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

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DEMOCRATIC INCLUSION, COGNITIVE DEVELOPMENT, 
AND THE AGE OF ELECTORAL MAJORITY

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Who should vote in the modern democratic state? The question cuts to the core of democratic government. 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. Yet the United States, which holds itself out as a beacon of democratic participation, is not currently considering the electoral inclusion of some cohort of their younger citizens. For a number of compelling reasons, it should be.

Research from various disciplines within the developmental sciences, including developmental psychology and cognitive and social neuroscience, demonstrate that by mid-adolescence individuals have attained the cognitive-processing and decision-making capacities required for electoral competence. Classic democratic theory, which embraces a principle of presumptive political and electoral inclusion, thus supports extension of the franchise to mid-adolescents. Absent some legitimate basis 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 voting age in every U.S. state is eighteen. Presumably, eighteen is a proxy for voters’ attainment of desirable characteristics—e.g., maturity of judgment, civics knowledge, and understanding of political processes. Yet there has been no sustained scholarly effort to examine whether age eighteen is a good, or even good-enough, indicator of the attainment of those or other relevant characteristics. Academic inattention persists despite widespread acceptance that the franchise is the core of modern representative democracy, its “free and unimpaired [exercise] preservative of other basic civil and political rights.”1 Historically a privilege extended almost exclusively to white male property holders, today it is a broadly inclusive entitlement, and indeed few categorical exclusions from it remain.2

Minimum age requirements are among the few remaining voter qualifications that categorically disfranchise a large group of potential voters. Along with every U.S. state, most of the world’s nations limit the franchise to citizens aged eighteen and older.3 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

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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.”).
their aging electorates and stimulate political and civic engagement among their younger citizens.\(^4\)

In the United States, the individual states retain broad power to establish electoral qualifications, subject to certain Constitutional and other federal law constraints.\(^5\) The Twenty-Sixth Amendment, for example, prohibits states from setting the age of electoral majority above eighteen.\(^6\) No Constitutional or other federal law provision, however, prohibits states from lowering the age of electoral majority; each state retains that power.\(^7\) Other than a few states that allow seventeen-year-olds to vote in a primary election so long as they will turn eighteen in time for the general election,\(^8\) however, no state has exercised—nor seriously considered exercising—its power to lower the voting age.

The Twenty-Sixth Amendment’s exclusion of those under eighteen from explicit constitutional protection undermines constitutionally-grounded arguments for lowering the voting age. Any court that held the enfranchisement of citizens younger than eighteen constitutionally compelled would, in so holding, depart from well over a century of established precedent.\(^9\)

\(^4\) 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 the right to “at any time by Law make or alter such Regulations, except as to the Place of Chusing Senators.” U.S. CONST. ART. I, Sec. 4; Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 665 (1966) (recognizing the franchise as a conditional fundamental right by providing that “once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment” and holding that state laws restricting individuals’ rights to vote will be subject to the Court’s strict scrutiny).

\(^6\) U.S. CONST. amend. XXVI, Sec. 1 (providing that “[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”).

\(^7\) U.S. CONST. Art. 1, Sec. 2 & amend. XVII (providing that in statewide elections for Congressional Representatives and Senators, “the Electors in each State shall the Qualifications requisite for Electors of the most numerous Branch of the State Legislature”); Lassiter v. Northampton Cty. Bd. of Electors, 360 U.S. 45, 51 (1959) (asserting that, “while the right of suffrage is established and guaranteed by the Constitution, it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress acting pursuant to its constitutional powers, has imposed”).

\(^8\) See infra Part I.C.4.

\(^9\) The Supreme Court has held that explicit protection of certain classes of individuals in the Constitution’s text excludes the extension of that protection to other classes of individuals not so listed. For example, the Court held that the Fourteenth Amendment’s Reduction-of-Representation Clause did not extend voting protection to women, since it explicitly listed “male inhabitants” of states. Minor v. Happersett, 88
Constitutional compulsion, however, is not the sole, nor even primary, justification for most state action. I argue here that the core democratic principle of inclusion (embraced by democracy theorists and political entities, and from which derives the concept of “universal suffrage”) places on states the burden of justifying electoral exclusions. And in light of decades of research on voter decision making and significant advances across various scientific disciplines in knowledge of cognitive and psychological development, the time has come to revisit and if warranted, readjust, the age of electoral majority.

We can surmise the reasoning of one who believes that the voting age merits little attention: (a) Age is a reasonable—perhaps the

U.S. 162, 174 (1873) (holding that nothing in the Fourteenth Amendment conferred the franchise on women, observing that its Reduction-of-Representation Clause reduces the federal representation of states that disfranchise male citizens twenty-one years of age and over, and asking “if suffrage was necessarily one of the absolute rights of citizenship, why . . . inflict the penalty for the exclusion of males alone?”). Similarly, the Court held that the Fourteenth Amendment’s exempting from sanction states that disfranchise “male citizens twenty-one years of age and over, except for participation . . . in crime,” affirmatively sanctioned the exclusion of felons from the vote. Richardson v. Ramirez, 418 U.S. 24, 54-55 (1974) (concluding that “the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment.”).

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”).

11 A handful of theorists who do examine the voting age group all minors into a single homogenous category, discounting age-related distinctions among them. These theorists reach one of two conclusions: (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 “creat[ing] proxies, so that their interests and voting power are expressed through others.”).

Two scholars, legal theorist David Archard and political theorist Francis Schrag, do consider age-related differences among those younger than eighteen, although each author only briefly addresses the issue. See DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD 98-105 (2nd ed. 2004) (discussed infra note ___); Francis Schrag, Children and Democracy: Theory and Policy, 3 POL., PHILOS. & ECON. 365 (2004-05) (discussed infra note __).
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; 12 and (c) because age eighteen is a common proxy for legal competence generally, and because community consensus seems satisfied with its use as such, 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 is a broadly accepted normative commitment flowing from basic principles of democratic theory. While the presumption does not foreclose the possibility of legitimate exclusions, it does shift to the state the burden of justifying electoral exclusion. 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 have long supported two such criteria: (1) ongoing interest in and connection to the political community and (2) electoral decision-making competence. 15 Because no principled conception of electoral competence exists, I develop a concept of it that draws on behavioral decision research on voter decision making and on developmental psychology. I define electoral competence as the attainment and application of adult-like cognitive-processing capacities in the electoral context. These capacities include the abilities to acquire

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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] . . .[i]t is now accepted everywhere, . . . that all adult citizens should be represented through the electoral system.”).

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 inevitably be a certain number of individuals who in truth should have fallen on the other side of the line. Epidemiologically, these are known as false positives and false negatives. The greater the number of false positives and false negatives, the less usefulness we have for a given bright line rule.”).

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.
information and knowledge, to assess and process information, and to make and justify a decision.\textsuperscript{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 survey 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 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.\textsuperscript{17}

While scientific research cannot dictate policy, it can inform policy. Armed with more nuanced understandings of both voter decision making and the development of adolescent cognitive processing and decision making, I conclude that voting is the sort of decision-making context in which mid-adolescents will reliably demonstrate competence.\textsuperscript{18} In light of mid-adolescent electoral competence, states fail to meet their justificatory burden in the absence of other reasons for continued mid-adolescent electoral exclusion.

The Article proceeds in three Parts:

Part I situates the U.S. voting age within a conceptual, historical, and modern global context.

Part II identifies and justifies basic 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 possess certain characteristics—ongoing interest in and 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 new evidence of the age-related attainment of the relevant cognitive processes.

\textsuperscript{16} See infra Part III.A.
\textsuperscript{17} See infra Parts III.A. & B.
\textsuperscript{18} See infra Part III.B.
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. The voting age remained unchanged in the United States for more than two centuries. Concerted efforts to lower the voting age to eighteen began in 1942, when Congress lowered the age of conscription from twenty-one to eighteen. Those efforts bore fruit in 1971, when a war especially unpopular with the young people drafted to serve in it sparked a national movement to lower the national voting age 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 concludes by surveying the contemporary global context and examining the factors that are driving this downward trend.

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

The primary historical influence on early American voting rules was, unsurprisingly, the English common law tradition. Arguments made during the famous Putney Debates in mid-seventeenth century England, both in favor of and against widespread suffrage, 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

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20 Id. at 25.
throughout the northern parts of Europe between the ninth and eleventh centuries, the age of majority for males was fifteen.\textsuperscript{21} Though nearly identical to the Roman age of majority, the requisite capacities that signaled legal maturity were not intellectual but instead physical—nearly, the physical ability to participate in warfare.\textsuperscript{22}

The age of majority for English knights, who fought on behalf of the crown, increased during the Middle Ages.\textsuperscript{23} Legal historians attribute the increased age requirement to the changing characteristics of warfare. Armies increasingly included mounted cavalry, which required knights skilled in the use of horses in battle—skills that required a lengthy training period to develop. Along the same lines, improvements in defensive armor also increased its weight, requiring additional strength by those wearing it.\textsuperscript{24} 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.\textsuperscript{25}

English suffrage originated in 1215, when English barons forced King John’s accession to the Magna Carta.\textsuperscript{26} Initially the exclusive privilege of the English nobility, the franchise gradually expanded to other property owners.\textsuperscript{27} Early suffrage provisions imposed only

\textsuperscript{21} Id.

\textsuperscript{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”).

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{25} JAMES, supra note __, at 28.

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

\textsuperscript{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 ENGLISH DICTIONARY (2d ed., draft rev. 2010), http://dictionary.oed.com (search “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).
residence and property (“freehold”) qualifications.\textsuperscript{28} 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.\textsuperscript{29}

English historical and common law traditions eventually became law throughout the British Commonwealth, and indeed much of the Western world.\textsuperscript{30} However arbitrary its genesis may seem in retrospect, age twenty-one remained firmly entrenched as the age of legal and electoral majority for centuries in England, as well as in the nations across the globe that incorporated English traditions.\textsuperscript{31}

1. Concepts of Electoral Inclusion: The Putney Debates

The early franchise extended only to a tiny fraction of Englishmen. Following the end of the English Civil War in the mid-seventeenth century, soldiers who had fought in Oliver Cromwell’s victorious parliamentary army joined with political activists known as “Levelers” to demand equal (“level”) political rights.\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

\begin{footnotesize}
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\item The Reform Act of 1832 was the first English voter qualification statute that explicitly specified that the franchise extended only to “male person[s] of full age” who met other qualifications. \textsc{Wendell W. Culice, Youth's Battle for the Ballot: A History of Voting Age in America} 72 (1992).
\item \textit{Culice, supra} note \_ at 72.
\item \textit{Id.} at 2.
\item \textit{James, supra note \_}, at 22, 33. \textit{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).
\item \textit{Stephenson, supra} note \_ at 34-35
\item \textit{Stephenson, 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. \textit{Williamson, supra} note \_, at 64-68.
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inclusion and justifiable limits to inclusion. The concerns underlying the moderates’ arguments for limited suffrage have helped justify and define modern boundaries of democratic inclusion; the Levelers’ arguments in favor of widespread suffrage echo too, as the standard justifications for presumptive democratic inclusion and universal suffrage.\textsuperscript{35}

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.”\textsuperscript{36} A property ownership requirement guaranteed that would-be voters possessed these characteristics. Property gave a man a personal stake in and knowledge of the community. The relatively permanent and ongoing nature of property ownership meant that the freeholder would himself be affected by and subject to the community’s laws, both current and future.\textsuperscript{37} The freeholder’s interests were thus linked to, if not identical with, those of the community, and he could be trusted by his fellow citizens to vote in a manner reasonably consistent with its interests—distinguishing him from transients who, lacking the rootedness that came with property ownership, could be “here today, and gone tomorrow.”\textsuperscript{38}

Second, only “men freed from dependence upon others” could be trusted to vote.\textsuperscript{39} The landless, servants, and women would too easily be influenced or manipulated by those on whom they were economically

\textsuperscript{35} STEPHENSON, 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, 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).

\textsuperscript{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.

\textsuperscript{37} JACK R. POLE, PATHS TO THE AMERICAN PAST 245 (1979).

\textsuperscript{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).

\textsuperscript{39} \textit{Id.}
dependent. Economic independence alone could guarantee that persons’ votes reflected intellectual independence.\footnote{2011] AGE OF ELECTORAL MAJORITY 11}{40}

The radicals who argued in favor of universal suffrage, on the other hand, tapped into the antimonarchical and growing egalitarian sentiments of the post-Civil War, pre-Enlightenment years.\footnote{2011] AGE OF ELECTORAL MAJORITY 11}{41} They argued that all men equally possessed certain “natural rights” by virtue of their humanity—rights neither derived from nor dependent on the government or property ownership. “Has not the meanest He,” asked one of their leading spokesmen pointedly, “as much a life to live as the greatest He?”\footnote{2011] AGE OF ELECTORAL MAJORITY 11}{43} Men, regardless of station or education, were equally endowed with “human reason.”\footnote{2011] AGE OF ELECTORAL MAJORITY 11}{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.”\footnote{2011] AGE OF ELECTORAL MAJORITY 11}{45} Those “bound by laws in which they have no voice at all” are a people “enslave[d].”\footnote{2011] AGE OF ELECTORAL MAJORITY 11}{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.\footnote{2011] AGE OF ELECTORAL MAJORITY 11}{47} The considerable influence of the Putney Debates on American political thought more likely derived from two factors: First, the timing of the debates resulted in their dissemination throughout the American colonies in the decades preceding the American Revolution, as colonists increasingly chafed at their political inequality with respect to their mother country. Second, the debates’ emergence out of Britain itself magnified their importance in

\footnote{2011] AGE OF ELECTORAL MAJORITY 11}{40} Statement of Colonel Rich, in \textit{1 THE CLARKE PAPERS, NEW SERIES XLIX}, 299-303 (C.H. Firth, ed., 1891), quoted in \textit{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 \textit{viva voce}—not by secret ballot—the economically vulnerable might understandably hesitate to cast a vote that would displease their economic superiors. \textit{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. \textit{KEYSSAR, supra note ___}, at 23-24.


\footnote{2011] AGE OF ELECTORAL MAJORITY 11}{42} \textit{STEPHENSON, supra note ___}, at 40; \textit{WILLIAMSON, supra note ___}, at 62-67.


\footnote{2011] AGE OF ELECTORAL MAJORITY 11}{44} \textit{WILLIAMSON, supra note ___}, at 65.


\footnote{2011] AGE OF ELECTORAL MAJORITY 11}{46} \textit{Id.}

\footnote{2011] AGE OF ELECTORAL MAJORITY 11}{47} \textit{STEPHENSON, supra note ___}, at 33.
the American colonies, given that 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.”

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

When England established the thirteen American colonies in the seventeenth and eighteenth centuries, however, it imposed on them no uniform voting rule. Each colonial assembly thus 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. An occasional and singular exception to general voter requirements was militia service, and some colonies occasionally enfranchised militiamen younger than twenty-one. This exception was in keeping with longstanding opinion (whose endurance seems to come more from its emotional appeal than its logical integrity) that those who

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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.
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.
risked their lives defending their country were considered by doing so to have earned a voice in its governance. 55

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. 56 Just as the Levelers’ ideas echoed in support of expanding the franchise, however, the opponents of widespread suffrage at Putney remained equally important to the political evolution of the nation. Political theorist Judith Sklar has noted that the moderates’ “arguments were repeated over and over again whenever yet another group of Americans demanded the right to vote.” 57

The Constitution submitted to the states for ratification contained no uniform national suffrage law. 58 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. 59 The states, as had the colonies before them, thus retained the power to determine voter qualification standards for both state and national elections, 60 and all retained twenty-one as the age of electoral majority. 61

57 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.”)
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.
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. 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.

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).

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).

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.
The voting age received no national attention to speak of until the United States entered World War II at the end of 1941.65 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.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.”67 Congress lowered the draft age to eighteen in the fall of 1942 but adjourned without taking action on the proposed amendment.68

Between 1942 and 1944, members of Congress introduced more than a half-dozen similar joint resolutions to lower the national voting age, and in the states, lawmakers began doing the same.69 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.70 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.71 It was more than ten years after Georgia’s constitutional amendment, however, before any other proposals would succeed. Then in 1955, Kentucky became the second state to lower its voting age.72 When new states Alaska and Hawaii adopted their

65 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.

66 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, 77th Congress, 2nd Sess., October 19, 1942.


68 CULTICE, supra note ___ at 22.

69 Id. at 21-22.

70 Id. at 25-26.

71 Id. at 30.

72 Id. at 55. 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.72 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 __.
constitutions soon thereafter, they adopted compromise voting ages of nineteen and twenty, respectively.\textsuperscript{73}

Unlike earlier movements to enfranchise African-American and women citizens, the disfranchised—young people themselves—were not at the forefront of the youth vote movement. The nation’s youth did not began to mobilize until the early 1960s, when the nation’s involvement in the Vietnam War galvanized their efforts.\textsuperscript{74} Student organizations on college campuses and in high schools then joined various civil rights organizations already working to extend voting rights to eighteen-year-olds.\textsuperscript{75}

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.\textsuperscript{76} Lawmakers, before voting to extend the Voting Rights Act, which was set to expire, inserted into the Act a provision lowering the voting age to eighteen in both federal and state elections. President Richard Nixon, who explained that he supported a lower voting age not because eighteen-year-olds were old enough to fight, but because “they were smart enough to vote,” signed the amended Act into law.\textsuperscript{77} 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.\textsuperscript{78}

Nixon’s skepticism was well-founded, and four states immediately challenged the law.\textsuperscript{79} The case, \textit{Oregon v. Mitchell}, split the
Supreme Court. The Justices filed five separate opinions in the case. 400 U.S. at 112.

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).

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).

400 U.S. at 117.

Id. See also CULTICE, supra note ___ at 172-73.

Id. at 180-81.

Id.

Id.

Id.

Id. at 185.

Id. at 191.

U.S. Const., Amend. XXVI, Sec. 1.
law—in time for the 1972 elections—when Ohio became the thirty-eighth state to ratify in June 1971.91

World War II did not spark the voting age debate in the United States alone; it ignited a “global suffrage age reduction movement.”92 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).93

C. Global Context, into the 21st Century

This Part surveys the continuing expansion of the franchise to younger citizens in other countries, and the status of the voting age in the United States. More than a dozen countries have lowered local, state, or national voting ages to sixteen, driven primarily by efforts to increase youths’ political engagement and counter the disproportionate political influence of older citizens (who vote at higher rates than the young, and whose numbers have grown as a result of demographic factors). Other nations have begun to consider doing the same. In the United States, a handful of state legislatures have considered proposals to lower statewide voting ages, but the issue has so far generated no widespread attention.

At the beginning of the twentieth century, the average age of electoral majority worldwide was just under twenty-four years.94 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.95

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91 CULTICE, supra note __ at 191.
92 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.
93 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.
94 Id. at 76.
95 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.
Today, most nations have adopted some form of representative democratic government. 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. The average voting age worldwide is between seventeen and eighteen years.

Two countries, the Dominican Republic and Indonesia, allow married individuals to vote irrespective of age. In several Latin American nations, the changes came in the 1970s and 80s, in the midst of significant governmental restructurings. Most recently, Ecuador in 2008 passed an amendment to its constitution lowering the voting age to sixteen. 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.

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 at greater length 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

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97 Id.
99 Id. For others, the presumptive age of electoral majority in the Dominican Republic is eighteen; and in Indonesia it is seventeen. Id.
101 The island nations of Philippines and Indonesia lowered their voting ages to sixteen and seventeen, respectively.
supporters advanced their proposal as an instrumental measure that would reverse declining voter participation and reengage youth in the nation’s politics. 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, but the bill failed to pass the House.

The Australian federal government, also with the goal of increasing voter engagement and participation, proposed lowering the national voting age to sixteen in a 2009 Green Paper. As of this

102 See Statement of Private Member Mark Holland, on Canada Elections Act, Feb. 1, 2005, House of Commons Hansard #47 of the 38th Parl., 1st 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.” Id. Younger adolescents still in school could join a political party, participate in debates, and engage with legislators and candidates for office in a meaningful way. Because they still live at home (as opposed to high school graduates who have gone to college or moved out of their parents’ home), it would be easier for them to register and actually vote. Early voting and political engagement will potentially establish a lifetime pattern; Holland claimed that “if we can get them to vote once they will vote again and again.” Id.


A law enacted in 2010 lowered the voter registration age to sixteen but did not affect the current voting age of eighteen.


Another political party, the Australian Democrats, have recently urged the State of South
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. 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.” It
then noted numerous advantages to lowering the voting age. Foremost
among them, the VEC noted that “lowering the voting age to an age
when people are still in school would allow more effective education
programmes due to them being more relevant to students’ immediate
lives,” and thus potentially “reduce voter ignorance overall.”
Consistent with reported studies, the Research Paper suggested that
participating in elections at a young age could establish lifelong
participatory habits and reduce the likelihood of apathy at later ages.
The VEC concluded that “democracy will be enhanced by the inclusion
of additional viewpoints.”

2. Continental Europe

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

Australia to lower its voting age to sixteen. The Democrats have little presence in the
national parliament, however. Democrats Urge S.A. to Lower Voting Age, THE AGE
lower-voting-age-20080414-25ys.html.

Christopher Gribbin, Policy Officer, Victorian Electoral Commission
Research Paper, Lowering the Voting Age: A Discussion of the Issues from the Victorian
Electoral Commission’s Perspective (2004), available at

Id. at 10.

Id. at 10.

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.

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.
higher turnout of older voters and the aging of the population), and improve democracy more generally.

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

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

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, the Ombudsman for Children has

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111 Id.

112 Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl No. 1/1930, as last amended by Bundesgesetzblatt [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.


published a report advocating lowering the national voting age to sixteen.\textsuperscript{115} As a pilot project, the Norwegian Parliament has authorized twenty municipalities to enfranchise sixteen-year-olds in municipal and county elections in 2011.\textsuperscript{116} Finland, too, has recently appointed a government group to study the issue.\textsuperscript{117}

3. The British Islands

In the British Islands, the self-governing Crown Dependencies—the Isle of Man and the Bailiwick of Guernsey and Jersey—lowered their voting ages from eighteen to sixteen in 2006, 2007, and 2008, respectively.\textsuperscript{118} In both Scotland and Wales, Parliamentary Assemblies voted in 2008 in favor of lowering the voting age to sixteen.\textsuperscript{119} Neither is currently able to implement the change, however, since the authority to establish voter qualifications, even for local elections, rests with the central U.K. Parliament in Westminster.\textsuperscript{120}


\textsuperscript{116} Id.


\textsuperscript{120} 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://exploretheassembly.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.”).
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 2010.122

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.123 Former British Prime Ministers Tony Blair and Gordon Brown both announced their support while in office for lowering the voting age.124

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124 Brown urged the House of Commons to consider the issue in a 2007 speech on constitutional reform. HOUSE OF COMMONS DEB. C819 (July 3, 2007) (statement of P.M. Gordon Brown), http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070703/debtext/7070 3-0003.htm#c07070334000391. After an independent commission studied the issue but found insufficient cause for change, Brown noted that the commission “couldn’t make up its mind, so it’s come back to us. I personally would like to see the voting age reduced to 16.” Tomos Livingstone, I’d Like to See the Voting Age Lowered to 16, Says Brown, WESTERN MAIL, July 24, 2009, available at http://www.walesonline.co.uk/news/wales-news/2000724/f-d-like-to-see-the-voting-age-lowered-to-16-says-brown-91466-24228229/. See also, Joanna Moorhead, Sweet 16: Would You Give the Vote to Them?, INDEPENDENT ON SUNDAY (U.K.), May 9, 2004 (Features), 2004 WLNKR 10422645; Andrew Grice, Blair Will Give Vote to 16-Year-olds, THE INDEPENDENT (U.K.), May 4, 2004,
In 2002, the Electoral Commission, an independent commission charged by the British Parliament to review public election law and policy, began a review of minimum voting and candidacy ages. The Commission undertook its review in response to declining election turnouts, noting that the citizens least likely to vote in the United Kingdom are the youngest group of eligible voters—eighteen-to-twenty-four-year-olds. Its review followed those of independent commissions from England, Scotland, and Wales; which had all recommended lowering the voting and candidacy ages as a way of increasing young people’s interest and participation in government.

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.”\footnote{Id. at 61.}

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.”\footnote{Id. at 62.}

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.”\footnote{Id. at 62.} The first factor was the continued development of citizenship education across the United Kingdom (the public schools had only recently introduced a new citizenship education program),\footnote{Id. at 39-43.} and the second was a change in public opinion on the general age of majority.\footnote{Id. at 7.} At the time of this writing, the Commission has not yet revisited the issue. The Labour Party in 2008 submitted to Parliament a bill to lower the voting age to sixteen for all U.K. elections. Although the bill garnered some support from other parties, opponents successfully blocked its progressing through Parliament.\footnote{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.}

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.\footnote{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.} 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.\footnote{States that have considered proposals to lower the voting age are: Arizona (2001, 2002, 2008, 2009 proposals to lower age to sixteen) (HCR 2011, failed 2001;...}
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. A proposal that would permit sixteen-year-olds to vote in limited circumstances, such as for school district elections, is also pending before the Michigan legislature.

II. PRINCIPLES OF DEMOCRATIC ELECTORAL INCLUSION

Voter qualification rules determine the categories of individuals included in and excluded from an electorate. This Part looks to


In 2002, the Massachusetts state legislature placed under indefinite study a bill approved by the Cambridge City Council lowering the local voting age to seventeen. The state legislature’s approval was required in order for the bill’s enactment. Ricarose Roque, Voting Age Bill Stuck in State Legislature, THE TECH 1, 28, available at http://tech.mit.edu/V122/N48/48bote.48n.html.

democratic and liberal theories to identify standards for establishing, and assessing the legitimacy of, these rules.

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

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

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

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

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

A. Presumptive Electoral Inclusion

There are many conceptions of democracy, and each has normative implications for the democratic legitimacy of a given political system. Assessing the nature of political inclusion required for democratic legitimacy thus first requires a conception of democracy itself. The conception advanced below is a fairly typical one that describes the minimum requirements for a democratic system—i.e., the

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type of political participation required to render a process democratic, and the scope of political inclusion required to render a community democratic.

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 derives its authority from the “the people” who are the individual members of the political community. Although minimalist, this normative account supplies a particular conception of “the people” who are entitled to political participation, and it implies a conception of political participation itself.

144 Although this is a fairly conventional conception of democracy, this formulation directly draws from the nearly identical definitions of political philosopher David Estlund and political theorist Albert Weale. For Estlund, “[d]emocracy [is] the authorization of laws collectively by the people who are subject to them [and] is inseparable from voting.” DAVID M. ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK 66 (2008). 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 doctrine of democracy.” Schumpeter believes that typical voters lack sufficient political knowledge to make reliable decisions, denies the possibility of a “uniquely determined common good,” and argues that the expression of a public opinion “from the infinitely complex jumble of individual and group-wise . . . volitions . . of the ‘democratic process,’ . . lacks not only rational unity but also rational sanction.” Id. at 251.

145 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”).
Under this account, “the people” are the legal subjects of a government. This conception is narrower than that advocated by some theorists, who argue that “the people” should include “everyone who is affected by the decisions of a government [and who thus] should have a right to participate in that government.” The broader conception is the more inclusive of the two, but also the less useful. Because there are innumerable ways in which governments’ decisions affect people, the scope of the affected by conception is difficult to delimit. And since causal connections cross national borders, species membership, and time, the conception’s implementation (i.e., the method by which the preferences of geographically scattered or remote persons, other species, future generations, etc., would be identified and registered) poses nearly insurmountable challenges. The narrower, legal conception of “the people” delimits the notion of “affected” by extending rights of participation only to those individuals who are legal subjects “bound by” or “subject to the government and its laws.” The scope of government’s authority to directly regulate an individual’s behavior or status thus bounds the relevant conception of “affected.”

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146 See, e.g., ESLUND, 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.”).

147 ROBERT A. DAHL, AFTER THE REVOLUTION: AUTHORITY IN A GOOD SOCIETY 64 (1970) (emphasis added) (hereinafter DAHL, AFTER THE REVOLUTION); ROBERT DAHL, DEMOCRACY AND ITS CRITICS 119 (1989). Dahl concludes, however, that the broad form of the principle is unhelpful, as it offers a “diffuse galaxy of uncountable possibilities.” DAHL, AFTER THE REVOLUTION, supra, at 66.

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


150 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).
This account of democracy also 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 a model that registers the collective will as the aggregation of individuals’ preferences, as expressed through their vote decisions. Participatory or deliberative processes, for example, may aim to achieve consensus of some sort, but they are also apt to result in continued disagreement (even when numbers do not make such deliberation impractical). Voting provides a method for reaching legitimate collectively binding decisions by registering and weighing equally individuals’ expressed preferences. Voting has thus long been the primary means by which the people authorize the laws—sometimes

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

152 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 Phillip Pettit eds., 1989) (arguing that political decisions are legitimate “if and only if they could be the object of free and reasoned agreement among equals.”); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 2 (William Rehg, trans., Polity Press 1996) (arguing that political legitimacy requires “the ‘concuring and united will of all’ free and equal citizens”).

153 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. Id. See also, JAMES S. FISHKIN, THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY (1995).
directly, by voting on policy questions, but more commonly indirectly, by electing legislators.\textsuperscript{154}

The basic entitlement to participate in the governance of a democratic system thus 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. I turn next to the normative implications of this principle.

2. \textit{Implications: presumptive inclusion and the burden of justifying exclusion}

Members of the political community—“the people”—each have presumptively equal claims to inclusion in the demos (here, those persons within a given community entitled to political participation through the franchise),\textsuperscript{155} absent some legitimate reason\textsuperscript{156} for treating them unequally by excluding them from it.\textsuperscript{157} Would-be voters subject to a government’s authority thus ought not bear the burden of demonstrating that they merit full political participation. To the contrary—the state bears the burden of demonstrating the legitimacy of their exclusion.\textsuperscript{158}

\textsuperscript{154} 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{155} The term \textit{demos} can indicate more broadly the members of a populace, but I use its narrower construction, in which it 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”).

\textsuperscript{156} What some of these legitimate reasons might be is the subject of Parts II.B.1 and 2., infra.

\textsuperscript{157} Elizabeth Fraser, Democracy, Citizenship and Gender, in DEMOCRATIC THEORY TODAY: CHALLENGES FOR THE 21\textsuperscript{st} 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.”).

\textsuperscript{158} 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
The report of the U.K. Electoral Commission summarized in Part I.C.3. above is a recent and explicit example of official failure to assimilate the principle of presumptive inclusion.\textsuperscript{159} The Commission’s report almost certainly represents the most comprehensive and balanced examination of the voting age to be conducted by any public entity to date. Yet in it the Commission presumed the legitimacy of youth exclusion.\textsuperscript{160} 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.\textsuperscript{161} In other words, the Commission has imposed on proponents of the enfranchisement of sixteen- and seventeen-year-olds the burden of demonstrating their entitlement to political inclusion. In so doing, it relieved the state of the obligation of justifying their exclusion. Presumptive inclusion requires the reverse: the burden rests firmly with the state to justify voter qualifications that operate to exclude any category of persons subject to its authority.\textsuperscript{162}

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. \textit{Id.} at 376.

\textsuperscript{159} U.K. ELECTORAL COMM’N 2004 REPORT.

\textsuperscript{160} 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. \textit{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.”); \textit{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.

\textsuperscript{161} U.K. ELECTORAL COMM’N 2004 REPORT, at 59.

\textsuperscript{162} I reiterate here that this is not a Constitutional analysis of voter qualifications. It is instead a normative analysis of the obligations of the liberal democratic state, grounded in political and democracy theory. Were the analysis grounded in the obligations imposed on the federal and state governments by the U.S.
Presumptive inclusion, however, neither mandates electoral participation nor precludes the possibility of legitimate exclusions. In a democratic process, the aggregation of individuals’ votes determines the collective preference.\(^\text{163}\) But aggregated votes will accurately reflect collective community preference so long as some critical mass of the people, sufficiently representative of the whole, participate. Because the number of voters is typically large, the aggregation of votes will accurately reflect the collective preference even without the actual participation of every member of the community. Democratic legitimacy thus requires widespread electoral inclusion, but it survives tolerable levels of nonvoting and does not foreclose the possibility of some legitimate exclusion.

B. The Boundaries of Electoral Inclusion

The previous Part argued that the state bears the burden of justifying electoral exclusions. At the same time, no demos is fully inclusive, and every democracy has adopted voter qualification rules that exclude some members of the community from electoral participation. In this Part, I first describe the two basic voting criteria that I argue electoral qualification rules typically—and legitimately—aim to ensure. I then propose a new justification of these criteria, grounded in liberal democratic theory.

1. Identifying Criteria for Electoral Inclusion: Interest and Competence

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

Identifying and justifying the basic criteria that all voters should satisfy, however, is an important endeavor. Criteria can serve as a useful standard, both for establishing voter qualification rules and against which to evaluate the legitimacy of existing rules.

Those theorists and activists who have sought to identify basic voting criteria have reached near-consensus, even across the centuries. Most have designated criteria that exclude from the demos individuals who lack (1) a significant and ongoing connection to the community and (2) vote decision-making competence.

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164 Dennis F. Thompson, Just Elections (2002) (arguing that “[t]he electoral process should provide citizens with equal opportunities to have their votes equally counted, unless respectful reasons justify unequal treatment. The reasons are respectful if they could be mutually accepted by free and equal citizens.”). See also Beckman, supra note __ at 12; Donald W. Rogers, Introduction: The Right to Vote in American History, in Voting and the Spirit of American Democracy 3 (Donald W. Rogers ed., 1992).

165 Robert Dahl, Dilemmas of Pluralist Democracy: Autonomy vs. Control 98 (1982) (concluding simply that there is “no definitive answer” to questions involving which criteria, if met, would establish the legitimacy of any given exclusion); Beckman, supra note __ at 9-10 (suggesting that the reluctance of political scientists to undertake the task might be due to its “not be[ing] perceived as interesting enough or because the issue has been associated with seemingly intractable normative and conceptual muddles.”). Beckman argues for a set of criteria, consistent with the liberal tradition, in the recently published Frontiers of Democracy. Beckman applies his criteria to common voting rules disfranchising criminals, noncitizens, and minors. He does not, however, apply his criteria to minors of different ages. See Beckman, supra note __.

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

168 See supra Part I.A.1 (recounting arguments made at the seventeenth-century Putney Debates). Two centuries after the Putney Debates, John Stuart Mill advocated these same basic standards for inclusion—interest in community and decision-making competence. To ensure that voters had the requisite competence and to improve the quality of voting generally, Mill (somewhat infamously) proposed 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).
While basic voting criteria have largely remained constant, notions of reliable indicia of them reflected in specific voter qualification rules have changed significantly. For example, the seventeenth-century moderates at Putney sought to ensure that voters would cast their ballots in a manner consistent with community interests, and believed that only voters with a “permanent and fixed” interest in the community and its future would reliably vote in this way. To them, property ownership was the best indicator that a potential voter possessed the requisite interest. Today, not property ownership but instead citizenship, residence, and law-abidingness qualifications all seek to ensure the same criteria—ongoing community interest/connection. Next, the Putney moderates sought to ensure that voters would vote in a manner that reflected independent intellectual judgment. To them, intellectual independence could not exist in the absence of economic independence. Dependent voters, they reasoned, might be unwilling to vote in a way that accurately reflected their best independent judgment if doing so risked displeasing those to whom they were economically beholden. Today’s voting rules do not inextricably link economic and intellectual independence/judgment. But to the same end, states have adopted voter qualification rules that allow the disfranchisement both of adults deemed mentally incompetent. The voting age, however, is the primary voter qualification rule whose aim is to ensure that voters have developed the requisite intellectual independence and decision-making competence.

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

2. Criteria for electoral inclusion in the liberal constitutional democracy: a noninstrumental justification

To the extent that the term “democracy” implies absolute majority rule, no nation is—or aspires to be—fully democratic. A

\(^{169}\) See supra Part I.A.I.  
\(^{170}\) See id.  
\(^{171}\) The etymological origin of “democracy” is the Greek demokratia, or “popular government” (combining demos—“the commons” or “the people,” and kratos—“rule” or “authority”).  
\(^{172}\) ROBERT A. DAHL, ON POLITICAL EQUALITY 7 (2006). Dahl explains that an “ideal” can serve two purposes—one empirical, one moral—and that the two are often confused. Although the “democratic ideal” may describe a system that is in some sense perfect, the function of “ideal” here is strictly definitional or descriptive. It does not necessarily follow that the more perfectly democratic, the better. The ideal system is not necessarily the best system. It may be, but deciding that the ideal is desirable is distinct from defining what the ideal is. The former is a normative judgment; the latter a descriptive definition. Id.
system’s commitment to the democratic principle of popular rule coexists with, and is tempered by, other commitments. The United States is a liberal constitutional federal democracy. The democratic principle requires that those subject to a government’s authority collectively authorize its laws. But constitutionalism restrains popular sovereignty, limits the power of government, and establishes procedures for legitimate rulemaking; and pursuant to it, federalism aims to achieve an optimal balance between local and centralized governance. The nation’s foundational value and core political commitment, however—and that which undergirds the others—is individual liberty.

Classical liberals consider individual liberty to be the central value of the liberal state, 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.” Individual liberty is a core value for classical and modern liberals alike, however, and is thus a least common denominator of sorts.

While individual liberty is the nation’s core value, different conceptions exist of what that liberty itself entails. The thinnest of

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173 For a discussion of more participatory or republican democratic models (in which the electorate participates in making policy decisions) and more protective ones (in which the primary function of democracy is to protect individuals’ liberty by constraining the power of government), see David Miller, The Competitive Model of Democracy, in DEMOCRATIC THEORY AND PRACTICE 133, 133 (G. Duncan ed., 1983). JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT WITH GENEVA MANUSCRIPT AND POLITICAL ECONOMY, 56 (R.D. Masters, ed., J.R. Masters, trans., 1978) (1762) (“obedience to the law one has prescribed for oneself is freedom.”).

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

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

Political theorist Stephen Macedo describes as a “truism” that the liberal tradition is the foundation of the nation’s political identity. STEPHEN MACEDO, LIBERAL VIRTUES 5-6 (1990). For a discussion of individual liberty as the nation’s core value, see Vivian E. Hamilton, Immature Citizens and the State, 2010 B.Y.U. L. REV. 101, 114-19.

176 See, e.g., HAYEK, THE CONSTITUTION OF LIBERTY, supra note 33, at 257–58.

177 JOHN Rawls,

178 Hamilton, supra note __, at 119.

179 Three conceptions of individual liberty are most prominent—negative liberty, positive liberty, and republican liberty. For a brief description of each, see
these is negative liberty—freedom as noninterference. Negative liberty permits the individual to define and pursue her ultimate life course. And, as I have argued elsewhere, if liberty is the state’s core value, then safeguarding individuals’ liberty must be its primary end. Basic, life-deciding liberty is thus the 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 liberal political values and the institutional structures that actualize them have important implications for electoral inclusion/exclusion. One of these is the democratic principle of presumptive inclusion, which aims at a minimum to secure individuals’ consent to being governed and to ensure that the laws directly or indirectly reflect the collective preference, defined as the aggregated preferences of the individual members of the political community.

By registering a vote, an individual expresses her will or preference. A vote can be thought of as representing: (1) the allotment or share of the individual’s influence over governance; (2) the individual’s transfer or surrender to the government of some corresponding share of the individual’s liberty (i.e., a transfer of power or authority) for the purpose of effectuating and enforcing the combined...

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

181 Hamilton, supra note __, at 119.

182 Id.

183 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).

184 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 ELEFHERIADIS, 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.

185 There are, of course, other means by which individuals might influence governance. See ____________
wills of the people; and (3) tacit acceptance that, once transferred to it, the government’s exercise of its accumulated authority is legitimate and binding, whether or not consistent with the individual’s preference.  

Every person governs and is governed in equal measure under this liberal democratic conception of the franchise. No one person yields greater influence than any other in the development of rules, and the resulting rules bind all equally.

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

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

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

Second, assume that a member of the political community lacks electoral competence. The instrumental justification for excluding

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186 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.

187 This is the Aristotelian symmetrical conception of democratic legitimacy. See ARISTOTLE, THE POLITICS OF ARISTOTLE, 1275a8 (E. Barker, trans., ed. 1958).

188 In the next Part (III), I argue for a conception of electoral competence, but here let us simply assume the absence of the relevant competence, however it is conceived.
incompetent voters is weaker than the instrumental justification for excluding the outsider-voter. One might reason that the outsider-voter is more likely to cast a vote that considers short-term but not long-term consequences, or otherwise vote in a manner predictably at odds with the interests of the political community. The votes of incompetent individuals, however, will presumably be distributed randomly. Their random votes should thus cancel each other out and accordingly have no effect on electoral outcomes.

I argue that a noninstrumental justification can explain and legitimate the exclusion of both the “good” outsider-voter and the incompetent voter. Recalling the liberal democratic conception of a vote’s meaning, these voters’ ballots denote (1) a share of influence over governance, but not (2) the transfer or surrender of a corresponding share of individual liberty to the government nor (3) acceptance of the government’s resulting legitimate authority over them. The outsider-voter does not surrender a share of her liberty to the government nor necessarily accept the government’s legitimate authority over her because she remains beyond its reach, outside the political community. The incompetent voter has influenced governance, albeit without the capacity to do so purposefully. She does not surrender liberty nor accept the legitimacy of government’s authority over her, however, because she presumably lacks the capacity to (even implicitly) do either.

The outsiders’ and incompetent voters’ net influence over others would thus exceed that of others over them, and the degree by which the members of the political community are governed exceeds that by which they govern. By withholding the franchise from the community outsider and incompetent individuals, then, the state prevents the unequal distribution of liberty that would otherwise result and thus performs its liberty-preserving obligation.190

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

190 See ELEFTHERIADIS, supra note __, at 108-09.
III. ELECTORAL COMPETENCE

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

Democracy theorists today tend to shy away from the concept of competence, perhaps partly because political elites have historically, and notoriously, invoked the supposed incompetence of various groups—including women, African Americans, and the poor—to justify their categorical disfranchisement.191

Some conception of competence must underlie voting age requirements, however. The connection/interest-related criterion cannot explain age-based exclusion. One might argue that the young are not members of the political community at all, and are thus not among those presumptively entitled to electoral inclusion. The argument fails, because while they may receive different treatment than do their elders when they violate government’s mandates, the young are nonetheless equally subject to them. One might alternatively argue that the young lack the requisite interest in and connection to the governance of the political community and are thus legitimately excluded. That argument too fails. As community residents (and the generally more vulnerable among them), the young have the same, if not greater, interests as their elders in issues of public concern—including public health, safety, and education.192 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 interest in and ongoing connections to it.

It is thus young people’s lack of the relevant competence that must justify their electoral exclusion. There can be little dispute that

191 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).

192 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.”).
newborns lack that competence, or that the typical person acquires it at some point over the course of her development. Age and cognitive development are predictably correlated (discussed infra Part III.B.). There thus is a temporal element to the attainment of electoral competence, for which age is arguably the most reasonable proxy. The impracticality of widespread individual competence assessments, moreover, makes an age-based qualification reasonable.

A voting age qualification thus helps ensure that voters will satisfy the criterion of electoral competence. What electoral competence entails, however, remains ill-defined, even among voting experts. One such expert, for example, justified their ongoing exclusion by stating that youth “under 18 do not have any competence to vote, . . . no knowledge. If they’re lucky, they have taken one civic course.” He added later, “[they 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.” These statements imply possible elements of a standard of competence: certain factual (perhaps civics-related) knowledge, maturity of judgment, historical perspective, life experience, civic responsibility, etc. But are these the correct, or even among the correct, elements of the criterion of voting competence? And how can we assess whether young people have actually achieved these (or some other) elements of competence? It is the aim of this Part to answer these questions.

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

193 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.

194 Belluck, supra note __.
A. Conceptualizing Electoral Competence

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

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

Many democratic systems disfranchise the cognitively impaired.195 Nearly forty U.S. states, for example, have constitutional or statutory provisions prohibiting people with cognitive impairments from voting.196 Beginning in the 1990s, however, states began imposing procedural protections to guard against the unwarranted deprivation of various rights of cognitively impaired persons under guardianship, including the right to vote. Over thirty states now provide for individualized judicial determinations of whether persons under guardianship nonetheless retain the competence to vote.197

In a 2001 case in which a group of cognitively impaired adults challenged their categorical disfranchisement under Maine law, a district court articulated a standard for voting competence that has since been widely cited and incorporated into a Competence Assessment Tool.198 The standard articulated by the Maine district court in the case, Doe v. Rowe, requires simply that potential voters have “the mental capacity to

196 Hurme & Appelbaum, supra note __, at App. A.
197 Id. at 933.
make their own decision by being able to understand the nature and effect of the voting act itself.”

Using the *Doe* standard, psychiatrists developed the Competence Assessment Tool for Voting (“CAT-V”), a questionnaire administered to individuals to assess their voting capacity. The questionnaire is brief (seven questions) and asks respondents to imagine that it is election day for the office of state governor. It then asks questions aimed to ascertain respondents’ understanding of the nature of voting (“What will the people of [person’s state] do today to pick the next Governor?”) and effect of voting (“When the election for governor is over, how will it be decided who the winner is?”). The test then provides information about two hypothetical candidates and asks the respondent to compare them, choose, then discuss the potential consequences to the respondent of that candidate’s being elected.

If the *Doe* standard or something like it defines electoral competence, then a large category of young people—including many preadolescents—could very well qualify as competent to vote. 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 individuals with mental impairments are members of the in-group that has presumptively attained the development-related cognitive capacities required for electoral competence. The function of a standard by which to determine their competence is to assess whether the nature of individuals’ cognitive impairments are such that the presumption of competence ought not apply to them—i.e., their impairments have prevented them from developing the relevant cognitive capacities, or have caused them to lose the relevant capacities. The state, however, must overcome two presumptions before being justified in disfranchising a cognitively impaired adult. First, it bears the burden of justifying electoral exclusion. Second, all age-qualified individuals are members of the group that has satisfied the presumption of electoral competence. Adults with cognitive impairments should receive the benefit of that presumption. In other words, evidence of electoral incompetence must be persuasive in order to justify the competence-related disfranchisement of an age-qualified individual.

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199 Id. at 51 (citing Def. Mot. for Summ. J. at 8).
200 The study was reported in Raymond Raad, Jason Karlawish, & Paul S. Appelbaum, *The Capacity of Vote of Persons with Serious Mental Illness*, 60 PSYCHIATRIC SVCS. 624 (2009).
201 Id. at 625, App. 1, *Competence Assessment Tool for Voting (CAT-V)*, available at ps.psychiatryonline.org.
202 Id.
203 Id.
The purpose of a standard by which to measure the electoral competence of young people, on the other hand, is to assess as an initial matter their acquisition as a group of the array of cognitive capacities required for competent voting.

Thus while the Doe standard might suffice to indicate adequate electoral competence despite cognitive impairment, it is not necessarily adequate to assess the initial development-related attainment of the array of cognitive capacities required for electoral competence.

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

2. Electoral competence and political/civics knowledge?

Rousseau believed that a well-informed citizenry was necessary to determine and implement the public good. 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 from our conception of electoral competence.

204 See, e.g., BENJAMIN BARBER, STRONG DEMOCRACY (1984).

205 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 X. DELLI CARPINI AND SCOTT KEEPER, 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 & KEEPER, supra at 19.

206 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
First, voluminous data methodically gathered since the 1930s has consistently shown the typical citizen to be far removed from the ideal 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.

so forth); and (3) people and parties (the promises, performances, and attributes of candidates, public officials, and the political parties).

Id. at 14.

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 surveys, which have been funded by the National Science Foundation since the 1970s. University of Michigan News Service Press Release, NSF Awards $10 Million for American National Election Studies, Feb. 25, 2010, available at http://ns.umich.edu/htdocs/releases/story.php?id=7542.

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.).


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”).
Widespread voter ignorance alone arguably renders unfeasible the adoption of specific factual knowledge as a component of voting competence. Incorporating even basic levels of civics or political knowledge into a conception of electoral competence theoretically justifies voter qualification rules that would operate to disfranchise a significant proportion of the current (aged eighteen and over) electorate. 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 college graduates, low-income earners than high-income earners, and those under thirty than those sixty-five and older.211

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

Excluding a factual-knowledge component from a conception of electoral competence is also reasonable in light of variability in the instrumental utility of political knowledge itself.212

First, the utility of political knowledge is situational, meaning that its value will depend on the decision-making context.213 A voter’s intimate

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212 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. Belief in the relatively value of knowledge, however, also suggests 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.

213 Id. at 14.
knowledge of campaign finance legislation, for example, does not help her decide whether to vote in favor of a proposed school redistricting plan. It is thus difficult to identify with any certainty the knowledge required for competent voting in a given election, and knowledge requirements are likely to change from one election to the next.

Second, the utility of political knowledge is collective, in that the greater the aggregate amount of such knowledge, the greater the likelihood that the citizenry’s decisions will accurately reflect the will of the people.214 Because random or uninformed views cancel each other out, the “miracle of aggregation” generally results in collective decisions that reflect those beliefs that are well-informed and coherent.215 Thus, while a broadly informed public is critical to the functioning of a democratic system, broadly informed citizens are less critical.

Finally, individuals may have a variety of goals when making their vote decisions. Not all voters necessarily seek to cast a vote for the candidate who “would, if elected, produce a better outcome set from [the voter’s] point of view.”216 Some voters may have less instrumental goals, seeing their vote as a “speech-act” with primarily expressive or symbolic (rather than instrumental) value.217 This use of one’s ballot is not irrational, given the negligible real-world influence of the individual’s vote on an election’s outcome. Since individual voters may want to cast their ballots so as to express any number of messages, values, or beliefs, this possible use of the vote, too, inveighs against substantive standards of voter knowledge.

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

214 Id. at 15.
215 Some studies have shown that errors do not always cancel each other out; instead, voters might share misperceptions that reflect lopsided biases. In these cases, low levels of political knowledge might indeed skew election results. Craig & Martinez, supra note __, at 77-78, 81-82.
216 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.
217 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).
3. *Normative decision theory and actual voter decision making: Insights from behavioral decision and cognitive performance research*

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

Just as they rarely possess optimal levels of political knowledge, however, individuals rarely make decisions using the value-maximizing, decision-making model. 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.

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.” Individuals’ limited cognitive-processing abilities allow them to absorb and process only a small fraction of the barrage of information to which they are typically exposed, including political information. Limited information combines with limited time

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221 Fischhoff, *supra* note __, at 13.


223 Lau & Redlawsk, *supra* note __, at 73-74. Thus:
and motivation, which all together can impede rational decision making.\textsuperscript{224}

From a behavioral economics perspective, voter ignorance makes good sense:\textsuperscript{225} 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).\textsuperscript{226}

In lieu of incurring the cost of educating themselves, voters generally rely on more readily available “information shortcuts” such as party affiliation and a candidate or party’s past performance.\textsuperscript{227} These shortcuts (more broadly referred to by theorists today as “heuristics”\textsuperscript{228}) substitute

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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.

\textit{Id.}\textsuperscript{224} 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, \textit{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 Simon, \textit{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. \textit{Lau & Redlawsk, supra note __, at 29}.

\textsuperscript{225} In his now-classic treatise, economist Anthony Downs famously described voters as “rationally ignorant.” ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

\textsuperscript{226} \textit{Id.}\textsuperscript{227} \textit{Id.}\textsuperscript{228} Cognitive psychologists have identified three categories of \textit{judgment heuristics} that decision makers use in order to simplify complex decisions and avoid burdensome information gathering and analysis. They are: (1) \textit{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) \textit{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) \textit{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, \textit{Choices, Values, and Frames}, 39 AM. PSYCHOL. 341 (1984). People more generally \textit{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
for more complete information, allowing voters to make decisions reasonably consistent with their preferences while expending relatively little effort.\footnote{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.}

Heuristics that voters commonly use in political decision making include party affiliation, group endorsements, person stereotypes such as gender, race, or age, and poll results indicating candidate viability.\footnote{Id. at 74-75.} 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.\footnote{Id. at 74.} 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.\footnote{Id. at 74.} 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.”\footnote{Id. at 226.}

Cognitive psychologists have conducted research in other decision-making contexts that confirms that in some cases, excess information—i.e., a volume of information that is beyond an individual’s cognitive-processing capacity—hurts decision making, presumably by confusing individuals or otherwise making it more difficult for them to identify and and assign to it the default values already associated with the schema. LAU & REDLAWSK, supra note __, at 26.}
retain salient information. In certain decision-making contexts, a greater amount of preexisting knowledge can hinder rational analysis of a new set of facts. 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.

Preexisting knowledge or belief can hinder cognitive performance in other ways. It can lead, for example, to undue certainty in one’s judgments. Persons with preexisting beliefs or theories tend to subject new information to inconsistent standards of evidence in order to protect their preferred theories. 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.”

Undue certainty

234 Id. at 212.
236 To give an example from one recently reported study, adults examined the following syllogism involving deductive reasoning:

Syllogism 1
Premise 1: All living things need water.
Premise 2: Roses need water.
Conclusion: Roses are living things.

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. Id.
237 Deanna Kuhn, Jumping to Conclusions, 18 SCIENTIFIC AMER. MIND 44 (2007). This sort of misplaced certainty reflects a failure of metacognition, or “knowing what one knows.” Id.
238 Id.
239 Id.
in one’s beliefs in turn “underlies the rigidity in thinking that is a major contributor to human strife.”

At least in some contexts, then, less knowledge leads to more objective analysis and thus improves cognitive performance. Research confirms common wisdom that, with age and experience, people can become less open-minded, less objective when analyzing new evidence, and generally more “set in their ways.” Knowledge can lead to cognitive biases that 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. Early adolescents and young adults who initially showed faulty multivariable causal reasoning also showed significant improvement after engaging with similar problems over the course of several months.

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

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

4. In support of a cognitive-process-driven conception of electoral competence

I argue for a standard of competence that is process-driven rather than knowledge-based. As discussed above, incorporating factual knowledge into a normative standard of electoral competence risks disfranchising much of the current electorate and is unnecessary to ensure correct vote decisions. Even without requiring specific

240 Id.
241 Kuhn et al., Developing Reason, supra note ___.
242 Id.
243 Id. See also, DEANNA KUHN, EDUCATION FOR THINKING (2005) (summarizing studies).
knowledge, however, it is possible to identify the cognitive processes, or mental operations, involved in and required for competent voting.

Cognitive processes include (1) learning and retrieving information; (2) encoding, which involves forming a mental representation of information or a situation; and (3) thinking, which is the goal-directed application and coordination of inferences and includes various forms of reasoning. When thinkers deliberately constrain their inferences so as to conform to what they believe are appropriate inferential norms, they engage in reasoning. Forms of reasoning include deductive, inductive, and analogical reasoning, as well as decision making and problem solving. 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.”

Rationality does not necessarily require applying formal logic to a set of premises or adhering to a normative, value-maximizing decision-making process. These formal cognitive processes will indeed provide “good reasons” for one’s conclusions, but as developmental psychologist David Moshman asserts, “[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.”

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

Our typical voter has thus learned a limited amount of information. After acquiring that information (itself a cognitive process) the voter applies additional cognitive processes to it. The voter may recall that Republicans generally favor lower taxes. She makes the inference that the Republican candidate is more likely to favor lower taxes than the Democratic candidate, and infers further that electing a Republican to office makes it more likely that taxes will be reduced. She believes that a
tax 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, that 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, and one likely to be correct (i.e., consistent with the decision she would have made had she possessed full information).

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

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

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

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

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250 Id. at 24 (observing that while the concepts and forms of reasoning of many individuals continue to develop after childhood, “postchildhood developmental changes in thinking are not tied to age and do not culminate in a state of maturity”). 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).
The next Part surveys recent research on adolescent development and concludes that adolescents reliably attain the relevant cognitive-processing 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. Scientists have made two critical findings, however: First, by mid-adolescence, individuals have the cognitive capacity to make competent decisions. Second, however, certain situations and factors predictably hinder the decision-making abilities that adolescents otherwise possess.

In this Part I first canvass research on adolescent cognitive development from various disciplines in the developmental sciences. I then conclude that the factors that characterize the vote decision-making context (time for deliberation, the absence of peers, etc.) render voting the 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 brief discussion of relevant aspects of

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251 Id. at 13.
252 See supra Part IV.C.
254 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 development, first from the perspective of behavioral science, then developmental neuroscience, follows.\textsuperscript{255}

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.\textsuperscript{256} 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.\textsuperscript{257} By mid-adolescence, thinking processes are adult-like. According to developmental psychologist David Moshman, “[n]o theorist or researcher has ever identified a form or level of thinking routine among adults that is rarely seen in adolescents.”\textsuperscript{258}

Despite their apparently advanced cognitive abilities, universal characteristics of adolescent behavior include increased propensities for impulsivity, risk taking, and sensation seeking.\textsuperscript{259} Early behavioral 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.\textsuperscript{260} Intervention programs implemented to counteract these cognitive deficiencies by

\textit{Adolescent Brain Development}, supra note __, at 162. See generally Steinberg, \textit{Adolescent Risk-Taking}, supra note __.

\textsuperscript{255} For a summary of cognitive development from early childhood through early adulthood, see Hamilton, \textit{Immature Citizens}, supra note __, at __.

\textsuperscript{256} Laurence Steinberg et al., \textit{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., \textit{Less Mature Than Adults?}].

\textsuperscript{257} Steinberg, \textit{Adolescent Risk-Taking}, supra note __, at 80.

\textsuperscript{258} Moshman, supra note __, at 24.

\textsuperscript{259} Sara B. Johnson et al., \textit{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, \textit{A Social Neuroscience Perspective on Adolescent Risk-Taking}, 28 DEVELOPMENTAL REV. 78, 79 (2008). See also, Michael Windle and Rebecca C. Windle, \textit{Alcohol and Other Substance Use and Abuse}, in \textit{BLACKWELL HANDBOOK OF ADOLESCENCE} 450-63 (Gerald R. Adams and Michael D. Berzonsky eds., 2003) (surveying empirical studies on the onset and escalation of substance use among adolescents).

Developmental scientists reason that evolutionary processes would have selected for these characteristics, which presumably motivated adolescents (of all cultures and species) to leave their natal environments and seek out mates. Laurence Steinberg, \textit{A Behavioral Scientist Looks at the Science of Adolescent Brain Development}, 72 BRAIN & COGNITION 160, 161 (2010) [hereinafter, Steinberg, \textit{Adolescent Brain Development}].

correcting adolescents’ misperceptions about common risks, however, were largely ineffectual in changing adolescent behavior.\textsuperscript{261} Studies, moreover, revealed no cognitive differences between adolescents and adults that could explain their different propensities for risk taking.\textsuperscript{262}

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.”\textsuperscript{263} Cognitive deficiencies do not account for adolescents’ propensity for risky and impulsive decision making. Studies instead consistently confirm that adolescents have the cognitive competence to make rational decisions about risks.\textsuperscript{264} Why, then, do they frequently make irrational, risky decisions?

Behavioral scientists examined more closely the real-world contexts\textsuperscript{265} in which adolescents make decisions, and in so doing have gained valuable insights into adolescent decision-making processes.\textsuperscript{266} Their findings 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.\textsuperscript{267} The real-world contexts in which adolescents usually make decisions, however, can drastically affect the quality of their decision making.\textsuperscript{268}

\textsuperscript{261} Reyna & Farley, supra note __, at 33 (surveying studies of education interventions aiming to seek adolescents’ misperceptions by educating them about commonly encountered risks).
\textsuperscript{262} Laurence Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, 28 DEVELOPMENTAL REV. 78, 80 (2008) [hereinafter, Steinberg, Adolescent Risk-Taking].
\textsuperscript{263} Steinberg, Adolescent Risk-Taking, supra note __, at 80.
\textsuperscript{264} Reyna & Farley, supra note __, at 2.
\textsuperscript{265} 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).
\textsuperscript{266} Steinberg, Adolescent Risk-Taking, supra note __, at 80.
\textsuperscript{267} Id.; Reyna & Farley, supra note __, at 2.
\textsuperscript{268} 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, \textit{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, \textit{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
Studies 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. This temporal disjunction has the potential to explain adolescents’ risk taking and poor decision making despite their improved cognitive ability, as well as other aspects of adolescent psychology and behavior. 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. When certain neurons (nerve the ability to filter irrelevant information and suppress inappropriate actions) and other complex mental abilities.

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. Klauczynski eds., 2005).

Valerie F. Reyna & Frank 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.

Laurence 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 “[n]eurobiological evidence in support of the dual systems model is rapidly accumulating”).

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

The socio-emotional system includes the amygdala, nucleus accumbens, orbitofrontal cortex, medial prefrontal cortex, superior temporal sulcus. Steinberg, Adolescent Risk-Taking, supra note __, at 83.
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.274 In the socio-emotional system, the neurotransmitter dopamine modulates the neural reward circuitry.275 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.276

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.277 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.278 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, “∩”-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.279

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.280 The cognitive control system follows a more gradual and linear developmental trajectory than does the socio-emotional system.281 Three structural changes in the brain characterize the maturation of cognitive control during adolescence:

275 Geier & Luna, supra note __, at 216.
276 Steinberg et al., Sensation Seeking & Impulsivity, supra note __, at 1764–66; Geier & Luna, supra note __ at 216–17.
277 Steinberg, Adolescent Risk-Taking, supra note __, at 85.
278 Steinberg et al., Sensation Seeking & Impulsivity, supra note __, at 1765; Steinberg, Adolescent Risk-Taking, supra note __, at 85.
279 Steinberg, Adolescent Brain Development, supra note __, at 163; Sindy R. Sumter et al., The Developmental Pattern of Resistance to Peer Influence in Adolescence: Will the Teenager Ever Be Able to Resist?, 32 J. ADOLESCENCE 1009–10 (2009). See also, Steinberg et al., Adolescent Risk-Taking, supra note __, at 89 (ages thirteen to sixteen). See also, Steinberg et al., Sensation Seeking & Impulsivity, supra note __, at 1774 (ages twelve and fifteen).
280 Id. at 93–94. The cognitive control system also includes parts of the corpus callosum, which connects the left and right hemispheres. Id.
281 Steinberg et al., Adolescent Risk-Taking, supra note __, at 93.
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, spatial working memory, etc.) associated with the integrated functioning of multiple prefrontal regions of the brain.

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 the association areas (areas throughout the brain connecting its different regions and supporting the complex integration of inter-regional function). Beatriz Luna, Developmental Changes in Cognitive Control Through Adolescence, in ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR 233, 238 (Patricia Bauer, ed., 2009) [hereinafter Luna, Developmental Changes].

Nitin Gogtay & Paul M. Thompson, Mapping Gray Matter Development: Implications for Typical Development and Vulnerability to Psychopathology, 72 BRAIN & COGNITION 6, 7 (2010); Arthur W. Toga et al., Mapping Brain Maturation, 29 TRENDS IN NEUROSCIENCES 148, 149-50 (2006); Tomas Paus, Mapping Brain Maturation and Cognitive Development During Adolescence, 9 TRENDS IN COG. SCI. 60, 62 (2005) [hereinafter Paus, Mapping Brain Maturation]. There is also some evidence of synaptic pruning in the association areas (areas throughout the brain connecting its different regions and supporting the complex integration of inter-regional function). Beatriz Luna, Developmental Changes in Cognitive Control Through Adolescence, in ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR 233, 238 (Patricia Bauer, ed., 2009) [hereinafter Luna, Developmental Changes].

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.

Steinberg, Adolescent Risk-Taking, supra note 215, at 94–96.

Id. at 94–98. Important social and emotional information-processing regions of the brain include the limbic and paralimbic regions. Id.

Id.
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.

Adolescents’ susceptibility to the confounding influence of heightened reward salience 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.

2. Domain-specific competence: the vote decision

By ages fifteen or sixteen, then, adolescents have attained adult-like cognitive-processing capacities. In other words, they are as able as are adults to acquire, retain, and retrieve relevant information and apply to that information reasoning processes that lead to justifiable conclusions. But while they have adult-like abilities to think and reach rational judgments, their capacities are more susceptible than are adults’ to being

287 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].

288 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.

289 Steinberg, Adolescent Risk-Taking, supra note 215, at 97–98; Luna, Developmental Changes, supra note __, at 257.

290 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.
confounded by the real-world contexts in which they make decisions. When they must make decisions quickly or under time pressure, or when highly emotional or stressed, adolescents’ performance suffers. In contexts in which adolescents are likely to make poor decisions—especially when their decisions will have negative externalities—the state properly constrains their decision-making liberty.

One example of such a real-world context is driving. Driving provides ready opportunities for risk taking and thrill seeking—especially in the presence of encouraging peers. At the same time, responsible driving frequently requires rapid decision making in response to unpredictable situations, in what is still an unfamiliar context to the inexperienced adolescent driver. Data on adolescent collisions and motor-vehicle-related fatalities provide compelling evidence of the challenges faced by adolescent drivers.

Elections, on the other hand, 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, Lau and Redlawsk’s test for correct voting (“Irrespective of how the vote decision is actually reached, how frequently do voters vote correctly?”) 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. Empirical studies of correct voting might thus be used as a benchmark or test of adolescent voting competence—if adolescents cast “correct” votes between (something like) seventy- to

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291 For an argument in favor of additional limits on adolescent driving, see Hamilton, Immature Citizens, supra note __, at __.
293 LAU & REDLAWSK, supra note __, at 85, 88. Lau, et al., supra note __, at 406.
seventy-five percent of the time, then they have achieved adult-like levels of competence.\textsuperscript{294}

\textbf{Conclusion}

Even without including in this Article’s 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 electoral incompetence of that category of citizens, but what electoral 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{294} 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.