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The Age of Electoral Majority

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Popular political participation is the core of democratic government, and the archetypal participatory mechanism is the vote. For centuries, voting was a privilege limited to few, but democratic norms now require that electoral inclusion be presumed, and exclusion justified. 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. Others, including Australia and the U.K., are seriously considering doing the same. The United States is not among the growing number of democracies deliberating the electoral inclusion of some cohort of their younger citizens. But it should be.

I argue that presumptive inclusion places on the state the burden of justifying categorical electoral exclusion. States legitimately exclude persons who lack voting competence, but no conception of it currently exists. Classic democratic theory describes the decision making of the ideal citizen-voter as both well-informed and rational, but the decision making of the actual citizen-voter 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 (1) informed by behavioral decision research and studies of voter decision making; and (2) characterized by the reliable attainment of the relevant cognitive processes and their competent application in the electoral domain.

Converging research from several disciplines within the developmental sciences has established a reliable connection between age range and the attainment of certain cognitive competencies. Research in developmental psychology and cognitive and social neuroscience explains that/why adolescents make notoriously bad decisions under certain conditions. It also explains that by mid-adolescence (age fifteen or sixteen), when making unpressured, considered decisions—like those required to privately cast a ballot in an election that has unfolded over time—their cognitive-processing capacities and performance are adult-like.

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

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INTRODUCTION

The franchise is the core of modern representative democracy, its “free and unimpaired [exercise] preservative of other basic civil and political rights.” Historically a privilege extended almost exclusively to white male property holders, today it is a broadly inclusive entitlement, and few categorical exclusions from it remain. Among those that do are minimum age requirements, which in every U.S. state, and indeed most of the world’s nations, limit the franchise to citizens aged eighteen and older. Globally, however, a growing number of nations have lowered or are considering lowering their voting ages to enfranchise sixteen- and seventeen-year-old adolescents. These include Western democracies for whom the policy change, if successful, will help correct demographic imbalances among their aging electorates and stimulate political and civic engagement among their younger citizens.

In the United States, the individual states retain broad power to establish electoral qualifications, subject to certain Constitutional and other federal law constraints. The Twenty-Sixth Amendment, for

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1 Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 626 (1969) (stating that “since 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) (stating that “[t]he 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”).


3 Stefan Olsson, Children’s Suffrage: A Critique of the Importance of Voters’ Knowledge for the Well-Being of Democracy, 16 INT’L J. OF CHILDREN’S RIGHTS 55, 55 (2008) (observing “[t]hat 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.”).

4 See infra Parts I.C.1-3.

5 Lassiter v. Northampton County Board of Elections 360 U.S. 45, 50-51 (1959) (explaining that “[t]he 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”). 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
example, prohibits states from setting the age of electoral majority above eighteen. No Constitutional or other federal law provision, however, prohibits states from lowering the age of electoral majority; each state thus retains that power. Other than a few states that allow seventeen-year-olds to vote in primary elections so long as they will turn eighteen in time for the general election, no state has exercised, nor seriously considered exercising, the power to lower the voting age.

The Twenty-Sixth Amendment’s exclusion of those under eighteen from explicit constitutional protection undermines any constitutionally-grounded argument for lowering the voting age. Any court that held the enfranchisement of citizens younger than eighteen constitutionally compelled would, in so holding, depart from well over a century of established precedent.

Constitutional compulsion, however, is not the sole, nor even primary, justification for most state action. I argue here that what is
widely embraced as the core democratic principle of inclusion\textsuperscript{10} (from which derives the concept of “universal suffrage”) compels states to ensure that categorical electoral exclusions remain justified. In light of significant advances in knowledge of human development in various scientific disciplines over the last several decades, the time has come to revisit and if warranted, readjust, the age of electoral majority.

Academic analysis of the voting age has been all but nonexistent.\textsuperscript{11} One might imagine the reasoning that would lead scholars to conclude that the issue merits little attention: (a) Age is a reasonable—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, but such is the nature of proxies, and of bright-line legal rules more generally.\textsuperscript{12}

\textsuperscript{10} See, e.g., UNIVERSAL DECLARATION OF HUMAN RIGHTS Art. 21 (1948) (“everyone has the right to take part in the government of his country”).

\textsuperscript{11} A handful of theorists who do examine the voting age group all minors into a single homogenous category, discounting or ignoring age-related distinctions among them. These theorists reach one of two conclusions: (1) 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 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); (2) Despite minors’ incompetence, their interests should be registered through the use of some proxy voting method. See, e.g., Stefan Olsson, Children’s Suffrage: A Critique of the Importance of Voters’ Knowledge for the Well-Being of Democracy, 16 INT’L J. OF CHILDREN’S RIGHTS 55 (2008) (acknowledging the increasing political competence that comes with age, but 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 “creating” 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 98-105 (2nd ed. 2004) (discussed infra note \textsuperscript{11}); Francis Schrag, Children and Democracy: Theory and Policy, 3 POL., PHILO. & ECON. 365 (2004-05) (discussed infra note \textsuperscript{11}).

See, e.g., ANTHONY H. BIRCH, THE CONCEPTS AND THEORIES OF MODERN DEMOCRACY 93-94 (2d ed. 2001) (concluding that disputes in modern democratic states about who should be represented have “now been resolved, and that . . . [t] is now accepted everywhere, . . . that all adult citizens should be represented through the electoral system.”).

\textsuperscript{12} Paul Arshagouni, “But I’m an Adult Now . . . Sort of:” Adolescent Consent in Health Care Decision-Making and the Adolescent Brain, 9 J. OF HEALTH CARE L. & POL’Y 315, n.110 (observing that [w]herever one draws a bright line, there will
Thus, (c) because age eighteen is a common proxy for legal competence generally, and because community consensus seems satisfied with its use as such, age eighteen seems to be as good a proxy for electoral competence as any.13

This reasoning, while superficially plausible, suffers serious flaws that I aim to expose and correct in the course of the argument that follows. I briefly highlight those flaws, and core elements of my argument, here:

First, this reasoning ignores the presumption of electoral inclusion to which persons subject to a democratic government’s authority are entitled. Presumptive inclusion, espoused by democracy theorists, flows from basic principles of democracy. While the presumption does not foreclose the possibility of legitimate exclusions, it does shift to the states the burden of justifying electoral exclusion.14

Second, assessing whether a state has met its justificatory burden requires some principled criteria or standards for inclusion. Democracy theory and liberal constitutional principles both support two such criteria: (1) ongoing connection with the political community and (2) electoral decision-making competence.15 I then draw on behavioral decision research on voter decision making and on developmental psychology to develop a concept of electoral competence defined by the attainment and application of adult-like cognitive-processing capacities in the electoral context. These include the abilities to acquire information and knowledge, to assess and process information, and to make and justify a decision.16

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 discuss research in behavioral and developmental psychology, cognitive neuroscience, 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 adult-like cognitive-processing capacities by

13 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.
14 See infra Parts II.A.
15 See infra Parts II.B.
16 See infra Part III.A.
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.\footnote{See infra Parts III.A. & B.}

Scientific research cannot dictate policy, but 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 mid-adolescents will reliably demonstrate competence.\footnote{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.

Part II explores voting criteria. It argues that democratic principles require that members of a political community be presumptively entitled to political/electoral participation. Members may nonetheless be excluded from participating if they fail to have certain characteristics—ongoing connection to the relevant community, and electoral competence.

Part III argues for a conception of electoral competence informed by behavioral decision and political 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 critical new evidence of the age-related attainment of the relevant cognitive processes.

I conclude 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 must 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. Twenty-one remained the voting age for
more than two centuries. The franchise was always conceptually linked
to military service, and efforts to lower the voting age began when
Congress lowered the age of conscription from twenty-one to eighteen in
1942. Those efforts finally succeeded in 1971, when an unpopular war
provided the necessary additional pressure to force the national voting
age down to eighteen. In the four decades since, the voting age has
received no attention domestically to speak of. But it is receiving
significant attention internationally. A growing number of countries have
lowered their voting ages from eighteen to sixteen, or are considering
doing so. This Part surveys this global context and examines the factors
that are driving this downward trend.

A. England and the British Empire through the 18th Century

This Part discusses the primary historical influence on early
American voting rules—unsurprisingly, the English common law
tradition. It recounts the arguments made during the famous Putney
Debates in mid-seventeenth century England, both in favor of and
against widespread suffrage. The same arguments have echoed at voting
rights debates ever since, and 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. 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.” In France, Germany, and
throughout the northern parts of Europe between the ninth and eleventh
centuries, the age of majority for males was fifteen. Though nearly
identical to the Roman age of majority, the requisite capacities that
signaled legal maturity were not intellectual but instead physical—
namely, the physical ability to participate in warfare.

The age of majority for English knights, who fought on behalf of
the crown, increased during the Middle Ages. Legal historians attribute
the increased age requirement to the changing nature of warfare.

20 Id. at 25.
21 Id.
22 Id. (noting that “[t]he test applied in selecting this age seems to have been
different from that applied in Rome[—]namely, the capacity to bear arms”).
23 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 reasonable to
assume that to have been the case. Id. at 26.
Increasingly, armies included mounted cavalry, which required knights skilled in the use of horses in battle—skills that could only develop during a lengthy training period. Along the same lines, improvements in defensive armor also increased its weight—requiring additional strength by those wearing it. 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.

English suffrage originated in 1215, when English barons forced King John’s accession to the Magna Carta. Initially the exclusive privilege of the English nobility, the franchise gradually expanded to other property owners. Early suffrage provisions imposed only residence and property (“freehold”) qualifications. Nothing explicitly restricted the franchise to males, or to those of a certain age—these restrictions were sufficiently obvious they remained unstated well into the nineteenth century.

English historical and common law traditions eventually became law throughout the British Commonwealth, and indeed much of the Western world. However arbitrary its genesis may seem in retrospect, age twenty-one remained firmly entrenched as the age of legal and

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24 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 n79 (1906), available at 
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 __, at 30.

25 JAMES, supra note __, at 28.

26 M.T. CLANCY, ENGLAND AND ITS RULERS: 1066-1307 190-92 (3d ed., 
2006).

27 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 
“franchise”). A well-known 1430 English statute extended to “40-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 5-6 (1960).

28 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 
meter other qualifications. WENDELL W. CULrvine, YOUTH’S BATTLE FOR THE BALLOT: A 

29 CULrvine, supra note ____ at 72.

30 Id. at 2.
electoral majority for centuries in England and in the nations across the globe that incorporated English traditions.\textsuperscript{31}

1. \textit{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.\textsuperscript{32} Among their then-radical demands were the elimination of the freehold requirement and the adoption of near-universal male suffrage.\textsuperscript{33} 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 are now famously known as the Putney Debates.\textsuperscript{34} The Debates frame modern concepts of political inclusion and justifiable limits to inclusion. The concerns underlying the moderates’ arguments for limited suffrage have help justify and define modern boundaries of democratic inclusion, and the Levelers’ arguments in favor of widespread suffrage have echoed as the standard justifications for presumptive democratic inclusion and universal suffrage.\textsuperscript{35}

\textsuperscript{31} JAMES, \textit{supra} note __ at 22, 33. James characterizes the common law age of majority of twenty-one as “a curious development from the older systems requiring military service.” \textit{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. \textit{Lowering the Voting Age to 18: A Fifty-State Survey of the Costs and Other Problems of Dual-Age Voting}, Report of the Constitutional Amendments Subcomm. of the Sen. Judiciary Comm., 92d Cong., 1\textsuperscript{st} Sess. 7 (1971).

\textsuperscript{32} STEPHENSON, \textit{supra} note ___ at 34-35


\textsuperscript{34} STEPHENSON, \textit{supra} note ___ at 34-35. The Levelers’ commitment to political equality derived from their religious beliefs, but their public arguments aimed for broad, secular appeal. WILLIAMSON, \textit{supra} note __, at 64-68.

\textsuperscript{35} STEPHENSON, \textit{supra} note ___ at 34-35 (observing that “To one extent or another, every voting rights debate for more than 200 years afterwards echoed the debates at Putney”). See generally, LUDVIG BECKMAN, THE FRONTIERS OF DEMOCRACY: THE RIGHT TO VOTE AND ITS LIMITS 8 (2009) (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.”). \textit{But cf.}, WILLIAMSON, \textit{supra} note __, 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).
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] Kingdom, [and to] comprehend the local interest.” 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, indefinite nature of property ownership meant that he would himself be affected by and subject to its laws, both current and future. 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 comes with property ownership, could be “here today, and gone tomorrow.”

Second, only “men freed from dependence upon others” could be trusted to vote. The landless, servants, and women would too easily be influenced or manipulated by those on whom they were economically dependent. Only economic independence could guarantee that persons’ votes reflected intellectual independence.

The men 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. They argued that all men equally possessed certain “natural rights” by virtue of their humanity—rights neither derived from nor dependent on the government.

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36 Statement of Commissary General Henry Ireton, in 1 THE CLARKE PAPERS, NEW SERIES XLIX, 299-303 (C.H. Firth, ed., 1891), quoted in STEPHENSON, supra note __, at 36-37. 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. STEPHENSON, supra at 34.


38 WILLIAMSON, supra note __, at 64, citing Statement of Commissary General Henry Ireton, quoted in A.S.P. WODEHOUSE, PURITANISM AND LIBERTY 58 (2d ed. 1950).

39 Id.

40 Statement of Colonel Rich, in 1 THE CLARKE PAPERS, NEW SERIES XLIX, 299-303 (C.H. Firth, ed., 1891), quoted in STEPHENSON, supra note __ at 37 (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 dictators”). At a time where 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. STEPHENSON, supra note __, 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 __, at 23-24.

41 Id. at 38-39.

42 STEPHENSON, supra note __, at 40; WILLIAMSON, supra note __, at 62-67.
or property ownership. “Has not the meanest He,” asked one of their leading spokesmen pointedly, “as much a life to live as the greatest He?”43 Men, regardless of station or education, were equally endowed with “human reason.”44 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.”45 Those “bound by laws in which they have no voice at all” are a people “enslave[d].”46

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.47 The considerable influence of the Putney Debates on American political thought more likely derived from their timing, which resulted in their dissemination throughout the American colonies in the decades preceding the American Revolution, and their emerging from Britain, given that American colonists identified with the British/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 “more instructive and influential in understanding later American political developments” than more historically distant antecedents.”48

2. The American Colonies

The rhetoric at Putney had enduring influence but little immediate effect, either in England or the American colonies. Instead, English law retained property and income qualifications for nearly three more centuries.49 The age of legal and electoral majority would remain unchanged even longer, well into the twentieth century.

44 WILLIAMSON, supra note __, at 65.
46 Id.
47 STEPHENSON, supra note __, at 33.
48 Id. at 33.
49 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 __, at 72.
When England established the thirteen American colonies in the seventeenth and eighteenth centuries, it imposed on them no uniform voting rule. Each colonial assembly enacted voter qualification rules that would govern elections within its respective territory. Although the colonies’ rules varied, they all adopted property-based electoral systems that reflected prevailing British practice. They also retained twenty-one years as the near-universal age of electoral majority. Militia service was an occasional and singular exception to general voter requirements, and some colonies occasionally enfranchised militiamen younger than twenty-one. In keeping with the longstanding belief (whose endurance seems to come more from its emotional appeal than its logical integrity), those who risked their lives defending their country were considered by doing so to have earned a voice in its governance.

B. United States, Through the 20th Century

This Part 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. Just as the Levelers’ ideas echoed in support of expanding the franchise, however, the opponents of

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50 STEPHENSON, supra note __, at 41-48.
51 Id. Within a given colony, however, there could be cities that possessed charters issued by the Crown. In these cities, royal decree, not the colonial assembly, established the rules governing the franchise. Id. at 42.
52 Id. at 41.
53 CULTICE, supra note ___ 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, non-freemen and those not members of the church could vote upon reaching age twenty-four. Id. at 4.
54 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, 76.
56 JUDITH SKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 45 (1991) (arguing that the Putney “debates have a permanent significance, especially for American political thought,” and that the “future American citizen was born in the course of these exchanges.”)
widespread suffrage at Putney remained equally important to the political
evolution of the nation. Political theorist Judith Sklar has noted that their
“arguments were repeated over and over again whenever yet another
group of Americans demanded the right to vote.”

The Constitution submitted to the states for ratification contained
no uniform national suffrage law. 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. The
states, as had the colonies before them, thus retained the power to
determine voter qualification standards for both state and national
elections, and all retained twenty-one as the age of electoral majority.

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. It warned that a state disfranchising
“any male inhabitants . . . being twenty-one years of age, and citizens of
the United States, . . . except for participation in rebellion, or other
crime,” would lose representation in Congress and the electoral college.

57 Sklar, supra note ___ at 45.
58 Keyssar, supra note ___ at 18.
59 Id. at 18-20. James Madison explained that “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 (James Madison).
60 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. 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.

Article I also imposes age qualifications for various federal offices: twenty-five
for the House; thirty for the Senate; and thirty-five for the presidency. Id. 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 of the United States (II), in Essays on the Constitution of the United
States 141 (Paul Leicester Ford, ed., 1888).
61 Cultice, supra note ___ at 12.
63 Id. See also, Pamela S. Karlan, Unduly Partial: The Supreme Court and the
the Reduction-of-Representation clause).
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.\textsuperscript{64}

The voting age received no national attention to speak of until the United States entered World War II at the end of 1941.\textsuperscript{65} 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 proposed another—a constitutional amendment to lower the national voting age, also to eighteen.\textsuperscript{66} 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 of government for which they are best satisfied to fight.”\textsuperscript{67} Congress lowered the draft age to eighteen in the fall

\textsuperscript{64} Minor v. Happersett, 88 U.S. 162, 174 (1873) (relying on the clause’s explicit mention of “male” citizens to support its conclusion that the Fourteenth Amendment did not require extending women the franchise).

\textsuperscript{65} 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 United States citizens to vote shall not be abridged by the United States or by any State on account of race, color, or previous condition of servitude.” Id. at § 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 them. 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., pre-registration 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).

\textsuperscript{66} Over the following decades, activists sought both to enfranchise women and re-enfranchise African-American men. The passage of the Nineteenth Amendment in 1920 accomplished the former; years of litigation and the passage of the Voting Rights Act of 1965 went a long way towards accomplishing the latter. U.S. CONST. amend. IX; THOMPSON, supra.

\textsuperscript{67} CULTICE, supra note ___ 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.

\textsuperscript{68} Republican Senator Arthur Vandenberg from Michigan and Democratic Congressman Jennings Randolph from West Virginia introduced joint resolutions proposing the constitutional amendment. U.S. Senate, Joint Resolution No. 166, 77\textsuperscript{th} Congress, 2\textsuperscript{nd} Sess., October 19, 1942.

\textsuperscript{69} U.S. Senate, Joint Resolution No. 166, 77\textsuperscript{th} Congress, 2\textsuperscript{nd} Sess., October 19, 1942; U.S. House of Representatives, Joint Resolution No. ___, 77\textsuperscript{th} Congress, 2\textsuperscript{nd} Sess., October 20, 1942.
of 1942 but adjourned without taking action on the proposed amendment.\footnote{Cultice, supra note ___ at 22.}

Between 1942 and 1944, members of Congress introduced more than a half-dozen similar joint resolutions, and in the states, lawmakers began doing the same.\footnote{Id. at 21-22.} 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.\footnote{Id. at 25-26.} 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.\footnote{Id. at 30.} It was more than ten years after Georgia’s constitutional amendment before any of these proposals would succeed. Then in 1955, Kentucky became the next state to lower its voting age.\footnote{Id. at 55.} When new states Alaska and Hawaii adopted their constitutions, they adopted compromise voting ages of nineteen and twenty, respectively.\footnote{Id. at 55.}

Unlike the 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.\footnote{In 1956, 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.\footnote{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 ___, at ___.} 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 ___, at ___.} 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.\footnote{Lowering the Voting Age to 18: Hearings Before the Subcomm. on Constitutional Amendments of the Sen. Judiciary Comm., 90th Cong., 2d Sess. at 23 (1968) (statement of R. Spencer Oliver). As of 1968, approximately twenty-five percent of U.S. troops, and nearly thirty percent of U.S. casualties, had been soldiers younger than twenty-one. 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 3000 high schools and 400 colleges across the country. Cultice, supra note ___ 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. Cultice, supra note ___ at 65.} Lawmakers, before voting to

\begin{itemize}
  \item The amendment extended the Voting Rights Act, and in addition to its provision lowering the voting age, it abolished residency requirements over thirty days for national elections and prohibited literacy tests for a period of five years.
\end{itemize}
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. 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.

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

*Oregon v. Mitchell* thus left intact the provision in the Voting Rights Act lowering to eighteen the voting age 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 to either modify their voting systems to accommodate two voting lists, one for federal elections and one for state; or to change their laws to lower the voting age in both federal and state elections.

Modifying state voting systems presented significant administrative

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76 CULTICE, supra note ___ at 115.
77 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.” CULTICE, supra note ___ at 139.
79 The Justices filed five separate opinions in the case. 400 U.S. at 112.
80 They were Justices Blackmun, Harlan, and Chief Justice Burger. See 400 U.S. 112, 152 (Harlan, J., concurring in part and dissenting in part); (Stewart, J., concurring in part and dissenting in part).
81 They were Justices Brennan, Douglas, Marshall, and White. See 400 U.S. 112, 230 (Brennan, J., concurring in part and dissenting in part); Id. at 135 (Douglas, J., concurring in part and dissenting in part).
82 400 U.S. at 117.
83 *Id.* See also CULTICE, supra note ___ at 172-73.
84 *Id.* at 180-81.
challenges and would be expensive.\textsuperscript{85} Lowering the voting age statewide required amending state constitutions, and in every state but Delaware, constitutional amendments required voter referenda.\textsuperscript{86} Because of the requirements of their constitutional amendment processes, only fifteen of the states could possibly have changed their statewide voting ages in time for the November 1972 elections.\textsuperscript{87}

Spurred by the prospect of election-day chaos, Congress in March 1971 hurriedly approved the proposed Twenty-sixth Amendment.\textsuperscript{88} 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.”\textsuperscript{89} 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 in June 1971.\textsuperscript{90}

World War II did not spark the voting age debate in the United States alone; it ignited a “global suffrage age reduction movement.”\textsuperscript{91} 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 voting ages of less than twenty-one (with fifty-two of these adopting eighteen as the national voting age).\textsuperscript{92}

The following Part (I.C.) surveys the continuing expansion of the franchise to younger citizens in other countries, and the status of the voting age in the United States.

\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 185.
\textsuperscript{88} Id. at 191.
\textsuperscript{89} U.S. Const., Amend. XXVI, Sec. 1.
\textsuperscript{90} CULTICE, supra note ___ at 191.
\textsuperscript{91} As did the United States after lowering the age of conscription, U.S. allies also confronted pressures to enfranchise their youngest soldiers; several did so, at least temporarily. CULTICE, supra note ___ 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.
\textsuperscript{92} CULTICE, supra note ___ 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. CULTICE, supra note ___ at 78-79.
C. Global Context, into the 21st Century

This Part surveys the current global landscape. 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. The U.K. Electoral Commission studied the issue and recently published a report, whose findings this Part briefly summarizes, and portions of which Part II will critique—in particular, its misplacing the “burden of persuasion” on those seeking inclusion and focusing heavily on public opinion. In the United States, a handful of state legislatures have considered proposals to lower statewide voting ages, but the issue has so far generated no widespread attention.

At the beginning of the twentieth century, approximately half of Europe’s nations (including Britain, France, and Italy) set the age of electoral majority at twenty-one, and half at a later age.93 The average age of electoral majority worldwide was just under twenty-four years.94 Today, most nations have adopted some form of representative democratic government.95 Some eighty-two percent have set the voting age at eighteen. Of those that have adopted voting ages lower than eighteen, eleven have set it to sixteen, and five to seventeen.96 The average voting age worldwide is between seventeen and eighteen years.97

Two countries, the Dominican Republic and Indonesia, allow married individuals to vote irrespective of age.98 In several Latin American nations, the changes came in the 1970s and 80s, in the midst of significant governmental restructurings.99 Most recently, Ecuador passed

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93 CULTICE, supra note ___ at 76. 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 set it at thirty. Id. at 89.
94 Id. at 76.
96 Id.
98 Id. For others, the presumptive age of electoral majority in the Dominican Republic is eighteen; and in Indonesia it is seventeen. Id.
an amendment to its constitution lowering the voting age to sixteen in 2008.

In Eastern Europe, the newly independent Bosnia-Herzegovina, Croatia, Serbia, and Slovenia all adopted measures in the early 1990s permitting employed sixteen- and seventeen-year-olds to vote.\textsuperscript{100}

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 politically most closely aligned, and I discuss them below.

1. Australia and Canada

Canadian political parties all allow members as young as fourteen to vote for the parties’ candidate for Canadian prime minister. The national voting age for all other elections, however, is eighteen.

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. The bill’s supporters argued that the measure would reverse declining voter participation and reengage youth in the nation’s politics.\textsuperscript{101} Although members of Parliament from each of the four federal political parties, including the caucus leaders of each party, joined in multi-partisan support of the proposal, the bill failed to pass the House.\textsuperscript{102}

\textsuperscript{100} The island nations of Philippines and Indonesia lowered their voting ages to sixteen and seventeen, respectively.

\textsuperscript{101} See Statement of Private Member Mark Holland, on Canada Elections Act, Feb. 1, 2005, House of Commons Hansard #47 of the 38\textsuperscript{th} Parl., 1\textsuperscript{st} Sess., available at http://openparliament.ca/hansards/1504/250/. Holland, who sponsored the bill, suggested that because younger people lack the vote, legislators ignore them and their issues, which contributes to their disengagement. He argued that, “by 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.” \textit{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.” \textit{Id.}

Supreme Court recently rejected the argument made by a sixteen- and a seventeen-year old that their disfranchisement violated the Canadian Constitution. The Court held that the voting age was instead a political matter and thus within the purview of the legislature.

The Australian federal government, also with the goal of increasing voter engagement and participation, proposed lowering the national voting age to sixteen in a September 2009 Green Paper.103 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 Victorian Electoral Commission (“VEC”), which conducts 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.104 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.”105 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


105 Id. at 10.
The improved effectiveness of education efforts could in turn “reduce voter ignorance overall,” and participating in elections at a young age could reduce the likelihood of apathy at later ages.107 Finally, it concluded that “democracy will be enhanced by the inclusion of additional viewpoints.”108

2. Continental Europe

A growing number of Western European nations have either lowered their voting ages or are considering doing so. They hope 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 to 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 countries.109 The proposal expressed the signers’ concern over current low rates of voting 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.110

Austria lowered its national voting age to sixteen by constitutional amendment in 2007, becoming the first European Union nation to do so.111 In large part, the change sought to counterbalance the

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106 Id. at 10.
107 Id. at 10-11. 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. at 11.
108 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 (Australia), 7, Apr. 14, 2008, available at 2008 WLNR 6923734.
110 Id.
111 Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl I No. 1/1930, as last amended by Bundesgesetzeblatt [BG] BGBl I No. 27/2007 (Austria); Franz Fallend, Austria, 47 EUR. J. OF POL. RESEARCH 902, 907 (2008); World Briefing | Europe: Austria: Voting Age Lowered to 16, N.Y. TIMES, June 6, 2007.
increasing percentage of voters aged sixty-five and older, whose numbers have been growing due to declining birth rates. Because those 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.\footnote{Austria, in a First, Allows Children to Vote, N.Y. TIMES, Sep. 25, 2008, http://www.nytimes.com/2008/09/25/world/europe/25iht-austria.4.16485539.html.} 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 seventy-three percent.\footnote{Ulrike Kozeluh, Post Election Study—Voting with 16: Main Results for the National Elections in Austria 2008, SORA Institute for Social Research and Analysis (English-language Summary 2009), available at http://www.sora.at/fileadmin/downloads/wahlen/2009_waehlen-mit-16_summary-english.pdf.}

Several states in Switzerland and Germany have lowered the voting age for local elections to sixteen, with nearly half of the sixteen German states doing so. In Norway, an ombudsman identifies and advocates for children’s interests generally and has published a report advocating the national voting age. As a pilot project, the Norwegian Parliament has authorized twenty municipalities to enfranchise sixteen-year-olds in municipal and county elections in 2011.\footnote{REIDAR HJERMANN, WHAT’S THE POINT?: A BOOKLET ON THE RIGHT TO VOTE FOR 16-YEAR-OLDS (last visited Aug. 12, 2010), http://www.barneombudet.no; http://www.regieringen.no/nb/dep/krd/tema/valg-og-demokrati/forsok-med-stemmerett-for-16-aringer.html?id=581646.} Finland, too, has recently appointed a government group to study the issue.\footnote{See, e.g., Voting Age May Be Lowered to 16 in Finnish Municipal Elections, HELSINKI TIMES, June 8, 2010, available at http://www.helsinkitimes.fi/htimes/domestic-news/politics/11365.}

3. The British Islands

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.\textsuperscript{118} The Scottish parliament has called on Westminster to transfer to Scotland the legislative and executive power needed to effectuate a change the voting age.\textsuperscript{119} It passed legislation in 2009 to lower 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.\textsuperscript{120}

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.\textsuperscript{121} Former British


\textsuperscript{118} Dinwoodie, supra note 119. The U.K. Parliament has devolved designated powers to the governments of Scotland and Wales, retaining others. The power to set electoral rules is among those retained by the U.K. Parliament in Westminster. See also, Welsh National Assembly, Voting at 16, available at http://exploreethesassembly.org/lang/en-uk/get-involved/elections-etholiadau/voting-at-16 (accessed Sep. 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.”).


Prime Ministers Tony Blair and Gordon Brown both announced their support while in office for lowering the voting age.\footnote{Brown urged the House of Commons to consider the issue in a 2007 speech on constitutional reform. \textit{HOUSE OF COMMONS DEB.} C819 (July 3, 2007) (statement of P.M. Gordon Brown), \url{http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070703/debtext/70703-0003.htm#07070334000391}. 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, \textit{I’d Like to See the Voting Age Lowered to 16, Says Brown}, \textit{WESTERN MAIL}, July 24, 2009, available at \url{http://www.walesonline.co.uk/news/wales-news/200/07/24/i-d-like-to-see-the-voting-age-lowered-to-16-says-brown-91466-24228229/}. \textit{See also}, Joanna Moorhead, \textit{Sweet 16: Would You Give the Vote to Them?}, \textit{INDEPENDENT ON SUNDAY} (U.K.), May 4, 2004 (Features), 2004 WLNR 10422645; Andrew Grice, \textit{Blair Would Give Vote to 16-Year-olds}, \textit{THE INDEPENDENT} (U.K.), May 4, 2004, \url{http://www.independent.co.uk/news/uk/politics/blair-will-give-vote-to-16-year-olds-562185.html}.}


The Commission noted that independent commissions from England, Scotland, and Wales had recommended lowering the voting and candidacy ages as a way of increasing young people’s interest and participation in government.\footnote{A coalition of organizations in the U.K. launched \textit{Votes at 16} in January 2003. Coalition membership includes political parties and a range of organizations concerned with democracy and young people. \textit{See} \url{www.votesat16.org.uk}; \textit{VOTES AT 16 COALITION, 16 FOR 16: 16 REASONS FOR VOTES AT 16} (2008); Alex Folkes, \textit{The Case for Votes at 16}, 41 \textit{REPRESENTATION} 52 (2004).}
The Commission reached five major conclusions:  

1. 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.  

2. The age at which young people attain various legal rights and responsibilities varies; so while informative, the nation should assess the age of electoral majority in its own context.  

3. There is no consensus on the definition of “maturity” and “what it means in relation to electoral participation and minimum voting and candidacy ages.”  

4. In research it conducted, young people reported that being insufficiently informed was the primary reason they did not vote; it also noted that citizenship education was only in its infancy in the UK.  

5. While the majority of those who responded directly to the Commission’s public consultation paper favored a reduction of the voting age to sixteen, it found that the general public opinion favored retaining the current age of eighteen and noted “no significant or even consistent majority of young people calling for the right to vote.”  

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.”  

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.” The first change was the continued development of citizenship education across the United Kingdom (the public schools had only recently introduced a new citizenship education program). And the second was a change in public opinion on the general age of majority. 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

127 Id. at 59.  
128 Id. at 59-60.  
129 Id. at 60.  
130 Id. at 60.  
131 Id. at 61.  
132 Id. at 62.  
133 Id. at 62.  
134 Id. at 39-43.  
135 Id. at 7.
bill garnered some support from other parties, opponents successfully blocked its progressing through Parliament.\textsuperscript{136}

Although still a relatively new idea, other nations have given the age of electoral majority significantly greater consideration than has the United States, to which the next (very brief) Part turns.

4. The United States

The voting age everywhere in the United States is eighteen, although nine states permit seventeen-year-olds to vote in primaries if they will turn eighteen in time for the general election.\textsuperscript{137} Nothing suggests imminent change. A number of state legislatures in recent years have considered—and rejected—occasional bills or proposed constitutional amendments lowering state or local voting ages.\textsuperscript{138} 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 candidates for U.S. Senate declared their support for the measure.\textsuperscript{139} A

\textsuperscript{136} New Bid to Lower the Voting Age to 16-year-olds Is Blocked, BIRMINGHAM POST (U.K.), June 7, 2008, at 4, 2008 WLNR 10745322.

\textsuperscript{137} See Pam Belluck, Sixteen Candles, But Few Blazing a Trail to the Ballot Box, N.Y. TIMES, Week in Review, Aug. 26, 2007. [BETTER CITE] Most recently, the Maryland state legislature in its 2010 session passed a provision permitting persons younger than eighteen to vote in certain primary elections. 2010 Md. Laws, Ch. 271.


\textsuperscript{139} Associated Press, 3 of 4 Democrats Running for Ted Kennedy’s Senate Seat Say They Support Lowering Federal Voting Age, MASSLIVE.COM (Associated Press,
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.140

II. Principles of Democratic (Electoral) Inclusion

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

From a minimalist conception of a democratic system, Part II.A. derives the popular principle of presumptive inclusion, which has been advanced by democracy theorists. Presumptive inclusion places on the state the burden of justifying electoral exclusions.

Part II.B. discusses minimum criteria or standards for inclusion that have, for centuries, been invoked to justify voter qualifications. The standards permit the exclusion from the electorate of individuals who lack: (1) ongoing connection to the community; and (2) electoral decision-making competence.

While these standards for inclusion (or similar versions of them) have long enjoyed near-universal acceptance, democracy theorists have struggled to justify them. I argue that such a justification can derive, not solely from democratic principles, but instead from the foundational commitment to individual liberty of the liberal constitutional democratic state.

Part III turns to the standard that is of primary relevance here—electoral decision-making competence. It develops a conception of electoral competence, since none currently exists, and 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. Assessing the nature of political inclusion required for democratic legitimacy thus first requires adopting a conception of democracy itself. This Part adopts a fairly typical definition that describes the minimum requirements for a democratic system—i.e., the type of political participation required for a democratic process, and the scope of political inclusion required for a democratic community.

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. A democratic government thus

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142 Although this is a fairly conventional conception of democracy, it directly derives from and essentially restates 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). In one formulation of Weale’s definition requires for democratic legitimacy 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, and he argues against “defin[ing] democracy by the extent of the franchise.” JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 276 n.16 (4th ed., George Allen & Unwin 1954) (1942). He thus denies the centrality to democratic systems of a widespread franchise, decrying what he terms the “classical
derives its authority from the “the people” who are the individual members of the political community. Although minimalist, this normative account supplies a definite conception of “the people” who are entitled to political participation, and it implies a conception of political participation itself.

First, it defines “the people” as the legal subjects of a government. This definition is a refinement of a broader conception advocated by some theorists, in which “everyone who is affected by the decisions of a government should have a right to participate in that government.” The broader principle 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 principle is difficult to delimit. And since causal connections cross national borders, species membership, and time, the principle’s implementation (i.e., the method by which the preferences of geographically scattered or remote persons, other species, future generations, etc., would be identified and registered) poses challenges quite insurmountable. The narrower, legal conception of “the people”

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143 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); ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 119 (1989). See generally, BECKMAN, supra note __, at 10-15 (discussing various political theorists’ approaches to the “problem of inclusion”).

144 See, e.g., ESTRUND, supra note __, 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 __, at 208. See also, MICHAEL WALZER SPHERES OF JUSTICE 62 (1983) (observing that “the denial of citizenship is always the first of a long train of abuses.”).


146 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 “virtually everyone in all possible and future worlds”); Robin Eckersley, Deliberative Democracy, Ecological Representation and Risk: Towards a Democracy of the Affected, in DEMOCRATIC INNOVATION: DELIBERATION, REPRESENTATION AND ASSOCIATION 119 (M.
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.” The scope of government’s authority to directly regulate an individual’s behavior or status thus bounds the relevant conception of “affected.”

Second, this account of democracy requires the people to authorize the laws that govern them. There are any number of ways in which members of a political community can participate in and influence government’s decisions. Voting is one, but other forms include political demonstrations, participatory town meetings or deliberation, canvassing, community or internet organizing, letter/op-ed writing, etc. Whatever the relative merits or efficacy of other forms of political activity, pragmatic and equitable concerns generally require eventual resort to an aggregative 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

Saward, ed., 2000) (arguing that democratic inclusion should extend to anyone, “irrespective of social class, geographic location, nationality, generation, or species”).

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 them. D. Held, MODELS OF DEMOCRACY 335 (2d ed. 1996). 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, 40 (T.A. Sinclair trans., Penguin: London 1981).

See generally, BIRCH, supra note __, at 159-69 (presenting a typology of political power).

ANTHONY H. BIRCH, THE CONCEPTS AND THEORIES OF MODERN DEMOCRACY 105 (2d ed. 2001) (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 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 (A. Hamlin and Philip 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., Polity Press 1996) (1992) (arguing that political legitimacy requires “the ‘concurring and united will of all’ free and equal citizens”).
equally individuals’ expressed preferences.\textsuperscript{151} 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.\textsuperscript{152}

2. Implications: presumptive inclusion and the burden of justifying exclusion

The basic entitlement to participate in the governance of a democratic system derives from an individual’s being subject to and bound by its laws—in other words, membership in the political community. This is what I will call the democratic principle of presumptive inclusion. Members of the political community have equal claims to inclusion in the demos (referring here to those persons within a given community entitled to political participation through the franchise)\textsuperscript{153} in the absence of legitimate reasons for treating them unequally by excluding them from it. A category of would-be voters subject to a government’s authority ought not bear the burden of demonstrating that they merit full political participation. To the

\textsuperscript{151}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 and 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 (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. \textit{Id.} See also, JAMES S. FISHKIN, THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY (1995).

\textsuperscript{152}In addition, both allow that representation (“direct or indirect” or by “authorizing” laws) does not delegitimize democracy. 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 145-46 (1984). These ideas echo Rousseau’s account of unmediated popular rule required that citizens assemble and decide law and public policy in furtherance of the common good, without the mediation of political representatives. JEAN-JACQUES Rousseau, THE SOCIAL CONTRACT (G.D.H. Cole, trans., J.M. Dent & Sons 1973) (1762).

\textsuperscript{153}The term \textit{demos} can refer broadly to the members of a populace, but here refers to those persons within a given community entitled to political participation through the franchise. OXFORD ENGLISH DICTIONARY (2d ed. 1989), http://dictionary.oed.com (search “demos”).
contrary—the state bears the burden of demonstrating the legitimacy of their exclusion.154

The report of the U.K. Electoral Commission summarized in Part III.C.III. above is a recent and explicit example of official failure to recognize the principle of presumptive inclusion. 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.155 Yet in it the Commission presumed the legitimacy of exclusion.156 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.157 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 lifted from the state the burden of justifying their exclusion. Presumptive inclusion requires the reverse: the burden rests firmly with the state to

154 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. Id. at 376.

155 U.K. ELECTORAL COMM’N 2004 REPORT.

156 Presumptive electoral inclusion embodies the norm of universal suffrage. I generally avoid using that term, however, because as conventionally used, it describes an electoral system that imposes only 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 eighty-five percent of all countries “provided for universal suffrage.”); See also, KEYSSAR, supra note ____, at xxvi (asserting that “the United States was one of the last countries in the developed world to attain universal suffrage.”); LUDVIG BECKMAN, THE FRONTIERS OF DEMOCRACY: THE RIGHT TO VOTE AND ITS LIMITS 2 (2009); ROBERT DAHL, DILEMMAS OF PLURALIST DEMOCRACY 97 (1982); 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 error nonetheless. It subtly infuses a normative judgment (“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; but it should not simply redefine exclusions, because they happen to be common, as non-exclusions.

justify voter qualifications that operate to exclude any category of persons subject to its authority.

To be clear, presumptive inclusion does not preclude the possibility of legitimate exclusions; it instead makes political inclusion the default and requires the state to justify explicitly any exclusions.158 The aggregation of individuals’ votes determines the collective preference.159 In order for the aggregated votes to accurately reflect the collective preference requires the electoral participation of some critical mass of the people, sufficiently representative of the whole. Because the number of voters is typically large, however, 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 legitimate exclusion.

B. The Boundaries of Electoral Inclusion

No demos is fully inclusive. Every democracy has adopted voter qualification rules that result in the exclusion of some members of the community from full political/electoral participation. The previous Part argued that the state bears the burden of justifying exclusion. This Part identifies and justifies the general voter standards that specific voter qualification rules may legitimately aim to ensure.

I adopt twin standards typically suggested—but infrequently justified—by theorists. I then argue that the liberal democratic state’s protective commitment to individual liberty may best explain and justify the electoral exclusion of some members of a political community.

158 Elizabeth Fraser, Democracy, Citizenship and Gender, in Democratic Theory Today: Challenges for the 21st Century 75 (A. Carter and G. Stokes, eds. 2002) (noting that “[d]emocracy . . . has progressively come to imply the rightness of universal suffrage . . . So, any barriers to participation, or any exclusions, have explicitly to be justified.”).

159 But see, e.g., Young, supra note __, for a sustained argument that 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.” Id. at 6. 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) (arguing that “inclusive citizenship encompasses opportunities for collective problem solving and deliberation”).
1. Standards of Inclusion

Few political theorists have addressed standards by which to evaluate the legitimacy of electoral exclusions. They generally assume an inclusive conception of the demos. They then variously argue that voter qualifications aim to ensure competence, personal interest in/nexus to the local community, and independence.

Most theorists avoid altogether identifying any group of criteria or a standard of legitimacy, and would instead analyze any rule of exclusion to ensure that distinctions made between groups of individuals are reasonable and “consistent with norms of equal treatment.”

Today, states’ voter qualification rules tend to reflect the same concerns articulated by the moderate officers who advocated limited...
suffrage at the Putney Debates in seventeenth-century England. These concerns underlie what I identify as the twin standards of electoral inclusion. The standards permit the exclusion of political community members who lack (1) a significant and ongoing connection to the community and (2) vote decision-making competence.

First, recall that the moderates at Putney sought to ensure that voters would cast their ballots in a manner consistent with community interests. The moderate debaters argued that only voters with a “permanent and fixed” interest in the community and its future would reliably vote in this way and that property ownership was the best indicator that a potential voter possessed the requisite interest. Today, citizenship, residence, and law-abidingness qualifications all seek to ensure ongoing community interest/connection.

Next, the moderate officers sought to ensure that voters would vote in a manner that reflected independent intellectual judgment. To the officers, 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, the voting age is the primary voter qualification that seeks to ensure that voters have developed the requisite intellectual independence and decision-making competence. States have also adopted voter qualification rules that allow the disfranchisement of adults deemed mentally incompetent.

2. Justifying standards of inclusion in the liberal constitutional democracy

To the extent that the term “democracy” implies unrestricted majority rule, no nation is—nor aspires to be—fully democratic. A

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166 See supra Part I.A.1.
167 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 as voting criteria literacy and mathematical tests, 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).
168 The etymological origin of “democracy” is the Greek demokratia, or “popular government” (combining demos—“the commons” or “the people,” and kratos—“rule” or “authority”).
169 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
system’s commitment to the democratic principle of popular rule coexists with, and is tempered by, other commitments. The United States is a liberal federal constitutional democracy. The democratic principle requires that those subject to a government will collectively authorize its laws; \(^{170}\) constitutionalism restrains popular sovereignty, limits the power of government, and establishes procedures for legitimate rulemaking; \(^{171}\) and federalism aims to achieve an optimal balance between local and centralized governance. The nation’s foundational value and core political commitment, however, is individual liberty. \(^{172}\)

Classical liberals consider individual liberty to be the central value of the liberal state, \(^{173}\) 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.” \(^{174}\) Individual liberty is a core value for classical and modern liberals alike, however, and thus a least common denominator of sorts.

Along the same lines, there are different conceptions of individual liberty. \(^{175}\) The thinnest and arguably most broadly acceptable...
of these is negative liberty—freedom as noninterference. As I have argued elsewhere, if liberty is the state’s core value, then safeguarding individuals’ liberty must be its primary end. Negative liberty permits the individual to define and pursue her ultimate life course. That basic liberty is thus a minimum entitlement of individuals in the liberal state.

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. 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.” This restraining function is one of the core purposes of constitutionalism and the institutional arrangements through which it limits popular and governmental power.

These political values and the resulting institutional structures that actualize them have important implications for electoral inclusion/exclusion.

Most democracy theorists would likely agree that democratic principles and presumptive inclusion aim, at a minimum, to secure legal subjects’ consent to being governed, to ensure that the laws directly or indirectly reflect the collective preference, and that the individual preferences of the members of the political community equally figure into that collective preference.

Examining the act of voting in light of the above political commitments, I argue that a vote expresses an individual’s will or preference and can be thought of as representing (1) the measure of the individual’s influence over governance; (2) the individual’s transfer or surrender to the government of some corresponding measure of the individual’s liberty (i.e., a transfer of authority) for the purpose of effectuating and enforcing the combined wills of the people; and (3) tacit

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177 Hamilton, supra note __, at 119.

178 Id.

179 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., 1923).

180 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” here simply refers to the ability to determine or control the life-course of another.
acceptance that, once transferred to it, the government’s exercise of its accumulated power is legitimate and binding, whether or not consistent with the individual’s preference.\textsuperscript{181} Every person thus governs and is governed in equal measure, in the Aristotelian symmetrical conception of democratic legitimacy.\textsuperscript{182} No one person wields greater influence than any other in the development of rules, and the resulting rules bind all equally.

Under this liberal democratic conception of the vote, the categorical exclusion from the franchise of some members of the political community would seem to count as democratic deficits. The previous Part stated the twin standards of inclusion that have long been invoked to justify voter qualification rules. It also summarized the instrumental justifications for the standards, which can explain the \textit{ex ante} exclusion of certain individuals from the franchise—e.g., without a connection to and knowledge of the community, individuals cannot be relied upon to cast votes consistent with its interests. I argue that a noninstrumental justification of the existing standards of inclusion is rooted in the liberal commitment of the state. The following example illustrates the need for a noninstrumental justification, grounded in principle.

Assume the following: 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.

The vote cast by this outsider-voter represents (1) a measure of influence over governance, \textit{but not} (2) the transfer or surrender of a corresponding measure of her individual liberty to the government nor (3) acceptance of the government’s resulting legitimate authority over her. The outsider’s net influence over others exceeds that of others over her; the measure by which members of the political community are governed exceeds that by which they govern. In order to avoid the net loss of liberty that would result, the state legitimately withholds the franchise from the hypothetical outsider.

The standard instrumentalist assumptions justify the outsider-voter’s \textit{ex ante} exclusion by assuming that she is likely to cast a bad vote. It cannot legitimize, however, the \textit{ex post} exclusion of the outsider-voter’s good vote. A noninstrumental justification, grounded in principle, is important because it does not rely on (instrumentalist) assumptions about the likelihood of an individual’s bad vote.

\textsuperscript{181} The abstaining nonvoter, not prevented from voting by external or illegitimate forces, might be thought to have implicitly transferred her quantum of influence/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.

\textsuperscript{182} This is the Aristotelian symmetrical conception of democratic legitimacy.
I argue that stronger, noninstrumental justifications of standards for inclusion that can explain the legitimacy of excluding the above outsider-voter (as it does not rely on instrumentalist assumptions about the likelihood of an outsider’s bad vote) is rooted in the liberal commitment of the state.

Analogous reasoning justifies the standard of electoral competence. The next Part (III.) will argue for a new conception of voter decision-making competence. Here, however, let us simply assume that a member of the community lacks the requisite competence, however it is defined. The person is incapable of making the sort of decision contemplated by the vote. If an incompetent person nonetheless casts a vote, she performs the act of voting, but the act is devoid of intentionality and political meaning. The incompetent person’s vote registers (1) a measure of influence over government, but not (2) transfer of liberty nor authority, nor (3) acceptance of the legitimacy of governmental authority.

The instrumental justification for excluding the incompetent voter is arguably weaker than the instrumental justification for excluding the outsider-voter. One might argue, for example, 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. Incompetent voters presumably cast random votes. From an instrumental perspective, their random votes will cancel each other out and have no effect on electoral outcomes.

Because incompetent voting does not threaten to harm the political community, an instrumental argument that justifies the \textit{ex ante} exclusion of the incompetent voter based on the likelihood of her bad vote will gain little purchase. Further, because the incompetent person has a liberty interest in performing the act of casting a ballot, the state must justify restraining her liberty. The state finds that (noninstrumental) justification in its commitment to individual liberty.

The incompetent person who casts a ballot has, like the outsider-voter, influenced government but has not—because she lacks the capacity do so—agreed to a corresponding surrender of liberty. The state thus legitimately restrains the liberty of members of the political community who may have a liberty interest in and ability to cast a ballot, but who lack the cognitive competence required to comprehend the full meaning of and thus intentionally vote.

Whether citizenship, residency, and criminal background are reliable proxies for the relevant community connections is debatable. Those debates, however, are beyond the scope of this Article. The question of electoral competence, on the other hand, goes to the heart of youth exclusion.
Part II argued that the state bears the burden of justifying electoral exclusion. It may legitimately adopt standards that would exclude those who lack the requisite community connections, 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, given that political elites have historically, and notoriously, invoked the alleged incompetence of various groups—including women, African Americans, and the poor—to justify their categorical disfranchisement.183

Some conception of competence must underlie voting age requirements, however. Nothing else explains age-based exclusion. One might try to argue that the young are not members of the political community and 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 connection to the political community and are thus legitimately excluded by voting criteria. That argument too fails. As community residents, the young have the same, if not greater, interests as their elders in issues of public concern—including public health, safety, and education.184 And as young people, they are more likely to bear the long-term consequences of public policy.

The young can thus be members of the political community, with significant and ongoing connections to it. Yet no one disputes that newborns lack voting competence, and few dispute that the typical person acquires that competence at some point over the course of development. Age and development are correlated, and there is a

183 Marion Smiley, Democratic Citizenship, in Citizen Competence and Democratic Institutions 371, 380 (Stephen L. Elkin & Karol Edward Soltan eds., 1999) (observing that “the 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 (1988) (demonstrating the use of the concept of competence to justify the ongoing disfranchisement of African American and immigrants).

184 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; see also Wisconsin v. Yoder, 406 U.S. 205, 213 (“Providing public schools ranks at the very apex of the function of a state.”).
temporal element to the development of electoral competence. Below a certain age, that competence is clearly wanting; the relevant competence develops with time. Assuming that cognitive development generally follows a predictable course (discussed infra Part III.B.), age is arguably the most reasonable proxy for the attainment of electoral competence. The impracticality of widespread individual competence assessments, moreover, makes an age-based qualification reasonable.

A voting age qualification thus ensures a standard of competence. The standard of competence that the qualification seeks to ensure, however, remains ill-defined, even among voting experts. One such expert, at the Center for the Study of the American Electorate at American University, for example, justified their ongoing exclusion by stating that “[p]eople under 18 do not have any competence to vote, they have no stake in society, no knowledge. If they’re lucky, they have taken one civic course.”\(^{185}\) He added in a later interview, “[t]eens younger than eighteen are not mature enough to make voting judgments because they don’t have any historical perspective and they don’t have any comparable civic responsibility.”\(^{186}\) 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 (however that may be defined) etc. But are these the correct, or even among the correct, elements of a standard of voting competence? And how can we assess whether certain young people have actually achieved these standards (or whatever the correct standards are)? It is the aim of this Part to answer these questions.

Part III.A. develops a new, cognitive-process-driven standard or conception of electoral competence, informed by political science, behavioral decision research (including research on voter decision making), and developmental psychology. Part III.B. assesses the development of the relevant cognitive-processing capacities, informed by research in developmental psychology and social and cognitive neuroscience. This research explains that/why adolescent decision-making competence is context-specific. By mid-adolescence (around age sixteen), young people have attained adult-like cognitive-processing capacities. Domains in which they competently exercise these capacities are limited, but they include those allowing for unpressured, considered decision making. I argue that privately casting a ballot in an election that has unfolded over time is such a domain.

\(^{185}\) Marilyn Rauber, *Vote Early—And Young: It’s the Goal of Plans to Lower the Voting Age to 16, or Even 14*, RICHMOND TIMES-DISPATCH, June 13, 2004, at A9, 2004 WLNR 156663 quoting Curtis Gans, Director of the Center for the Study of the American Electorate at American University.

\(^{186}\) Belluck, *supra* note ___.

A. Conceptualizing Electoral Competence

This Part first explains why it is reasonable to apply a different, more lenient, standard of electoral competence to adults with cognitive disabilities than to youth. It then examines whether political/civic knowledge ought to figure into a concept of electoral competence and concludes that it ought not. It concludes by deriving a cognitive-process-driven conception of electoral competence.

1. Adults with cognitive impairments and the Competence Assessment Tool for Voting

Many U.S. states and other democratic systems disfranchise the cognitively impaired.187 Nearly forty states have constitutional or statutory provisions prohibiting people with cognitive impairments from voting.188 Legislative reform of state guardianship laws beginning in the 1990s, however, increasingly preserves the rights of persons under guardians, including the right to vote. Thus, over thirty states now explicitly provide for judicial determination of an individual’s capacity to vote.189

In Doe v. Rowe, a district court in Maine announced a low threshold for demonstrating voting competence.190 The Doe standard requires 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.”191 Using the Doe standard, psychiatrists developed the Competence Assessment Tool for Voting (“CAT-V”) to use in assessing

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188 Hurme & Appelbaum, supra note __, at App. A.

189 Id. at 933.


191 Id. at 51 (citing Def. Mot. for Summ. J. at 8).
voting capacity.\textsuperscript{192} The test asks respondents to imagine that it is election day for the office of state governor, then asks questions aimed to ascertain their understanding of the nature of voting (“What will the people of [person’s state] do today to pick the next Governor?”\textsuperscript{193}) and effect of voting (“When the election for governor is over, how will it be decided who the winner is?”\textsuperscript{194}). The test then provides information about two hypothetical candidates and asked to compare them, choose, then discuss the potential consequences to the voter of that candidate’s being elected.\textsuperscript{195}

If the \textit{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. I argue, though, that 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 voters with mental impairments have presumptively attained development-related cognitive capacities required for electoral competence. The purpose of the standard used to determine their competence is simply to assess whether the nature of voters’ cognitive impairments are such that they have clearly lost that competence. The purpose of a standard used to determine the electoral competence of young people, on the other hand, is to assess whether they have reached the stage of development by which they will have attained—as an initial matter—the array of cognitive capacities required for competent voting.

Thus while the \textit{Doe} standard might be sufficient to indicate the retention of electoral competence despite cognitive impairment, a different standard might be used to assess the development-related attainment of electoral competence.

I next consider a development-related standard of electoral competence.

\textsuperscript{192} The study was reported in Raymond Raad, Jason Karlawish, & Paul S. Appelbaum, \textit{The Capacity of Vote of Persons with Serious Mental Illness}, 60 PSYCHIATRIC SVCS. 624 (2009).
\textsuperscript{193} \textit{Id.} at 625, App. 1, \textit{Competence Assessment Tool for Voting (CAT-V)}, available at ps.psychiatryonline.org.
\textsuperscript{194} \textit{Id.}
\textsuperscript{195} \textit{Id.}
2. Political/civics knowledge

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

First, voluminous data methodically gathered since the 1930s has consistently shown the typical citizen to be far removed from the ideal.

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197 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 JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 272 (3d ed. 1950) (arguing that “electorates 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. CITE See, e.g., MICHAEL Delli CARPINI AND 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 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.
198 To argue that political knowledge ought not figure into our conception of electoral competence is not to say that political knowledge is unimportant. Michael Delli Carpini and Scott Keeter have identified broad categories of information likely to be relevant to voting, and thus with which citizens would ideally be familiar. 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).
Id. at 14.
199 MICHAEL X. DELLI CARPINI AND SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 62-67 (1996). 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 and is held at the Roper Center for Public Opinion Research at the University of Connecticut. Id. at 66. See also http://www.ropercenter.uconn.edu/. 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
citizen of classic democratic theory. Instead, “a large segment of the public has been and remains woefully ignorant about virtually every aspect of American politics.” Studies find that public ignorance extends to knowledge of basic civics and government.

Widespread voter ignorance alone arguably renders unfeasible the adoption of specific factual knowledge as a measure of voting competence. Incorporating even basic levels of civics or political knowledge into a conception of electoral competence could justify voter qualifications that would operate to disfranchise a significant proportion of the current (aged eighteen and over) electorate. Based on differences in knowledge among various groups that have held steady over time, moreover, rates of disfranchisement would be unequally distributed across the population—rates would thus likely be higher among women than men, African Americans than whites, high school graduates than


200 Richard R. Lau & David P. Redlawsk, Voting Correctly, 91 POL. SCI. REV. 585, 585 (1997) (concluding that “only 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.” (internal citations omitted)). 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 that flaws in the way in which pollsters conduct public opinion surveys can lead to the underreporting of political knowledge, however. See, e.g., Melissa K. Miller & Shannon K. Orr, Experimenting with a ‘Third Way’ in Political Knowledge Estimation, 72 PUB. OPINION Q. 768 (2008); Jeffrey J. Mondak, Developing Valid Knowledge Scales, 45 AM. J. OF 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. OF POL. SCI. 169 (2008). These have found that the number of correct responses increased somewhat when respondents were discouraged or prevented from responding “don’t know” (Miller & Orr, supra), given an incentive to respond correctly (such as one dollar for each correct answer) (Prior & Lupia, supra), or given extra time in which to respond (such as twenty-four hours as opposed to one minute) (Id.).


202 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: THEORY MEETS PRACTICE 83, 83 (Stephen C. Craig & David B. Hill eds., 2010) (arguing that 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 fifty percent of adults could name the three branches of government, for example, only forty-one percent of teenagers could do so. JACOBY, supra note __, at 299-300.
college graduates, low-income earners than high-income earners, and those under thirty than those sixty-five and older.203

A second reason to exclude a factual-knowledge component from a conception of electoral competence stems from the instrumental value of political knowledge itself.204 The utility of political knowledge is situational, meaning that its value depends on the decision-making context.205 A voter’s intimate knowledge of campaign finance legislation, for example, is of little use in deciding 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 any given election, and that knowledge requirement is likely to change from one election to the next.

Third, the value 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.206 Thus, while a broadly informed public is critical to the functioning of a democratic system, broadly informed citizens are less critical—the “miracle of aggregation” generally results in collective decisions that reflect well-informed and coherent beliefs, because random or uninformed views cancel each other out.207

A final reason to exclude a factual-knowledge component from a conception of electoral competence stems from the different goals


204 Delli Carpini and Keeter, supra note __, 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.2., provides some evidence to the contrary. Id. at 14-15. This also implies that citizens ought to become relatively “better” voters (in that they more accurately identify and vote consistently with their own interests) over time; lifelong accumulation and assimilation of information enables voters to refine their opinions and interests and vote accordingly. Id. at 14-15. Research again provides some evidence to the contrary, however, demonstrating that memory decreases linearly with age beginning in early adulthood, and that decision-making abilities show significant decline beginning in the mid-60s.

205 Id. at 14.

206 Id. at 15.

207 Some studies have shown that errors do not simply cancel each other out; instead, misperceptions can reflect lopsided biases, such that low levels of political knowledge might instead skew election results. Craig & Martinez, supra note __, at 77-78, 81-82.
individuals may have for their vote decisions. It is generally assumed that the voter’s goal is to cast a vote for the candidate who “would, if elected, produce a better outcome set from [the voter’s] point of view.”

Some political theorists argue, though, that voters may also have less instrumental goals; they may instead see voting as a “speech-act” that has primarily expressive or symbolic (rather than instrumental) value. For an individual to take this view of voting is rational in light of the negligible real-world influence of her vote on an election’s outcome. This use of the vote arguably weighs against a substantive standard of voter knowledge as well, since individual voters may want to cast their ballots so as to express any number of messages, values, or beliefs.

It is reasonable to expect, and public educational policy should ensure, that citizens will possess these basic categories of knowledge. Imposing competency tests to ensure well-informed voting would result in a better-informed electorate, but a less representative and democratic one.

The next two Parts survey behavioral decision research on voter decision making and research in adolescent psychological development to better understand the voting decision and the requirements for competent voting. I argue that individuals’ attainment of adult-level thinking and reasoning capacities indicates their electoral competence.

Part III.B will argue that advances in the developmental sciences make it possible to reliably predict the age range by which individuals will have attained those cognitive skills.

3. Behavioral decision and psychological development research

Normative decision theory prescribes a decision-making model whose rules lead the individual decision maker to choose the option with the highest expected utility, based on the individual’s beliefs and values. It describes decision making as a logical process that involves: (1) identifying the relevant options; (2) predicting the possible outcomes

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208 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.

209 See, e.g., Geoffrey Brennan & Alan Hamlin, Democratic Devices and Desires (2000) (developing an expressive view of voting behavior in which individuals consider voting to be primarily “speech-act,” as opposed to serving other instrumental interests).

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.211

Just as they rarely possess optimal levels of political knowledge, however, individuals rarely make decisions using the value-maximizing, decision-making model.212 Normative analysis is thus just the starting point of behavioral decision research. That research instead recognizes that people are not always rational, can make choices that are rational without using rational processes, and may have goals other than making the most rational choice in a given decision-making context.213

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.”214 Individuals’ limited cognitive-processing abilities allow them to absorb and process only a small fraction of the barrage of information to which they are exposed, including political information.215 In addition to limited cognitive abilities, voters have limited information, time, and motivation—all of which can impede rational decision making.216 Indeed, from a behavioral economics


213 Fischhoff, supra note __, at 13.


215 Lau & Redlawsk, supra note __, 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 processing political information, of course, but rather that we do an equally bad job of processing any other type of complex information.

Id.

216 In contrast to the rational actors of 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 Am. Psychol. 129, 129, 136 (1956). The actual decision-making process generally aims, not to “maximize” or identify the optimal option, but instead more modestly to “satisfice”—identify an adequate or satisfactory option. Herbert
perspective, voter ignorance makes good sense: 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).

In lieu of incurring the cost of educating themselves, voters rely on more readily available “information shortcuts” such as party affiliation and a candidate or party’s past performance. These shortcuts (more broadly referred to by theorists today as “heuristics”) substitute for more complete information, allowing voters to make decisions reasonably consistent with their preferences while expending relatively little effort. Heuristics that voters commonly use in political decision making include availability—judging probability, frequency, and causality by how easily concrete examples come to mind; representativeness—assigning new information to broader preexisting categories with which it best fits; and 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. Daniel Kahneman and Amos Tversky, Choices, Values, and Frames, 39 AM. PSYCHOL. 341 (1984). People more 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.

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.

217 In his now-classic treatise, economist Anthony Downs famously described voters as “rationally ignorant.” ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

218 Id.

219 Id.

220 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; she may then apply that attribute to the new candidate.); (2) representativeness—assigning new information to broader preexisting categories (such as stereotypes or other schema) with which it best fits (e.g., applying person stereotypes based on gender, race, age to fill in an impression of a candidate; or partisan schemata to do the same); 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). Daniel Kahneman and Amos Tversky, Choices, Values, and Frames, 39 AM. PSYCHOL. 341 (1984). People more 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.

221 Id. See also, LAU & REDLAWSK, supra note __, at 13. Samuel Popkin elaborates on Downs’s model in THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS (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. 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/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.
making include party affiliation, group endorsements, person stereotypes such as gender, race, or age, and poll results indicating candidate viability (particularly in primaries, poll results can inform voters which candidates seem to be gaining consensus support and which seem to be hopelessly behind).\textsuperscript{222}

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.\textsuperscript{223} 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.\textsuperscript{224} 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.”\textsuperscript{225}

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.\textsuperscript{226} Other studies likewise suggest that in certain decision-making contexts, a greater amount of preexisting knowledge can hinder rational analysis of a new set of facts.\textsuperscript{227} In making judgments, people generally bring to bear their prior knowledge; in many contexts, this improves this decision making. But in decision-making tasks calling for “decontextualized” reasoning—which requires evaluation only of evidence presented—real-world knowledge hampers analysis. Decontextualized reasoning improves the evaluation of causation, such as jury’s evaluation of evidence in order to reach a verdict, and deductive reasoning generally.\textsuperscript{228}

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 __, at 25. Lau and Redlawsk observe that “[p]olitical heuristic use is nigh onto universal.” \textit{Id.} at 236.

\textsuperscript{222} LAU & REDLAWSK, supra note __, at 233-35.
\textsuperscript{223} \textit{Id.} at 74-75.
\textsuperscript{224} \textit{Id.} at 74.
\textsuperscript{225} \textit{Id.} at 226.
\textsuperscript{226} \textit{Id.} at 212.
\textsuperscript{228} To give an example from one recently reported study, adults examined the following syllogism involving deductive reasoning:

\begin{center}
\textbf{Syllogism 1}
\end{center}
Preexisting knowledge or belief can hinder cognitive performance in other ways. It can lead to undue certainty in one’s judgments, which reflects a failure to “know[.] what one knows,” or metacognition.\textsuperscript{229} Persons with preexisting beliefs or theories tend to subject theories to inconsistent standards of evidence in order to protect their preferred theories.\textsuperscript{230} 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.”\textsuperscript{231} Undue certainty in beliefs in turn “underlies the rigidity in thinking that is a major contributor to human strife.”\textsuperscript{232}

At least in some contexts, then, less knowledge leads to more objective analysis and thus improves cognitive performance.\textsuperscript{233} Research thus 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 impede analysis. Youth and inexperience may, counterintuitively perhaps, 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.\textsuperscript{234} Early adolescents and young adults who initially

| Premise 1: All living things need water. |
| Premise 2: Roses need water. |
| Conclusion: Roses are living things.\textsuperscript{228} |

Although the conclusion does not follow logically from the premises, seventy 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.

Only twenty percent of adults accepted this conclusion as valid, with eighty 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. \textit{Id.} \textsuperscript{229} Deanna Kuhn, \textit{Jumping to Conclusions}, 18 \textsc{Scientific Amer. Mind} 44 (2007).

\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{231} Id.
\textsuperscript{232} Id.
\textsuperscript{233} Kuhn et al., \textit{Developing Reason}, supra note \textsuperscript{___}.
\textsuperscript{234} Id.
showed faulty multivariable causal reasoning also showed significant improvement after engaging with similar problems over the course of several months.\textsuperscript{235}

Specific civics or political knowledge thus ought not constitute part of the standard of electoral competence. Incorporating factual knowledge into a standard of electoral competence risks disfranchising much of the current electorate and is unnecessary to ensure correct vote decisions. 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 serve as serviceable substitutes for full information.

4. A cognitive-process-driven conception of electoral competence

Without requiring specific knowledge, it is nonetheless possible to identify the cognitive processes, or mental operations, involved in and required for competent voting. I thus argue for a standard of competence that is process-driven rather than knowledge-based.

In order to cast non-random votes, voters must go through the process of acquiring relevant knowledge/information of some sort. 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. The voter might thus learn from the election ballot itself only the names and party affiliations of candidates seeking a certain local office. After acquiring that information (itself a cognitive process) the voter applies additional cognitive processes to the information.

In addition to learning and retrieving information, cognitive processes can include (1) encoding (forming a mental representation of information or a situation); and (2) thinking, which is the goal-directed application and coordination of inferences\textsuperscript{236} and includes various forms of reasoning.\textsuperscript{237} When thinkers deliberately constrain their inferences so as to conform to what they believe are appropriate inferential norms,

\textsuperscript{235} Id. See also, DEANNA KUHN, EDUCATION FOR THINKING (2005) (summarizing studies).
\textsuperscript{236} DAVID MOSHMAN, ADOLESCENT PSYCHOLOGICAL DEVELOPMENT: RATIONALITY, MORALITY, AND IDENTITY 26 (2d ed., 2005).
\textsuperscript{237} James P. Byrnes, Cognitive Development During Adolescence, in BLACKWELL HANDBOOK OF ADOLESCENCE 227, 228 (Gerald R. Adams & Michael D. Berzonsky, eds. 2003).
they engage in reasoning.\footnote{Id.} Forms of reasoning include deductive, inductive, and analogical reasoning, as well as decision making and problem solving.\footnote{Byrnes, supra note __, at 227.} Reasoning supplies a person with reasons for her beliefs and actions, or justifiability. The ability to appropriately apply and coordinate various reasoning processes is a fundamental aspect of rationality, which in its oldest and broadest sense requires “good reasons for one’s beliefs and actions.”\footnote{MOSHMAN, supra note __, at 16.}

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 “very good reasons” for one’s conclusions, but as developmental psychologist David Moshman asserts, “[e]ven 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.”\footnote{Id.}

Returning to our typical voter, she has learned a limited amount of information about the election for a certain office—only the names and party affiliations of the candidates. The voter recalls 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 reduction would help her and other middle-class workers like her. She also notes that the Democratic candidate is a woman, and surmises that if elected, the candidate might be even more liberal and pro-government-spending than the typical Democratic. She thus votes for the Republican candidate.

Although the voter has not made a particularly well-informed decision, she has arguably made a minimally competent one. Put simply, \textit{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 reason.} Our typical voter thus 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.

Developmental psychologists make several important generalizations about the development of thinking relevant to the vote decision.

First, adolescents and adults show forms of thinking rarely seen in children. But 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."  A242 Adolescent thinking develops, but there is no universal state of maturity. The development of thinking in and beyond adolescence is instead highly variable, and depends on individual interests, activities, and contexts. “No theorist or researcher,” according to Moshman, “has ever identified a form or level of thinking routine among adults that is rarely seen in adolescents.”  A243 A “mature” cognitive-processing requirement for electoral competence would, like a factual-knowledge requirement, exceed the capacities of and thus disfranchise many current voters. Assessment would also present insurmountable administrative hurdles. A more coherent, workable standard for electoral competence thus requires individuals to have reliably attained the relevant “adult-like” cognitive-processing capacities.

Second, cognitive processing is heavily influenced by emotion and context.  A244 The cognitive-processing requirements for electoral competence thus must require competent performance in the electoral context.

The next Part surveys recent research on adolescent development and concludes that adolescents reliably attain the relevant abilities by ages fifteen or sixteen.

B. Assessing Electoral Competence

Researchers who study cognitive development cannot identify with precision every context where developmentally-normal citizens are likely to have decision-making competence, given both individual and situational, or context-specific, variability.  A245 Researchers have made two critical findings, however: first, by mid-adolescence, individuals have the cognitive capacity to make competent decisions; but second, certain situations and factors reliably hinder the decision-making abilities that adolescents otherwise possess.  A246

This Part first canvasses research on adolescent cognitive development from various disciplines in the developmental sciences and then concludes that the factors that characterize the vote decision-making context (time for deliberation, absence of peers, etc.) render voting the

242 Id. at 24. See also, Laurence Steinberg & Elizabeth Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 AMER. PSYCHOLOGIST 1009 (2003).
243 MOSHMAN, supra note __, at 24.
244 Id.
245 Id. at 13.
246 See supra Part IV.C.
sort of domain in which mid-adolescents 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. 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 on the other. A discussion of adolescent development, first from the perspective of behavioral science, then developmental neuroscience, follows.

Cognitive capacity, including learning and reasoning from facts and information processing, improves more or less linearly throughout childhood, reaching adult-like levels by mid-adolescence. Researchers have consistently found “the logical reasoning and basic information-processing abilities of 16-year-olds” to be “comparable to . . . [or] essentially indistinguishable” from those of adults.

Despite their apparently advanced cognitive abilities, universal characteristics of adolescent behavior include increased propensities for impulsivity, risk taking, and sensation seeking. Early behavioral

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248 Casey et al., supra note __, at 63 (discussing cognitive and neurobiological hypotheses that fail to adequately account for adolescent decision-making behavior). Developmental psychologist Laurence Steinberg has 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.” Steinberg, *Adolescent Brain Development*, supra note __, at 162. See generally Steinberg, *Adolescent Risk-Taking*, supra note __.

249 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. PSYCH. 583, 590-92 (2009) [hereinafter Steinberg et al., *Less Mature Than Adults?*].


251 Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. OF ADOLESCENT HEALTH 216, 218 (2009). Compared to 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. Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 79
decision models attributed these behavioral characteristics to cognitive deficiencies that caused adolescents to misperceive risks and fail to appreciate the long-term consequences of their decisions. Intervention programs implemented to counteract these cognitive deficiencies by correcting adolescents’ misperceptions about common risks, however, were found to be largely ineffectual in changing adolescent behavior. Studies, moreover, revealed no cognitive differences between adolescents and adults that could explain their different propensities for risk taking.

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.” Cognitive deficiencies do not account for adolescents’ propensity for risky and impulsive decision making, with studies consistently confirming that adolescents have the cognitive competence to make rational decisions about risks. Why, then, do they frequently make irrational, risky decisions?

Behavioral scientists examined more closely the real-world contexts in which adolescents make decisions, and in so doing gained valuable insights into adolescent decision-making processes. Their findings


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. Laurence Steinberg, A Behavioral Scientist Looks at the Science of Adolescent Brain Development, 72 BRAIN & COGNITION 160, 161 (2010) [hereinafter, Steinberg, Adolescent Brain Development].


253 Reyna & Farley, supra note __, at 33 (surveying studies of education interventions aiming to seek adolescents’ misperceptions by educating them about commonly encountered risks).

254 Laurence Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, 28 DEVELOPMENTAL REV. 78, 80 (2008) [hereinafter, Steinberg, Adolescent Risk-Taking].

255 Steinberg, Adolescent Risk-Taking, supra note __, at 80.

256 Reyna & Farley, supra note __, at 2.

257 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.” Byrnes, The Development of Self-Regulated Decision Making, in THE DEVELOPMENT OF JUDGMENT AND DECISION MAKING IN CHILDREN AND ADOLESCENTS 1, 7 (Janis E. Jacobs & Paul A. Klaczynski eds., 2005) (internal citations omitted).

258 Steinberg, Adolescent Risk-Taking, supra note __, at 80.
confirmed adolescents’ competence to make rational decisions—at least when making decisions in the relatively ideal conditions of the research laboratories in which they complete tasks involving minor, symbolic risks. The real-world contexts in which adolescents usually make decisions, however, can drastically affect the quality of their decision making.

Studies have found that contexts that predictably compromise adolescent decision making include those requiring them to make decisions “in the heat of passion, in the presence of peers, on the spur of the moment, in unfamiliar situations, . . . [and] when behavioral inhibition is required for good outcomes.” 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.

Developmental neuroscientists also study adolescent cognitive development and have begun developing a neurologically-based model primarily oriented around the development in two neural systems of the brain: that associated with cognitive control, and that associated with socio-emotional maturity. The core insight of this dual systems model is that these two neural systems develop along different timelines.

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259 Id.; Reyna & Farley, supra note __, at 2.
260 Id. at 1; Margo Gardner & Laurence Steinberg, Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study, 41 DEV. PSYCH. 625, 625 (2005). 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. & HUMAN BEHAVIOR 219, 220 (1996) (internal citations omitted). Consistent with these observations, studies demonstrate that not all cognitive processes mature by mid-adolescence. Some processes, such as certain aspects of working memory, continue to specialize and develop into adulthood. Luna, et al., supra note __ at 1367-68 (suggesting that all components of working memory mature by around age nineteen). 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.

261 Id. See also, 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 (Janis E. Jacobs & Paul A. Klaczynski eds., 2005).

262 Reyna & Farley, supra note __, at 1. Valerie F. Reyna & Frank Farley, Is the Teen Brain Too RATIONAL?, 17 SCIENTIFIC AMERICAN 60 (2007). Even though they do not generally misperceive risks (if anything, studies have tended to show that adolescents and adults both overestimate risk), adolescents tend to weight and value benefits more heavily than risks, as compared to adults. Researchers advance a number of theories, some related to cognition and some grounded in neural development itself, to explain this. See Luna et al., Maturation of Cognitive Processes, supra note __, at 258; Fischhoff, supra note __ at 19-20.

263 Steinberg, Adolescent Risk-Taking, supra note __, at 97–98. See also, Laurence Steinberg, Dustin Albert, Marie Banich, Elizabeth Cauffman, & Sandra Graham, Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model, 44 DEV. PSYCH 1764, 1764 (2008) [hereinafter Steinberg et al., Sensation Seeking & Impulsivity] (noting that
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.\textsuperscript{264} An overview of the model’s features follows.

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.\textsuperscript{265} 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.\textsuperscript{266} In the socio-emotional system, the neurotransmitter dopamine modulates the neural reward circuitry.\textsuperscript{267} 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.\textsuperscript{268}

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.\textsuperscript{269} 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.\textsuperscript{270} Consistent with this theory, studies show that sensation seeking, risk preference, susceptibility to deviant or anti-social peer influence, and reward sensitivity all follow a curvilinear, “\(\cap\)”-shaped trend. These behavioral characteristics begin to increase at age ten, peak around ages fourteen to fifteen (depending on the study and measure used), then decline.\textsuperscript{271}

\textsuperscript{264} See infra notes __, and accompanying text. For slightly different accounts of the dual systems model, see Casey et al., \textit{supra} note __; Geier & Luna, \textit{supra} note __. See also, Catherine Sebastian et al., \textit{Social Brain Development and the Affective Consequences of Ostracism in Adolescence}, 72 \textit{BRAIN & COGNITION} 134, 138 (2010) (discussing aspects of the dual systems model).

\textsuperscript{265} The socio-emotional system includes the amygdala, nucleus accumbens, orbitofrontal cortex, medial prefrontal cortex, superior temporal sulcus. Steinberg, \textit{Adolescent Risk-Taking}, \textit{supra} note __, at 83.

\textsuperscript{266} CHARLES A. NELSON ET AL., \textsc{Neuroscience of Cognitive Development: The Role of Experience and the Developing Brain} 24 (2006).

\textsuperscript{267} Geier & Luna, \textit{supra} note __, at 216.

\textsuperscript{268} Steinberg et al., \textit{Sensation Seeking & Impulsivity}, \textit{supra} note __, at 1764–66; Geier & Luna, \textit{supra} note __, at 216–17.

\textsuperscript{269} Steinberg, \textit{Adolescent Risk-Taking}, \textit{supra} note __, at 85.

\textsuperscript{270} Steinberg et al., \textit{Sensation Seeking & Impulsivity}, \textit{supra} note __, at 1765; Steinberg, \textit{Adolescent Risk-Taking}, \textit{supra} note __, at 85.

\textsuperscript{271} Steinberg, \textit{Adolescent Brain Development}, \textit{supra} note __, at 163; Sindy R. Sumter et al., \textit{The Developmental Pattern of Resistance to Peer Influence in Adolescence: Will the Teenager Ever Be Able to Resist?}, 32 \textit{J. ADOLESCENCE} 1009–10 (2009). See also, Steinberg et al., \textit{Adolescent Risk-Taking}, \textit{supra} note __, at 89 (ages
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. This system includes the prefrontal cortex, which is involved in executive function, decision making, and self-regulatory functions, and “association” areas, which connect different regions of the brain and thus support the complex integration of function. The cognitive control system follows a more gradual and linear developmental trajectory than does the socio-emotional system. 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 gone unstimulated due to lack of use, are eliminated, and remaining synaptic connections stabilize and strengthen. Synaptic pruning begins in childhood, then accelerates in adolescence, with the prefrontal cortex maturing in mid-adolescence. This correlates with the maturation of basic cognitive processes by age sixteen.

Second, myelination (a process involving the insulating 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. This change correlates with observed behavioral improvements in higher-order and executive functions (future orientation, planning, response inhibition, thirteen to sixteen). See also, Steinberg et al., *Sensation Seeking & Impulsivity*, supra note _, at 1774 (ages twelve and fifteen).

Id. at 93–94. The cognitive control system also includes parts of the corpus callosum, which connects the left and right hemispheres. Id.

Steinberg et al., *Adolescent Risk-Taking*, supra note __, at 93.


Steinberg, *Adolescent Risk-Taking*, supra note __, at 94–96; Geier & Luna, supra note 188, at 216; Paus, *Growth of White Matter*, supra note 189, at 26; Luna, *Developmental Changes*, supra note 188, at 237–41; Gogtay & Thompson, supra note __, at 7. Because 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 earlier in development. Luna, *Developmental Changes*, supra note 188, at 239–40.
spatial working memory) associated with the integrated functioning of multiple prefrontal regions.  

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). The increased connectivity between these regions correlates with coordination of affect (the external expression of emotions) and cognition; the result is that emotional regulation and impulse control both improve through the mid-twenties. Strategic planning, anticipation of future consequences, and resistance to neutral (as opposed to anti-social) peer influence and peer influence in general all follow the same trajectory, increasing linearly from preadolescence through late adolescence and early adulthood.

In summary, adolescents’ basic cognitive abilities are mature by age sixteen, giving them the capacity to process information and make rational decisions. But the heightened sensitivity to rewards that increases and peaks around mid-adolescence inclines them 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. Their susceptibility to these confounding influences on their decision making begins to decline after mid-adolescence, however, while their abilities to exercise cognitive control increases, ultimately reaching mature levels in their twenties. 

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277 Id. at 94–98. Important social and emotional information-processing regions of the brain include the limbic and paralimbic regions. Id.
278 Id.
279 Id. See also, Sumter et al., supra note 243, at 1016 (reporting a steady increase in reported resistance to general peer influence with age). See generally Luna et al., What has fMRI Told Us About the Development of Cognitive Control Through Adolescence?, 72 BRAIN & COGNITION 101, 101 (2010) [hereinafter Luna et al., Development of Cognitive Control].
280 Steinberg, Adolescent Risk-Taking, supra note 215, at 97–98; Luna, Developmental Changes, supra note 188, at 257. Researchers have more generally found the following personality traits and contextual factors correlated with suboptimal choices: sensation-seeking, impulsivity, competitiveness, overconfidence, and the presence of peers. Byrnes, supra note __, at 31-32.
281 Steinberg, Adolescent Risk-Taking, supra note 215, at 97–98; Luna, Developmental Changes, supra note __, at 257.
2. Domain-specific competence: the vote decision

By ages fifteen or sixteen, adolescents have attained adult-like cognitive-processing capacities.\(^{282}\) When required to apply their capacities in certain contexts, however, such as when they must make decisions quickly or under time pressure, or when highly emotional or stressed, their performance suffers.

Elections are a decision-making domain in which mid-adolescents’ adult-like 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. Information of all sorts is readily available over a period of time as well, including many sources of information which voters can use as scaffolding of sorts or heuristics or on which voters can rely to help them evaluate their choices—broadcast debates, endorsements of candidates, party affiliations, etc. Voting itself is done anonymously and in private, which diminishes concern that adolescents’ choices will be unduly pressured or influenced by peers.

Finally, I suggest that Lau and Redlawsk’s test for correct voting (“Irrespective of how the vote decision is actually reached, how frequently do voters vote correctly?”)\(^ {283}\) may help assess adolescents’ vote decisions. Lau and Redlawsk’s mock election study predicted that seventy 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 seventy-five percent.\(^ {284}\) Empirical studies of correct voting might thus be used as a benchmark or test of adolescent voting competence—if adolescents cast “correct” votes between

\(^{282}\) 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 attainable by children as young as eleven, more certainly attainable by teenagers. Id. at 103. To support his claim that children likely attain the necessary voting competence before age eighteen, Archard relies on the 1982 publication of a study of children’s ability to understand political matters that 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.” OLIVE STEVENS, CHILDREN TALKING POLITICS: POLITICAL LEARNING IN CHILDHOOD 148 (1982), quoted in Archard, supra.


\(^{284}\) LAU & REDLAWSK, supra note __, at 85, 88. Lau, et al., supra note __, at 406.
(something like) seventy- to seventy-five percent of the time, then they have achieved adult-like levels of competence.\textsuperscript{285}

“Given that adolescents are more clearly distinguishable from children than from adults, I suggest adolescence be viewed not as the last stage of childhood, or even as an intermediate period between childhood and adulthood, but rather as the first phase of adulthood . . . [It is] a mistake to overdifferentiate adolescents from adults.”\textsuperscript{286} p..

CONCLUSION

Even without including in my analysis the numerous policy considerations that support lowering the voting age, compelling reasons to do so—grounded in foundational democratic principles—have emerged. I have argued that democratic legitimacy requires the presumptive electoral 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 voting incompetence of that category of citizens, but what voting competence requires remains 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 age fifteen or sixteen. Their continued exclusion can thus no longer be justified by claiming their incompetence.

States should thus adjust the age of electoral majority downward to sixteen, by which age we can safely say that adolescent citizens will be competent voters.

\textsuperscript{285} 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 fifty percent.

\textsuperscript{286} THE DEVELOPMENT OF JUDGMENT AND DECISION MAKING IN CHILDREN AND ADOLESCENTS xxi (Janis E. Jacobs & Paul A. Klaczynski eds., 2005).