

The Politics of Disenfranchisement

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Why Is It So Hard to Vote in America?

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Preface

Why This Book?

Like many other book projects, this one began as something else.

During the aftermath of the 2000 presidential election in Florida, my telephones rang incessantly. It was always reporters and commentators and pundits, from all parts of the United States and around the world, wanting to know what had happened, and why, and what would happen. I stopped counting at 137 interviews, and that was a mere two weeks after the election, several days before Thanksgiving. The phone calls did not end until after the Electoral College met to hand the presidency to George W. Bush.

The subtext of virtually every interview was a variant on: how could Florida make such a mess of things? Didn't people in Florida know how to count? What's going on down there? I thought, while all of this post hoc activity was occupying and indeed consuming me, I would write a book on the Florida fiasco.

But as more dust settled and time passed, I was able to step back and think about what was fundamental and what was sideshow in the whole business; I realized that what happened in Florida was really just the tip of a vast iceberg. In fact, with few exceptions it could have occurred in other states as well (as the 2004 presidential election in Ohio and the 2008 Minnesota U.S. Senate race demonstrated). I began to see that our electoral system was seriously flawed, even sick. We were singularly unprepared to deal with elections whose results were nanoscopically close. More fundamentally, I realized that much of what lay at the heart of the disputes over the Florida results was caused by the clumsy, antediluvian, unnecessarily complicated, nontransparent, often arbitrary, and generally unfair ways we vote in this country, from the question of who is a legitimate voter to how ballots are cast to their tallying and recounting.

It also rapidly became clear that there were serious and nasty racial components to the difficulties: black voters were disenfranchised at much greater rates and numbers than whites, and black ballots were disqualified and tossed out—or not even counted—at rates and numbers greater than for whites. Further investigations showed that other peoples of color also were experiencing difficulties voting, including Hispanics, Asians, and others. Whites generally had fewer problems than these other population groups (unless they were also part of disenfranchised groups, to be

Trying to Vote in America

Why is it so hard to vote in America?

This deceptively simple question constitutes the heart of this book. It is in part an investigation of the barriers that prospective voters in the United States must overcome in order to exercise their franchise, cast a vote, and have it recorded and counted. But the book will also look more deeply at these matters, and ask why these barriers exist in the first place. After all, it is not enough to point out what has become all too well known, namely, that voting in America is often a struggle for the individual citizen. The real question is, why have we structured our voting procedures and mechanics so that this happens? Surely it is not just an accident, a matter of accumulated bad voting practices over time. Rather, it is much more likely, as Jonathan Kozol has eloquently and movingly written in another context, to be the result of conscious human decisions—or sometimes nondeliberate ones. What, then, does the difficulty of exercising the franchise say about attitudes toward voting in America? What are its implications for our democratic elections, or indeed, our democratic system of governance?

It is no secret that problems have arisen in American elections since the founding of the nation, including during the twenty-first century, to the extent that too often their legitimacy, fairness, and accuracy have been called into question. We know that eligible voters are not always able to cast ballots, or have them counted even if they do vote. For this situation to exist in a modern, mature democracy is both anomalous and intolerable. We know how to structure election systems that expand rather than restrict the franchise. We know how to fashion election procedures so that voting is a non-burdensome activity. And we can construct voting and counting machines such that the results of elections are not matters of doubt and controversy, or their legitimacy in question. Other democracies do so all the time.

Yet our policy and practice is not to do this. This book asks why.

Let's be clear at the outset about what this book is and is not. It is an investigation of what is wrong with the American voting system. But unlike many—even most—critiques of American voting, it does not inquire from a top-down, bird's-eye view. Instead, it looks at voting from the perspective of the individual voter—from a street-level view, in other words. Although my approach is certainly systemic (and systematic), my task is to deconstruct the steps individual prospective voters have to take, and hurdles they have to overcome, in order to

document just how difficult it is to vote in the United States: those of the Century Foundation (2005) and Cooperative Congressional Election Survey conducted by MIT (2009) come to mind.¹ It is the premise of this book that most of the “reform” efforts are doomed to failure and that problems will persist because of the fundamental structure of elections and voting in this country.

The Intellectual Context

This book is not solely a study of barriers to voting. It will additionally address two major theoretical questions, one based on constitutional issues and one rooted in mainstream American democratic theory.

First, the existence of a range of voting rules and procedures across the states raises a Fourteenth Amendment question. If voting is a right, and if one person's vote is worth the same as another's regardless of location, then does not the equal protection clause demand far more uniformity in voting procedures, across the board, than currently exists? The U.S. Supreme Court in *Bush v. Gore* (2000) raised the possibility that variations in election practices might trample on the Fourteenth Amendment. It backed away from pushing the point, but it remains very much problematic—a 900-pound gorilla that sooner or later has to be confronted.

I am neither a lawyer nor a published constitutional scholar. As a political scientist, however, I am qualified to outline the political ramifications of a possible Fourteenth Amendment issue on how we vote in America. Indeed, I believe I have a scholarly obligation to provoke such a discussion. This will be done in the concluding chapter.

Second, much of mainstream American democratic theory since its origins rests on the view that a politically inert, passive, nonparticipatory citizenry is neither noteworthy nor harmful to democracy. Beginning in the late nineteenth century, scholars such as Woodrow Wilson and Arthur Bentley, and continuing through giants of American political science like Lawrence Chamberlain, David Truman, Harold Lasswell, Robert Dahl, Gabriel Almond, Sidney Verba, and Heinz Eulau, among many others, have advanced variations on this theme. These theorists argue in different ways, and with different data sets, that elite rule, in which the mass public merely votes occasionally to confirm the position of one or another set of elites, preserves stability and continuity in democracy. It is fair to say that in one way or another, all are far more elitist than populist in their views of politics. Limiting the franchise and making voting onerous are neither a problem nor a liability in their writings, but are in fact functional steps for us to take because they ensure that nonelite “outsiders,” not to mention extremists or the lunatic fringe, cannot vote, let alone be elected.

This book takes serious issue with these views. Its theoretical reference point is rooted in the work of such authors as V.O. Key, Floyd Hunter, C. Wright Mills, Grant McConnell, William Domhoff, and Howard Zinn, among others, who question whether the political and social stability brought on by apathy and low rates

of participation caused in part by hurdles to voting is indeed healthy. It takes as its starting point Carole Pateman's sardonic comment about Giovanni Sartori: “political apathy is not, as one writer dismissively claimed, ‘nobody's fault’ . . . but . . . is a socially structured and maintained phenomenon.” As Jonathan Kozol more recently put it in another context, the existence of social pathologies, including inequality and discrimination, is not a matter of inevitability or a result of “naturally occurring” conditions, but one created by the deliberate decisions—or nondecisions—of human beings.

This book will address the question of whether the difficulty hundreds of thousands of citizens face in voting is “nobody's fault.” If it is a systemic (if not systematic) characteristic of our electoral system, what does this say about how we really regard the right to vote? Indeed, what does it say about the nature of American democracy?

The Politics of Disenfranchisement and Other Works

Although *The Politics of Disenfranchisement* is a unique book, it rests on the shoulders of two distinguished intellectual and political traditions in this country. The first might be called “progressive populism.” It has its roots in the Jefferson/Jackson political tradition celebrating everyday Americans and their struggle to participate in the American dream. This tradition was carried on in the late nineteenth and early twentieth centuries by such figures as William Jennings Bryan and Upton Sinclair, and still later by John Dos Passos, Dorothy Parker, John Steinbeck, the artist Diego Rivera, and the musician Aaron Copeland, among a host of others. None were social scientists, of course, but they provided an intellectual and artistic, as well as political, foundation for understanding the struggle of the dispossessed, marginalized, poverty-stricken characters depicted in their art against huge social, economic, and political forces allied against them, forces that they could only dimly imagine but whose impact on their lives they knew all too well.

By mid-twentieth century a well-conceived social science literature had developed that systematically and empirically examined what the artists and writers had imagined; writers would include such political scientists and sociologists as Key, Mills, and Hunter. Social science writings continued in this vein, on a more theoretical level, with Peter Bachrach and his collaboration with Morton Baratz, Noam Chomsky, and others. At the journalistic level, the progressive/populist tradition has most recently been given expression by (among others) I.F. Stone, Jim Hightower, Studs Terkel, and Barbara Ehrenreich, and by such periodicals as the *Nation*, *Mother Jones*, and the *Village Voice*. Emerging blogs and online “magazines” (the *American Prospect* comes to mind, among others) have pursued similar themes.

The second tradition on which this book rests can be called “the struggle for full and equal rights.” It reaches back to the Bill of Rights, ratified in 1791, and extends through the Thirteenth, Fourteenth, and Fifteenth Amendments of the post-Civil War

minor differences in style and rhetoric but little of substance. But leaving others on the sidelines, others who may have very different political values, and not allowing them into the political game is hardly the sign of a robust democracy. Indeed, the latter is characterized by vigorous debate and high-energy dynamics that are inclusive rather than exclusive. The scholars and writers and pundits who point to our quiescent politics with limited participation and a bounded franchise as a sign of a healthy democracy evidently have never envisioned what one would be like.

So the argument that limiting the franchise undermines corruption, prevents vote fraud, and is an indicator of a viable democracy is sheer sophistry.¹ But what does account for the perpetuation of practices that keep people from the free and ready exercise of their franchise?

Failure to Recognize That Voting Is a Right

In spite of the 1965 Voting Rights Act, Americans still have not grasped that voting is a right. True, it is not a constitutionally guaranteed right, like a First Amendment right. But just because it is legally and not constitutionally based does not mean it is any less of a right.

Rather, it is likely that many—even most—Americans think voting is a privilege, something the prospective voter has to earn, to prove worthy of in order to be able to vote. They probably regard voting as more on the order of getting a driver's license than, say, exercising rights of free speech or the right of assembly. Even knowledgeable people fall into this trap. It is not unusual, for example, on TV news programs to hear correspondents talking about the "privilege" of voting, rather than the "right" to vote. They should know better.

Is there any evidence that Americans think of voting more as a privilege than a right? The discussion in the previous section on the range of structural problems that serve as hurdles to be overcome by prospective voters constitutes valid evidence. Whether it was the poll tax in the nineteenth century or literacy tests or character testimonials—directed primarily but not exclusively at blacks—or more recently, complicated registration procedures and draconian voter ID requirements, the effect is that of making potential voters jump through hoops and leap over barriers before they can vote. If Americans truly thought of voting as a right, there would be few if any obstructions to voting. It would be afforded those of sufficient age as a matter of course, not something people had to earn or demonstrate or achieve.

There are many problems with thinking of voting as a privilege instead of a right. But the most important is that it gives public officials—legislators, voting supervisors, secretaries of state, even judges—license to convey, or withhold, the ballot. Too often discretion is left to officials to determine if the voter has satisfactorily met some arbitrary, unspecified "standard" so that he or she can vote. As a result, determining who gets the franchise and who doesn't potentially wallows in the muck of arbitrary, capricious, and unreasonable decision making. There is usually no recourse for the voter who is turned down, and no accountability for the

official making the decision. If voting were regarded as a right and not a privilege, public officials would not have so much discretionary authority. Indeed, the burden would be on those officials to show why a prospective voter should not have the franchise, rather than on the voter to show that he/she has satisfactorily met the standard in order to cast a ballot. It is critical to remember that the 1965 legislation was called the Voting Rights Act, not the Voting Privilege Act.

Structural Problems

There are numerous structural and administrative hurdles placed in front of potential voters that limit their ability to cast ballots. Without doubt, the single most important one is archaic registration rules. Indeed, scholars of voting have for decades pointed to difficult, often arbitrary and capricious, registration rules as the single most important factor that keeps people away from the polls.

Later we will look at where voter registration requirements came from, and why they so profoundly limit access to the polls. For the moment, let us note that it does not have to be this way. In many modern democracies voter registration is easy, often automatic as soon as the person reaches the right age. All he or she need do is show up at the polls to vote. In the United States, the process is hard. Registration forms are often long, complicated, and difficult to navigate. It is easy to make a mistake in filling them out, which could have the effect of disqualifying the potential voter.

While literacy tests have long been outlawed, it is a reasonable argument that most registration forms constitute their reincarnation. And even though residence requirements are a thing of the past, in most states there are substantial time periods between the last day of voter registration and the election date (or even the onset of early voting), which in effect constitutes a form of residence requirement: very few states allow same-day voter registration. Moreover, increasingly in the United States, even if the voter shows up with a valid registration card, he or she still is not guaranteed the opportunity to vote. The voter often has to prove his or her identity first, not always an easy task.

The truth is, the structural problems—and there are many more besides those just mentioned, which I will detail in subsequent chapters—are too great for many potential American voters to negotiate successfully. Their effect is to limit the franchise sharply.

Partisan Politics

As in so many other areas of American public and even private life, partisan politics has intruded on the right to vote. It is possible to see the history of voting rights in America from the nineteenth century to the present as a clash between the Democratic and Republican parties. The struggle at times has reached titanic, even epic, proportions, as the dramatic conclusion to the 2000 presidential election in Florida

Republican/McCain country. He was not allowed to vote even though he was apparently correctly registered and had at hand the necessary photo ID.⁹

According to reports, this voter was denied a ballot because his shirt violated the "50 foot rule." In Florida, no campaign signs or advertisements are permitted within fifty feet of the entrance to a polling place. The T-shirt did not meet the legal definition of a political advertisement, as an endorsement, or just an image on a T-shirt, is not necessarily an advertisement. In addition, articles of clothing are exempt. However, local administrators decided that it constituted a violation of the 50-foot rule and denied the voter the chance to cast a ballot.

The impact of administrative discretion will be a frequent and recurring theme in this book. There is substantial evidence on the effect of administrative discretion in depriving voters of their right to cast ballots.¹⁰ Local voting officials have an extraordinary range and depth of discretion at all phases of the voting process: handling snail-mail and electronic requests for voter registration materials; evaluating completed registration forms; expediting (or not) requests for absentee ballots; counting returned absentee ballots; determining the location of polling places; designing ballots; determining whether or not voters showing up at the polls produce the required documentation, including voter ID;¹¹ judging whether a voter's eccentric behavior or articles of clothing disqualify him/her from voting;¹² deciding whether or not to offer provisional ballots to voters whose credentials were questioned; deciding what to do with provisional ballots, including whether or not to count them; how to deal with requests for assistance to voters, including those from language minorities and those with physical disabilities; how to handle breakdowns of voting equipment; how to accommodate—or not—voters who make mistakes or spoil their ballots; how to deal with voters standing on line even after the polling hours officially end; how to expedite local counting of ballots (if done on-site) or facilitate their secure transit to county offices for official counting; and so on.

At each and every step of the voting process local voting officials have broad authority to make decisions about who gets to vote and how ballots are handled. It should be emphasized that most carry out their tasks diligently, honestly, and in a consistent fashion. But in a sense this is not the point; democratic elections demand nothing less.

The problem arises when these standards are not met, or when local officials overstep their bounds or make unreasonable, arbitrary, or capricious decisions based on personal or partisan political views, biases and prejudices, or something else. Local supervisors of elections, in their training sessions and manuals, try to anticipate as many peculiar circumstances as possible, but there is no way to foretell all of them; human behavior being what it is, something out of the ordinary or exceptional will always arise. When local polling officials, reacting to circumstances, make one or more decisions preventing a potential voter from getting a ballot or having it treated like everyone else's, then questions of both equity and fairness have to be raised.

Occasions may arise when there is a valid reason to block access to the ballot box, for example, if the official can demonstrate that the voter already cast a ballot earlier, or elsewhere. But unfortunately, there are too many cases on record in which local voting officials regard themselves as gatekeepers to the ballot box rather than facilitators of voting. The assumption of the gatekeeping role results in the acquisition of a great deal of discretionary power by local voting officials. For example, it changes the burden of proof in disputes over who can vote. Instead of the burden being on local officials to show why a potential voter should not be allowed to vote, the burden is on the voter to show why she should be permitted to do so. This is a misplaced, and unfair, burden. Even if it amounts to denying the rights of only one voter on Election Day, this is one too many.

Making matters worse is the fact that there is almost no accountability for local officials who exercise their discretion and prevent voters from casting ballots. True, voters who feel they have been unfairly prevented from voting can file complaints; some 11,000 did in Florida in 2000. But in no case did the complaints do any good. By the time they were processed, the election was long over and the results certified. In no case was a complainant in that election allowed to revote and his vote counted. This is the usual case with voters who try to file complaints against officials whom they believe treated them illegally or unfairly. Moreover, the Bush administration's Department of Justice, which handled many of the complaints, was so partisan and politicized that it allowed only a handful of complaints to stand, while the others were tossed away as invalid. In no instance was a local voting official censured, or fired, or brought to trial because of discretionary decisions he or she had made on Election Day.

Racism and Xenophobia

The continuing existence of racism in America is too well known and documented to require more than a passing comment here. Indeed, much of the rest of the book will offer evidence that peoples of color—not solely African Americans—are at much greater risk of being denied their voting rights than white Americans, especially Anglo-Saxon Americans. While numerous explanations are offered to justify this situation—"they didn't register correctly," "their registration names and those on other 'approved' lists don't match," "they 'didn't do it/something right'"—they are virtually always bogus. The truth is, there are still too many forces at play in America that seek to minimize political participation among African Americans and other peoples of color, and try to delegitimize what participation exists.¹³

The same is true of xenophobia. Although we are a nation of immigrants, in fact there are powerful forces at play in this nation that are openly hostile to new arrivals, especially those from Latin America, Africa, and the Middle East. Evidence for the power of these forces can be seen in the extraordinary levels of vituperation and hostility expressed at immigrants, especially illegal aliens, during the Bush administration's attempt to revise U.S. immigration policy early in its second

are unacceptable to them and, presumably not in the best interests (or so they would have us believe) of most Americans.

Thus their impact on the electoral system, including who gets to vote and how, is indirect. U.S. corporations and other pillars of the U.S. economy help define the value system within which the mechanics of our elections are created and maintained, with an emphasis on how far the limits of acceptability extend. But to say their influence on our electoral system is indirect is not to diminish its importance. One shudders to imagine the level of discomfort such giants as Citibank, Halliburton, or the United Auto Workers would feel if massive numbers of new voters suddenly started determining the outcome of elections, and how they would respond.

Political Leadership

Ensuring the existence and vitality of political rights requires ongoing and careful vigilance. It is a cliché, but also a truism, that once rights are taken away, they may well prove difficult, and sometimes impossible, to replace.

This is especially true of voting rights. Unlike constitutional rights, especially those covered by the First Amendment, voting rights appear not to occupy a prominent place on the radar screens of most people. Because voting rights are taken for granted and frequently regarded as a privilege to be earned, the public generally affords them scant attention, especially if it is not election season.

But it is precisely for this reason that voting rights are so fragile, and those of certain groups can successfully be attacked, virtually with impunity. It is not the case that state and local voting officials work to protect the voting rights of all eligible voters and groups; too often, as the experience of the November 2008 general election reveals, partisan politics intervene to the extent that voting rights for some groups are threatened, as they were for African Americans in Ohio, Louisiana, Mississippi, and a few other places. Nor do federal courts consistently uphold and strengthen the voting rights of all citizens. In many instances in recent years they have done the opposite, perhaps culminating in the June 2008 Supreme Court decision allowing Indiana's draconian voter ID law to stand.¹⁴

Keeping voting rights at the forefront of public consciousness and demanding constant surveillance would seem in recent years to have become the responsibility of private groups and organizations. One thinks in this connection of the American Civil Liberties Union (ACLU), People for the American Way, the NAACP, the Brennan Center for Justice at New York University, Lawyers Committee for Civil Rights Under Law, Project VoteSmart, and the League of Women Voters, to name just a few. None of these has any formal constitutional or legal standing; rather, their task has been to investigate possible violations of voting rights and bring them to the attention of responsible public officials, including the courts. The latter, of course, may or may not respond positively, or at all.

From time to time, however, presidents and governors have pushed voting rights

as part of their agendas. One thinks of President Lyndon B. Johnson—shortly after the mayhem on the Edmund Pettus Bridge in Selma, Alabama, March 1965, as blacks sought their voting rights—invoking and endorsing the anthem of the civil rights movement, “We Shall Overcome,” as he addressed Congress, seeking voting rights legislation. Later that summer, LBJ signed the Voting Rights Act into law, regarded by many as the most significant piece of civil rights legislation ever passed in this country.

But presidential leadership has not always advanced the cause of voting rights. President Ronald Reagan, opposed to extending the Voting Rights Act, had to be persuaded to sign it as amended in 1982. During the administration of George W. Bush, the Department of Justice, including the Office of Civil Rights, became highly politically charged, to the extent that senior officials motivated solely by narrow partisan interests overruled the objections of career staff attorneys who claimed that Georgia's new voter ID law was too strict and potentially unconstitutional. Previously Georgians could have shown any of seventeen forms of ID at the polls and received a ballot, but under the new law only a specially digitized card issued by the state, costing \$20 and expiring in five years, would be acceptable. This was but one example of partisanship trumping voting rights in that administration. Throughout the whole sorry episode, Mr. Bush's silence on the potential impact of the proposed change on the voting rights of the poor, elderly, and peoples of color in Georgia was deafening.

Voting rights were also not enhanced when in 2000 the Republican governor of Florida, Jeb Bush (who was also his brother George's state election co-chair) authorized and used a list of some 57,700 alleged felons to disqualify otherwise registered voters from voting. The list was appallingly flawed and biased against African American voters, especially males. It turned out that many people on the list were not felons at all, and a large number who were felons had had their rights restored and thus should have been entitled to vote. Governor Bush may or may not have been aware of the flaws in the list, but nonetheless he supported its use throughout the state, with the result that thousands of eligible African American voters never cast ballots.

And during the 2004 presidential election another political executive, Ohio's Republican secretary of state, Kenneth Blackwell, failed to provide sufficient numbers of voting machines in inner-city, largely black precincts of Cleveland. The result was that many registered voters never got to cast ballots. Blackwell also achieved notoriety in subsequent years by pursuing and punishing a number of private organizations and community activists engaging in voter registration drives, and imposing such strict registration requirements (including at one point specifying the weight of paper that had to be used for forms) that it became virtually impossible for any but a few agencies to meet them.¹⁵

Thus, at least some of the blame for backtracking on voting rights is the result of failure of leadership by political executives. Facts require the observation that most of the activity, behavior, and language that has resulted in reduction or nar-

groups is brought into the design and administration of elections and the whole process made fully transparent, accountable, and open to public scrutiny, so will the public components of our elections be enhanced. And so, too, will voting rights be strengthened.

The tension between the public-private nature of our elections will be noted throughout this book. Indeed, most of the text illustrates just how “private”—in the sense developed here—our elections really are. We shall return explicitly to this issue in the concluding chapter.

A Note on the 2008 General Election

In the days immediately following the 2008 general election there was a good deal of political commentary in the print and electronic media assessing that it had gone reasonably smoothly, especially considering that turnout rose 9 million over 2004, to over 133 million voters. It is not clear why so many pundits and analysts reached the conclusion they did. Perhaps they were relieved that it did not turn into the Florida fiasco of 2000, or the 2004 Ohio turmoil that caused consternation and anger well beyond the borders of the Buckeye State.

In fact, the 2008 general election was anything but smooth. What gave it a reasonably pacific appearance on the surface was that it was not close at the presidential level in any state except Missouri. Barack Obama swamped his opponent John McCain throughout the land, and the Missouri results made absolutely no difference to the final outcome. So the election did not come down to a single closely fought, controversial state outcome as in 2000 and 2004.

At the Senate level, some contests were very close, and the results not known for some time after Election Day. Alaskans were slow to count provisional ballots, and it took more than two weeks to discover that Democrat Mark Begich won by a few thousand votes over incumbent, and convicted felon, Ted Stevens. Minnesota has in place a well-defined recount procedure that had to be employed to determine the nano-close race between Al Franken and incumbent Norm Carlson; it took until the summer of 2009 to resolve that contest. Georgia required a run-off between incumbent Saxby Chambliss and Democrat Jim Martin because neither reached the requisite 50 percent plus 1 mark.

Because of the way in which the close Senate contests were being resolved, could it not be argued, as so many did, that in fact the 2008 election was smooth, and produced fair, legitimate results? Perhaps. The problem is that this conclusion only works for what occurred subsequent to November 4. As it happened, the period leading up to Election Day was fraught with major difficulties. Indeed, it would have to be said that in many parts of the country there was a collective holding of the breath while events unfolded on Election Day as public officials, voting officials, lawyers from voting rights groups, civil rights organizations, much of the media, and even the public waited to see if an avalanche of disasters took place while people voted and ballots were counted.

The story of the 2008 election and its election troubles is recent history, and I encourage those wanting more information and documentation about what happened to avail themselves of a library or the Internet. What is important to point out is that the forces discussed earlier that serve to disenfranchise voters were in full force prior to November 4, 2008. Early on in the campaign, partisan politics were manifested in powerful ways to block access to the polls for some people. The Republican Party began crying “voter fraud” from the campaign’s beginning, and desperately tried to make an issue of ACORN and other voter registration groups, arguing that they were registering voters fraudulently. Actual documented cases of fraud were virtually nonexistent, however, and where errors had been made, they were corrected administratively. The *New York Times* reported on October 8 that in at least six “swing” states, voters were being illegally purged from voter lists.¹⁹ As early voting began in many states, Republicans again sought to force draconian methods for verifying voter ID, including matching of signatures with approved lists and demanding certain types of photo identification for new voters. Indeed, matters became so egregiously partisan and unfair that the U.S. Supreme Court—even with the addition of Bush-appointed justices John Roberts and Samuel Alito—overturned a federal appeals court decision and put a stop to GOP demands in Ohio.¹⁹ There were disputes in other states about the standards that Republicans insisted on for new voters (because there were millions of them in the 2008 elections) that may not have reached the Supreme Court, but were no less intense than the Ohio battle.

But matters did not stop there. As Election Day drew near, there were fears that local jurisdictions would not have enough election machines, or ballots, to accommodate the flood of voters that was expected. Early voters and absentee ballots undoubtedly helped relieve some of the pressure (the former reached record numbers), but there were numerous documented reports from around the nation of voters waiting on lines three, four, and more hours before casting a ballot.

Once voting began on Election Day, reports of trouble began almost immediately. Some difficulties were clearly silly, resulting from human error: in Virginia, one polling place did not open on time because a poll worker overslept; in Florida, one precinct could not open because someone had changed the locks on the door.²⁰ Other matters were more serious. There were numerous documented reports of voters arriving at their polling stations only to find that they had been purged from voter lists, for which they had no prior warning. In jurisdictions continuing to use touch-screen technology there were numerous reports of breakdowns, including machines that cast votes for candidates other than the voters’ choices. Even the more reliable optical scanning equipment became dysfunctional in some places because of electrical failures, jammed machines, inoperable or dirty scanners, and so forth.

The evidence is that while the 2008 general election may have gone smoothly at the macro level—at least compared to 2000 and 2004—at the micro level, where it matters most because that is the level of the individual voter, it did not.

10. Nonsystematic but credible data can be found in publications of such organizations and agencies as the United States Commission on Civil Rights, the Brennan Center for Justice at New York University Law School, Project VoteSmart, and others. Citations of these literatures will be given in ensuing chapters. However, an excellent recent volume documents, through careful historical, legal, and administrative analysis, the impact that local voting officials and practices have had on voting rights. See Alec C. Ewald, *The Way We Vote: The Local Dimension of American Suffrage* (Nashville, TN: Vanderbilt University Press, 2009).

11. Readers are reminded that in 2000 in Florida, there were documented reports from Palm Beach County that some African American voters were asked for two forms of ID, even though the law only required one. There were no reports that white voters there were asked for two IDs.

12. The young man with the Obama T-shirt is not the only documented case of a voter being turned away on account of "unsuitable" attire. Voters who appeared drunk have also been denied ballots, although there are no extant laws on the books that make public drunkenness a reason to disqualify a voter. Nor is eccentric behavior, such as might accompany nervous tics or idle chatter, catatonic or epileptic fits, grounds for disqualification, although voters have been denied ballots because they struck polling officials as acting strangely.

13. Readers interested in or concerned about this issue are urged to consult an insightful recent book by Frances Fox Piven, Lorraine C. Minnite, and Margaret Groark, *Keeping Down the Black Vote: Race and the Demobilization of American Voters* (New York: The New Press, 2009).

14. *Crawford v. Marion County Election Board*, April 28, 2008.

15. Blackwell was not the only state official to move to prevent private groups from registering voters. In Florida, the Republican-dominated legislature passed laws following the 2004 election to keep private groups from engaging in voter registration. They were so punitive and draconian that the League of Women Voters, which has been registering voters since its origin, ceased all efforts in the state to continue the practice. Later, the rules were suspended pending the outcome of litigation, but there is no question that the imposition of these rules had a chilling effect until 2007–2008, when the Obama campaign and Democratic Party actively recruited and registered new voters in the Sunshine State.

16. "Some Voters Purged from Voter Rolls," www.cnn.com/2008/POLITICS/10/26/voter.suppression/index.html, accessed October 27, 2008.

17. The Republican-dominated Florida legislature in 2005 limited the hours and days of "early voting" out of purely partisan interests. Governor Charlie Crist, in late October 2008, ordered that early voting hours be extended, contravening the legislation.

18. Ian Urbina, "States' Action to Block Voters Appears Illegal"; see also Myrna Perez, "Voter Purges," a report of the Brennan Center for Justice, New York University School of Law, September 30, 2008, found at www.brennancenter.org/content/resource/voter_purges/, accessed November 21, 2008. This is a comprehensive study of voter purges in twelve states.

19. "High Court Rejects GOP in Ohio Voting Dispute," MSNBC, October 17, 2008, www.msnbc.msn.com/id/27238980/; "US Supreme Court Upholds Ohio Voters' Rights," *Election Protection*, October 17, 2008, <http://8660urvote.articulatedman.com/newsroom/press-releases?id=0023>. Both accessed on November 19, 2008.

20. "Supreme Court Sides with Ohio Secretary of State," *Election Protection*, October 17, 2008, www.8660urvote.org/state/news?id=0052, accessed July 7, 2009.

Part I

Disenfranchisement as Public Policy

The Great American Tradition

Part I of this book consists of two chapters dealing with the American tradition of voter disenfranchisement. Some readers may be startled to learn that in fact the expansion of the franchise, and access to the polls, has been a long, slow, arduous, nonlinear, and incomplete process in the United States. But the conclusion from the historical and contemporary data we shall examine is incontrovertible: voting in the United States for most of our history was a privilege denied significant portions of the population, and even now is a right not universally enjoyed here.

2

Let Everyone Vote? Not on Your Life!

An underlying theme of this book is that of "disenfranchisement as public policy." This requires a bit of an explanation. In this book, "policy" refers to more than just what government does; "policy" is the rational attempt to attain objectives," as one recent author put it.¹ Other analysts suggest that "policy" is actually limited to the public sector.² Such a view seems unnecessarily narrow. As used here, policy does indeed refer to the actions of public bodies that seek to limit the franchise, whether by law or by administrative rules and procedures. But it also refers to more informal activity—customs, traditions, attitudes, beliefs, and behaviors (many of which are probably reflexive and unconscious) that have the effect of disenfranchising individuals or groups.

Examples abound that illustrate the point. Disenfranchisement of former slaves occurred widely throughout the South following the demise of Reconstruction. It was carried out through institutionalization of Jim Crow laws by state legislatures, but it also resulted from local practices and community prejudices. In the North, the Irish, and later Italians and other eastern and southern Europeans, were repeatedly victimized, harassed, and kept from voting, sometimes by law but more often by thuggery and intimidation.

Thus, a "great tradition" of the United States has been to implement policies of disenfranchisement. Whether that policy resulted from the specific acts of public bodies or was simply the result of local attitudes, beliefs, traditions, and customs is not very important. What is essential is the effect of those policies: in the United States a great deal of effort has gone into keeping some voters away from the polls, rather than welcoming them to cast ballots.

This chapter will look closely at the "great American tradition" of disenfranchisement. After a brief overview of the extent of disenfranchisement at the origins of the nation, we will examine the most egregious case: that of African Americans. We will also look at the struggle of women to gain the franchise and then turn our attention to Chinese immigrants. In the next chapter we explore the disenfranchisement of a variety of other groups. The goal of these two chapters is to show readers that in fact our policy of limiting the franchise goes very deep into the American past and, arguably, into the very soul of our nation.

Indeed, a reading of the history of this period indicates that far more effort went into shutting people out of the franchise than affording it to them.

Disenfranchising African Americans

Prior to the Emancipation Proclamation of 1863, most African Americans were slaves. True, by 1790 there were about 60,000 freedmen in the states, many in the South. By the dawn of the nineteenth century all of the Northern states provided some mechanism for emancipation. As a result, the number of freedmen rose rapidly, until there were about a half-million on the eve of the Civil War. Nonetheless, following the Revolutionary War the number of slaves had grown rapidly in the United States, reaching about 4 million in 1860, almost all in the South and border states. As Eric Foner points out, by that date the "South had become the largest, most powerful slave society the modern world has known."¹³

It is difficult for modern readers to grasp the significance and consequences of the slave society in the United States, so distant does it seem from the present. Perhaps it would help to note that in a slave society, slaves were not considered human. They were property, chattel—no different from clothes, a table, or a horse. Most importantly, because slaves were not considered human, they had no rights whatsoever. Perhaps this is the most difficult concept for the modern reader to grasp: we are, after all, accustomed to the idea that even the most depraved felons or prisoners of war have certain basic rights that cannot be (but unfortunately sometimes are) ignored. Slaves did not rise even to this level. Only to the extent that their owners treated them decently or afforded them limited privileges did they have the opportunity to live as non-slaves might. But this seldom happened, and even though it was in the economic self-interest of slave owners to keep their slaves reasonably healthy, most treated their slaves abominably. As Foner observes,

Slaves, of course, experienced the institutions of politics and the law quite differently from white Americans. Before the law, slaves were property who had virtually no legal rights. They could be bought, sold, leased, and seized to satisfy an owner's debt, their family ties had no legal standing, and they could not leave the plantation or hold meetings without the permission of their owner. Masters had almost complete discretion in inflicting punishment, and rare was the slave who went through his or her life without experiencing a whipping. The entire system of southern justice, from the state militia and courts to slave patrols in each locality, was committed to enforcing the master's control over his human property, and no aspect of their lives, no matter how intimate, was beyond the reach of his interference.¹⁴

It is well recognized that the existence of a slave society caused considerable discomfort and mental anguish throughout the United States, including in the South. Such major Enlightenment intellectuals as Thomas Jefferson and James Madison were deeply troubled by the presence of slaves, yet neither made any effort to free theirs. The slave society was an early example of "green handcuffs" in the South:

the existence of a plantation economy that depended totally for its success on an abundance of slaves meant that it was not possible to dump the system, even if the will had been present to do so.

The framers of the Constitution in 1787 were indeed troubled by the existence of the slave system, and of course there was deep division between slave and non-slave states over what to do about it. As is so often the case in the politics of document-drafting, the framers wrote around the issue. Neither "slaves" nor "slavery" is mentioned in the Constitution. Slaves were referred to as "other persons" in the document, as sanitary a euphemism as the writers could conjure. But the Constitution, as Foner notes, underscored and even strengthened the institution of slavery: "The Constitution allowed the slave trade from Africa to continue for twenty more years, required states to return to their owners fugitives from bondage, and provided that three-fifths of the slave population be counted in allocating electoral votes and Congressmen among the states."¹⁵

This latter point underscores the fundamental inhumanity of the eighteenth-century American view of slaves and slavery: they counted, for the purpose of enumeration, only as 60 percent of a person. Nowadays even convicted felons are counted as whole individuals for census purposes. Not so for slaves in the Constitution. Perhaps nothing underscores the capacity of the slave society to deny the basic humanity of slaves as the Constitution's failure to enumerate them as full, bona fide human beings.

Under these circumstances, it was not possible for slaves to vote; indeed, to award the franchise to them would have afforded them a measure of humanity, and that was inconceivable. Because they were property, they were no more entitled to the franchise than chickens, or a wagon, or cotton bolls.

Thus, it is of interest that as early as 1763 Virginia felt compelled to establish a law preventing blacks from voting; Georgia followed in 1777. Undoubtedly these measures were a result of the presence of black freedmen in the states; no one wanted them to vote either.

But the effect of these and other early race-exclusionary laws (South Carolina, 1790; Delaware, 1792; Kentucky, 1799)¹⁶ was to change dramatically the nature of disenfranchisement policy. No longer was it merely confined to slaves. In fact, race became a major focus of who could vote and who could not. It would be wrong to say that these early measures merely institutionalized racism in disenfranchisement policy; matters were much deeper and more pernicious, because these measures reflected early racial attitudes and views that were based on the supposed biological and moral inferiority of the black race. Even where blacks were not slaves, they were not to be considered in any way equal to whites. Indeed, they had to be kept apart from whites, and were to be afforded none of the rights and privileges that whites, even the poorest and most derelict of whites, could claim.

Thus, it was the development of American racial attitudes and views, not just the existence of slavery, that gave rise to policies of disenfranchisement of blacks. Institutionalized racism started very early in this nation's history, and one sees it

contained severe penalties against those preventing otherwise qualified citizens (including former slaves) from voting.²³

But in *U.S. v. Cruikshank*²⁴ and *U.S. v. Reese*,²⁵ the Supreme Court essentially gutted the Enforcement Act and, by extension, the Fifteenth Amendment, and significantly limited the application of the Fourteenth Amendment. In *Cruikshank*, the Court held that indictments against whites in Louisiana who had rioted to prevent blacks from voting, and who had in the process murdered more than 100, were illegal because the Fourteenth Amendment prevented state action against private citizens; thus, the amendment (and therefore the Constitution) offered blacks no protection against the wrath of private agents, including the Ku Klux Klan and its fellow travelers. In *Reese*, indictments against local voting officials who had declined to count the votes of blacks in Kentucky were dismissed on the grounds that the indictments did not specifically point to a racial intent to discriminate. "The Fifteenth Amendment does not confer the right of suffrage upon any one," Chief Justice Morrison R. Waite stated in writing for the majority.²⁶ It merely prevented the state from keeping otherwise qualified voters away from the polls on racial grounds, something that was not demonstrated in the facts of the case.

The effect of these decisions was to eliminate federal supervision of black voting in the South. Taken together, they placed enforcement of civil and voting rights in the hands of states, not the federal government. Indeed, they pushed the federal government out of the voting rights enforcement business altogether, as far as former slaves were concerned. Thus, the door was open for state officials to discriminate more or less as they pleased against African Americans seeking their civil and voting rights, with the recognition and knowledge that the federal government—including its army-of-occupation—would not intervene against them. Enter the era of Jim Crow.

As far as voting rights are specifically concerned, Jim Crow probably began in 1871, when Georgia passed a poll tax (in 1877 it was made cumulative, meaning that prospective voters had to pay back taxes before they could vote).²⁷ In theory, the poll tax was a revenue-raising device, but in fact it was a mechanism for keeping blacks (and poor whites) away from the polls. The tax, which spread widely to other Southern states, seems modest by today's standards—usually a dollar or two (unless it had to be paid cumulatively)—but in the sharecropper economy of the South (which operated on credit and barter, not cash) it was substantial. The poverty of the region was staggering, almost incomprehensible. In 1900, farms in Alabama were worth only \$4.84 per acre, compared to the national average of \$15.57; in Georgia the figure was \$5.25 per acre, in Mississippi \$6.30, and Texas \$4.70.²⁸ But these figures are deceptive because they do not account for race. Farm values and incomes of ex-slaves were less than half those of whites. Given the crushing burden of poverty that Southerners bore, especially African American Southerners, it is easy to see why a dollar or two tax paid to vote (assuming they would be allowed to vote even after paying) was not realistic for most Southern blacks.

The constitutionality of the poll tax was not seriously challenged until 1937, in

Breedlove v. Suttles.²⁹ In another amazing display of judicial blindness, the U.S. Supreme Court argued that there was nothing in Georgia's poll tax law (and, by implication, those in other states) that was designed to disenfranchise, and that it was in fact a legitimate mechanism for raising revenues. "To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment," the Court held, and it went on to point out, "Privilege [that word again] of voting is not derived from the United States, but is conferred by the state and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the state may condition suffrage as it deems appropriate."

Obviously this kind of judicial language constituted a license for states to impose whatever kind of tax requirements on potential voters they wanted; as late as 1921 at least twenty-six states, including all of the Southern states, imposed a poll tax or other tax-paying requirement as a prerequisite to voting.³⁰ And these requirements were effective in disenfranchising voters; the Michigan study referenced above estimates that in Georgia the poll tax "reduced overall turnout by 16–28%," and, citing J. Morgan Kousser, among blacks by at least 50 percent.³¹

The poll tax was finally eliminated by the Voting Rights Act in 1965. But it was by no means the only Jim Crow mechanism designed to disenfranchise black voters. Literacy tests and character testimonials were also commonly used, and not only in the South. As late as 1924, some twenty-four states imposed literacy requirements on prospective voters, including all of the Southern states.³² These could range from relatively modest requirements of demonstrating an ability to read, to requirements that prospective voters interpret sections of the state or federal constitution after reading them aloud to an election official. As it would often turn out, of course, it was far easier for whites to pass these "tests" than African Americans, even those who were well educated professionals. Local election officials would simply reject them out of hand, whereas interpretations offered by whites would be accepted. Literacy tests were also abolished by the Voting Rights Act in 1965.³³

Character testimonials were not as common or widespread as literacy tests, but like the latter, they were differentially and racially applied. Prospective voters would be forced to provide at least one affidavit stating that they were of "good character." Those offering testimonials would usually have to be registered voters, which, in the South, overwhelmingly meant whites. Thus, a potential black voter would have to find and convince one or more registered white voters to vouch for his "character," something that was virtually impossible. The legal basis of character testimonials was never clear, nor was it always explicit; it was more frequently one of those local mores or customs used by voting officials to keep blacks from the polls. With the advent of the Voting Rights Act, especially its ability to force names onto registration lists, and the presence of federal monitors in covered areas, character testimonials were deservedly relegated to the scrap heap of history.

The all-white primary was another mechanism designed to disenfranchise blacks during the Jim Crow era. It was a product of the one-party system in the

blacks were denied any form of civil rights, including voting rights. Even after the period of slavery ended, they were still denied, either as a matter of law, Supreme Court decisions, or state and local practice. Much of this happened, it must be said, with the approval—either tacit or explicit—of agents and agencies of the federal government.

But beyond these formalisms was the indifference and acquiescence of white Americans to the continued disenfranchisement of African Americans. From presidents (except for Harry Truman, Lyndon Johnson, and, toward the end of his life, John Kennedy) on down, Americans turned a cold shoulder to the civil and voting rights plight of their fellow citizens. Once Reconstruction ended, very few whites cared anymore, and those who did were shunned, ignored, or (in some cases) persecuted like blacks were.⁴⁸

Nor have African Americans fully won their voting rights. As we shall see elsewhere, there are continuing instances—entirely too many—in which they have been denied the right to vote. Indeed, as Frances Fox Piven and her coauthors recently demonstrated, there are ongoing efforts in this country by government officials and others, including those responsible for voting rights, to demobilize black voters.⁴⁹

This is not a discussion of where to place the responsibility for what happened. But it is appropriate to point out that the policy of black disenfranchisement in America is a result of decisions made and acquiesced to by whites.⁵⁰ African Americans did not create their own disenfranchisement, nor did they ask to be denied the right to vote. It was whites who created the policy of black disenfranchisement, by their actions and inaction, by their willingness to “go along” with and perpetuate traditional customs and beliefs of prejudice, intolerance, indifference, and bigotry. Few were the white voices that spoke out against this tradition. It is surely one of the most shameful strands in the long history of white political culture in America.

Women's Suffrage

Just as it is impossible to fix with certainty the date when the civil rights movement began, so is the origin of the women's suffrage movement uncertain. No one knows when the first woman wondered, to herself or out loud, why she did not have the right to vote even though at least some men did. A reasonable place to begin, however, would be with the publication in 1792 of Mary Wollstonecraft's *Vindication of the Rights of Women*.⁵¹ Strictly speaking, the *Vindication* is not a text devoted to women's suffrage. It is generally regarded, however, as one of the first thoughtful, even philosophical, works on women's rights published in the West, as it advocates equality of the sexes.

The beginnings of the American version of the women's suffrage movement might be a little easier to affix. In 1840, a group of American women, headed by Lucretia Mott of Philadelphia, attended the World Anti-Slavery Convention in London. Mott was a prominent Quaker preacher and public intellectual, and

founder in 1833 of the Female Anti-Slavery Society in Philadelphia.⁵² Mott and her colleagues were not allowed to address the convention, however, solely on grounds of gender. Incensed, Mott and another participant, Elizabeth Cady Stanton, resolved that when they returned to the United States, they would convene a women's rights convention.⁵³

It took until 1849, but Mott and Stanton did preside over a gathering in Seneca Falls, New York, on July 20. That historic meeting and its aftermath sounded the opening bell in a fight that would last more than fifty years, and would culminate in the 1920 ratification of the Nineteenth Amendment granting voting rights to women. Indeed, it was but four years after Seneca Falls at another women's rights convention held in Syracuse that Susan B. Anthony made her famous speech arguing that “the right women needed above every other . . . was the right of suffrage.”⁵⁴

In fact, issues of women's suffrage preceded Seneca Falls by quite a bit. As Keyssar points out, as early as the Revolutionary War there were some who held the view—albeit distinctly a minority one—that all “inhabitants” with a “stake in society” should be allowed to vote. This was generally interpreted to include women, particularly widows and other women who owned property. As early as 1776, New Jersey had a provision in its constitution reflecting the “stake in society” argument, and it was followed by a 1790 election law implementing it.⁵⁵ The effect was to grant the franchise to at least some women in the state.

No other state moved as far as New Jersey in this early period, and in fact, in 1807 New Jersey took the remarkable step of rescinding women's voting rights. Why it did so is not exactly clear. According to Keyssar, the state seemed not so much concerned that the effect of women's suffrage would break up the family or to allow unqualified and incompetent women to vote as it was determined to correct “defects” in the state constitution and to clarify “doubts” about what exactly constituted the “legitimate” electorate. But once that happened, “women everywhere in the nation were barred from the polls.”⁵⁶

The Reconstruction proposals for the Fourteenth and Fifteenth Amendments provided another opportunity for the women's suffrage movement to put its agenda before the public. It gained virtually no traction. While there were a number of issues considered, two were fundamental. First, there was a question of whether or not the language of either amendment included women's suffrage. The Fourteenth Amendment speaks, in Section 2, only of “male inhabitants,” and later in the section, of “male citizens” as potential voters. But Section 1 seemed to offer some hope to women in its gender-neutral statement that “nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws.” It was the “any person” language that seemed to open the door, if only by a small crack, to women's suffrage. The problem for advocates of women's suffrage was that very few people outside the movement—and even a surprising number within it—accepted the view that “equal protection of the laws” included voting. But there was an even more fundamental constitutional problem: because voting was seen as a state function, it was not even clear, at that early date, that the Fourteenth

Later it was learned that Burn had received a telegram from his mother, which he held in his pocket, urging him to "be a good boy" and vote for women's suffrage. For his trouble, Burn had to jump out a third floor window of the Capitol and go into hiding in the attic to keep from being dismembered by outraged amendment opponents.⁶⁵

What was behind all this? Why did it take so long for women in the United States to secure the right to vote? The easy answer is male chauvinism, of course; men didn't want women leaving hearth and home to participate in the act of voting, traditionally an exclusively male activity. A better answer is cultural inertia; for nearly two thousand years there was no Western impulse—at least not in any formal, organized, or institutional manner—to permit women to vote or, indeed, to participate in public affairs in any but the most tangential way. A woman's place, whether she was married or not, was at home, not in the public square. While it would be incorrect to say that the idea of women's suffrage did not exist before the publication of Wollstonecraft's treatise, in fact as a political and social movement it had little traction prior to the nineteenth century. Undoubtedly the role that women on both sides of the Atlantic played in the antislavery movement, whose roots lay in the first decades of the nineteenth century, served as a major catalyst for events that culminated in the Seneca Falls convocation in the summer of 1848.

Indeed, the wonder is not that it took so long for American women to secure the franchise but that it happened at all. Efforts to include women were slow and sometimes painful, as noted women activists for suffrage were not infrequently severely mistreated. The United States was very slow to grant the right to vote to women. New Zealand was the first nation to do so, and that did not happen until 1893. Some twenty-six nations worldwide gave women the franchise before the United States finally did in 1920.⁶⁶

All sorts of objections were raised during the nineteenth century to the idea that women should be able to vote. To the modern reader they may seem bizarre and ridiculous, but there seems little doubt that they held great currency a century ago and more. While it is not possible to list all of the objections here, a few can briefly be mentioned: women are not capable of voting; women are different from men, less rational and more emotional; all women tend toward the hysterical and thus need not be taken seriously; women are too weak to vote ("Once a woman arrived [at the polls] she would have to mingle among the crowds of men who gathered [there] . . . and to press her way through them to the ballot box. Assuming she reached the polling place, she might get caught in a brawl and given women's natural fragility, she would be the one to get hurt"⁶⁷); it's a woman's job to take care of the household and family, and to raise children, not to vote; dire consequences would occur if women secured the vote, including jeopardizing national security ("Allowing women to vote would lead to foreign aggression and war"⁶⁸); allowing women to vote would increase fraud, because they could hide extra ballots in their "voluminous sleeves" and thus cast multiple votes.

Women, of course, fought back at every turn, and made it very clear that these

accusations and attitudes were baseless. Howard Zinn quotes Rose Schneiderman of the Garment Workers, who at a feminist rally at Cooper Union denied that if women could vote they would lose their essential femininity:

Women in the laundries . . . stand for thirteen or fourteen hours in the terrible steam and heat with their hands in hot starch. Surely these women won't lose any more of their beauty and charm by putting a ballot in a ballot box once a year than they are likely to lose standing in foundries or laundries all year round.⁶⁹

In spite of sensible statements like this one, notions and rationalizations denying women's suitability as voters persisted. And there was, in fact, a very powerful political force preventing the rapid spread of women's suffrage in the United States: many women opposed it. It was not solely men who successfully kept women from voting. As Sara Hunter Graham points out, even as the women's suffrage movement had a kind of renaissance at the beginning of the twentieth century, so did opposition increase as well.⁷⁰ Many of the opposing organizations were well funded and organized, and counted among their members urban women of substance and social prominence. But opposition extended into smaller towns and villages as well, and as we noted, it was especially pronounced in the conservative Southern states. It wasn't until pro-suffrage activists and organizations made the leap from social movement to skillful, savvy political lobby that the tide of public opinion began to turn in their favor.⁷¹

To reiterate, there was nothing inevitable about women's securing voting rights in the United States, unless one wants to adopt a history-as-progress perspective. In the case of women's suffrage, such an interpretation would be unjustified. Women's suffrage in this country was achieved only after decades of blood, sweat, and tears, repeated setbacks, and enormous dedication on the part of skilled, committed leaders such as Susan B. Anthony, Lucretia Mott, Elizabeth Cady Stanton, and a number of others. Indeed, the ultimately successful struggle for women's suffrage achieves meaning only when seen in the context of the long tradition of American disenfranchisement; it didn't have to happen, but the fact that it did only after Herculean labors shows just how intransigent and grounded were the forces allied against it.

Chinese Immigrants

Disenfranchisement as public policy can also be seen in the case of the vast waves of immigrant groups that came to the United States beginning in the decades before the Civil War, and which grew to tsunami proportions from the 1870s until World War I. Indeed, virtually all groups—national, ethnic, and religious—whose origin was not northern Europe or the British Isles experienced substantial, in some cases severe, levels of discrimination, including denial of the franchise. Irish Catholics and eastern, central, southern, and southeastern European immigrants (many of

recently documented cases (AALDEF Report to Congress, March 19, 2009) in which U.S. citizens of Chinese and other Asian descent were not allowed to vote, in part because of noncompliance with Voting Rights Act language requirements, but in some cases because local voting officials refused to recognize these voters' credentials (especially in the case of first-time voters). These officials also engaged in other harassment practices, including illegal demands for identification. AALDEF also reported 214 hate crimes against Asian Americans in the United States, as well as the use of overtly racist tactics designed to keep them away from the polls on Election Day 2004 in New Jersey.⁸⁰

Conclusion

My investigation of three groups in this country—African Americans, women, and Chinese Americans underscores the point of this chapter: disenfranchisement of targeted populations has long been part of the public policy of this nation. Other groups could also be held up as examples of American policies of disenfranchisement. Native Americans and Alaskan indigenous populations come to mind. Indeed, it may be fair to say that the policy of extending the franchise to immigrant groups existed only in carefully controlled, limited circumstances (as we saw in Chapter 1). In the main, most groups that did not consist of white Anglo-Saxon Protestant men were widely prevented from voting.

Eventually women secured the franchise because of the Nineteenth Amendment; whatever problems women have in voting today are generally not a function of their gender but of something else. But for African Americans and Chinese Americans, the struggle to vote continues. Hard data and anecdotal evidence from the 2000, 2002, 2004, and 2006 elections reveal that these two groups continue to be the victims of discriminatory practices whose purpose is to prevent them from voting. And so it is for other groups; evidence from California in 2006, for example, reveals that other Asian American citizens, especially Vietnamese, were prevented from voting. Other examples of similar ilk surfaced in the 2008 elections.

This chapter forces us to look at a question posed earlier, and to which we will return again: how far do Americans really want to extend the franchise, especially to nonwhite fellow citizens? This same question will form the basis of our investigation in the next chapter, when we will look at the disenfranchisement of some other population groups, those who are even further outside "mainstream" America than African Americans and Chinese Americans.

Notes

1. Deborah Stone, *Policy Paradox* (New York: W.W. Norton, 1998), p. 37.
2. David L. Weimer and Aidan R. Vining, *Policy Analysis*, 2d ed. (Englewood Cliffs, NJ: 1992), Chapter 1.
3. Data for this section draw heavily from the tables in Alexander Keyssar, *The Right to Vote* (New York: Basic Books, 2000), pp. 339–402.

4. *Ibid.*, p. 340.
5. *Ibid.*, pp. 340–341.
6. *Ibid.*, p. 341.
7. *Ibid.*, pp. 340–341.
8. *Ibid.*, p. 54.
9. *Ibid.*, pp. 54–55.
10. New Hampshire was the first state to eliminate property requirements, in 1792. American Civil Liberties Union, Voting Rights Act Timeline. Viewed at www.votingrights.org/timeline/?year=1700, accessed July 13, 2010.
11. Keyssar, *The Right to Vote*, p. 348.
12. *Ibid.*, pp. 349–353.
13. See the expert testimony of Eric Foner, *Gratz v. Bollinger* (02–516), 539 U.S. 244 (2003). Viewed at www.vpcomm.umich.edu/admissions/legal/expert/fooner.html, accessed October 10, 2007.
14. *Ibid.*
15. *Ibid.*
16. Keyssar, *The Right to Vote*, p. 354.
17. *Ibid.*, p. 354.
18. As late as the mid-twentieth century, journalist Edward R. Murrow could quote a Southern farmer as saying, "We used to own our slaves, now we rent them." Edward R. Murrow, *Harvest of Shame*, CBS Reports, November 25, 1960 (videotape).
19. See, for example, the Louisiana Black Code of 1865, which sharply curtailed the economic activity in which blacks could engage. Viewed at <http://lsm.crl.state.la.us/cabildo/cab11.htm>, accessed July 13, 2010.
20. See V.O. Key, Jr., *Southern Politics in State and Nation* (New York: Vintage Books, 1949); C. Van Woodward, *Origins of the New South* (Baton Rouge: LSU Press, 1951); Woodward, *The Strange Career of Jim Crow* (New York: Oxford, 1966); J. Morgan Kousser, *The Shaping of Southern Politics* (New Haven: Yale University Press, 1974); Foner, expert testimony.
21. Numan V. Bartley and Hugh D. Graham, *Southern Politics and the Second Reconstruction* (Baltimore, MD: Johns Hopkins University Press, 1975).
22. Woodward, *The Strange Career of Jim Crow*.
23. See United States Department of Justice, Civil Rights Division, "Introduction to Federal Voting Rights Laws," July 25, 2008. Viewed at www.usdoj.gov/crt/voting/intro/intro_a.htm, accessed July 7, 2009.
24. *U.S. v. Cruikshank*, 92 U.S. 542 (1875).
25. *U.S. v. Reese*, 92 U.S. 214 (1875).
26. See the discussion at www.gpoaccess.gov/constitution/html/amdt15.html, and U.S. Supreme Court Center, www.justia.com, 2005. Viewed online at <http://supreme.justia.com/constitution/amendment-15/07-congressional-enforcement.html>. Both viewed July 7, 2009.
27. Race, Voting Rights, and Segregation, "Techniques of Direct Disenfranchisement, 1880–1965." Viewed at www.umich.edu/~lawrace/disenfranchise1.htm, accessed July 7, 2009.
28. U.S. Census of Agriculture, 1920 and 1930, Chapter 1, "Farms and Farm Property." Viewed at <http://www2.census.gov/prod/20decennial/documents/0337983v4ch02.pdf>, accessed July 13, 2010.
29. *Breedlove v. Suttles*, 302 U.S. 277 (1937).
30. Keyssar, *The Right to Vote*, pp. 368–369.
31. Kousser, *The Shaping of Southern Politics*, pp. 374–379.
32. "Techniques of Direct Disenfranchisement."
33. Any number of analysts have pointed out that the instructions accompanying the

Gaming the System: Disenfranchisement by Other Means

Thus far in our survey of voter disenfranchisement we have looked at an array of hurdles that those wishing to cast ballots must overcome in order to do so, as well as having said ballots recorded and counted accurately. We can conclude from these discussions that American policies on voting—consisting of laws, practices, rules, customs, and attitudes—make voting onerous for many people, and impossible for some who should be eligible, rather than easier for all.

But the issue of disenfranchisement extends beyond the machinations of those who want to limit ballot access. There is a deeper, and more pernicious, way to disenfranchise voters: people can be allowed to cast ballots, but by a variety of devices and structures those votes can be rendered meaningless. In other words, it is possible to allow people to cast ballots and to count them accurately, but to ensure that they have little or no effect on the outcome of an election.

When this happens, it qualifies functionally as disenfranchisement every bit as much as do the practices and rules and procedures that we have examined in previous chapters. But it might actually be more insidious, because it is not necessarily obvious to voters, or the public at large, that "the system" has been gamed to prevent their votes from influencing or determining the result. If this is the case, even if only in some circumstances, can we not conclude that the formalism of the election becomes merely a hoax, a charade, or a mirage—a sort of electoral Potemkin village, all front and no substance? If it occurs more than just "occasionally"—as I will try to document here—then can we not say that our democracy has far less meaning than we are taught, indeed that our democracy has serious, even potentially fatal, flaws?

Dr. Martin Luther King, Jr., understood this matter very early in his civil rights career. He recognized, as Southern blacks pursued the right to vote denied them by public officials, that unless and until blacks had the franchise they could not be regarded as full-fledged, first-class citizens.

In this sense, King saw that there was a powerful symbolic element to the franchise. It was a definitive indicator of one's status in the political community. But he also saw that there was an instrumentality to the vote as well, that is, it was a mechanism by which one could influence what happened in the community, state,

election fraud scarcely occurs in the United States any more.² Voter fraud exists mainly in the minds of people who want to limit the franchise, to keep "undesirables" (too often, read Democrats or Democratic fellow travelers) away from the polls. Efforts to "eradicate" voter fraud mainly have the effect of disenfranchising otherwise eligible voters.

Voting fraud is another matter entirely. It has been and probably still is endemic in our electoral politics. As Tracy Campbell has shown in his masterful study of election fraud in the United States,³ it has been with us since before we were a nation. We might even say, to paraphrase H. Rap Brown, that voting fraud is as American as cherry pie.

What is voting fraud? It is deliberate manipulation of election practices to ensure results favorable to those controlling election machinery. How is it done? The techniques are as varied and wide-ranging as human imagination can conceive. The following is a partial but suggestive list of the ways in which voting fraud has been carried out:

- Ignoring the actual results of ballot counts and declaring victory;
- Over-counting ballots favorable to the candidates of those controlling election machinery;
- Under-counting ballots cast for the candidates opposed by those controlling election machinery;
- Stuffing ballot boxes;
- Creating fake ballots for favored candidates (e.g., voting cemeteries, drawing up false lists of registered voters and casting ballots on their behalf, claiming voters in a different state/county are actually registered in the relevant jurisdiction);
- Rigging or jimmyming election machinery so that it does not accurately record voters' preferences (this can be done on old-time gear-and-lever voting machines, punch-card systems, optical-scanning devices, and touchscreen equipment);
- Denying that voters registered in a given jurisdiction are in fact qualified, thus denying them access to the ballot;
- Rigging or jimmyming vote-counting devices or computer programs so that voters' preferences are not accurately tallied, the rigging done so that ballots for favored candidates are counted correctly but not those for nonfavored ones;
- Manipulating absentee ballots by creating fake ones, ignoring or "losing" others, miscounting those submitted, or changing the rules in mid-election for what constitutes a legitimate absentee ballot;
- "Losing" or misplacing ballots—whole boxes if necessary—before, during, even after vote counting has taken place;
- "Finding" uncounted ballots at the eleventh hour favorable to the candidate(s) of those controlling the election machinery;

- During recounts, disqualifying ballots, especially those for the opposition, whether absentee, early, or Election Day votes, by changing the rules under which they are judged acceptable or unacceptable;
- Ignoring or "losing" ballots from "inconvenient" precincts.

Again, this list is not exhaustive. The question however is not how long is the list of fraudulent election activities, but how and why could these activities be carried out with relative impunity? And how long has this been going on?

The answer lies in several places. For starters, electoral fraud in this country is hard to document or to prove in court if matters get that far. Courts, for the most part, have been reluctant to intervene unless the fraud carried out is so egregious that it cannot be swept under the carpet. As a result, legal redress for those claiming fraud has been highly problematic. And there is the "boy who cried 'wolf'" syndrome: claims of electoral fraud are so commonly heard from losers that their credibility is usually in doubt from the start. Then, too, officials controlling election machinery are rarely held to account, and in some ways have effectively operated in the shadows, away from public scrutiny. Other officials are reluctant to criticize them, as they themselves are obviously successful products of the political machinery in place when they were elected (whether fraudulent or not). As to protests about the conduct of elections, including allegations of fraud, editorial writers, good-government groups, academics, and pundits can largely be ignored, as it is rarely clear that they speak for anyone other than themselves. And too often the evidence they present is scanty, or unconvincing.

Examples of fraud are legion, as Tracy Campbell and other scholars have shown. But a few might be mentioned by way of illustrating how fraudulent electoral practices have worked over time. In the presidential election of 1876, Democrat Samuel Tilden of New York gained a popular vote lead over Republican Rutherford B. Hayes of Ohio, but not a majority in the Electoral College. Returns in three states—Florida (where else?), Louisiana, and South Carolina—were manipulated and traded to throw the election to Hayes. In the late nineteenth century, Tammany Hall of New York City was known to boast that the outcome of the election was never in doubt, because Tammany could and did declare the winner(s) while the polls were still open. Tammany was completely indifferent to the actual vote total, even if it were ever revealed/know. In the first decades of the twentieth century, Ed Crump of Memphis established a powerful statewide political machine and ensured the electoral success of his candidates by barging African Americans across the Mississippi River from West Memphis, Arkansas, on Election Day, giving them cash and firewater after instructing them on how to vote. In 1948, Lyndon B. Johnson of Texas gained the moniker "Landslide Lyndon" after the last-minute "discovery" of ballots favorable to him (all conveniently in alphabetical order) in some remote precincts, enabling him to win a U.S. Senate seat by eighty-seven votes out of nearly one million cast. Fraud was suspected but never proven in 1960 when Mayor Richard J. Daley of Chicago held back vote totals from his city until after

U.S. House races (42 percent).⁹ In Florida, 6 of 20 state senate incumbents (30 percent) were unopposed in 2008, and 34 of 120 House incumbents (28 percent) got a free ride. In many of the Florida contests—including those involving U.S. House incumbents, where all had opponents—opposition can most charitably be called “weak,” with challengers’ chances of winning ranging from slim to none. It is likely that the same is true in other states.

Explaining why incumbents in legislative races have such an extraordinary advantage is beyond the scope of this book. Money, money, and more money accounts for most of the explanation, as incumbents vacuum it up faster and in greater quantities than their challengers. Also important are name recognition, party backing, lobbyist support (in addition to money), easy access to free publicity by the media, casework on behalf of incumbents, favorable legislative districting, and other factors.

Our concern is not to explain this phenomenon, but to consider its impact on the meaning of the vote. It is strongly negative. Surely it is hard to argue that a vote has much meaning in a contest that does not exist because there is no opposition, or where the opposition is so weak as to represent no threat to the incumbent at all. Indeed, in those many legislative contests that are essentially over before they begin, perhaps the wonder is that anyone bothers to vote at all. They are examples of gaming the system, and they represent another way of functionally disenfranchising voters.

Districting

Districting is a mechanism through which all residents of a given jurisdiction—not just citizens, not just voters—are represented in legislative chambers. If we had a fully participatory democracy—the much-mythologized “New England Town Meeting” comes to mind—we would not need districts, because individuals would represent themselves. But we don’t, and so we do.

Americans adopted a system of choosing representatives to legislatures by means of districts—discrete geographic entities—before we even became a nation. Voters would choose from a list of candidates the person or persons who would act on their behalf in legislative chambers. There are a host of ways to do this, of course. In single-member districts (now the most common) only one representative per district is chosen, whether to the U.S. House of Representatives, state legislature, or local council or board.¹⁰ But in the past, multimember districts have been used, in which voters selected more than one representative per district. “At-large” districts for local legislative bodies are similar to multimember ones, in that voters choose from a number of candidates for all contested seats; some at-large systems require “residence districts” in which candidates must live within discrete geographic areas, but are voted on by all voters in the jurisdiction.

Drawing district lines is arguably the most complex, controversial, and political act in which legislators are involved. State legislatures draw district lines for the

U.S. House of Representative as well as for their own members.¹¹ Local councils and commissions draw lines for theirs. How the lines are drawn, the technology used, and the political and legal dynamics that go into the process are matters that unfortunately would take us far afield from the scope of this book, important (and interesting) as they are.

But two issues in districting are of such paramount importance to the thrust of this chapter that they require some attention. First, legally, all districts in a given jurisdiction must have equal populations.¹² This is true whether the legislative body is the U.S. House of Representatives or a local council; all the congressional districts in a given state must contain the same number of people, and while courts have allowed state and local legislative bodies slightly more wiggle-room than for congressional seats, most districting plans for these entities attempt to conform closely to the equal-population standard unless there are extenuating circumstances.

Second, political parties will do whatever they can, including engaging in titanic power struggles, to maximize the number of seats that they can win and hold. Individual legislators will also engage in the same kind of behavior and activity to ensure that their seats are as “safe” as possible. The phrase “titanic struggle” actually understates the lengths to which parties and individual legislators will go to maximize their strength and protect themselves. By most accounts, the rancor, acrimony, bitterness, partisan pushing and shoving, and individual battles pitting colleague against colleague (sometimes even within the same party) surpass by far even the most ferocious legislative fights over budgets or policy issues. Districting always leaves blood on the floor of legislative chambers, and especially at the state level (but sometimes at the local as well), the whole matter often ends up in federal courts, as aggrieved parties try to find satisfaction there and winners attempt to defend what they have done as constitutional and legitimate.

These two major districting issues help us see how the whole process affects the meaning of the vote, and potentially functionally disenfranchises some voters. Drawing lines for districts is *not* politically neutral. Lines are deliberately drawn to maximize the number and power—or at least the political inclinations—of some voters while at the same time minimizing those of others. Party leaders want district lines that will ensure that their members are a majority in the legislative chamber, as great a majority as possible, and will stay that way until the next districting cycle. Individual legislators want to make their elections and reelections as safe and predictable as possible, and thus want districts that aggregate the vote of “their” kind of people and minimize that of others.

It is not hard to see what happens next. Architects of districting plans survey the political landscape, finding and harvesting “desirable” voters and drawing lines around them, enough either to create an actual or a functioning majority (the latter is determined by projected turnout rates). “Undesirable” voters—that is, those not likely to support candidates of the architects’ party or interests—can be dealt with in several ways. The most common is to “crack” them, that is, to draw lines splitting them into several different districts, thus diluting their voting strength. Another

them, and the election goes into the record books. Matters quiet down, and people turn their attention elsewhere.

But the truth is different from this scenario of "normalcy." It is still possible to disenfranchise voters even after the polls have closed and all the ballots have been cast and counted. It can be done through recounts, and by action of courts. It is another way of gaming the system, in this case not just to disenfranchise voters but potentially to determine the outcome of an election, even to the point of overturning the results of the popular vote.

States provide for recounts of ballots following their initial tabulation. The standards vary, but generally recounts are automatic if the results are so close as to fall within a very narrow range. In the 2000 presidential election in Florida, for example, the standard was 0.5 percent of the vote—in other words, if candidates' vote totals were within a half percent of one another, a recount was mandated, at public expense.²⁶ Other states have comparable thresholds and parameters requiring recounts if results are close, although the numbers may vary.

It is also possible for candidates to demand recounts even if the results fall outside of the specified range. Losing candidates often make such demands and requests, particularly if they allege voting fraud, although in most states they have to pay for the recounts from campaign funds if the spread of voting returns exceeds the percentage differential for which the state will pay.

Why are recounts allowed? We already alluded to one reason: the possibility of electoral fraud. If there is suspicion that ballot boxes have been stuffed; if ballots are missing; if there are more returns from one precinct than there are registered voters; if there is reason to think ballots have been mismanaged or tallied inaccurately; if there is suspicion about the way in which election officials have acted; if there are serious doubts about the accuracy and adequacy of the technology (software or hardware) involved in e-voting—the list is endless. All of these can give rise to recounts, sometimes by court order.

But another reason for recounts is technical. If the results of an election are so close as to fall within the margin of error of the tabulating equipment or computer programs, then it is impossible to say what the true results are. Only a manual recount can reveal voter preference. This, of course, is exactly what occurred in the 2000 Florida presidential election. The margin of error of the punch-card devices so widely used exceeded 3 percent, and the error rate of some of the optical-scanning equipment (especially the atavistic kind used in African American precincts) was not much better. These machines could not count accurately at the nano-level required by the closeness of the election. Only manual recounts could reveal the true results. Minnesota ran into a similar problem in its 2008 U.S. Senate election. Although it used a sophisticated optical-scanning system for voting, the results were so close (at most a few hundred votes) that lengthy manual recounts were required before there was even a glimmer of discerning who actually won, and even then the ballots ended up in court for further consideration.

It is for this reason that recounts should automatically be mandated when the

margin between the candidates, in percentage terms, falls below the error rate of the technology used for voting. As noted in Chapter 5, results of vote tabulations should always be seen as probability statements. When the candidates' final margin is greater than the error rate, the totals will tell with some degree of certainty (the greater the margin, the greater the certainty) who won. But if the margin is below the error rate, there is no way to tell. The announced results are just a guess, or a political gambit, and a manual recount becomes essential.

But therein lies the rub, and the politics, of recounts. Which ballots are to be recounted? All of them, across the whole jurisdiction? Only in some counties? Which counties? Why? All the precincts in the county, or just a sampling? How is the sample to be drawn? As we have seen so often before in this book, the devil is in the details. How these and other questions are answered will determine whether or not every vote will count, or whether some get shoved aside, with the result that some voters will be disenfranchised even though they cast ballots.

And then there is the question of how recounts are to be carried out. Every state has its own procedure, and if Florida is not the modal example it is at least illustrative of how the process generally works. State law provides that in the event of a recount, the county convenes an election canvassing board consisting of three officials: the supervisor of elections, the chair of the county commission, and a county judge. These individuals are authorized to examine each and every ballot and make a determination of how it was cast. The process is to be carried out in public, in the presence of representatives of the candidates (or the candidates themselves), observers sent by the political parties if it is a partisan election, and open to the media, indeed, the public generally.

The process is intensely political, not mechanical. In the year 2000, there were major differences and arguments on canvassing boards as to how ballots were to be recounted (the same was true during the 2008 Minnesota recount). Readers will recall photos plastered all over the electronic and print media (this was in the days before YouTube and Facebook!) with members of canvassing boards squinting at chads, trying to determine how individual ballots were to be tallied. In some cases—Miami-Dade County is the prime example—extraordinary political pressures were brought to bear on canvassing board members to "till" the recount one way or the other; there was even a mini-riot outside the offices of the Miami-Dade Supervisor of Elections where the recount was being conducted, interfering with the proceedings and intimidating board members to such an extent that the recount was shut down. While this degree of fervor is not the norm, candidates, the parties, their lawyers, and the media—who desperately want a winner—do bring pressure to determine and indeed influence the outcome. The rush to judgment, then, speeds up the process, which greatly increases the chances of carelessness and error.

And there is no agreed-upon set of standards to be used in determining how a ballot is to be counted. Standards can vary from county to county, across the whole state, and from one state to another. The general standard by which the boards operate is to determine the "intent" of the voter. While seemingly simple, in practice it

And for the most part, courts, when they do intervene, are hesitant to overturn even disputed election results, arguing that it is not their place to disregard or displace the will of the people unless egregious mistakes or misbehavior can be incontrovertibly documented.

There is a host of literature written by legal scholars and jurists addressing the question of whether or not courts should get involved in elections after the fact. For example, after the 2000 decision of *Bush v. Gore*, an avalanche of books, law review articles, and more general literature appeared, and a considerable number of scholarly symposia were held, in an attempt to address the question of whether court intervention in election results was a good idea or not.³¹ As one might expect, the range of opinion was staggering.

Our concern in this chapter is not with the question of whether or not judicial intervention is good or bad, desirable or undesirable. Instead, it is what happens to the individual vote, and voter, when intervention does occur, especially if votes are thrown out and/or results overturned? One of the more shocking developments in the run-up to *Bush v. Gore* was the manner in which courts—state and federal—ran roughshod over election results. Indeed, courts—goaded by lawyers, candidates, parties, and the media—never allowed the Florida recount process to work. Instead, courts insisted on deciding which recounts were permissible and which not (and thus which votes were to be counted and which thrown out).³² A host of decisions from a variety of courts resulted in mass confusion, uncertainty, and a general sense that not only had Florida's county electoral canvassing boards been preempted, but individual voters were thrust aside, their ballots mere grist for legal and political mills, cannon fodder for the enormous legal and political forces at work that were on display nightly on the national news. Florida's statutes, legal procedures for contesting elections, its constitution, even the very federal system itself, were ignored, wrenched apart, and trampled on as court after court, climaxing with the highest court in the land, issued verdict after verdict and finally a decision that had painfully little to do with voters' preferences or the ballots they cast.³³

In truth, court activity following the 2008 Minnesota U.S. Senate election has been much more low-key, and the courts involved appear to have moved more slowly and with greater concern for the integrity of the electoral and recount process than was the case in Florida. Of course, Minnesota courts did not have the time pressures that faced those in Florida, as the constitutionally mandated meeting of the Electoral College helped force the rush to judgment. But even in Minnesota, courts were in the position of having to determine which ballots were to be counted, and which not.

Indeed, this is exactly the problem with court intervention in the electoral process, at least as far as this chapter is concerned. Americans like to believe that the results of elections reflect the will of the people. But when courts disregard votes in the pursuit of other interests, they undermine both their legitimacy and that of the election itself.³⁴ When votes are ignored or set aside, those whose ballots are no longer counted are deeply affected: Why theirs? Why not count everybody's

vote equally? Who decides which votes to accept and which to discard? Why? To deny the vote of some individuals or groups and not others cheapens the meaning of all votes. Why should anyone bother to vote if the courts are just going to pay no attention?

We can say with certainty that once lawyers and courts get involved in determining the results of elections, voters get thrown out, along with the democratic process. No longer do those casting ballots decide who won and who lost. Indeed, to the extent that courts determine the winner, voters—on the losing side—are functionally disenfranchised. The system has been gamed so that their votes no longer matter.

True, some elections are flawed, and it has happened that results are tampered with. Courts, especially lower courts, exist to investigate facts and make determinations of whether such things happen, and how serious are the allegations. No one disputes that courts are the proper forum for resolving disputed elections involving fraud or improper behavior by election officials. But this in no way is a license to disenfranchise some individuals and groups. When this happens, the legitimacy of the whole electoral process is called into question, and the meaning and value of the individual vote significantly compromised.

Intimidation

Our final scenario of gaming the system to render votes meaningless is voter intimidation. Some readers might question why the discussion of intimidation has been left for the end of this chapter, and not placed earlier in the book. The reason it belongs here is that voter intimidation, along with voter fraud, are ultimate examples of politics by other means, in terms of violating voting rights. They are immoral, unconstitutional, and illegal. Thus they form a useful set of "bookends" for this chapter, as they are among the worst possible offenses against voting rights. But their perpetrators are seldom held to account for their actions. Too often they have been, and are, carried out with impunity.

There is a certain irony associated with voter intimidation. Like a number of other hurdles and barriers placed in front of voters, it does not deny citizens the right to vote. It denies them the ability to cast ballots, just as so many of the procedures and rules discussed in Chapters 4 and 5 do. But unlike the other four scenarios in this chapter, including fraud, intimidation does not represent a structural effort to render votes meaningless. Far from it. Intimidation occurs precisely when actors in the electoral system fully understand how important the votes of some individuals and groups are, and they thus seek extra- and illegal means to ensure that that importance is never realized. Using tactics that range from terror to fear-mongering to harassment to propagation of lies and misinformation, intimidators will do whatever it takes to ensure that key segments of the voting population—segments whose votes they fear—never get to cast ballots.

Intimidation has a long, nasty, and sordid history in the United States, and

power of groups and individuals different from them. It does not matter whether the differences are racial, religious, ethnic, national, economic, linguistic, sexual, or something else. The goal of the intimidators is to ensure that the groups, however marginalized, are prevented from voting because of the potential, or at least perceived, threat they and their votes represent to the status quo.

Matters go deeper than this, of course. Preventing a group or an individual from voting by intimidation is a means of denying their legitimacy as citizens. It is not simply that they become marginalized. Their very acceptance into the heart of American society as bona fide, full-fledged members is, through intimidation, called into question. Far from underscoring the values of a democracy, intimidation of voters cuts them to shreds. The fact that so few intimidators are ever held to account, or are prosecuted, but instead engage in their practices with relative impunity, simply compounds the socially destructive forces that intimidation creates.

Who is responsible for voter intimidation? In the late nineteenth and early twentieth century South it was largely the Democratic Party, local voting and other public officials, the Ku Klux Klan, and its fellow travelers who were the perpetrators. Know-nothings, anti-Communists, nativists and xenophobes, religious bigots, homophobes, and the like have also been involved at one time or another in voter intimidation throughout the nation's history. In more recent times, evidence suggests that fellow travelers of the Republican Party, if not always the party itself, have taken steps to intimidate and harass marginalized groups of voters, especially those whose citizenship/patriotism they question, or at least those whom they fear might vote Democratic.

In a real sense, though, it is we the people, the public at large, who are responsible for voter intimidation. The reason is that we continue to tolerate it. The public outcry is less than deafening when instances of voter intimidation are brought to light. Especially lacking have been the voices of the parties, both of which at one time or another have either engaged in voter intimidation, fostered or sponsored it, or allowed it to go forward with a wink and a nod. When the parties take the lead in bringing voter intimidation to a halt, public officials at all levels and the public at large will follow close behind. Until that happens, however, voter intimidation will likely continue, and will increase if the election at hand is seen as especially competitive and/or critical.

Conclusion

Much of this book has focused on the way in which election procedures and techniques can be used to disenfranchise voters. But in this chapter the argument shifted to much broader concerns. Is the systemic problem solely that election rules and procedures can be structured to cause individual voters and groups to lose their vote, as we saw in Chapters 3, 4, and 5? Or can the system be gamed or rigged so that not all votes count, or so that the votes of some segments of the population become meaningless because they are ignored or are so diluted as not to figure in the outcome at all, not just in one election but repeatedly? In other words, a voter

can have the franchise, but if he can't use it, as in the case of voter intimidation, or it doesn't mean anything, as with instances of disenfranchisement by other means, what good is it? Under these circumstances, does it make sense to cast a ballot? Does not the value of the vote decline to virtually nothing?

Perhaps what is astounding is that voters continue to cast ballots even when they realize their side is lost from the outset, that the outcome of the election is decided even before the election season begins. Clearly the impulse to vote is a powerful one among some, perhaps many, voters; like people who marry multiple times, voting under the circumstances outlined in our five scenarios in this chapter represents the triumph of hope over experience.

This chapter also documents that voting rights demonstrate important instances of "politics by other means." In two cases—election fraud and intimidation—those instances involve activities that are illegal and unethical, even immoral. But in the other three—distorting the effects of incumbency, and recounts/court action—they are totally legal, but not always ethical, moral, or fair. These latter three are especially pernicious, because it might not always be obvious to citizens that their votes are being diluted into virtual oblivion, rendered meaningless, or thrown out after they have been cast. These scenarios exist as a shadowy, dimly recognized political reality, but their effect can be devastating. We shall leave to others the question of whether "politics by other means" as discussed here represents a conspiracy of the powerful against those they wish to marginalize, ignore, or reduce to second-class status. But there is no doubt that this is the effect of "politics by other means" in the voting rights scenarios this chapter discusses.

Can we do better? Can we provide a more level playing field so that every voter has a fair chance to cast votes that count equally? Can we, in fact, game the system in favor of fairness, instead of rigging it so that some voters are perpetually disenfranchised? It is to these and similar questions that I turn in the concluding chapter.

Notes

1. Dr. Martin Luther King, Jr., "Give Us the Ballot" Address at the Prayer Pilgrimage for Freedom, Washington, D.C., May 17, 1957, available at www.stanford.edu/group/King/publications/speeches/Give_us_the_ballot.html, accessed July 9, 2008.
2. Justin Levitt "The Truth About Voter Fraud," Brennan Center for Justice, New York University, 2007. Viewed online at http://brennan.3cdn.net/e20e4210db075b482b_wcm6ib-0hl.pdf, Saturday, March 14, 2009. See also Levitt, "The Truth About Voter Fraud," press release, November 9, 2007, viewed online at <http://www.brennancenter.org/content/resource/truthaboutvoterfraud>, Saturday, March 14, 2009. See also Lorraine C. Minnite, "The Politics of Voter Fraud," Washington, Project Vote, n.d., www.projectvote.org. Viewed online at http://www.projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf, Saturday, March 14, 2009.
3. Tracy Campbell, *Deliver the Vote* (New York: Basic Books, 2006).
4. In states that have only one representative but two senators (Delaware, Montana, North and South Dakota, Vermont, Wyoming), the reverse would be true.
5. Another study shows that between 1982 and 2004, House incumbents won at a rate exceeding 95 percent. See Russell D. Renka, "The Incumbency Advantage in the U.S.

33. It was, for example, very apparent, as recounts proceeded, that Mr. Gore was the winner in Florida. The results of Election Day in Florida, and of all of the permitted recounts, showed that Mr. Gore was the winner with 2,911,417 to Mr. Bush's 2,911,215. This information was known to those involved in the recounts, but not to the general public. It is generally thought that further recounts would have enhanced Mr. Gore's totals, and may well have been a major factor in the Court's decision to shut them down. See Florida Division of Elections, General Election 2000, viewed online at <http://election.dos.state.fl.us/elections/resultsarchive/index.asp?ElectionDate=11/7/2000&DATA MODE=>, accessed March 15, 2009.

34. Tokaji, "Leave It to the Lower Courts."

35. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

36. The best example of intimidation of gays came in Kalamazoo, Michigan, in the fall, 2009. See, for example, Mark Thompson, "Anti-gay Rights Flyer Circulates K'zoo," WoodTV.com, October 20, 2009, http://www.woodtv.com/dpp/news/local/kalamazoo_and_battle_creek/anti-gay_rights_flyer_circulates_k'zoo, viewed online July 25, 2009. There are many other reported, albeit anecdotal, instances of harassment of gays seeking to vote.

37. See, for example, United States Commission on Civil Rights, *Voting Irregularities in Florida*, 2001, available at www.usccr.gov/pubs/pubsndx.htm; People for the American Way (PFAW), "The Long Shadow of Jim Crow," 2004, available at http://site.plaw.org/site/PageServer?pagename=report_the_long_shadow_of_jim_crow; Bob Herbert, "Voting While Black," *New York Times*, August 20, 2004, available at <http://www.nytimes.com/2004/08/20/opinion/20herbert.html?ex=1250740800&en=2e315e6b726b38d0&ei=5090&partner=rssuserland%20Associated%20Press>; "Kerry Says Trickery Foiled Many Voters," *New York Times*, November 11, 2005, available at [Think Progress, November 7, 2006, available at http://thinkprogress.org/2006/11/07/voter-intimidation-virginia; Jo Becker, "Groups Say GOP Moves to Suffile Vote," *Washington Post*, August 26, 2004, available at \[www.washingtonpost.com/wp-dyn/articles/A33798-2004Aug25.html\]\(http://www.washingtonpost.com/wp-dyn/articles/A33798-2004Aug25.html\); Alan Elsner, "Millions Blocked from Voting in U.S. Election," *Common Dreams*, September 22, 2004, available at \[www.commondreams.org/headlines/04/0922-03.htm\]\(http://www.commondreams.org/headlines/04/0922-03.htm\); "Raging Caging," *Slate.com*, May 31, 2007, available at \[www.slate.com/id/2167284\]\(http://www.slate.com/id/2167284\); Editorial, "Sorry, I Can't Find Your Name," *New York Times*, October 22, 2008, available at \[www.nytimes.com/2008/10/23/opinion/23thu1.html\]\(http://www.nytimes.com/2008/10/23/opinion/23thu1.html\); Andrew Burmon, "Where the GOP Could Get Dirty," *Salon.com*, October 22, 2008, available at \[www.salon.com/news/feature/2008/10/22/voter_suppression_guidehttp\]\(http://www.salon.com/news/feature/2008/10/22/voter_suppression_guidehttp\); Democracy Now!, "Early Voting Sees Reports of Voter Intimidation, Machine Malfunctions," October 22, 2008, available at \[www.democracynow.org/2008/10/22/votes\]\(http://www.democracynow.org/2008/10/22/votes\); Momie Tulloties, "Presidential Election: 2008 Voter Intimidation Incidents," *Associated Content*, November 4, 2008, available at \[www.associatedcontent.com/article/1179703/presidential_election_2008_voter_intimidation.html?cat=8\]\(http://www.associatedcontent.com/article/1179703/presidential_election_2008_voter_intimidation.html?cat=8\).](http://www.nytimes.com/2005/04/11/politics/11kerry.html?adxnml=1&adxnmlx=1218650597-xy/rxCsJv9wQKt8Hv8Vow; Farhad Manjoo,)

38. See, especially, the comprehensive survey of voter intimidation in 2008 carried out by the Brennan Center for Justice at New York University. Wendy Weiser and Margaret Chen, "Recent Voter Suppression Incidents," November 3, 2008, available at http://brennman.3cdn.net/e827230204c5668706_p0m6b54jk.pdf, accessed March 13, 2009. See also Weiser and Chan, "Voter Suppression Incidents 2008," the Brennan Center, November 11, 2008, available at www.brennancenter.org/content/resource/voter_suppression_incidents, accessed March 13, 2009.

39. Frances Fox Piven, Lorraine C. Minnie, and Margaret Groark, *Keeping Down the Black Vote: Race and the Demobilization of American Voters* (New York: The New Press, 2009).

40. Alexander Keyssar, *The Right to Vote* (New York: Basic Books, 2000).

7

Conclusion: Do We Want to Do Better?

During the aftermath of the 2000 presidential election in Florida, a frequently heard line from those wanting to limit or shut down the recounts and cast aside questionable ballots was that those voters who "didn't do it right" deserved to have their votes disqualified. Indeed, the phrase "didn't do it right" became something of a mantra, repeated endlessly by Republican leaders and their faithful. It was clearly a talking point, designed to influence media coverage and shape public opinion in their favor. It worked.

It worked because of the ongoing belief—which we have often confronted in this book—that voting is a privilege, and with it comes the responsibility to "do it right." If voting is a privilege, it can be revoked: if the voter makes a mistake, then his/her ballot has possibly been invalidated and can be rejected. In other words, if you don't "do it right," then we don't have to count your vote. If the voter *recognizes* while voting that he has made an error, then *perhaps* he might be given a chance to rectify it. But once the ballot is completed and the votes recorded, errors subsequently discovered during the counting or recounting process are grounds for disqualification. The privilege of voting does not extend to post facto correction of the error even if the voter's intent is clear. Voting is a one-shot deal, and if the voter blows the chance, too bad, or so the mantra goes.

Accompanying the "voting is a privilege" school of thought is the "it's the responsibility of the voter to do it right" line of argument. The "do it right" proponents argue that it is the duty of the voter to make sure he understands how voting goes forward. The voter himself forfeits his ballot by not following the "rules," or by making even the smallest of missteps, even if his intent is obvious. He has not risen to the level of his civic responsibility, and thus his ballot is null and void.

In the first chapter of this book we dealt with the question of voting as privilege rather than a right. But what about the business of "doing it right"? What does this mean? Or, rather, what does "doing it wrong" mean? Does it mean making a minor error in registering so that the name at the polling station does not exactly match the state's—too often flawed—list, and the "no match, no vote" rule is applied even though it is obvious that the names belong to one and the same person? Does it mean that the voter has done something wrong because she possesses and brings with her an approved identification card but is denied the right to vote because the local official, using his discretion, refuses to accept it?

What is the state's obligation? For each voter it is:

- To provide fair and equal access to the franchise;
- To provide fair and equal access to the polls;
- To provide clear and accurate means of casting, recording, and counting ballots;
- And to provide accountable, impartial, publicly verifiable mechanisms and procedures in case of recounts or challenges to ballots.

Perhaps put more simply, the state must provide an even playing field for voters. It must not in any way establish laws and rules and procedures that effectively discriminate against some groups of voters by making it harder for them to qualify, register, or identify themselves than others. It must not deny to any group of voters ready access to polls; indeed, it must provide sufficient numbers of polling places and keep them open long enough to accommodate the maximum number of voters possible; in this connection, same-day registration and early and mail voting are extremely important. It must eliminate draconian—or, rather, ridiculous and absurd and discriminatory—voter ID requirements whose only purpose is to keep people from voting. It must make certain that there are enough ballots on hand to accommodate voters who show up, that language minorities are respected, that help is available for those whose English is not proficient. It must have on-site help for those who do not understand how to use the voting machinery. It must accommodate those whose physical disabilities make voting difficult, yet respect the secrecy of their ballot. And it must record ballots in accordance with the voters' intent, tally them accurately and impartially, and provide machinery to allow for open, transparent, accountable recounts, with standards for disqualification that are clearly spelled out and are nondiscriminatory.

In short, it is the obligation of the state to provide fair, equal, transparent, accountable, and politically neutral election systems.

But as we have seen throughout this book, our election systems fail on virtually every one of these criteria. True, in some jurisdictions they get closer to the mark than in others: Minnesota has probably achieved a higher degree of fairness, equality, transparency, accountability, and political neutrality than other states, as the 2008 U.S. Senate election and recount demonstrated. And there are counties—not enough, it should be emphasized—where voting has proceeded fairly, smoothly, and in a nondiscriminatory manner for decades.

But too often states and counties do not meet their obligations to voters. They tilt the field in favor of some groups of voters, and place unacceptable hardships on others. Too often these are groups of voters of color, language minorities, the poor, the marginalized, the disabled, often the elderly, always the outsiders. Until these groups are brought fully and without qualification into our electoral systems, we have to place dampers on frequently heard boasts that this country provides its citizens with truly democratic elections.

Some will argue that all of this will cost money, a lot of money. It will. The Federal Elections Commission, which does not conduct elections, requested over \$63 million in fiscal year 2009 for its oversight and enforcement responsibilities.³ New York State spent about \$40 million for elections in 2009–2010.⁴ The Florida elections budget (part of the Florida Department of State) called for expenditures of about \$13.5 million in 2009–2010, a nonpresidential election year. In 2005, Americans spent \$33.5 billion on pet food, services, and supplies.⁵ It is not a stretch to say that Americans could spend more money to provide a fair playing field for elections.

I posit at least three rationales for arguing that the state has an obligation to voters extending well beyond any that the voter has to the state:

- Constitutional obligations
- Political obligations
- Ethical obligations

Constitutional Obligations

The U.S. Supreme Court has already set forth the state's constitutional obligation very clearly in *Brown v. Board of Education* (1954) in speaking of children's right of access to public education regardless of race: "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."⁶

In the present instance, if the state provides an opportunity for citizens to participate in elections by voting, it must ensure that this opportunity is fair and equal to everyone just as it is supposed to be for public education.

Both the requirements of *Brown* and the state's obligation to voters rest on the Fourteenth Amendment: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." In *Brown*, the Fourteenth Amendment issue was that segregated schools were "inherently unequal" and had to be abolished.

But the application of the Fourteenth Amendment to voting has a more curious history. In Chapter 2 we saw that during the nineteenth century and for more than half of the twentieth the Supreme Court declined to apply it to voting at all. But beginning in the 1960s and for more than forty years thereafter, the U.S. Supreme Court has held that all votes must be considered equal and be treated equally; this is the fundamental reasoning behind such landmark decisions as *Baker v. Carr* and *Westberry v. Sanders*.⁷ In both legal and popular contexts this idea has become known as the "one person, one vote" standard. In *Bush v. Gore*, the Supreme Court wrote:

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

elections will become more consistent throughout the nation. Another possibility is a voting rights constitutional amendment, which we shall discuss. But whether we will ever achieve the uniformity of many modern democracies in the way people become voters, cast ballots, have their ballots recorded and tallied, and contest the results is highly doubtful.

2. *Impose statewide standards.* Many states have already reduced or eliminated county discretion over registering voters and conducting elections, but there are still a substantial number that have not. Oregon, for example, allows only mailed-in (or dropped-off) ballots; there are no polling places and no absentee ballots. Many states mandate one consistent form of voting technology across the state (different varieties of second-chance optical-scanning equipment have become popular as the luster of touchscreen technology has faded), but some still allow county options. Imposition of statewide standards would seem to address the key issue bothering seven justices in *Bush v. Gore*. Undoubtedly other statewide rules could be imposed that might pass constitutional muster, but it would have to be said emphatically that if the statewide requirements were draconian and had the effect of disenfranchising voters rather than accommodating them (such as is the case with current state voter ID rules), then no good will have come of the effort and they would have to be protested in the strongest possible ways.

But imposition of statewide rules and procedures can also founder on the rocks of county/local politics and local patriotism. Local supervisors of elections are notoriously jealous of their prerogatives (so are other local officials), and to the extent they have discretion they will complain bitterly about infringements on their territory and powers. The fact that at present their levels of discretion sometimes lead to disenfranchisement of potential voters will conveniently be overlooked. Rather, they will voice the usual reactions—ranging from lamentations to outrage to defiance—of local officials who feel they are being stepped on by the state. They don't like it, they will resist state "takeovers," and might even work to subvert statewide rules. If any of these happen, then the state is no closer to complying with Fourteenth Amendment requirements than if it had done nothing.

But there is still the matter of what statewide standards might look like. In the previous paragraphs there were several suggestions that would create greater levels of uniformity in voting for states that do not now have them, and thus bring them in greater compliance with the Fourteenth Amendment. But what about recounts? Seven justices in *Bush v. Gore*, it will be recalled, felt that the way in which Florida's sixty-seven counties implemented the state standard of determining the voter's intent violated the equal protection clause. Two points need to be made about this. First, there is nothing inherently unconstitutional about the standard itself. Determination of voter's intent has long been recognized as the fairest, most reasonable way to count and recount ballots, and to judge disputed ones. In a sense, the Florida standard violated nothing, at least not until efforts were made by local canvassing boards to implement it, and state judges to evaluate it.¹² Moreover, it should be remembered that the voter intent standard replaced a vacuum of no

standard at all. Most constitutional and political scholars would recognize that replacing nothing with something that at least can be examined, measured, and tested against the equal protection clause enhances the possibility of compliance with the Fourteenth Amendment.

But this raises the second, and in some ways more important, point. It is very likely that at least some of the justices' negative view of Florida's treatment of the voter intent standard was motivated at least as much by political, indeed partisan, considerations as constitutional ones. If this is true—and there is at least indirect evidence based on the 5–4 decision to shut down the recount, as well as journalistic and anecdotal accounts—then the *Bush v. Gore* holding that the Florida Supreme Court's standard for recounts violated the Fourteenth Amendment was a red herring, an excuse, a rationale by five justices to find a way to shoehorn Candidate Bush into the White House not because of, but in spite of, constitutional principles. Distinguished constitutional scholars, including many of those who signed the statement protesting the decision in *Bush v. Gore*, have made this point repeatedly since the dénouement of the case in December 2000.

Why is this relevant to the present discussion? Because it points up the importance of examining political contexts in discussions of how the Fourteenth Amendment applies to states' obligations to voters. One of the beauties of the Fourteenth Amendment is its flexibility, and applicability in a variety of political and social circumstances. But one of its downsides is exactly the opposite: because of its flexibility, it can be used for purposes that extend far beyond what is constitutionally warranted and move fully into political realms. This can do more harm than good.

3. *Do nothing.* Another option is to do nothing to address the Fourteenth Amendment and its linkage with states' obligation to voters. The effect, of course, would be to continue the current hodgepodge system of elections that we have now. Would this move elections into greater compliance with equal protection requirements? Of course not; the very question points to the absurdity of doing nothing.

Thus we return to where we began this discussion: instead of criticizing voters for not "doing it right" and disenfranchising them when they don't, those who loudly and prominently trumpet the "they have to do it right before they can vote or have their ballot counted" argument need to recognize that the state has an obligation to meet voters on their terms, and to institute rules and procedures (some of which we have mentioned in previous paragraphs) that meet the state's constitutional and other obligations to voters. Following this course of action will bring states and counties into ever-greater compliance with the Fourteenth Amendment.

Political Obligations

Constitutional obligations are not the only obligations that states have to voters. There are political obligations as well. At the most fundamental level, the political obligation of the state is to provide democratic elections. What does this mean?

So why don't we make these changes, except in very limited places? Again, inertia and vested interests in the form of state and local voting officials—always very reluctant to change their modus operandi—act as a strong countervailing force against even sensible reforms. But even more fundamental is the ongoing belief that voting is a privilege. If voting were viewed as a right, there would be no reason whatsoever to create barriers to accessing the ballot.

And so it goes with the other aspects of the state's political obligation to the voter. Purging of voter lists can and should be done without reference to partisanship, race, geographic location, or anything else; robust efforts to contact potential purged voters should be carried out promptly and fairly, with benefit of the doubt given to the voter, not local or state voting officials. Voter ID rules at the polls could be relaxed, replacing the draconian ones now being imposed, because even as the U.S. Supreme Court noted in *Crawford v. Marion County*, there is no evidence that voter fraud is a problem. Instead of relying on dubious but sexy high-tech voting machines, we could do what other democracies do—use simple, readily understood, readily recountable, cheap paper ballots, at least until the technology of e-voting (especially Internet voting) becomes reliable. Recounts could be systematized using the standard of the voter's intent, with the result that the recount process would disenfranchise fewer people than it does now. (With the use of paper ballots this becomes very easy, much more so than with e-voting, which can easily mask or hide voter intent.) And it is essential to stop disenfranchisement by other means. For example, elections could be made more competitive, and cracking and packing of political, racial, ethnic, or religious minorities eliminated, by taking the districting process out of legislative hands and putting it into the hands of more politically neutral ones, such as Bipartisan Election Commissions, or panels of retired federal judges, thus ending political gerrymandering.

Adopting any of these measures, as well as others, would help satisfy the state's political obligation to voters. At a minimum such measures would remove, or at least alleviate, many of the barriers that many voters encounter when they attempt to cast ballots. As barriers and impediments to voting are removed, elections become more democratic. As it stands now, most states do a poor job of meeting this obligation. As a result, when voters don't "do it right" it can hardly be said to be their fault. It is the state that has failed them, not the other way around.

Besides removing structural barriers to voting, the state has another political obligation to voters: to ensure that their votes matter, that is, that they have meaning. This is not merely a matter of accurately tallying votes, an obligation that is self-evident. It is to remove the problems discussed in Chapter 6, namely the functional disenfranchisement of actual voters who cast ballots that are tallied, but are without significance or meaning in helping to determine the election's final outcome.

The two most obvious steps in meeting this obligation are for the state to crack down on voting fraud, and to create zero tolerance for voter intimidation. Both practices are totally unacceptable, and there is no excuse for their existence in the electoral arena. It is the state's responsibility to root them out and eliminate them

entirely. Constant vigilance and monitoring are essential to prevent outbreaks of either. Severe penalties for those occasions when either or both occur need to be promptly meted out.

The other forms of functional disenfranchisement may be more problematic to eliminate, because they lie at the heart of how the game of politics is played, but that is no reason for the state to stand passively aside and do nothing. Creating electoral districts that are competitive so that real electoral contests take place (instead of contests decided even before they take place), and ensuring that neither partisan nor racial/ethnic/religious gerrymandering takes place, are fundamental political obligations of the state that are too often ignored. The only way to attack them is to take the job of drawing of legislative districts—congressional, state legislative, and local—away from legislatures. Ways to do this include nonpartisan commissions charged with drawing lines, establishing panels of retired federal judges to create districts, allowing federal judges sitting en banc to draw them, and so forth. None of these solutions is perfect. It is not possible to fully remove partisan and other political pressures from the drawing of district lines. But to allow the present situation to continue—in which legislatures essentially draw their own lines for their own benefit—is simply to perpetuate a condition in which at least some voters will be functionally deprived of their votes.

The final form of functional disenfranchisement that was discussed in Chapter 6—depriving voters of their votes through recounts and court action—also needs to be addressed by states. That recounts need to be carried out fairly and honestly seems self-evident, and yet we know that they are not always conducted in this manner. States need to ensure the political and legal independence of bodies charged with recounting ballots—whether at the state or local level. The consequences of partisan politics invading recounting procedures are too severe to condone, as we saw in Florida 2000. But we also know that they can be politically insulated, and allowed to do their work unfettered and unpressured, as the 2008–2009 Minnesota recounts showed. One of the best ways to ensure that this happens is for the state to lay out, as explicitly as possible, rules for determining voter intent in the case of disputed ballots during recounts (or even for the initial count, for that matter) and to ensure that no other public agencies, including courts, preempt these bodies until they have fully completed their work. There is every reason to think, for example, that local canvassing boards in Florida 2000 could have arrived at just and fair conclusions if they had been left alone to consider ballots free of media, public, legal, and political pressures. But they were not, and so could not do their work.

Legislative specificity about the determination of voter intent and requirements for the independence of recounting agencies might also act as a brake on aggressive court intervention into recount procedures. At a minimum, it would allow reasonable assessment of how closely the recount process conforms to Fourteenth Amendment requirements before stopping it and throwing ballots out the window, thus disenfranchising some voters. It would also be helpful if the American Bar Association issued guidelines about the manner in which voter intent is to be de-

are not released, how would errors be discovered, especially since, until recently, paper trails were not required with touchscreen machines? Instead, let us assume they are right, and the machines are fully accurate, reliable, kosher.

None of this matters. What does matter is that in a democracy the public needs to know how its elections are conducted, including the casting and tabulating of votes. The question in determining the degree of democracy is, how open and aboveboard is the *process*? If the source codes are not available, there is no way to be sure the results are legitimate. Accountability and transparency are synonyms for light, sunshine, accessibility, and information. If anything in the voting process is kept hidden from public view—anything—then accountability and transparency have been compromised, perhaps fatally. When this happens, voters and the public instead must *assume* that the machines are accurate; theirs is an act of faith. Democratic elections do not rest on faith; they rest on sunshine peeking into dark corners, revealing whatever is there, giving information to the public. Without transparency, the notion of a democratic election becomes suspect.

There is also the argument that vendors have a commercial interest in protecting their source codes. Some may well be patented. This is not a trivial matter. Vendors have a right to be paid for the use of their equipment, even to make a reasonable profit. And patents need to be protected, and respected.

Of course, if this country were to move in the direction advocated in Chapter 5—namely, go back to the future and use simple paper ballots—the problem of private vendors and source code patents disappears completely. Elections would be much more public than they are now because there would be no opportunity for private vendor involvement, except possibly to sell paper to election officials and contract for the printing of ballots.

But the author is under no illusions that the public will demand a return to simple paper ballots. And it is unlikely that any public officials, including election officials, would support the idea—not after making such huge monetary investments in sophisticated, expensive voting gadgetry.

So the task becomes one of protecting private vendors and their patents while ensuring that they serve the public interest, not their own. This is clearly a balancing act. But too much of the “balance” has favored the private vendor. The public must be equally protected, and respected. This can and should be done during state certification processes, when officials require that the machines and accompanying software demonstrate their accuracy and fairness. But this requires that the certification process be carried out in a rigorous, responsible, publicly visible way. Of course, public officials have also to assure vendors that they will not violate the patents and copyrights with which they have been entrusted. But public officials must do more than this. There are too many reports in which the certification process has been little more than a wink and a wave, with rigorous standards not applied. Failure to apply standards makes the process a charade, and means that the accuracy and fairness of voting machinery will be based on faith, not empirics. Officials must oversee the source codes with rigor and demonstrate

that the soft- and hardware are fair and accurate. If this requires the creation of nonpartisan boards to ensure that the public as well as the vendors are protected, then this is a cost we must be willing to pay.

In the end, the state's ethical obligation to voters is to do whatever it can to ensure that elections are firmly grounded in the public square. This is an affirmative duty. State and local election officials—indeed, the public at large—have constantly to monitor elections rules to ensure their fairness and equity, and that they do not discriminate. They have an affirmative duty to root out any elections practices that might allow even the smallest feature of running elections to become the private domain of an interest—even if that interest is a public agency. Convenience, bureaucratic inertia, partisanship, economic clout, tradition—none of this matters. All that matters is that elections be fully and totally public. To the degree they are not, they are not democratic.

Some would say the state has no greater ethical obligation to voters than to implement fair, honest, and open procedures for carrying out elections. But it does. Even more so, it has the obligation to shoulder the *responsibility* of doing them right, that is, in the most democratic way possible. The key word in the previous sentence is responsibility. It is the state's ethical job to do it right, and the onus should be on the state to maximize the voters' chances of doing their part right. The onus should *not* be on the individual voter to hope he or she “did it right.” Indeed, central to the argument of this book is that unless and until we get past the idea that it is solely the voters' responsibility to do it right, we will never move closer to fully democratic elections.

What Is to Be Done?

When Vladimir Ilyich Lenin published a pamphlet called “What Is To Be Done?” in 1902, he called for the formation of a revolutionary political party of workers that would replace the czarist regime in Russia. The present work does not call for a new revolutionary political party. But it does call for thinking about voting rights in new, even revolutionary ways.

For Americans, the most revolutionary step would be to stop thinking of voting as a privilege. It has to be conceived as a right, because once it is, most of the blockades that we set up to keep people from voting will, like the walls of Jericho, come tumbling down. Voting, as I have repeatedly noted, already *is* a right. The problem is that because it is not constitutionally guaranteed but rather defined legislatively, too many people don't see it for what it really is. Somehow it doesn't rise to First Amendment status, or to the status of other constitutionally guaranteed rights, and so can be treated differently than, say, the right of assembly or trial by jury.

In truth, the situation is probably worse than this. If voting is not really seen as a right—even a second-rate right—then it can be extended and withdrawn at will, depending on the wishes of those in power. We have seen repeatedly that this is exactly what happens.

executives: presidents, governors, even mayors. As noted in Chapter 1, political executives have, at particular times and places, strongly influenced the course of voting rights in this country—but not always positively so. But how can this task be accomplished? At present there are many political leaders who would not lift a finger to extend the franchise and make voting easier. Nor is it clear that political winds currently blowing are favorable to increased voting rights.¹⁶

Without letting governors, mayors, secretaries of state, other state officials involved with voting procedures (including attorneys general), and local supervisors of elections off the hook, it is probably presidents and presidential candidates who will have to do the heavy lifting. The reason is that the presidency is the focal point for all federal issues, including voting rights. No other office has the capacity to mobilize public opinion, to lead and shape and mold it, and to promote changes in policy when needed. And presidents occupy a unique position to remind us of our responsibilities, and our rights.

But presidents rarely push policy changes in areas that have low public visibility and salience. In Chapter 1, we saw that voting rights often is scarcely on the public's radar screen. An examination of post–World War II presidents reveals that few paid the issue any attention. Lyndon Johnson was probably the only president who cared passionately about voting rights and pushed it strongly (in the form of the 1964 Civil Rights Act and 1965 Voting Rights Act). Both Jimmy Carter and Bill Clinton were favorably disposed, but neither pushed voting rights strongly. Even Barack Obama, at least during his campaign and first months in office, did not rank voting rights as a high-priority item. Among Republican presidents, all have been cool at best toward voting rights. Dwight Eisenhower did sign the Civil Rights Acts of 1957 and 1960, both of which had voting rights components, but he was never enthusiastic about either bill. Ronald Reagan had to be persuaded to sign the renewal and extension of the Voting Rights Act in 1982. And as noted in Chapter 1, the forty-third president, George W. Bush, actively sought to undermine voting rights through his Department of Justice.

Thus, the record of presidential leadership on voting rights is at best mixed, and that may be too positive a characterization. But the past is not always prologue, and it is possible that in the future, presidential candidates and occupants of the White House will push voting rights more strongly than in the past. Certain things need to happen if this is to come about:

1. The rise of a “new politics” as advocated by President Obama, in which traditional rhetoric and partisan policies begin to morph into less rigid and ideologically defined positions, would provide room in the political landscape for voting rights, something that has not occurred in more than twenty-five years. New rhetoric, new vocabularies, new forms of political discourse, such as the Obama administration is pushing, would have to replace the void left by the politics of the last twenty-five-plus years and perhaps create opportunities for voting rights to secure a prominent position in the American political agenda.

2. A reaction against recent draconian changes in state voting rights laws sets in. This is especially likely to happen as the public becomes aware of just how much stricter voter ID requirements actually disenfranchise major portions of the population. Public outcry over this would cause politicians at all levels, including presidents, to sit up and take notice.

3. Civil and voting rights advocates and groups regain the central position in political arenas that they had achieved from the late 1950s through the late 1960s. During the heady days of the active phase of the civil rights movement, voting and other civil rights issues occupied prominent positions on national, and even state and local, political agendas. It will not be easy for them to regain this stature. Advocacy groups such as the American Civil Liberties Union, People for the American Way, Lawyers for Justice Under Law, the Brennan Center for Justice, and others will have to ratchet up their efforts to show the extent of voting rights erosion and deterioration in this country. It would be helpful if more moderate, mainstream groups—such as chambers of commerce, labor unions, and religious and civic organizations—would include voting rights on their active political agendas. Even more helpful would be the emergence of another figure of the prestige and gravitas of Dr. Martin Luther King, Jr., who could reframe voting rights in terms of ethical issues and define the high moral ground on which he or she could lead public discussion of them.

4. Presidential candidates and presidents themselves have to be pushed by advocacy groups, journalists, opinion leaders, and other political figures at all levels to define their positions on voting rights and defend them publicly and repeatedly. How often are presidential candidates asked during campaign stops about voting rights? How often in recent decades have presidents, during news conferences, TV and press interviews, town hall meetings, and other public events been asked about—pushed on—civil and voting rights? When will the political parties place in their quadrennial platforms meaningful planks reaffirming voting rights and commitment to their expansion, instead of merely repeating their commitment to the status quo?

There are no guarantees in any of this, of course. Presidents cannot be made to speak about voting rights if they don't want to. And some presidents, like George W. Bush, might actually oppose the expansion of voting rights. And yet it seems clear that unless and until they come forward and discuss their view of voting as a basic right, very little change in the extent of voting rights in this country will occur. In order for real movement in extending voting rights to occur, in order for the voting-as-privilege nostrum to atrophy, presidents have to become energizers, the little engines that could. Otherwise, our past and present paths will be our future, and we will continue our policies of disenfranchisement.