGNITION* 160, 162 (2010) [hereinafter Steinberg, *Adolescent Brain Development*]. See generally Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 *DEV. REV.* 78 (2008) [hereinafter Steinberg, *Adolescent Risk-Taking*].

<sup>259</sup> For a summary of cognitive development from early childhood through early adulthood, see Hamilton, *supra* note 178, at 1099-1116.

<sup>260</sup> Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 6 *AM. PSYCHOL.* 583, 590-92 (2009).

<sup>261</sup> Steinberg, *Adolescent Risk-Taking*, *supra* note 258, at 80.

<sup>262</sup> MOSHMAN, *supra* note 248, at 24.

<sup>263</sup> Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 *J. ADOLESCENT HEALTH* 216, 218 (2009). Compared with adults over twenty-five, adolescents and young adults are more likely to binge drink, commit crimes, engage in violence, have casual sex, and cause serious or fatal automobile accidents. Steinberg, *Adolescent Risk-Taking*, *supra* note 258, at 79; see also Michael Windle & Rebecca C. Windle, *Alcohol and Other Substance Use and Abuse*, in *BLACKWELL HANDBOOK*, *supra* note 249, at 450-63 (surveying empirical studies on the onset and escalation of substance use among adolescents).

Developmental scientists reason that evolutionary processes would have selected for these characteristics, which presumably motivated adolescents (of all cultures and species) to leave their natal environments and seek out mates. Steinberg, *Adolescent Brain Development*, *supra* note 258, at 161.

the long-term consequences of their decisions.<sup>264</sup> Intervention programs implemented to counteract these cognitive deficiencies by correcting adolescents' misperceptions about common risks, however, were largely ineffectual in changing adolescent behavior.<sup>265</sup> Studies, moreover, revealed no cognitive differences between adolescents and adults that could explain their different propensities for risk taking.<sup>266</sup>

Behavioral scientists thus reached the counterintuitive conclusion that adolescents engage in higher rates of risky, seemingly irrational behavior than do adults *despite* being as "knowledgeable, logical, reality-based, and accurate in the ways in which they think about risky activity . . . as their elders."<sup>267</sup> Cognitive deficiencies do not account for adolescents' propensity for risky and impulsive decision making. Studies instead consistently confirm that adolescents have the cognitive competence to make rational decisions about risks.<sup>268</sup> Researchers have endeavored to determine why adolescents nonetheless frequently make *irrational*, risky decisions.

Behavioral scientists examined more closely the real-world contexts<sup>269</sup> in which adolescents make decisions, and have gained valuable insights into adolescent decision-making processes.<sup>270</sup> Their findings confirmed adolescents' competence to make rational decisions—at least when making decisions in the artificially ideal conditions of the research laboratories in which they complete tasks involving minor, symbolic risks.<sup>271</sup> The real-world contexts in which adolescents usually make decisions, however, can drastically affect the quality of their decision making.<sup>272</sup>

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<sup>264</sup> Valerie F. Reyna & Frank Farley, *Risk and Rationality in Adolescent Decision Making: Implications for Theory, Practice, and Public Policy*, 7 PSYCHOL. SCI. PUB. INT. 1, 33 (2006).

<sup>265</sup> *Id.* at 33 (surveying studies of education interventions aiming to seek adolescents' misperceptions by educating them about commonly encountered risks).

<sup>266</sup> Steinberg, *Adolescent Risk-Taking*, *supra* note 258, at 80.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> Behavioral scientists define a "context [as] a culturally defined situation that (a) occurs in a particular time and place and (b) contains actors who perform culturally defined roles." James P. Byrnes, *The Development of Self-Regulated Decision Making*, in THE DEVELOPMENT OF JUDGMENT, *supra* note 223, at 5, 7.

<sup>270</sup> Steinberg, *Adolescent Risk-Taking*, *supra* note 258, at 80.

<sup>271</sup> *Id.*; Reyna & Farley, *supra* note 264, at 2.

<sup>272</sup> Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEV. PSYCHOL. 625, 625 (2005); Reyna & Farley, *supra* note 264, at 11. Cognitive researchers have referred to this as the "competence-performance distinction." Jennifer L. Woolard et al., *Theoretical and Methodological Issues in Studying Children's Capacities in Legal Contexts*, 20 L. & HUM. BEHAV. 219, 220 (1996)

Studies found that contexts that predictably compromise adolescent decision making include those requiring them to make decisions “[i]n the heat of passion, on the spur of the moment, in unfamiliar situations, . . . and when behavioral inhibition is required for good outcomes . . . .”<sup>273</sup> In other words, adolescents tend to make bad decisions in emotionally charged or pressured situations, and they struggle to control impulses that lead to undesirable behavior.<sup>274</sup>

Developmental neuroscientists also study adolescent cognitive development and have begun creating a neurologically based model primarily oriented around development in two neural systems of the brain—the system associated with *cognitive control*, and the one associated with *socio-emotional maturity*. The core insight of this dual-systems model is that these two neural systems develop along different timelines.<sup>275</sup> This temporal disjunction has the potential to explain adolescents’ risk taking and poor decision making despite their improved cognitive ability, as well as other aspects of adolescent psychology and behavior.<sup>276</sup> An overview of the model’s features follows.

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(citations omitted). Consistent with these observations, studies demonstrate that not all cognitive processes mature by midadolescence. Some processes, such as certain aspects of working memory, continue to specialize and develop into adulthood. Beatriz Luna et al., *What Has fMRI Told Us About the Development of Cognitive Control Through Adolescence?*, 72 *BRAIN & COGNITION* 101, 101, 105 (2010) (suggesting that all components of working memory mature by the early twenties). Working memory is involved in the voluntary control of behavior (including the ability to filter irrelevant information and suppress inappropriate actions) and other complex mental abilities. *Id.* at 101.

<sup>273</sup> Reyna & Farley, *supra* note 264, at 12; *see also* Eric Amsel et al., *Anticipating and Avoiding Regret as a Model of Adolescent Decision-Making*, in *THE DEVELOPMENT OF JUDGMENT*, *supra* note 223, at 119-20.

<sup>274</sup> Valerie F. Reyna & Frank Farley, *Is the Teen Brain Too Rational?*, 17 *SCI. AM.* 58, 60 (2007); Reyna & Farley, *supra* note 264, at 1. Even though they do not generally misperceive risks (if anything, studies tend to show that adolescents and adults both overestimate risk), adolescents tend to weigh and value benefits more heavily than risks, as compared to adults. Researchers advance a number of theories to explain this, some related to cognition and others grounded in neural development itself. *See* Fischhoff, *supra* note 222, at 19-20; Geier & Luna, *supra* note 257, at 213.

<sup>275</sup> Steinberg, *Adolescent Risk-Taking*, *supra* note 258, at 97-98; *see also* Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 *DEV. PSYCHOL.* 1764, 1764 (2008) (“Neurobiological evidence in support of the dual systems model is rapidly accumulating.”).

<sup>276</sup> *See infra* notes 277-94 and accompanying text. For slightly different accounts of the dual-systems model, *see* Casey et al., *supra* note 257, at 63-64; Geier & Luna, *supra* note 257, at 213; *see also* Catherine Sebastian et al., *Social Brain Development and the Affective Consequences of Ostracism in Adolescence*, 72 *BRAIN & COGNITION* 134, 138 (2010) (discussing aspects of the dual-systems model).

The socio-emotional system within the dual-systems model includes neural circuitries across regions of the brain implicated in social-information-processing and reward-seeking/processing.<sup>277</sup> When certain neurons (nerve cells that transmit information throughout the brain in the form of electrical or chemical impulses) are stimulated by a chemical impulse, they trigger the release of neurotransmitters that then chemically stimulate the next neuron in the circuit.<sup>278</sup> In the socio-emotional system, the neurotransmitter *dopamine* modulates the neural reward circuitry.<sup>279</sup> The mechanisms underlying dopamine neurotransmission continue to mature during adolescence. Dopaminergic activity peaks rapidly and dramatically in early adolescence, around the time of pubertal maturation.<sup>280</sup>

Researchers believe that this peak in dopaminergic activity makes adolescents experience a potentially rewarding stimuli as even more rewarding “than would be the case during either childhood or adulthood.”<sup>281</sup> The resulting heightening of reward salience leads to increased sensation seeking—a “tendency to seek out novel, varied, and highly stimulating experiences, [coupled with a] willingness to take risks in order to attain them.”<sup>282</sup> Consistent with this theory, studies show that sensation seeking, risk preference, susceptibility to deviant or antisocial peer influence, and reward sensitivity all follow a curvilinear, (“∩”)-shaped trend. These behavioral characteristics begin to increase at age ten, peak around ages fourteen to fifteen (depending on the study and measure used), and then decline.<sup>283</sup>

The second neural system in the dual-systems model is the cognitive control system. Cognitive control refers to the abilities to voluntarily coordinate and engage in goal-directed behavior.<sup>284</sup> This system includes the prefrontal cortex, which is

<sup>277</sup> The socio-emotional system includes the “amygdala, nucleus accumbens, orbitofrontal cortex, medial prefrontal cortex, and superior temporal sulcus.” Steinberg, *Adolescent Risk-Taking*, *supra* note 258, at 83.

<sup>278</sup> CHARLES A. NELSON ET AL., *NEUROSCIENCE OF COGNITIVE DEVELOPMENT: THE ROLE OF EXPERIENCE AND THE DEVELOPING BRAIN* 24 (2006).

<sup>279</sup> Geier & Luna, *supra* note 257, at 216.

<sup>280</sup> *Id.* at 216-17; Steinberg et al., *supra* note 275, at 1764-66.

<sup>281</sup> Steinberg, *Adolescent Risk-Taking*, *supra* note 258, at 85.

<sup>282</sup> *Id.*; Steinberg et al., *supra* note 275, at 1765.

<sup>283</sup> Steinberg, *Adolescent Brain Development*, *supra* note 258, at 163; Sindy R. Sumter et al., *The Developmental Pattern of Resistance to Peer Influence in Adolescence: Will the Teenager Ever Be Able to Resist?*, 32 J. ADOLESCENCE 1009-10 (2009); *see also* Steinberg, *Adolescent Risk-Taking*, *supra* note 258, at 89 (ages thirteen to sixteen); Steinberg et al., *supra* note 275, at 1774 (ages twelve to fifteen).

<sup>284</sup> Luna et al., *supra* note 272, at 101.

involved in executive, decision-making, and self-regulatory functions, and “association” areas, which connect different regions of the brain and thus support the complex integration of functions.<sup>285</sup> The cognitive control system follows a more gradual and linear developmental trajectory than does the socio-emotional system.<sup>286</sup> Three structural changes in the brain characterize the maturation of cognitive control during adolescence.

The first structural change involves a process known as synaptic pruning, by which synapses (the point of contact between two nerve cells in a given neural circuit) that have not been stimulated (due to lack of use) are eliminated, and remaining synaptic connections stabilize and strengthen. Synaptic pruning begins during childhood and accelerates in adolescence, with the prefrontal cortex maturing in midadolescence.<sup>287</sup> This correlates with the maturation of basic cognitive processes by the age of sixteen.

Second, myelination (a process involving the insulation of existing connections between neurons with a fatty layer that improves neural connectivity) continues within the regions of the cortex and between the different cortical regions through adolescence and into the twenties.<sup>288</sup> This change correlates with observed behavioral improvements in higher-order and executive functions (future orientation, planning, response inhibition, spatial working memory, etc.) associated with the integrated functioning of multiple prefrontal regions of the brain.<sup>289</sup>

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<sup>285</sup> Steinberg, *Adolescent Risk-Taking*, *supra* note 258 at 93-94. The cognitive control system also includes parts of the corpus callosum, which connects the left and right hemispheres. Beatriz Luna, *Developmental Changes in Cognitive Control Through Adolescence*, in *ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR* 233, 240 (Patricia Bauer ed., 2009).

<sup>286</sup> Steinberg, *Adolescent Risk-Taking*, *supra* note 258, at 93.

<sup>287</sup> Nitin Gogtay & Paul M. Thompson, *Mapping Gray Matter Development: Implications for Typical Development and Vulnerability to Psychopathology*, 72 *BRAIN & COGNITION* 6, 7 (2010); Tomas Paus, *Mapping Brain Maturation and Cognitive Development During Adolescence*, 9 *TRENDS IN COGNITIVE SCI.* 60, 62 (2005); Arthur W. Toga et al., *Mapping Brain Maturation*, 29 *TRENDS IN NEUROSCIENCES* 148, 149-50 (2006). There is also some evidence of synaptic pruning in the association areas (areas throughout the brain which connect its different regions and support the complex integration of interregional function). Luna, *supra* note 285, at 238.

<sup>288</sup> Geier & Luna, *supra* note 257, at 216; Gogtay & Thompson, *supra* note 287, at 7; Luna, *supra* note 285, at 237-41; Tomas Paus, *Growth of White Matter in the Adolescent Brain: Myelin or Axon?*, 72 *BRAIN & COGNITION* 26 (2010); Steinberg, *Adolescent Risk-Taking*, *supra* note 258, at 94-96. Since myelination involves the “gradual enhancement of established connections”—as opposed to the initial establishment of such connections—the “changes in white matter [represent] a refinement of executive control processes that are in place earl[ier] in development.” Luna, *supra* note 285, at 239-40.

<sup>289</sup> Steinberg, *Adolescent Risk-Taking*, *supra* note 258, at 94-96.



Third, myelination also continues between the cortex and other regions of the brain, including connections between regions involved in social and emotional information processing, and those involved in cognitive control processes (especially the prefrontal regions).<sup>290</sup> The increased connectivity between these regions correlates with coordination of affect (the external expression of emotions) and cognition; emotional regulation and impulse control both improve through the midtwenties as a result.<sup>291</sup> Strategic planning, anticipation of future consequences, and resistance to neutral (as opposed to antisocial) peer influence and peer influence in general all follow the same trajectory, increasing linearly from preadolescence through late adolescence and early adulthood.<sup>292</sup>

In summary, adolescents' basic cognitive abilities are mature by the age of sixteen, giving them the capacity to process information and make rational decisions. But the heightened sensitivity to reward that increases and peaks around midadolescence inclines young people towards risk taking, sensation seeking, and impulsivity. These inclinations may dominate or overwhelm their cognitive processes and shape their behaviors, especially in situations triggering heightened emotion or pressure.<sup>293</sup>

Adolescents' susceptibility to the confounding influence of heightened-reward salience on their decision making begins to decline after midadolescence, while their ability to exercise cognitive control increases, ultimately reaching mature levels in their twenties.<sup>294</sup>

## 2. Domain-Specific Competence: The Vote Decision

By ages fifteen or sixteen, adolescents have attained adultlike cognitive-processing capacities.<sup>295</sup> In other words, they

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<sup>290</sup> *Id.* at 94-98. Important social and emotional information-processing regions of the brain include the limbic and paralimbic regions. *Id.* at 94-95.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*; see also Sumter et al., *supra* note 283, at 1016 (reporting "a steady increase in resistance to general peer influence with age"). See generally Luna et al., *supra* note 272, at 101.

<sup>293</sup> Luna, *supra* note 285, at 257; Steinberg, *Adolescent Risk-Taking*, *supra* note 258, at 96-98. Researchers have generally found the following personality traits and contextual factors to correlate with suboptimal choices: sensation seeking, impulsivity, competitiveness, overconfidence, and the presence of peers. Byrnes, *supra* note 269, at 31-32.

<sup>294</sup> Luna, *supra* note 285, at 257; Steinberg, *Adolescent Risk-Taking*, *supra* note 258, at 97-98.

<sup>295</sup> David Archard has addressed the voting age in his now-classic volume on children's rights. He argues for a minimalist concept of voter competence, conceivably

are as able as adults to acquire, retain, and retrieve relevant information and apply reasoning processes that lead to justifiable conclusions.

But while they have adultlike abilities to think and reach rational judgments, their capacities are more susceptible to being confounded by the real-world contexts in which they make decisions. When they must either make decisions quickly or under time pressure, or when they are highly emotional or stressed, adolescents' performance suffers. In contexts in which adolescents are likely to make poor decisions—especially when their decisions will have negative externalities—the state properly constrains their decision-making liberty.

One example of such a real-world context is driving. Driving provides ready opportunities for risk taking and thrill seeking—especially in the presence of encouraging peers. At the same time, responsible driving frequently requires rapid decision making in response to unpredictable situations, in what is still a new and unfamiliar context to the inexperienced adolescent driver.<sup>296</sup> Data on adolescent collisions and motor vehicle-related fatalities provide compelling evidence of the challenges adolescent drivers face. In other work, I discuss additional contexts likely to impair adolescents' otherwise-mature cognitive-processing abilities, as well as those contexts in which their cognitive-processing abilities (and the rationality and maturity of their resulting decisions) are likely to remain uncompromised.<sup>297</sup>

Elections, on the other hand, are a decision-making domain in which midadolescents' adultlike cognitive-processing abilities should remain uncompromised. Elections unfold over a period of time, giving voters the opportunity to deliberate and evaluate options without undue pressure. Many sources of information are readily available over a period of time as well,

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attainable by children as young as eleven, more certainly attainable by teenagers. ARCHARD, *supra* note 10, at 103. To support his claim that children are likely to attain the necessary voting competence before the age of eighteen, Archard relies on the 1982 publication of a study on children's ability to understand political matters which found that "[b]y eleven, many children have as good a working vocabulary for politics as many adults could claim, and a framework of ideas which . . . will enable them to grasp the facts of current affairs . . . and make their choices at general elections." *Id.* (quoting OLIVE STEVENS, *CHILDREN TALKING POLITICS: POLITICAL LEARNING IN CHILDHOOD* 148 (1982)). For compelling arguments which note some of the unintended negative consequences of extending notions of "children's rights" into fields beyond family law (although even there, of course, the concept can have troubling implications), see MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* (2005).

<sup>296</sup> For an argument in favor of additional limits on adolescent driving, see Hamilton, *supra* note 178, at 1064-65.

<sup>297</sup> See *id.*; Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. REV. (forthcoming 2012).

which voters can use as a kind of scaffolding or heuristics to help them evaluate their choices—broadcast debates, endorsements of candidates, party affiliations, etc. Voting itself is done anonymously and in private, which diminishes the concern that adolescents' choices will be unduly pressured or influenced by peers.<sup>298</sup>

By the age of sixteen, adolescents meet the standard of electoral competence defined above, where “a minimally competent voting decision involves an adultlike application and coordination of various reasoning processes to make a choice that could be justified by a good-enough reason.”<sup>299</sup>

Finally, Lau and Redlawsk's test for correct voting<sup>300</sup> may help assess adolescents' vote decisions. Lau and Redlawsk's mock-election study predicted that 70 percent of voters vote correctly; their study of the nine actual presidential elections from 1988 to 2004 showed that the mean number of correct voters was just over 75 percent.<sup>301</sup> Empirical studies of correct voting might thus be used as a benchmark or test of adolescent voting competence: if adolescents cast correct votes between 70 to 75 percent of the time, then they have achieved adultlike levels of competence.<sup>302</sup>

## CONCLUSION

Even without including the numerous policy considerations that support lowering the voting age (for example, making tangible and relevant to young people the civic education they receive in middle and secondary schools, and encouraging interest in, and habits of, civic participation), compelling reasons to do so—grounded in foundational democratic principles—have emerged. I have argued that democratic legitimacy requires the presumptive electoral

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<sup>298</sup> See Catherine J. Ross, *A Stable Paradigm: Revisiting Capacity, Vulnerability and the Rights Claims of Adolescents after Roper v. Simmons*, in LAW, MIND AND BRAIN (Michael Freeman & Oliver R. Goodenough eds., 2009) 183, 184-87, 193-96 (discussing adolescent decision making by the Supreme Court in *Roper* and arguing for a paradigm of rights that accounts both for adolescents' vulnerabilities and capacities).

<sup>299</sup> See *supra* Part III.A.4.

<sup>300</sup> To determine a correct vote, Lau and Redlawsk ask whether “[i]rrespective of how the vote decision is actually reached, how frequently do voters vote correctly.” See *supra* notes 226-37 and accompanying text; LAU & REDLAWSK, *supra* note 209, at 88; see also Richard R. Lau et al., *An Exploration of Correct Voting in Recent U.S. Presidential Elections*, 52 AM. J. POL. SCI. 395 (2008).

<sup>301</sup> LAU & REDLAWSK, *supra* note 209, at 85, 88; Lau et al., *supra* note 300, at 406.

<sup>302</sup> An arguably more radical approach might rely on aggregation models to find adolescent voters competent once they have reached a significantly lower threshold of correct voting—presumably something greater than 50 percent.

inclusion of members of the political community. Democratic systems may nonetheless legitimately impose competence-related electoral qualifications. Voter qualification rules excluding citizens younger than eighteen from the electorate are justified by the presumed electoral incompetence of that category of citizens, but the requirements of electoral competence remain unspecified. By studying voter decision making and the development of cognitive-processing skills, it is possible to derive a pragmatic conception of electoral competence. Research demonstrates that young people reliably attain electoral competence by the age of fifteen or sixteen. Thus, labeling them incompetent is error and can no longer justify their continued exclusion.

States should thus lower the age of electoral majority to sixteen, by which age it is safe to say that adolescent citizens will be competent voters.

