
LOCAL POLL SITE, NATIONAL IMPLICATIONS

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I. INTRODUCTION

Cities sit at the center of contestation of constitutional values and are key arbiters of the accessibility and mutability of rights.¹ Through a set of seven tools that shape and constrain activities adjacent and integral to rights, local governments play an underrealized role in operationalizing rights, thereby making them real, and in

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¹Cities, localities, and municipalities are used interchangeably to refer to the 90,056 local governments within the United States. U.S. CENSUS BUREAU, 2012 CENSUS OF GOVERNMENTS: LOCAL GOVERNMENTS BY TYPE AND STATE (2013).

actualizing core concepts of citizenship and suffrage.² One such hyper-federalized right at whose heart municipal governments sit is voting, the local control of which is a long-standing tradition of "independent constitutional value."³ As such, the United States possesses not "one uniform election system[,] but thousands of local precincts all running Election Day simultaneously" with annual changing rules that—taken together—significantly impact how we run our democracy.⁴ Yet election law violations that unfold at a local level often do not receive the same level of national attention, backlash, outrage, and resources as discriminatory changes at the state level.⁵ Indeed, the media often inaccurately portrays certain types of harmful election administration conduct, including the closure of poll sites as state action.⁶ While decentralization has the purported benefits of rendering it difficult for one party to seize control of the entire national or statewide election apparatus, ensuring flexibility in responding to unique local situations, and fostering direct accountability,⁷ as with other rights, local authority presents myriad opportunities for constitutional interpretation and under-enforcement. Localities, which drove efforts to eliminate property requirements and grant women the right to vote, continue to expand or contract citizenship through suffrage, extending the franchise to youth, non-citizens, non-resident property owners or felons, though some jurisdictions continue to exercise authority to define crimes of "moral turpitude" or mental incapacity to exclude

² See Louis Cholden-Brown, *Centering Cities in Constitutional Change* 18–20 (2020) (unpublished manuscript) (on file with author) [hereinafter Cholden-Brown, *Centering Cities*].

³ Richard C. Schragger, *Reclaiming the Canvassing Board: Bush v. Gore and the Political Currency of Local Government*, 50 BUFF. L. REV. 393, 414, 444 (2002) ("The county canvassing boards were not our heroes, but maybe they should have been. At least they should have had a place at the constitutional table.").

⁴ Joshua A. Douglas, *Local Democracy on the Ballot*, 111 NW. L. REV. ONLINE 173, 173 (2017).

⁵ See Sydnee Fielkow, *Shelby County and Local Governments: A Case Study of Local Texas Governments Diluting Minority Votes*, 14 NW. J. L. & SOC. POL'Y 348, 354 (2019).

⁶ See, e.g., Richard Salame, *Texas Closes Hundreds of Polling Sites, Making it Harder for Minorities to Vote*, GUARDIAN (Mar. 2, 2020, 6:00 AM), <https://www.theguardian.com/us-news/2020/mar/02/texas-polling-sites-closures-voting>; Marlee Kokotovic, *Texas Closes Hundreds of Polling Sites in Areas Where Minorities Vote*, NATION CHANGE (Mar. 5, 2020), <https://www.nationofchange.org/2020/03/05/texas-closes-hundreds-of-polling-sites-in-areas-where-minorities-vote/>.

⁷ See *Toward a Greater State Role in Election Administration*, 118 HARV. L. REV. 2314, 2317 (2005) [hereinafter *Toward a Greater State Role*].

voters.⁸ Though such pernicious tools as literacy tests and poll-taxes have been prohibited, but not wholly eliminated, bureaucratic determinations continue to "single-handedly translate voter action into virtually final electoral outcomes."⁹ Differential treatment of potential voters, which impinges on the guarantees of both the Fourteenth and Twenty-Sixth Amendments, has implications for the composition of the electorate and the nature of democratic political representation, with "the costs of discriminatory election administration" projected far beyond the territorial limits of the offending locality.¹⁰ Both established policies and enforcement decisions make it "marginally more difficult (or easier)" for groups to vote in every election cycle; such discretion, in the aggregate, can turn elections.¹¹ The procedures and frequency by which local boards purge "inactive" voters; the accessibility, hours and proximity of voting locations and ensuing wait-times; and the provision of interpretation services, poll-worker training, selection of voting systems, and registration locations or systems each serve as "vote denial" or "guarantee measures."¹² "Vote dilution" measures, like at-large redistricting schemes, dilute the franchise, while campaign finance reform and the implementation of ranked-choice voting amplify the right.¹³ Even where obligations flow from the state or federal government, local officials can resist through either leniency or stricture.¹⁴ Perhaps then, it should be unsurprising that in the pre-*Shelby County* era, the majority of the Department of Justice's Section 5 objections were lodged against local governments.¹⁵ The plenary authority and discretion granted localities to structure their election systems can either be viewed as a "thriving example of federalist experimentation or a horrifying mishmash of self-serving behavior[.]"¹⁶

⁸ Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1043 (2017) [hereinafter Douglas, *The Right to Vote*].

⁹ *Toward a Greater State Role*, *supra* note 7, at 2315.

¹⁰ *Id.* at 2330.

¹¹ *Id.* at 2318.

¹² NAT'L COMM'N ON VOTING RIGHTS, PROTECTING MINORITY VOTERS: OUR WORK IS NOT DONE 103, 135–88 (2014).

¹³ *Id.* at 103 (describing vote dilution and the use of redistricting schemes); see Andrew Spencer et al., *Escaping the Thicket: The Ranked Choice Voting Solution to America's Districting Crisis*, 46 CUMB. L. REV. 377, 379 (2016) (arguing in support of ranked choice voting as a remedy for vote dilution).

¹⁴ Justin Weinstein-Tull, *A Localist Critique of Shelby County v. Holder*, 11 STAN. J. C.R. & C.L. 291, 301 (2015) [hereinafter Weinstein-Tull, *A Localist Critique*].

¹⁵ *Id.* at 294.

¹⁶ *Toward a Greater State Role*, *supra* note 7, at 2316.

which effectively curtail participation in the process by which laws were made and laws and rights enforced.¹⁷ This Article charts how local policies and the everyday activities of local actors shape access to the polls and, despite the narrow geographic area of control, the nation as a whole.

History is replete with benefits and drawbacks to this decentralized system, and this Article seeks to neither indict nor redeem local electoral administration, as plenty of others have sought to do both.¹⁸ While "dark discriminatory episodes" are part of the history of local variation in the American right to vote, which at junctures "exacerbated exclusion and inequality,"¹⁹ municipal architecture has also been "a vector of inclusion" for the unpropertied, women, and noncitizens.²⁰ "Partisan fraud, racist exclusions, systematic discrimination against the poor and new immigrants, and money-grubbing corruption"²¹ were by no means restricted to the distant past. The records of Voting Rights Act ("VRA") enforcement against cities subject to preclearance by virtue of prior bad acts "where opposition to the Constitution's commands were most virulent"²² and the impacts of the Court's ruling in *Shelby County*, itself a municipal corporation, make clear just how much discretion is exercised by localities in the administration of elections and just how debasing and diluting of suffrage such administrative authority can be. Yet the relationship between local authority and suffrage is far more "complex, multidimensional, and multidirectional," with variation playing an outside role in broadening

¹⁷ See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2312 (2002) [hereinafter Eskridge, *Some Effects*].

¹⁸ See, e.g., ALEC C. EWALD, *THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE* 8 (2009) ("By emphasizing the historically grounded, constitutive, and potentially redemptive qualities of our decentralized suffrage system, this book tries to counter the prevailing assumption that local variation is either a toxin or simply an embarrassment."); Jennifer L. Hochschild, *Introduction and Comments*, 1 PERSP. ON POL. 247, 247 (2003) ("[L]ocalities fiercely protect their autonomy in running the mechanics of elections, with consequences ranging from amusing to appalling."); Schragger, *supra* note 3, at 403 ("Canvassing boards, like juries, are the appropriate sites for investing the kind of judgment required to make hard decisions under conditions of uncertainty, because the reasoning that ordinary citizens bring to the table is valuable, and because such local decision-making is more consistent with, and protective of, our democratic values.").

¹⁹ EWALD, *supra* note 18, at 123.

²⁰ *Id.* at 11.

²¹ *Id.* at 129.

²² *Shelby County v. Holder*, 570 U.S. 529, 562 (2013) (Ginsburg, J., dissenting).

the franchise and exposing burdensome and exclusionary rules to scrutiny and disuse.²³ Redefining suffrage through belonging reflects the "deep capacity" of localities to be "equality innovators" and productively "spur democratic conversations about the meaning of equality."²⁴ Tax-induced requirements to vote and other distinctive municipal franchise regulations sought to shape the Nineteenth Century local electorate,²⁵ and, though haltingly, property and literacy tests were each abolished through active violation and women's suffrage advanced as part of a "cities first approach"²⁶ through municipal governments like East Cleveland.²⁷

Following this introduction, Part II identifies the role localities as administrators play in structuring rights and the accompanying tools. Part III discusses the impacts of a discreet jurisdiction on a much broader discourse. In the subsequent parts, we turn to how these seven tools are utilized to effectuate 10,000 differences in who can vote, how they access the vote, and how those votes are tallied, in turn determining which people and communities have their votes counted where it counts most for our national discourse.

II. FRANCHISING RIGHTS

Localities play both self-evident and sub-rosa roles in actualizing diverse textual and peripheral rights,²⁸ by protecting access, recognizing

²³ EWALD, *supra* note 18, at 122, 156.

²⁴ R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1576 (2011).

²⁵ See ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 103–28 (rev. ed. 2009); *Kansas City v. Whipple*, 38 S.W. 295, 295 (Mo. 1896).

²⁶ Oral Argument at 12:25, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), https://apps.oyez.org/player/#/rehnquist10/oral_argument_audio/20884. Indeed, her "political means of going at the local level first is familiar in American politics." *Id.* at 12:15. For more on the local activism and claims of suffragettes, see KEYSSAR, *supra* note 25, at 140–78; AILEEN S. KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920, at 65–72 (1981).

²⁷ EWALD, *supra* note 18, at 148–49, 156; *see also* *State ex rel. Taylor v. French*, 117 N.E. 173 (Ohio 1917).

²⁸ David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 612 (1999) ("Local governments, the political structures that govern our lives on a daily basis, may be the means through which we discover our constitutional rights."); *Griswold v. Connecticut*, 381 U.S. 479, 482–83 (1965) (stating that without "peripheral rights," the "specific rights" enumerated in the constitution would be "less secure"); *see also infra* note 45 (discussing "adjacent" rights).

suspect classifications, remediating past wrongs, or preserving constructs against evolving norms.²⁹ Through their actions, cities both define availability of rights of access, generally through noninterference, and proactively enforce equal protection.³⁰ It is local civil servants who primarily "run the Constitution," reducing the words and principles to practice through "actions both routine and extraordinary."³¹ This bifurcation between author and administrator requires the latter to assume the role of interpreter, and while they "may not argue explicitly over the Constitution in their daily work," they are outsized participants in the "interpretive community that constructs constitutional meaning."³² Through their labors, the text is made real;³³ it is practice which legitimizes the words as part of our "going Constitution" and shapes constitutional values.³⁴ It is cities who must rulify constitutional principles, reducing them into enforcement processes "essential both to effectuate current policy and to inform future policy."³⁵ The actions of street-level bureaucrats,³⁶ who are encouraged by both state and federal law to push the envelope to best ensure the effective discharge of devolved duties,³⁷ require the constant adjudication of what is far enough.³⁸ Through processes and

²⁹ See William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 419–508 (2001).

³⁰ See Barron, *supra* note 28, at 489–91, 565–68, 599.

³¹ JOHN A. ROHR, CIVIL SERVANTS AND THEIR CONSTITUTIONS 141 (2002).

³² EWALD, *supra* note 18, at 13, 61; Barron, *supra* note 28, at 491 ("Towns and cities are often the institutions that are most directly responsible for structuring political struggles over the most contentious of public questions For that reason, local governments are often uniquely well positioned to give content to the substantive constitutional principles that should inform the consideration of such public questions—better positioned in some instances, that is, than either federal or state institutions.").

³³ Barron, *supra* note 28, at 491, 572.

³⁴ Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 12 (1934).

³⁵ Jill E. Habig & Joanna Pearl, *Cities as Engines of Justice*, 45 FORDHAM URB. L.J. 1159, 1168 (2018).

³⁶ Michael Lipsky, *Toward a Theory of Street-Level Bureaucracy*, in THEORETICAL PERSPECTIVES ON URBAN POLITICS 196, 196 (Willis D. Hawley & Michael Lipsky eds., 1976).

³⁷ Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565, 619 (2006).

³⁸ *Dore v. Tugwell*, 84 So. 2d 199, 202 n.5 (La. 1955) (distinguishing an executive official's contention that a statute is unconstitutional, which is an impermissible ground for nonenforcement, from her argument that one possible interpretation of the statute is unconstitutional, which is a permissible ground for enforcing the statute in a way that comports with such a construction).

enforcement, localities and their agents, at the most "mundane level of constitutional doctrine," possess an affirmative, structural role in protecting individual constitutional rights³⁹ and contribute to the reformation of equality norms.⁴⁰

If we accept the argument that "the people themselves" are the final arbiters of constitutional meaning through electoral engagement,⁴¹ it is local administrators who define the participants and results. In a system where the who and how of counting votes rivals who casts the votes in importance, it is essential to understand the work of local election officials ("LEOs"), as well as other municipal actors, who are central to the process by which constitutional meaning is constructed.⁴² Local governments are integral to operationalizing constitutional rights through a series of tools, including the powers to (1) fund, (2) enforce, (3) litigate civilly or criminal, (4) legislate, (5) district and zone, (6) set proprietary policies regarding employment or public property, and (7) procure.⁴³ Through these seven predominant tools, cities are the primary structurer and gatekeeper of rights and contour access by limiting what, who, where, how, when, who knows, and at what cost.⁴⁴ By variably regulating "adjacent" to the constitutional right to vote⁴⁵ through establishing dates and procedures by which

³⁹ Barron, *supra* note 28, at 489 nn.6–7 ("[T]o the extent that the constitutional Framers intended to connect localism and constitutionalism, it would be surprising if they did not intend for local governments to play some role in translating that intended connection into reality").

⁴⁰ Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1711 (2017).

⁴¹ LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

⁴² EWALD, *supra* note 18, at 20.

⁴³ See Cholden-Brown, *Centering Cities*, *supra* note 2, at 18–20.

⁴⁴ See Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443 (2009) (adopting this framework for the Second Amendment).

⁴⁵ Joseph Blocher, *Disuniformity of Federal Constitutional Rights*, 2020 U. ILL. L. REV. 1479, 1482 ("The *question* is whether the federal constitution is implicated by such rules, which do after all restrict people's ability to engage in what otherwise seems to be constitutionally protected conduct."). Adjacency bears some similarities not explored here to consideration of the core/periphery discourse pertaining to certain rights. See, e.g., *Boos v. Barry*, 485 U.S. 312, 318 (1988) (noting that political speech is at the core of the first Amendment); *Gould v. Morgan*, 907 F.3d 659, 671 (1st Cir. 2018) ("[T]he core Second Amendment right is limited to self-defense in the home."). But see, e.g., *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017) ("[T]he individual right to carry common firearms beyond the home for self-defense—even in densely populated areas, even for

putative voters establish eligibility for a particular election; the documents to establish identity; and the geographic, temporal and adaptive accessibility of the ballot or poll sites, suffrage rights are shaped before a vote is even cast. Indeed, some localities cast "reasonably convenient times and places for registration and voting" as a right guaranteed to its citizenry by a municipal "bill of rights."⁴⁶

Voting as meaningful participation in democratic institutions and processes is a key subset of citizenship,⁴⁷ and "no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."⁴⁸ Indeed, the right to vote is "preservative of all rights."⁴⁹ Thus, the pertinence of these tools to electoral administration, and with it access to the vote or "suffrage chicanery,"⁵⁰ impact not just the franchise itself but all the policies that emanate from those the polls elect. These affirmative and dissent tools, some of which "depend on regulatory powers exclusive to subnational governments,"⁵¹ are utilized by municipal corporations to shape rights-access through constructing both core concepts and regulating adjacent to fundamental rights to effectuate their constitutional vision.⁵² The use of legislation either directly regulating a protected activity or granting untethered discretion to some agent to determine access has been well-studied, if not exclusively on the local level; however, there are numerous other tools to (de)actualize a right whose legality is not dispositive of how government may promote or "thwart [a right] on the ground."⁵³ While facially void of constitutional values, municipal economic justice policies and legislation, like paid sick leave, and other soft controls including housing, education, social services, and family law, become

those lacking special self-defense needs—falls within the core of the Second Amendment's protections.").

⁴⁶ BISCAYNE PARK, FLA., CITIZENS' BILL OF RIGHTS, pt. I (2020).

⁴⁷ Christopher J. Tyson, *From Ferguson to Flint: In Search of an Antisubordination Principle for Local Government Law*, 34 HARV. J. RACIAL & ETHNIC JUST. 1, 42 (2018).

⁴⁸ Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 342 (1993).

⁴⁹ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

⁵⁰ EWALD, *supra* note 18, at 2.

⁵¹ Olatunde C.A. Johnson, *The Local Turn; Innovation and Diffusion in Civil Rights Law*, 79 L. & CONTEMP. PROBS. 115, 116 (2016).

⁵² See generally Cholden-Brown, *Centering Cities*, *supra* note 2.

⁵³ Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 U. CHI. L. REV. 1083, 1084–85 (2018).

means by which government, through incentives and disincentives, also significantly impacts the barriers to access for certain constitutional rights.⁵⁴

Of course, localities do not frame these rights wholly free of constraint, including differences in the standardization of state election rules, resources, population size, composition, and norms.⁵⁵ Jurisdictional scale, ranging from fewer than 100 voters in some locales to 6,800,000 in Los Angeles County, and density, spanning compact urban precincts and sprawling rural counties, contribute to distinct administrative advantages and challenges, including ease of voting registration list management or overall available resources.⁵⁶ With a small number of heavily-populated jurisdictions responsible for the majority of voters—fewer than 6% of LEOs serve more than two-thirds of voters—local discretion in a fewer spots can yield wildly divergent results.⁵⁷

Through the procurement and upkeep of vote-counting technologies and availability of paper ballots; accommodations and assistance provided to disabled or non-native English speakers with registration and voting; registration requirements and opportunities, whether online or at public sites (as well as list maintenance and purges); voter identification requirements; the setting of local elections; design of ballots; preparation of voter guides; selection of early voting and election day poll sites; identification and training of poll workers; absentee and provisional ballot provisions and timely distribution; campaign finance regulations; and vote-counting, recount, audit and reporting procedures, local election administrators construct an election "ecosystem" where changes in any one area wreak profound changes throughout.⁵⁸ In addition, other local actors who fund election agencies, prosecute election law violators, or provide services which enable

⁵⁴ Sarah Holder, *The Fight for Paid Sick Leave Moves South*, BLOOMBERG CITYLAB (Feb. 21, 2018, 8:51 AM), <https://www.bloomberg.com/news/articles/2018-02-21/austin-becomes-the-first-southern-city-to-pass-paid-sick-leave>; see Rick Su, *Immigration, Federal Authority, and City Hall*, HARV. L. REV. BLOG (Oct. 19, 2017), <https://blog.harvardlawreview.org/immigration-federal-authority-and-city-hall/>.

⁵⁵ David C. Kimball & Martha Kropf, *The Street-Level Bureaucrats of Elections: Selection Methods for Local Election Officials*, 23 REV. POL'Y RES. 1257, 1258 (2006).

⁵⁶ KAREN L. SHANTON, CONG. RESEARCH SERV., R45549, THE STATE AND LOCAL ROLE IN ELECTION ADMINISTRATION: DUTIES AND STRUCTURES 16–17 (2019).

⁵⁷ David C. Kimball & Brady Baybeck, *Are All Jurisdictions Equal? Size Disparity in Election Administration*, 12 ELECTION L.J. 130, 130–31 (2013).

⁵⁸ STEVEN F. HUEFNER ET AL., FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 11–17 (Nathan A. Cemenska ed., 2007).

physical or financial access to the polls by their actions further mold the experience of suffrage rights.⁵⁹

III. FRANCHISE RIPPLES

A single election can be constituted by anywhere from one to thousands of unique registration rules, ballots and voting machines, absentee and early voting policies, and postelection audit procedures.⁶⁰ Administered by over 13,000 state and local jurisdictions,⁶¹ these decentralized and partisan electoral administrative nuts and bolts are vulnerable to both incompetence and human error.⁶² As such, members of the same congressional body are elected by differently constituted electorates districted under different rules and facing different voting conditions, let alone different sizes.⁶³

Electoral hijinks are no longer associated with the same southern jurisdictions as at the passage of the VRA.⁶⁴ These hijinks now percolate in all corners of the nation from which both local structural electoral reforms and the consequences of LEO discretion manifest ripples throughout the election ecosystem.⁶⁵ By capturing a single local precinct, a close election extending across a far larger geography can be altered,⁶⁶ and, given the geography, a single stolen, discarded or dissuaded vote can wield different power.⁶⁷ These spillovers manifest

⁵⁹ See generally Danielle Root & Liz Kennedy, *Increasing Voter Participation in America*, CTR FOR AM. PROGRESS (July 11, 2018, 12:01 AM), <https://www.americanprogress.org/issues/democracy/reports/2018/07/11/453319/increasing-voter-participation-america/>.

⁶⁰ Anthony J. Gaughan, *Ramshackle Federalism: America's Archaic and Dysfunctional Presidential Election System*, 85 *FORDHAM L. REV.* 1021, 1031 (2016).

⁶¹ *Id.* at 1021.

⁶² PIPPA NORRIS, *WHY ELECTIONS FAIL* 134 (2015).

⁶³ See Kristin D. Burnett, *Congressional Apportionment: 2010 Census Briefs*, U.S. CENSUS BUREAU (Nov. 2011), <https://www.census.gov/content/dam/Census/library/publications/2011/dec/c2010br-08.pdf>.

⁶⁴ Cody Gray, *A New Proposal to Address Local Voting Discrimination*, 50 *U. RICH. L. REV.* 611, 623 (2016).

⁶⁵ BIPARTISAN POLICY CENTER, *LOGICAL ELECTION POLICY* 9 (Jan. 2020).

⁶⁶ *Toward a Greater State Role*, *supra* note 7, at 2331.

⁶⁷ EWALD, *supra* note 18, at 102 (noting that a resident moving from N.Y. to Vermont "is handed a much more powerful vote in U.S. Senate elections," as the voter's new state has the same number of senators but one-thirtieth the population).

from cybersecurity breaches,⁶⁸ decisions to count ballots,⁶⁹ or expansions of the franchise. The design and selection of the butterfly ballot in alleged contravention of state law,⁷⁰ along with Palm Beach and Volusia County's filing after the deadline established by the Secretary of State,⁷¹ both represent the most famous of the overwhelming consequences of such local decision-making. But the utility of Florida counties as the exemplar of how the design of a single ballot can have large repercussions. extends to Palm Beach County's requirement in 2018 that voters draw a line connecting the arrow indicating their preferred candidate, which, along with the placement of the Senate race in the lower left corner of the Broward County ballot, resulted in significant undervotes for Bill Nelson.⁷² Elsewhere, county decisions to not rerun their ballot counts have determined gubernatorial races,⁷³ and inconsistent village policies about the acceptance of mailed ballots during COVID-19 may swing Wisconsin.⁷⁴ The maintenance practices of one jurisdiction can result in capture elsewhere when access to mothballed technology is exploited to "disrupt an election in a state or locality still using that same machine"⁷⁵ and municipal voting rights

⁶⁸ See *Election Security: A Priority for Everyone*, NAT'L CONF. ST. LEGISLATURES: CANVASS (July 2017), <https://www.ncsl.org/research/elections-and-campaigns/states-and-election-reform-the-canvass-july-2017.aspx> ("[I]f a county doesn't have good security, it becomes the weak link for the whole state."); Eric S. Lynch, *Trusting the Federalism Process Under Unique Circumstances: United States Election Administration and Cybersecurity*, 60 WM. & MARY L. REV. 1979, 2003–04 (2019).

⁶⁹ Schragger, *supra* note 3, at 431 ("In this instance, the spillover effect of a local decision either to count or not to count ballots with hanging or dimpled chads might have been the election of the President of the United States.")

⁷⁰ Fladell v. Palm Beach Cty. Canvassing Bd., 772 So. 2d 1240 (Fla. 2000); Jonathan N. Wand et al., *The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida*, 95 AM. POL. SCI. REV. 793 (2001).

⁷¹ Bush v. Gore, 531 U.S. 98, 101 (2000).

⁷² Mike McIntire et al., *America's Election Grid Remains a Patchwork of Vulnerabilities*, N.Y. TIMES (Nov. 17, 2018), <https://www.nytimes.com/2018/11/17/us/usa-voting-system-elections.html>.

⁷³ See, e.g., David Postman, *Counties Opposing GOP Call to Reopen Vote Counts*, SEATTLE TIMES (Dec. 29, 2004, 12:00 AM), <https://www.seattletimes.com/seattle-news/politics/counties-opposing-gop-call-to-reopen-vote-counts/>.

⁷⁴ Ryan McCarthy, *Whether the Ballot You Mail Is Counted May Depend on Where You Vote*, PROPUBLICA: ELECTIONLAND (Apr. 30, 2020, 5:00 AM), <https://www.propublica.org/article/whether-the-ballot-you-mail-is-counted-may-depend-on-where-you-vote#948079>.

⁷⁵ Lynch, *supra* note 68.

reforms both directly engage larger populations, thereby swinging races, and by their success yield more widespread adoption.⁷⁶

Electoral manipulation not only imposes costs upon local voters, but also dilutes the ballots of supporters of the defeated, distributing the costs of discriminatory administration beyond the bounds of accountability.⁷⁷ The national implications are not merely the direct impacts on elections, which are national in scope, namely the presidency, and nowhere more so than Maine and Nebraska, which continue to choose electors by local districts.⁷⁸ These broad effects are also felt through the selection of officers with national implications; our members of Congress, who sway partisan and ideological control of our federal legislature; state representatives who ratify constitutional amendments with nationwide impact or alter the rules governing those individuals truly determining national elections (electors);⁷⁹ and indeed local officials who can instigate litigation with nationwide consequences, seek injunctions, or even prosecute national figures.⁸⁰ One election for the direct selection of the state or local election administrator will in turn birth policies, delegations, and determinations implicating the future of the right not just for oneself or one's polis, but myriad others.

⁷⁶ Douglas, *The Right to Vote*, *supra* note 8.

⁷⁷ *Toward a Greater State Role*, *supra* note 7, at 2328.

⁷⁸ *Distribution of Electoral Votes*, NAT'L ARCHIVES: ELECTORAL C., <https://www.archives.gov/electoral-college/allocation> (last updated Mar. 6, 2020).

⁷⁹ *McPherson v. Blacker*, 146 U.S. 1, 35 (1892); *Baca v. Colo. Dept of State*, 935 F.3d 887 (10th Cir. 2019), *rev'd*, 140 S. Ct. 2316 (2020); *In re Guerra*, 441 P.3d 807 (Wash. 2019), *cert. granted sub nom.*, *Chiafalo v. Washington*, 140 S. Ct. 918 (2020), *aff'd sub nom.*, 140 S. Ct. 2316 (2020); *see, e.g.*, Ronald Brownstein, *Florida Lawmakers Cite Broad Power to Award Electors to Bush*, L.A. TIMES (Nov. 28, 2000, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2000-nov-28-mn-58208-story.html>. In the midst of the Florida travails of 2000, Governor Jeb Bush and the legislature considering appointing electors pledged to his brother. Brownstein, *supra* note 79.

⁸⁰ Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1232, 1285 (2018); *see also* *Trump v. Vance*, 941 F.3d 631 (2d Cir. 2019), *aff'd and remanded*, 140 S. Ct. 2412 (2020); *Romer v. Evans*, 517 U.S. 620 (1996) (among the original plaintiffs were the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen).

IV. FRANCHISING THE FRANCHISE

"Franchised out to local affiliates" by states, practical control of suffrage is constituted by local administrative practices.⁸¹ This local dimension and the "terms, conditions, hurdles and boundaries" imposed by local officials, who act as stewards of democracy,⁸² define the right to vote.⁸³ The ensuing spatial variation in the right to vote has made electoral justice a concern not of equal protection for voters but for the ballots themselves⁸⁴ in which the procedures by which votes are counted and by whom can exceed the identity of the voter in import.⁸⁵ Electoral mechanics⁸⁶ such as variable funding, poll-site wait times and proximity, technology, partisanship, ease of registration or deregistration via purge, ballot design, counting and auditing procedures, and voting hours systematically make some votes count more than others.⁸⁷ The relative fortuity that is afforded some voters by dint of domicile is not merely an effect of unequal voting opportunity between jurisdictions but indeed within localities where deliberate resource allocation directly favors precincts at the expense of others.⁸⁸

Most voting procedures, which together constitute a system that must accurately translate voter preference and promote access while instilling in putative participants a sense of fairness, finality, and value, are neither exclusively good nor bad, but may further or

⁸¹ EWALD, *supra* note 18, at 3, 121.

⁸² SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* 14 (2006); *see also* NATALIE ADONA ET AL., *STEWARDS OF DEMOCRACY: THE VIEWS OF AMERICAN LOCAL ELECTION OFFICIALS*, DEMOCRACY FUND (2019).

⁸³ EWALD, *supra* note 18, at 10.

⁸⁴ *See* Henry E. Brady, *Equal Protection for Votes*, in *THE LONGEST NIGHT: POLEMICS AND PERSPECTIVES ON ELECTION 2000*, at 47–49 (Arthur J. Jacobson & Michel Rosenfeld eds., 2001).

⁸⁵ *Vote: The Machinery of Democracy*, SMITHSONIAN NAT'L MUSEUM AM. HIST., <https://americanhistory.si.edu/vote/index.html> (last visited Nov. 24, 2020).

⁸⁶ Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313 (2007).

⁸⁷ *See* Stephen Ansolabehere & Charles Stewart III, *Residual Votes Attributable to Technology*, 67 J. POL. 365, 365–66 (2005); DENNIS F. THOMPSON, *JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES* 180 (2002).

⁸⁸ *See* Edward B. Foley, *The Future of Bush v. Gore?*, 68 OHIO ST. L.J. 925, 945 (2007); Nathaniel Persily, *"Celebrating" the Tenth Anniversary of the 2000 Election Controversy: What the World Can Learn from the Recent History of Election Dysfunction in the United States*, 44 IND. L. REV. 85, 85–86 (2010).

encumber these goals.⁸⁹ This dichotomy means that in expanding voter access for some, through the relocation of staff, resources, or poll sites, restrictions or barriers may arise for others.⁹⁰ Consolidations present benefits of reduced staff and site needs and increased flexibility for commuter votes offset by disruptions to the election day habits of many and disadvantages for poor, disabled, or elderly voters and others with transportation issues, "whether by ill intent, insufficient planning, or poor implementation."⁹¹ Policies presented as accuracy-promoting, including voter identification requirements or signature-matching, represent barriers to equality of opportunity to cast a ballot that is counted.⁹² As such, "context matters," as does the level of consultation, evaluation, transparency, and updating that accompanies a new practice or policy even if warranted by changes in voter behavior or composition.⁹³

Local election policies, though not framed as formal civil rights law, can expand anti-discrimination norms to recognize and accommodate physical, linguistic, and technological barriers to suffrage.⁹⁴ However, disability compliance can also be weaponized to justify closing poll locations that serve particular communities.⁹⁵ Prospective oral, written, and audio accommodations that exceed the remedial mandates contained in the VRA remove participatory impediments but require

⁸⁹ See EWALD, *supra* note 18, at 96–97; Jocelyn Friedrichs Benson, *Democracy and the Secretary: The Crucial Role of State Election Administrators in Promoting Accuracy and Access to Democracy*, 27 ST. LOUIS U. PUB. L. REV. 343, 344–45 (2008).

⁹⁰ See Douglas, *The Right to Vote*, *supra* note 8, at 1079.

⁹¹ Peter Montgomery & Brad Ashwell, *Vote Centers: Potential Benefits for Voters, but Standards and Protections Must Be in Place*, ALL VOTING IS LOC. 3, 9, 16 (2020), <https://allvotingislocal.org/wp-content/uploads/2020/02/Vote-Centers-Report-9x12.pdf>; see also Tierney Sneed, *Arizona's Voting Problems Are More Complicated Than They Look*, TALKING POINTS MEMO (Mar. 28, 2016, 6:00 AM), <https://talkingpointsmemo.com/muckraker/arizona-voting-problems>.

⁹² See Benson, *supra* note 89, at 345; Foley, *supra* note 88, at 962–63, 963 n.89.

⁹³ *Democracy Diverted: Polling Place Closures and the Right to Vote*, LEADERSHIP CONF. EDUC. FUND 9 (Sept. 2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf>.

⁹⁴ See Angelo N. Ancheta, *Language Assistance and Local Voting Rights Law*, 44 IND. L. REV. 161, 192–93 (2010).

⁹⁵ See Matt Vasilogambros, *Tribes Strike Back: Native Americans Work to Overcome Voter Laws They Say Diminish Their Influence*, TUCSON SENTINEL (Oct. 15, 2018, 12:26 PM), http://www.tucsonsentinel.com/nationworld/report/100918_tribes_vote/tribes-strike-back-native-americans-work-overcome-voter-laws-they-say-diminish-their-influence.

the provision of assistance throughout the electoral process.⁹⁶ If printed or electronic registration or informational materials are only in English or mistranslated and not optimized for easy access by screen readers or other adaptive technology, or there is an inadequate supply of translators, signage, ballots in other languages, or ballot marking devices, the ballots of voters with limited English or disabilities are devalued, whether through intentional and wanton neglect or misappropriation.⁹⁷ Moves to online voter registration or mail voting can exacerbate these shortcomings as they eliminate the opportunity for in-person assistance.⁹⁸ While some of this disparate treatment is baked into such policies, elsewhere accessibility barriers violative of the Fifth and Fourteenth Amendments are erected by hostile and unequal treatment by poll officials, including derogatory language and behavior, identification demands not required by statute, or address verification requirements only for certain populations.⁹⁹ Even when implemented in concert with the provisions of the National Voter Registration Act ("NVRA") and its information-enhancing mandates,¹⁰⁰ voter list

⁹⁶ See PRESIDENTIAL COMM'N ON ELECTION ADMIN., THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 1, 6, 50–54 (2014), <https://law.stanford.edu/publications/the-american-voting-experience-report-and-recommendations-of-the-presidential-commission-on-election-administration/> [hereinafter THE AMERICAN VOTING EXPERIENCE].

⁹⁷ See *id.* at 1, 10, 16, 52–54; Arielle Kass, *Civil Rights Group: Gwinnett Must Send Ballot Applications in Spanish*, ATLANTA NEWS NOW: ATLANTA J.—CONST. (Apr. 13, 2020), <https://www.ajc.com/news/local/civil-rights-group-gwinnett-must-send-ballot-applications-spanish/wz09IL0pgfLZ4HZT4BEv1J/> (statement of Bryan Tyson, attorney for Gwinnett County Elections Board) (“[T]he state—not Gwinnett—sent the materials and so there is no requirement for the county to send the application in Spanish.”); Spencer Overton, *Against a “Post-Racial” Voting Rights Act*, AM. PROSPECT (Aug. 21, 2013), <http://prospect.org/article/against-post-racial-voting-rights-act> (demonstrating that Runnels County, Texas, officials failed to place any bilingual poll workers at any county polling sites notwithstanding a court order).

⁹⁸ See *Navajo Nation Human Rights Comm’n v. San Juan Cty.*, 281 F. Supp. 3d 1136, 1142–43, 1165–66, 1172 (D. Utah 2017) (permitting Section 2 claims to proceed to trial on the theory that closing polling places in favor of a mail-only voting system disparately burdens Native American voters). For those who need help casting a ballot, have poor reading skills or limited postal service, mail voting can increase barriers. See *Looking for “A Few Good Clerks”*, JUST. FOUND. FOR CIV. & ENVTL. RTS., http://dynamicpolicy.law/images/Default_Mail_Balloting_JFCER.pdf (last visited Nov. 24, 2020).

⁹⁹ See *United States v. Berks Cty.*, 250 F. Supp. 2d 525, 526, 529 (E.D. Pa. 2003).

¹⁰⁰ See *The National Voter Registration Act of 1993 (NVRA)*, U.S. DEP’T JUST., <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra> (last updated Mar. 11, 2020) (providing information and guidance on the National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77).

maintenance, expressed through purges, makes suffrage the only constitutional right "lost from disuse."¹⁰¹ It has also repeatedly disenfranchised large swaths as a result of mistake or technological failure.¹⁰² Shifts from listing all persons with local addresses on eligible lists to only those billed by a municipal utility,¹⁰³ having sheriffs serve subpoenas to appear at a hearing to prove their residence,¹⁰⁴ or the use of mass-mailings by third-parties¹⁰⁵ to conduct roll-maintenance can have racially disparate impacts. Once so relegated, voters who learn of this disposition of their registration upon arrival at the polls are thereby pushed, in turn, into the discretionary and uneven world of provisional ballots.¹⁰⁶ As such, even if the removal is undertaken with the uniform and non-discriminatory mandates of the NVRA, which are likely violated by the use of different methods of identification amongst a state's election jurisdictions,¹⁰⁷ because of not exercising the right, the result can be treatment of the impacted registrant in an incredibly uneven and partisan manner once a putative voter actively seeks to assert their right.

¹⁰¹ See David H. Gans, *The Roberts Court Will Not Ensure the Constitution's Most Fundamental Right*, SLATE (Apr. 7, 2020, 5:36 PM), <https://slate.com/news-and-politics/2020/04/john-roberts-court-will-not-ensure-right-to-vote.html>.

¹⁰² See Zach Despart, *Harris County Mistakenly Suspends Voter Registrations After GOP Challenge*, CHRON. (Aug. 28, 2018, 6:24 PM), <https://www.chron.com/news/houston-texas/houston/article/Harris-County-mistakenly-suspends-voter-13175685.php> ("Harris County mistakenly placed more than 1,700 voters on its suspension list in response to a local Republican official's challenge of nearly 4,000 voter registrations"); Brigid Bergin and Jenny Ye, *A Year After Brooklyn Voter Purge Scandal, a Timeline of Action and Inaction*, WNYC (Apr. 19, 2017), <https://www.wnyc.org/story/year-after-brooklyn-voter-purge-timeline-action-inaction/>.

¹⁰³ *Allen v. City of Evergreen*, No. 1:12CV-00496-CB-M, 2012 U.S. Dist. LEXIS 117420, at *5-6 (S.D. Ala. Aug. 20, 2012).

¹⁰⁴ Michael Wines, *Critics See Efforts by Counties and Towns to Purge Minority Voters from Rolls*, N.Y. TIMES (July 31, 2016), <https://www.nytimes.com/2016/08/01/us/critics-see-efforts-to-purge-minorities-from-voter-rolls-in-new-elections-rules.html> [hereinafter Wines, *Critics See Efforts*].

¹⁰⁵ *N.C. State Conference of the NAACP v. N.C. State Bd. of Elections*, No. 1:16CV1274, 2016 WL 6581284, at *1, *5 (M.D.N.C. Nov. 4, 2016).

¹⁰⁶ Richard F. Shordt, *Not Registered to Vote? Sign This, Mail It, and Go Hire a Lawyer*, 78 GEO. WASH. L. REV. 438, 459-61 (2010).

¹⁰⁷ Naila S. Awan, *When Names Disappear: State Roll-Maintenance Practices*, 49 U. MEM. L. REV. 1107, 1124-25 (2019).

V. FRANCHISE PENUMBRAS

Local policies, which accentuate or ameliorate the effects of poverty, location, disability, and senses of belonging or otherness, each extend into the ballot box.¹⁰⁸ These policies, which increasingly monetize the municipal criminal justice system, can—in states which make voting rights restoration dependent on ability to satisfy legal financial obligations arising out of convictions—disenfranchise.¹⁰⁹ Similar to local policies, local officials can also disenfranchise as they are granted unfettered discretion, in some instances, to define excluding "crimes involving moral turpitude."¹¹⁰ Elsewhere, local officials from prosecutors to public defenders implement collaborative policies to modify sentences, set aside financial penalties, and establish payment plans to re-franchise in the face of state-imposed barriers,¹¹¹ or, in challenges to the accuracy of state records, "err on the [side of the] right to vote" by retaining prospectively excluded voters on the roll.¹¹² Provision of inadequate polling locations or early voting sites for students, rollbacks of programs that preregister imminently eligible minors, prosecution and misinformation about eligibility, and electoral gerrymandering render localities responsible for barriers to the youth vote and "the unfulfilled promise of the [T]wenty-[S]ixth [A]mendment."¹¹³ Identification requirements, which can operate as modern poll taxes because of the expenses of obtaining the necessary underlying documentation,

¹⁰⁸ Gilda Daniels et al., *We Vote, We Count: The Need for Congressional Action to Secure the Right to Vote for All Citizens*, RACIAL EQUITY ANCHORS COLLABORATIVE 1, 30 (Nov. 2019), <http://advancementproject.org/wp-content/uploads/2019/11/We-Vote-We-Count-Report-Web.pdf>.

¹⁰⁹ Georgetown Law Civil Rights Clinic, *Can't Pay, Can't Vote: A National Survey on the Modern Poll Tax*, CAMPAIGN LEGAL CTR. 1, 16 http://campaignlegal.org/sites/default/files/2019-07/CLC_CPCV_Report_Final_0.pdf (last visited Nov. 24, 2020).

¹¹⁰ *Hunter v. Underwood*, 471 U.S. 222, 226–27 (1985).

¹¹¹ See, e.g., Linda So, *Restoring Felon Voting Rights a 'Mess' in Battleground Florida*, THOMSON REUTERS (Oct. 7, 2019, 7:48 AM), <https://www.reuters.com/article/us-usa-election-florida-felons-insight/restoring-felon-voting-rights-a-mess-in-battleground-florida-idUSKBN1WM0YV>.

¹¹² Bob Mahlburg & John Maines, *State Defends 'Potential Felons' List*, ORLANDO SENTINEL (July 3, 2004), <https://www.orlandosentinel.com/news/os-xpm-2004-07-03-0407030353-story.html>; Marc Caputo, *Questions Over Felon 'Purge List' Threaten Florida Governor*, MIAMI HERALD (July 4, 2004) (on file with author).

¹¹³ Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. PA. J. CONST. L. 1105, 1107–08, 1143–44 (2019).

including certified birth certificates,¹¹⁴ transportation to government agencies,¹¹⁵ or even internet and telephone connectivity and housing,¹¹⁶ all serve to deter the elderly, immobile, or impoverished as well as transgender voters or those who do not present in conformity with traditional gender norms.¹¹⁷ Thus, the creation by localities of alternative IDs, either specifically for electoral use,¹¹⁸ or as broader policies affirming identity, civic participation, and access to public and private goods,¹¹⁹ can serve to counter the ill effects of such mandates, which to a limited extent, exist in every jurisdiction.¹²⁰ Localities have immense power to both enfranchise and disqualify entire classes of voters, including the undomiciled,¹²¹ intellectually disabled or mentally

¹¹⁴ Foley, *supra* note 88, at 979; see Brandon S. Baker, Texas v. Holder: *How Texas Can Enact a Stringent Voter ID Law and Avoid Section 3(C) Preclearance*, 8 LIBERTY U. L. REV. 371, 402–03 (2014).

¹¹⁵ Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 211–12 (2008) (Souter, J., dissenting).

¹¹⁶ C.S. Hagen, *State Strips Then Delays Native Voting Rights*, HPR (Oct. 13, 2018), <http://hprl.com/index.php/feature/news/state-strips-then-delays-native-voting-rights>.

¹¹⁷ Kathryn O'Neill & Jody L. Herman, *The Potential Impact of Voter Identification Laws on Transgender Voters in the 2020 General Election*, UCLA WILLIAMS INST. (Feb. 2020), <https://williamsinstitute.law.ucla.edu/publications/trans-voter-id-impact/>.

¹¹⁸ In Missouri, you can issue a "local election authority IDs," therefore helping with voter ID problems. ERIC A. FISHER ET AL., CONG. RESEARCH SERV., STATE VOTER IDENTIFICATION REQUIREMENTS: ANALYSIS, LEGAL ISSUES, AND POLICY CONSIDERATIONS, 1, 8–10 (2016), <https://fas.org/sgp/crs/misc/R42806.pdf>.

¹¹⁹ Amy C. Torres, *"I Am Undocumented and A New Yorker": Affirmative City Citizenship and New York City's IDNYC Program*, 86 FORDHAM L. REV. 335, 345 (2017).

¹²⁰ See, e.g., Help America Vote Act of 2002 § 303(b), 52 U.S.C. § 21083 (2018).

¹²¹ Pitts v. Black, 608 F. Supp. 696, 696, 704 (S.D.N.Y. 1984) (holding that the Board's application of New York State Election Law to refuse to allow homeless individuals to register to vote on the ground that they did not to have inhabit fixed premises violated the equal protection clause); Collier v. Menzel, 221 Cal. Rptr. 110, 113 (Cal. Ct. App. 1985).

ill,¹²² youth,¹²³ the currently or formerly incarcerated,¹²⁴ non-residents,¹²⁵ and non-citizens,¹²⁶ with implications not only for the exclusion of persons from genuine representation and political membership,¹²⁷ but also the dilution or enhancement of the votes of other members of the electorate.¹²⁸ It is worthwhile to note that despite forgoing, many of the other attributes of citizenship which are universally borne by the above, the votes of expatriates are nevertheless preserved by the

¹²² Charles Kopel, *Suffrage for People with Intellectual Disabilities and Mental Illness: Observations on a Civic Controversy*, 17 YALE J. HEALTH POL'Y, L., & ETHICS 209 (2017); Shankar Vedantam, *Dementia and the Voter*, WASH. POST (Sept. 14, 2004), <https://www.washingtonpost.com/archive/politics/2004/09/14/dementia-and-the-voter/6feae54f-abeb-4621-a6c9-cbda20ecc989/>.

¹²³ Lindsay A. Powers, *Takoma Park Grants 16-Year-Olds Right to Vote*, WASH. POST (May 14, 2013), https://www.washingtonpost.com/local/takoma-park-grants-16-year-olds-right-to-vote/2013/05/14/b27c52c4-bccd-11e2-89c9-3be8095fe767_story.html. *But see* Elections, Op. Wash. Att'y Gen. AGO 2018 No. 6 (2018) (arguing that local governments cannot allow people under eighteen to vote in local elections); *Lowering the Voting Age: A Legal Feasibility Study*, GENERATION CITIZEN, https://d3n8a8pro7vhmx.cloudfront.net/fairvote/pages/245/attachments/original/1450727271/Voting_Age_Feasibility_Study.pdf?1450727271 (last visited Nov. 24, 2020).

¹²⁴ TAKOMA PARK, MD., MUN. CODE art. VI, § 601 (2002); *Hamilton v. Ashland Cty. Bd. of Elections*, 320 F. App'x 307 (6th Cir. 2008); *Richardson v. Ramirez*, 418 U.S. 24, 33 n.12 (1974) (quoting a California report showing that "a person convicted of almost any given felony would find that he is eligible to vote in some California counties and ineligible to vote in others").

¹²⁵ *Nonresident Property Owners and Voting in Local Elections: A Paradigm Shift?*, NAT'L CONF. ST. LEGISLATURES (Oct. 2008), <https://www.ncsl.org/research/elections-and-campaigns/nonresident-property-owners-voting-local-elections.aspx>; *see also* *May v. Town of Mountain Village*, 969 P.2d 790, 793–94 (Colo. App. 1998) (In sustaining home rule authority of a resort community to extend the vote to nonresident property owners, the court stated that "the qualification of voters in local and municipal elections is a matter of local, not statewide, concern."); *Non-Resident Property Rights Voting*, JEFFERSON COUNTY ELECTION COMMISSION, <http://www.jeffersoncountytg.gov/government/election-commission/non-resident-property-rights-voting/> (last visited Nov. 24, 2020).

¹²⁶ TAKOMA PARK, MD., MUN. CODE art. VI, § 601(a) (2002); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993).

¹²⁷ David M. Howard, *Potential Citizens' Rights: The Case for Permanent Resident Voting*, 95 TEX. L. REV. 1393, 1394–95 (2017).

¹²⁸ Amanda Mayo, Comment, *Nonresident Vote Dilution Claims: Rational Basis or Strict Scrutiny Review?*, 83 U. CHI. L. REV. 2213, 2213–14 (2016); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1677 (2001).

Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA").¹²⁹ While some of these exclusions are statutory, others are the result of either deliberate choices by LEOs or the inevitable effects of other governmental policies. The ability for an arrested indigent voter to vote depends greatly on the jurisdiction of detention, with some making affirmative efforts to provide ballot access to eligible incarcerated voters in jails, while others lack any process.¹³⁰ Where ballot access is dependent on law enforcement discretion, "the power of arrest becomes the power to disenfranchise" and variable pretrial detention practices become determinative of access.¹³¹ As the courts have, perhaps temporarily, recognized, the formal bounds of a policy no longer determine whether the policy itself burdens a fundamental right; it is only by extending the inquiry to the way the policy interacts with forces beyond the government's control, including political and financial trends, that the true implications for realization can be seen.¹³²

VI. FUNDING THE FRANCHISE

Especially as localities struggle with dire financial circumstances, suffrage rights, which are contingent on public funding, are constantly at risk of bankruptcy.¹³³ The strictures of federal election law pass expensive compliance costs onto the states, who in turn abdicate it all the way down.¹³⁴ The direct costs associated with an election are myriad from compensating poll workers and purchasing (and

¹²⁹ Brian C. Kalt, *Unconstitutional but Entrenched: Putting UOCAVA and Voting Rights for Permanent Expatriates on a Sound Constitutional Footing*, 81 BROOK. L. REV. 441, 441, 461 (2016).

¹³⁰ Dana Paikowsky, Note, *Jails as Polling Places: Living Up to the Obligation to Enfranchise the Voters We Jail*, 54 HARV. C.R.-C.L. L. REV. 829, 832, 863 (2019).

¹³¹ *Id.* at 844.

¹³² See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–10, 2313–18 (2016). However, there is presently a judicial and scholarly debate about whether in the wake of *June Medical v. Russo*, 140 S. Ct. 2103 (2020), this standard still controls, for the time being. See, e.g., David S. Cohen, *Why Whole Woman's Health's Balancing Test Still Applies After June Medical*, HARV. L. & POLY REV., <https://harvardlpr.com/2020/08/24/why-whole-womans-healths-balancing-test-still-applies-after-june-medical/> (last visited Nov. 24, 2020); *Maher v. Roe*, 432 U.S. 464, 475 (1977) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity.")

¹³³ Ed Kilgore, *Bankrupting the Vote*, WASH. MONTHLY (Apr. 26, 2012), <https://washingtomonthly.com/2012/04/26/bankrupting-the-vote/>.

¹³⁴ Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839, 907 (2017).

maintaining) equipment to purchasing supplies or postage and distributing registration materials.¹³⁵ Diminished compensation has negative implications for recruitment and quality of staff, which in turn impacts the number of available early or election day sites and wait times, the timeliness of absentee ballots being distributed or registrations processed, and the robustness of language access and disability services.¹³⁶ Insufficient funds to purchase new technology or conduct routine maintenance result in continued usage of machines which have exceeded their useful life and are likelier to break or lose votes.¹³⁷ In the vast majority of states, localities are responsible for the majority, if not all, the attendant costs of election administration.¹³⁸ As such, our "system leaves the value of the vote to be determined by whatever tax dollars a given county can afford to invest in it."¹³⁹ Since, in many jurisdictions, elections are perceived as a recurring, maybe twice a year, rather than persistent funding need, administrative entities who must be engaged in constant registration and voter roll maintenance activities are often considered the last priority in local budgets.¹⁴⁰ Deferred maintenance of our election infrastructure, like our physical infrastructure, is a consequence of localism, which encourages investment in visible problems rather than sporadic, if annual, evidence of neglect.¹⁴¹ By starving localities for resources, vote suppressors can ensure actual in-person voting extends beyond the time voters can spare,¹⁴² casting the line-leaver as the barrier to the exercise

¹³⁵ Katy Owens Hubler & Wendy Underhill, *Election Costs: Who Pays and with Which Funds?*, NAT'L CONF. ST. LEGISLATURES (Mar. 2018), <https://www.ncsl.org/research/elections-and-campaigns/election-costs-who-pays-and-with-which-funds.aspx>.

¹³⁶ *Id.*

¹³⁷ See J.B. Wogan, *Voting Technology Needs an Upgrade, but Who Will Pay for It?*, GOVERNING (Nov. 2016), <https://www.governing.com/topics/elections/gov-voting-technology-machines.html>.

¹³⁸ THE CONSTITUTION PROJECT, ELECTION REFORM BRIEFING: WORKING TOGETHER? STATE AND LOCAL ELECTION COORDINATION 7 (2002); see also Hubler & Underhill, *supra* note 135.

¹³⁹ LISA JANE DISCH, THE TYRANNY OF THE TWO-PARTY SYSTEM 131 (2002).

¹⁴⁰ THE AMERICAN VOTING EXPERIENCE, *supra* note 96, at 10.

¹⁴¹ HEATHER K. GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT 24 (2009).

¹⁴² *Voting Rights and Election Administration in America: Hearing Before the Subcomm. on Elections of the Comm. on H. Admin.*, 116th Cong. (2019) (statement of Elena Nunez, Director of State Operations and Ballot Measure Strategies at Common Cause) [hereinafter *Voting Rights and Election Administration Hearing*] ("In 2016, Macon, Georgia, election officials tried to move a voting precinct to a police station in a largely African-American community.").

without demanding an ID, rejecting a signature, or misreporting a tabulation.

VII. ZONING THE FRANCHISE

The zoning power, uniquely held by local government, in addition to the obvious takings implications, has been utilized to restrict access to constitutionally protected activities and govern constitutive families.¹⁴³ The local power to "zone" includes both the obligation to designate local districts for municipal elections, generally exercised by the elected legislators serving those boundaries, with the imperative to classify precincts for the effective administration of the vote, which married with the procurement of actual sites generate significant implications for physical access of varied forms.¹⁴⁴ Precincts, often apportioned on the basis of one political geography, are assembled to administer elections for numerous others and the assignment to the wrong one can shift the elections in which a vote can be cast and, in rare circumstances, swung.¹⁴⁵ Accurate precinct information, which determines not only the location from which you vote, but also the specific table or machine within the sometimes cavernous room, ensures that your registration can be identified and a vote cast, and in some instances an instruction to cast a provisional ballot in lieu of being redirected to the correct site or scanner can result in your vote being discarded.¹⁴⁶ Properly sizing a precinct ensures that it is adequately resourced and staffed so that long lines and wait times are minimized such that refusal, inaction, or non-decision to rezone can be just as determinative as an affirmative act.¹⁴⁷

¹⁴³ Louis Cholden-Brown, *The Reproductive Rights Charter*, 94 U. DET.-MERCY L. REV. 557, 567–68 (2019); see Cholden-Brown, *Centering Cities*, *supra* note 2.

¹⁴⁴ See Joaquin Gonzalez, *Fighting Back to Protect Student Voting Rights*, 129 YALE L.J. F. 258, 262–63 (2019) (discussing how legislative mapmakers can skew districts' racial and political demographics, and ultimately affect the availability of easily accessibly polling locations for many voters).

¹⁴⁵ *Id.* at 267 (discussing how at least 114 voters cast ballots in incorrect precincts, including one where a corresponding election was determined by 37 votes).

¹⁴⁶ See *id.* at 266–68 (discussing the frequency in which voter confusion regarding correct precinct locations results in provisional ballots that often-become discarded votes).

¹⁴⁷ See M. David Gelfand, *The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980's*, 21 B.C. L. REV. 763, 767–73 (1980).

VIII. LITIGATING THE FRANCHISE

The litigation authority of local prosecutors, law departments, or electoral agencies contributes to vote access both locally and nationally. As the implementors of state election law, not only are local boards, such as in Marion County, often the subject of suit by voters aggrieved by those mandates as implemented,¹⁴⁸ as well as the federal government for VRA violations or noncompliance with the Help America Vote Act ("HAVA") or NVRA,¹⁴⁹ but those administrators also can affirmatively seek to abolish those regimes as arguably accomplished by Shelby County. Even when not directly sued, localities have intervened in federal lawsuits against their states, often alleging poor representation by the state who had made compliance impossible through inaction, and asserting that they were responsible for "actually implement[ing], at the ground level" these mandates and thus were the parties slated to forego funding.¹⁵⁰ Localities have also filed amicus briefs seeking to preserve the VRA, through delineation of their experiences or in support of state policies alleged to be violative thereof.¹⁵¹ In addition, local election officials have initiated litigation

¹⁴⁸ See *Major Pending Election Cases*, OHIO ST. U.: ELECTION L. AT OHIO ST., <https://u.osu.edu/electionlaw/major-pending-election-cases/> (last visited Nov. 24, 2020).

¹⁴⁹ *Id.*

¹⁵⁰ Memorandum of Law in Support of Intervention at 1, *United States v. N.Y. State Bd. of Elections*, No. 06-CV-0263 (GLS) (N.D.N.Y. July 25, 2007).

¹⁵¹ Brief for Amici Curiae, *The City of New York et al. in Support of Respondents at 2, Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96) ("The Section 5 preclearance requirements do not impose an undue burden on or interfere with governmental function in covered jurisdictions like New York City. In fact, preclearance has, and continues to, provide substantial benefits to New York City and the nation in eliminating voting discrimination."); see also Brief of Merced County, California, as Amicus Curiae in Support of No Party at 4, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96) ("Merced County does not purport to speak for the Attorney General, nor does it have any view on the merits of bailout efforts by any other jurisdiction. The success of those efforts will necessarily turn on the unique facts of each covered jurisdiction, about which the County has no direct knowledge. However, the County does have knowledge about the circumstances of its own history under Section 5 and its bailout, which the County believes may be of interest and assistance to the Court in the determinations that it must make in this case."); Brief of Amici Curiae Jurisdictions That Have Bailed Out in Support of Respondents and Urging Affirmance at 2–5, *Shelby County v. Holder*, 570 U.S. 529 (Feb. 1, 2013) (No. 12-96) ("*Amici* therefore can offer a unique perspective on the operation of the bailout provisions and the actual procedures and costs associated with the process . . . this Court should again uphold Section 5 and the Act's coverage formula."); Brief for Amicus Curiae Maricopa County in Support of Petitioner at 2–3, *Democratic Nat'l Comm.*

against the state to force changes,¹⁵² or against other instrumentalities of local government considered to be intruding upon their province.¹⁵³ LEOs have also sued private parties who seek to monetize votes¹⁵⁴ or fail to provide polling sites¹⁵⁵ and candidates who fail to submit necessary filings or satisfy requirements for the ballot.¹⁵⁶ Threats of prosecution or indictment often intentionally target populations directly, like student voters in Waller County, Texas,¹⁵⁷ and the discretion afforded means that charging decisions, and subsequent sentences, have racialized impacts.¹⁵⁸ While only one county in North Carolina prosecuted unintentional improper voting under the state's felon disenfranchisement regime,¹⁵⁹ elsewhere in the state, prosecutors did not charge a woman who voted twice, including as her deceased mother.¹⁶⁰ An Iowa woman convicted of double-voting received a sentence of two years' probation and a \$750 fine, while a Texas woman who did not understand the terms of her supervised release received a five

v. Hobbs, 948 F.3d 989 (9th Cir. 2020), *docketed as* Brnovich v. Democratic Nat'l Comm., (No. 19-1257).

¹⁵² Len Barcouky, *Lawsuit Planned over Pennsylvania's Voter ID Law*, PITTSBURG POST-GAZETTE (June 16, 2012, 5:38 PM), <http://www.post-gazette.com/news/state/2012/06/16/Lawsuit-planned-over-Pennsylvania-s-voter-ID-law/stories/201206160172> (discussing how Allegheny County election board planned to "challenge the state's new voter ID law as being too expensive and too difficult to implement in time for the . . . election").

¹⁵³ Bd. of Elections v. Mostofi, 108 N.Y.S.3d 819 (N.Y. Sup. Ct. 2019).

¹⁵⁴ Audrey Cooper, *Vote-Selling Web Site Investigated for Fraud*, ABC NEWS (Jan. 7, 2006, 7:30 AM), <https://abcnews.go.com/amp/Technology/story?id=119359&page=1>.

¹⁵⁵ Bd. of Elections v. Woodhaven-Richmond Hill, No. 0400894/2012 (N.Y. Sup. Ct. Apr. 25, 2012).

¹⁵⁶ Bd. of Elections v. Diaz, Index No. 0405651/2001 (N.Y. Sup. Ct. Oct. 23, 2002).

¹⁵⁷ Nina Perales et al., *Voting Rights in Texas: 1982-2006*, 17 S. CALIF. REV. L. & SOC. JUST. 713, 741-43 (2008) (Students at a historically African-American university were indicted in 1992 for "illegally voting," and in 2003, the District Attorney attempted to prevent students from registering and voting by threatening to prosecute students who declared Prairie View as their residence).

¹⁵⁸ Jack Healy, *Arrested, Jailed and Charged With a Felony. For Voting.*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/us/arrested-voting-north-carolina.html?smid=tw-share> ("I don't think he targeted black people. But if you cast that net, you're going to catch more African-Americans.")

¹⁵⁹ *Id.*

¹⁶⁰ *DA Cites 'Compassion' for Not Prosecuting Voter Fraud Case*, NEWS HERALD, https://www.morganton.com/news/da-cites-compassion-for-not-prosecuting-voter-fraud-case/article_766b15cc-2ad8-11e7-abfa-8f9665252d92.html (last updated Mar. 15, 2019).

year prison sentence.¹⁶¹ Such decisions may be tinged with partisanship, intentional blindness to the complicity of poll workers who may mislead putative voters,¹⁶² or a desire to dissuade certain voters or vote-getting activities¹⁶³ that ensure that the repercussions of trying to exercise your right to vote, or assist others in such, are a matter of simple whim.

IX. PROCURING THE FRANCHISE

In addition to procuring the necessary temporary employees, technology, ballot variations, and incident supplies, including envelopes,¹⁶⁴ the untimely delivery of which can result in long waits or foregoing a vote,¹⁶⁵ the acquisition and selection of sites for registration activities, early voting, and election day can play an important structuring role. Each of these purchases interplay; the sheer number of sites implicates overall costs as well as the need for staff and ensuring sufficient requisitions at each location. It also poses implications for accessibility, proximity, and wait times.¹⁶⁶

¹⁶¹ *Meet Crystal Mason, the Black Texas Mother Facing 5+ Years in Prison for Voting in the 2016 Election*, DEMOCRACY NOW! (Aug. 29, 2018), https://www.democracynow.org/2018/8/29/meet_crystal_mason_the_black_texas.

¹⁶² Jason Clayworth, *Dozens of Felons Have Been Caught Illegally Voting in Iowa. So Why Aren't They Being Punished?*, DES MOINES REG., <https://www.desmoinesregister.com/story/news/investigations/2019/01/20/iowa-election-felons-caught-illegally-voting-not-punished-felon-rights-prosecuting-kim-reynolds/2583138002/> (last updated Jan. 23, 2019, 8:50 AM).

¹⁶³ Andy Pierrotti & Lindsey Basye, *How a Georgia Grandmother Almost Went to Prison – And Why Some Are Calling It Voter Suppression*, ILLINOIS LIVE, <https://www.illalive.com/article/news/investigations/how-a-georgia-grandmother-almost-went-to-prison-and-why-some-are-calling-it-voter-suppression/85-606018313> (last updated Dec. 4, 2018, 4:18 PM).

¹⁶⁴ Rachel Silberstein, *Envelope Snafu Creates Last-Minute Problems for New York Schools*, TIMES UNION (June 1, 2020, 6:15 PM), <https://www.timesunion.com/news/article/Envelope-snafu-creates-last-minute-problems-for-15308182.php>.

¹⁶⁵ ELECTION FRAUD: DETECTING AND DETERRING ELECTORAL MANIPULATION 121 (R. Michael Alvarez et al. eds., 2008) (Keys for building); *Polling Problems: Election Judge Late to Unlock Machines, Angers Voters*, YAHOO! NEWS (Apr. 26, 2016), <https://news.yahoo.com/polling-problems-election-judge-unlock-225237769.html> (Keys for machine); NORRIS, *supra* note 62 (“Elsewhere, people were turned away from Hartford Connecticut polling places that did not open on time since they had not received polling lists.”).

¹⁶⁶ Ari Berman, *There Were 5-Hour Lines to Vote in Arizona Because the Supreme Court Guttered the Voting Rights Act*, NATION (Mar. 23, 2016), <https://www.thenation.com/article/archive/there-were-five-hour-lines-to-vote-in-arizona-because-the-supreme-court-guttered-the-voting-rights-act/> (70% reduction of polling places in Maricopa County resulted in 5-hour waits).

With geographic accessibility playing a large role in turnout,¹⁶⁷ selection of sites distant from public transit or lacking pedestrian access,¹⁶⁸ or placement of sites within public buildings associated with law enforcement,¹⁶⁹ can depress enthusiasm and intimidate voters. While selection criteria like ensuring sufficient available parking, potentially by restricting it for voters,¹⁷⁰ can benefit some, requirements that sites have "sufficient non-permitted parking" can eliminate potential sites and suppress turnout, including among college students.¹⁷¹ By requiring more public agencies to conduct voter registration or requiring organizations operating out of city-owned buildings, on city-owned land, or receiving tax breaks to be poll sites, local governments can operationalize their proprietary interests.¹⁷²

Local choice and faulty implementation of different balloting mechanisms, which deploy more than 300,000 pieces of voting equipment in a national election, can result in significant differences in the number of votes discarded amongst localities, disenfranchising a subset of a state's electorate.¹⁷³ The selection of balloting technology, often fraught with financial conflicts of interest,¹⁷⁴ has implications

¹⁶⁷ Jeronimo Cortina & Brandon Rottinghaus, *'The Quiet Revolution': Convenience Voting, Vote Centers, and Turnout in Texas Elections* 7 (2019), <https://cpb-us-w2.wpmucdn.com/web.sas.upenn.edu/dist/7/538/files/2019/06/Cortina-and-Rottinghaus-ESRA-2019-Paper.pdf>.

¹⁶⁸ Tierney Sneed, *'Panties in a Bunch': Kansas Official Blew off Concerns About 2018 Polling Place Move*, TALKING POINTS MEMO (Feb. 26, 2020, 10:00 AM), <https://talking-pointsmemo.com/news/house-over-sight-kansas-voter-rights-investigation-update>; see also John M. Glionna, *Nov. 2 Is V-Day for Blacks in Florida*, L.A. TIMES (Oct. 11, 2004, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2004-oct-11-na-black-voters11-story.html>.

¹⁶⁹ Vasilogambros, *supra* note 95; *Voting Rights and Election Administration Hearing*, *supra* note 142. In 2016, Macon, Georgia, election officials tried to move a voting precinct to a police station in a largely African-American community. *Voting Rights and Election Administration Hearing*, *supra* note 142.

¹⁷⁰ WRIC Newsroom, *City of Richmond Announces Parking Restrictions for Tuesday's Elections*, ABC 8NEWS, <https://www.wric.com/news/politics/local-election-hq/city-of-richmond-announces-parking-restrictions-for-tuesdays-elections/> (last updated Nov. 1, 2018, 3:58 PM).

¹⁷¹ Michael Wines, *The Student Vote Is Surging. So Are Efforts to Suppress It*, N.Y. TIMES (Oct. 24, 2019), <https://www.nytimes.com/2019/10/24/us/voting-college-suppression.html>.

¹⁷² See Brigid Bergin, *Despite Tax Breaks, These City Institutions Shut Doors on Voters*, GOTHAMIST (Jan. 14, 2020, 5:00 AM), <https://gothamist.com/news/despite-tax-breaks-these-city-institutions-shut-doors-voters>.

¹⁷³ Schragger, *supra* note 3, at 413.

¹⁷⁴ Courtney Gross, *The Boss of the NYC Board of Elections Is Pushing for New Voting Machines Made by a Company He Benefited From*, SPECTRUM NEWS: NY1 (Mar. 29, 2019,

for casting and auditing the vote. The use of paper ballots, which avoids the errors prevalent with machine-based systems while also ensuring a paper trail for recounts, requires the provision of assistive technology and so, if utilized as a back-up because of technical glitches,¹⁷⁵ scanner misfeed,¹⁷⁶ or depleted batteries,¹⁷⁷ may be lacking the requisite assistive accommodations. The selection of the technology, which is often rushed to market by manufacturers to comply with HAVA deadlines without adequate testing and with software flaws or too little memory, and its maintenance, including large annual service fees, can be consequential for elections.¹⁷⁸ For instance, the failure to clean the aging Votomatic machines contributed to the infamous hanging chads.¹⁷⁹ Machines have often exceeded their ten-year life spans, and run on obsolete and unsupported operating systems that require the maintenance of custom servers that are vulnerable to hacking and freezing.¹⁸⁰ Despite knowing that machines can lose votes, whether because of mixed-up cartridges or anti-virus programs, cost constraints ensure that many local administrators continue to use software demonstrated to possess flaws, requiring them to utilize special protocols to identify dropped votes, except when they stop complying.¹⁸¹ Even when a state attempts to assert uniformity in systems utilized therein, LEOs can engorge narrow discretion to dissent. In one instance, after two days of early voting, the Athens-Clarke County, Georgia, Board of Elections determined that concerns that bystanders could see votes cast on the state-mandated system

8:24 PM), <https://www.nyl.com/nyc/all-boroughs/politics/2019/03/29/nyc-board-of-elections-boss-mike-ryan-pushing-for-voting-machines-made-by-ess-company-he-is-familiar-with>.

¹⁷⁵ Danny Hakim et al., *Voting Problems Surface as Americans Go to the Polls*, N.Y. TIMES (Nov. 6, 2018), <https://www.nytimes.com/2018/11/06/us/politics/voting-issues-election-day-georgia.html?smid=fb-nytimes&smtyp=cur>.

¹⁷⁶ Ian MacDougall, *What Went Wrong at New York City Polling Places? It Was Something in the Air. Literally.*, PROPUBLICA: ELECTIONLAND (Nov. 6, 2018, 9:23 PM), <https://www.propublica.org/article/new-york-city-polling-places-midterms-2018-humidity>.

¹⁷⁷ Renée Graham, *Brian Kemp's Voter Suppression in Georgia*, BOS. GLOBE, (Nov. 6, 2018, 10:08 PM), <https://www.bostonglobe.com/opinion/2018/11/06/brian-kemp-voter-suppression-georgia/tcycVrH5m0pJ9SQC7XwiWP/story.html>.

¹⁷⁸ See Michael Riley et al., *The Computer Voting Revolution Is Already Crappy, Buggy, and Obsolete*, BLOOMBERG: BUSINESSWEEK (Sept. 29, 2016), <https://www.bloomberg.com/features/2016-voting-technology/>.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Graham, *supra* note 177.

warranted exercising their delegated authority to not utilize the technology if use was "impossible or impracticable," and reverted to paper ballots.¹⁸²

X. FRANCHISE DISCRETION

The delegation to local election officials, who make the constitutional text real through their interpretative labors, to enforce election laws promulgated by higher-level government creates opportunity both for discretion and dissent in the nature and extent of their administration. Placed in the hands of LEOs, electoral execution is not a "neutral ministerial process but a system that is highly susceptible to politicization and manipulation."¹⁸³ This system, which is subject to administrative whims of staff unaccountable to courts or superiors due to the transience of the role, may in each particular area help (or kill) suffrage for some or many at will.¹⁸⁴ Where localities are called upon to interpret the unbounded "intent of the voter," this excessive discretion, at the heart of *Bush v. Gore*,¹⁸⁵ permits partisan administrators to suppress the support of opponents in manners reminiscent to some of prior authority for local officials to suppress political speech in the absence of specific standards.¹⁸⁶ Such malfeasance is not unintended by general rules which, "subverted behind a veil of neutrality," permit the discretionary exercise of discriminatory implementation.¹⁸⁷

Partisan violations of the law are not absent,¹⁸⁸ but illegal activity is not necessary to shift electoral outcomes. Countless discretionary

¹⁸² Kate Brumback & Russ Bynum, *Lawyer Warned Georgia County on Dumping New Voting System*, ASSOCIATED PRESS (Mar. 4, 2020), <https://ap-news.com/7249aef83587d9617bdea34e98b722db>.

¹⁸³ RONALD HAYDUK, GATEKEEPERS TO THE FRANCHISE: SHAPING ELECTION ADMINISTRATION IN NEW YORK 9 (2005).

¹⁸⁴ *Toward a Greater State Role*, *supra* note 7, at 2315–16.

¹⁸⁵ 531 U.S. 98, 105–06 (2000) (per curiam).

¹⁸⁶ Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1070–71 (2007).

¹⁸⁷ Atiba R. Ellis, *The Dignity Problem of American Election Integrity*, 62 HOW. L.J. 739, 763–64 (2019).

¹⁸⁸ The Philadelphia County Board of Elections was implicated in a fraudulent absentee ballot scheme that provided the 1993 Democratic mayoral candidate with his margin of victory. LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS 278–79 (1996).

decisions to move poll sites or reduce early voting make voting easier or more difficult for groups of voters, including the elderly, disabled, and low-income, and in the aggregate can provide the difference in close races.¹⁸⁹ Imprecise standards in the varying levels of power delegated by states to their local governments provide opportunities for manipulation of indeterminacies,¹⁹⁰ in some local jurisdictions where elections are overseen by elected boards of party-aligned officials, the law and procedures are simply selectively followed or ignored.¹⁹¹ Local officials exercise discretion in determining whether the administrative burdens and learning costs imposed by changes to election law and procedure should be passed along directly to voters or mitigated.¹⁹² While, in some localities, legislative provision is made for election-day procedures,¹⁹³ in most, decisions are made one-by-one by individual poll workers who determine whether a voter receives and ultimately casts a ballot that counts, including the privacy afforded by the election day set-up; the discouragement of use of machines designed to aid voters; the allowance of a relative in the booth; the check-in process; and whether a voter is in the rolls, eligible, and has the requisite identification or matching signature.¹⁹⁴ Some LEOs actively resist in instances of uncooperative localism¹⁹⁵ that offer real-world examples of their principles in practice designed to shame the majority into shifting their stance¹⁹⁶ and call upon their own constitutional

¹⁸⁹ *Toward a Greater State Role*, *supra* note 7, at 2318 (“[But] administrators need not break the law . . . some groups in Hamilton County are seeking to oust their Director of Elections because she closed a precinct serving predominantly elderly and disabled voters.”).

¹⁹⁰ *Id.* at 2324.

¹⁹¹ SABATO & SIMPSON, *supra* note 188, at 287.

¹⁹² Ethan Porter & Jon C. Rogowski, *Partisanship, Bureaucratic Responsiveness, and Election Administration: Evidence from a Field Experiment*, 28 J. PUB. ADMIN. RES. & THEORY 602, 602 (2018).

¹⁹³ *See, e.g.*, ANCHORAGE, ALASKA CODE OF ORDINANCES § 28.50.200 (2020).

¹⁹⁴ *See* Foley, *supra* note 88, at 938–39 (“[S]ome voters who showed up at the wrong precinct were successfully redirected to the right place so that they were able to cast a ballot that counted, whereas other voters had no such luck and instead submitted a provisional ballot that was ultimately rejected because it was cast at the wrong precinct. This disparate treatment of voters, moreover, was not merely between different counties of the same state, but also within counties, as the failure of poll workers to follow these instructions occurred at different polling places within the same county and, indeed, at different times of the day within the same polling place.”).

¹⁹⁵ Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349, 1370–71 (2013).

¹⁹⁶ Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1754, 1762 (2005); Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U. L. REV. 601 (2013) (identifying six strategies of official resistance—(1) defiance,

interpretative authority.¹⁹⁷ LEOs extend early voting "to balance changes in state election laws"¹⁹⁸ or quit rather than administer elections amidst the pandemic.¹⁹⁹

The broad discretion of local election officials permeates the counting of ballots, which despite the attention paid to barriers to voting and the right to vote, is ultimately of greatest concern in the exercise of the formal franchise and suffrage as practice.²⁰⁰ Ad hoc and shifting standards for rejecting ballots in a recount yield "arbitrary and disparate treatment" to voters not only amongst jurisdictions but among tables,²⁰¹ whether called upon to ascertain if a smudge is a permissible food-stain or an excluding stray mark,²⁰² standards for comparing ballot envelope signatures with registration forms,²⁰³ or the necessary level of detachment of a chad.²⁰⁴ The mere decision of whether to conduct the recanvass can be dispositive of an election of

(2) non-acquiescence, (3) bulletproofing, (4) outsourcing, (5) prioritization, and (6) interpretation).

¹⁹⁷ See Danielle Lynch, *Colwyn Judge Out to Register Voters*, DAILY TIMES (Aug. 8, 2012), https://www.delcotimes.com/news/colwyn-judge-out-to-register-voters/article_f06adebe-ade2-535b-beed-7315fde112b9.html (quoting Christopher Broach Jr.: "[A]s judge of elections in Precinct 1 of Colwyn Borough . . . I will not comply with the new voting laws as they are unconstitutional.").

¹⁹⁸ Gareth McGrath, *New Hanover Board of Elections Considers Extending Early Voting Hours*, STARNEWS ONLINE (July 15, 2014, 5:10 PM), <https://www.starnewsonline.com/article/NC/20140715/news/605043967/WM?template=ampart>.

¹⁹⁹ A.J. Bayatpour, *Clerk Resigns in Protest of Election Not Being Postponed, Citing Safety Concerns*, ABC WKOW 27, (Apr. 2, 2020, 6:50 PM), <https://wkow.com/2020/04/02/clerk-resigns-in-protest-of-election-not-being-postponed-citing-safety-concerns/>.

²⁰⁰ EWALD, *supra* note 18, at 8–9.

²⁰¹ *Bush v. Gore*, 531 U.S. 98, 107 (2000).

²⁰² Rich Calder & Georgett Roberts, *'French's or Gulden's': Ballot in Queens DA Race Hinges on Yellow Stain*, N.Y. POST (Aug. 6, 2019, 5:43 PM), <https://ny-post.com/2019/08/06/frenchs-or-guldens-ballot-in-queens-da-race-hinges-on-yellow-stain/>.

²⁰³ *McDonald v. Sec'y of State*, 103 P.3d 722, 723 (Wash. 2004); Fla. Democratic Party v. Detzner, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *8 (N.D. Fla. Oct. 16, 2016) ("Rather than enumerating specific procedures for comparing signatures, the Florida legislature 'left it to the canvassing boards to make determinations using their collective best judgment as to what constitutes a signature match.' The result is a crazy quilt of conflicting and diverging procedures.").

²⁰⁴ *Bush*, 531 U.S. at 106–07 ("Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal").

wider impact.²⁰⁵ Some of these decisions can heighten opportunities for partisanship and thereby inconsistency. While the first question for an absentee or provisional ballot concerns the completeness and accuracy of the external envelope with the subsequently accepted or rejected ballot and its preferred candidates yet unknown, the implementation of imprecise standards for discarded machine votes is precisely concerned with the voter's putative intent and the local officials are acutely aware of who stands to benefit and can be accordingly strict or lenient in application.²⁰⁶ Though morally disparate, both rule-breaching and gap-filling pose the same equal protection challenge to suffrage.²⁰⁷

Voter ID provisions, or the demand for identification notwithstanding no such mandate, call upon poll workers to "address one question—is the putative voter the person listed in the pollbook?—by asking a different question—has the putative voter produced acceptable identification?"²⁰⁸ Here too, discretion, which the higher incidence rates of Blacks and Hispanics being asked to produce ID demonstrates is not being neutrally applied,²⁰⁹ can be used to resist through leniency, outright nonenforcing or not against persons known to the staffer, or stricture, either demanding ID when not required, refusing to let those without ID sign an affidavit, or using barcode scanners or quizzing voters to confirm validity.²¹⁰ The issue of voter opportunities or need to establish identity also pervades and is altered by voting by mail, which "necessitates the disembodied verification of a voter's identity by a local election official after the voter has already cast his or her

²⁰⁵ Foley, *supra* note 88, at 955 ("In the 2004 gubernatorial election in Washington, for example, if King County had not voluntarily agreed to count several hundred ballots after double-checking original registration records, the Republican candidate would have been certified the winner of that election, and the Democratic candidate would have filed a judicial contest seeking a statewide recount of wrongfully excluded ballots."); see also *Wash. State Republican Party v. King Cty. Div. of Records*, 103 P.3d 725, 728 (Wash. 2004) (affirming local discretion on whether to count previously rejected ballots).

²⁰⁶ Foley, *supra* note 88, at 962.

²⁰⁷ *Id.* at 938–40.

²⁰⁸ Henry L. Chambers, Jr., *State and Local Officials and Voter ID*, 15 ELECTION L.J.: RULES, POL., & POL'Y 234 (2016).

²⁰⁹ Stephen Ansolabehere, *Access Versus Integrity in Voter Identification Requirements* (Cal. Inst. of Tech. & Mass. Inst. of Tech. Voting Tech. Project, Working Paper No. 58, 2007), <http://vote.caltech.edu/working-papers/58>.

²¹⁰ Weinstein-Tull, *A Localist Critique*, *supra* note 14, at 301–03.

ballot.²¹¹ As often voters are not apprised of whether their ballot was accepted, they can be disenfranchised in the dark by the signature verification process, and the efforts made by local officials to contact and rectify incorrectly completed absentee ballot requests can also be determinative of the ability to exercise the right to vote.²¹²

XI. DILUTING THE BALLOT

Other issues, including ballot access for candidates, which can implicate the enforcement of gender and cultural homogeneity, municipal redistricting, and methods of election or efforts to regulate candidate or third-party spending and disclosures, also contribute to restraints on entry to the body politic of candidates and ideas.²¹³ Signature and filing requirements,²¹⁴ term limits,²¹⁵ moving the date of

²¹¹ ANNA BARINGER ET AL., VOTING BY MAIL AND BALLOT REJECTION: LESSONS FROM FLORIDA FOR ELECTIONS IN THE AGE OF THE CORONAVIRUS 4 (2020); see also McCarthy, *supra* note 74 (noting that the number of days after election voters were allowed to correct problems with ballot signatures varied among Arizona counties); Rob Mentzer, *GOP Mailer on Absentee Ballot Requests Confuses Voters, Putting Burden on Clerks to Explain*, WIS. PUB. RADIO (May 4, 2020, 3:10 PM), <https://www.wpr.org/node/1635386>. See generally Josh Sweigart, *9K Local Voters Didn't Get Requested Ballots, Changes Called for in November*, DAYTON DAILY NEWS, <https://www.daytondailynews.com/news/local/local-voters-didn-get-requested-ballots-changes-called-for-november/tfn0q4MUbxoHEAVNrXY2nL/> (last updated May 3, 2020).

²¹² McCarthy, *supra* note 74.

²¹³ See, e.g., *Jobaida v. Bd. of Elections*, 2020 WL 2235994, at *2 (N.Y. Sup. Ct. May 4, 2020) (restoring to the ballot a candidate removed by the NYCBOE for listing Mary as their first name on designating petition rather than Meherunnisa, since "[i]n a county as diverse as Queens, with many exotic and unfamiliar names, an expansive view must be taken of what is familiar or diminutive"); Kevin Duggan, *Judge Tosses Gender Non-Binary Candidates' Lawsuit Against Brooklyn Democratic Party*, BROOKLYN PAPER (May 1, 2020), <https://www.brooklynpaper.com/brooklyn-judge-dismisses-non-binary-lawsuit/> (discussing NYCBOE disqualification of gender-nonconforming candidates); Gray, *supra* note 64, at 629.

²¹⁴ See, e.g., N.Y.C. CHARTER § 1057-b (2020) (detailing the number of signatures required for petitions for the designation or nomination of a candidate for an elected office of the city); BURTON, MICH., CHARTER § 12.7 (2018).

²¹⁵ See, e.g., N.Y.C. CHARTER § 1138(a) (2020) (removing from eligibility to serve as Mayor, Public Advocate, Comptroller, Borough President or Council Member a person who "previously held such office for two or more consecutive full terms, unless one full term or more has elapsed since that person last held such office"); HOUS., TEX. CODE OF ORDINANCES art. V, § 6a(a) (2020) ("[N]o person shall be eligible to be elected to more than two four-year terms in the same City elective office.").

local elections, and ranked-choice voting²¹⁶ can dilute minority votes, making it more difficult to elect chosen candidates and debasing the right of suffrage through diminishment of the weight of a ballot just as effectively as through wholesale denial of the franchise.²¹⁷ Local ordinances that reduce voting opportunities or exclude particular groups are tempered by federal and state constitutional baselines, which function as a one-way ratchet only allowing municipal governments to increase voter access when legislating directly on who may vote.²¹⁸ As a result, dilutionary efforts turn to measures like gerrymandering, which not only manipulates but also suppresses the electorate as gerrymandered voters who recognize the futility of their ballot preferences may be dissuaded from visiting the polls,²¹⁹ and off-cycle elections, which impose greater barriers on the transit-poor and working. Such policies undermine the "voice" bestowed by the franchise rendering the expression of preference, and with it all other rights, illusory.²²⁰

XII. EMPLOYING THE FRANCHISE

The selection, employment, and training of election officials, both permanent and election-day specific, has direct consequences for voting rights access. While in some jurisdictions, polling place changes might be the responsibility of elected officials, elsewhere it is the duty of an appointed bureaucrat.²²¹ The partisan selection of such staff, which often does not reflect the diversity of the voting population,²²² is "a spectre haunting the making of election laws, as well as their implementation."²²³ This can contribute to depressed turnout and disparate

²¹⁶ See, e.g., TAKOMA PARK, MD., MUN. CODE § 606(b) (2020).

²¹⁷ Gray, *supra* note 64, at 626.

²¹⁸ Douglas, *The Right to Vote*, *supra* note 8, at 1077–78.

²¹⁹ Ann Ravel, *A New Kind of Voter Suppression in Modern Elections*, 49 U. MEM. L. REV. 1019, 1025 (2019).

²²⁰ See *Wesberry v. Sanders*, 376 U.S. 1, 2–7 (1964).

²²¹ Gonzalez, *supra* note 144, at 276.

²²² ERIC A. FISCHER & KEVIN J. COLEMAN, CRS REPORT RL34363, ELECTION REFORM AND LOCAL ELECTION OFFICIALS: RESULTS OF TWO NATIONAL SURVEYS 2 (Feb. 7, 2008), <https://fas.org/sgp/crs/misc/RL34363.pdf>.

²²³ Daniel P. Tokaji, *The Persistence of Partisan Election Administration*, AM. CONST. SOC'Y (Oct. 1, 2010), <https://www.aclaw.org/expertforum/the-persistence-of-partisan-election-administration/>.

treatment of ballots. These "grenade catchers"²²⁴ are called upon to wear numerous hats on election day, "from computer technician and technology expert, to mediator and—coming soon to a polling place near you!—legal counsel,"²²⁵ and, especially in smaller jurisdictions, election administration is just one of many duties assigned to the local clerk.²²⁶ While some localities create city employee poll worker programs,²²⁷ or make election day a paid holiday,²²⁸ others are empowered by state law to randomly draw poll workers from registered voter lists,²²⁹ not only baking in disparities in enrollment but also resulting in a disinclined workforce that invariably ensures that the quality of administration varies not only by jurisdiction but even by polling place.²³⁰

Direct election administrators and election day staff are not the only municipal employees whose activities bear upon the franchise. Staff of social service agencies are often called upon to provide registration opportunities, and law enforcement behavior both before and during an election bears heavily upon comfort in voting.²³¹ Confrontational voter verification processes that unfold in communities

²²⁴ Doug Chapin, *Election Officials as Grenade Catchers: A Case Study from Connecticut*, ELECTION ACAD. (Oct. 19, 2011), <https://editions.lib.umn.edu/election-academy/2011/10/19/election-officials-as-grenade-catchers/>.

²²⁵ Ray Martinez, III, *Election Reform and Local Election Officials*, 8 ELECTION L.J. 239, 239 (2009) (book review).

²²⁶ See, e.g., *Texas County Clerk*, TEX. ASS'N COUNTIES, <https://www.county.org/About-Texas-Counties/%E2%80%8BAbout-Texas-County-Officials/%E2%80%8BTexas-County-Clerk> (last visited Nov. 24, 2020) (stating that the county clerk serves as clerk of the county court and the county commissioners court, acts as recorder of deeds and other instruments, issues marriage licenses and takes depositions in addition to "conducting countywide special and general elections and handling absentee voting").

²²⁷ See, e.g., *County Employee Election Worker Program*, L.A. COUNTY REGISTRAR-RECORDER/COUNTY CLERK, <https://www.lavote.net/home/voting-elections/election-worker-information/become-an-election-worker/county-employee-pollworker-program> (last visited Nov. 24, 2020).

²²⁸ See, e.g., Laurel Wamsley, *Sandusky, Ohio, Makes Election Day a Paid Holiday – By Swapping Out Columbus Day*, NPR (Feb. 8, 2019, 6:03 PM), <https://www.npr.org/2019/02/08/692771542/sandusky-ohio-makes-election-day-a-paid-holiday-by-swapping-out-columbus-day>.

²²⁹ NEB. REV. STAT. § 32-221 (2018).

²³⁰ THE AMERICAN VOTING EXPERIENCE, *supra* note 96, at 46–47.

²³¹ See *2010 Issues in Election Administration: Voter Intimidation and Caging*, PROJECT VOTE I (Feb. 2010), <http://www.projectvote.org/wp-content/uploads/2010/02/2010-Legislative-Brief-Voter-Intimidation-and-Caging.pdf>.

with a legacy of racism may dissuade those still waiting in line.²³² Police asking voters for non-existent voting permits,²³³ targeting get-out-the-vote efforts,²³⁴ threatening businesses for visible displays of support,²³⁵ serving subpoenas to verify registrations before elections,²³⁶ or canvassing homes after allegations of fraud²³⁷ each exemplify the use of public employees to intimidate putative voters.

XIII. LICENSING THE FRANCHISE

Voter registration lists are the "gateway to democracy,"²³⁸ and only through inclusion are suffrage rights permitted to be realized.²³⁹ While not overtly requiring a permit to vote, despite the disenfranchising misinformation of some,²⁴⁰ not only must a voter be "licensed" to cast their vote in forty-nine states via their registration card, but in many states voters also need to possess an additional license (be it to drive, leave the country, or shoot) to prove their identity and exercise their right, often itself incumbent upon government documents like birth certificates which police gender identity and expression.²⁴¹ The frequent use of registration lists to prepare jury calls culminates in a one-two punch of jury and voting exclusions which effectively

²³² See, e.g., *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 671 F. Supp. 2d 575, 612 (D.N.J. 2009), *aff'd*, 673 F.3d 192 (3d Cir. 2012).

²³³ *Voting Rights and Election Administration Hearing*, *supra* note 142.

²³⁴ Charles Bethea, *Are Police Targeting Get-Out-the-Vote Efforts in Georgia?*, *NEW YORKER* (Nov. 1, 2018), <https://www.newyorker.com/news/dispatch/are-police-targeting-get-out-the-vote-efforts-in-georgia>.

²³⁵ Wendy Weiser & Vishal Agraharkar, *Ballot Security and Voter Suppression: What It Is and What the Law Says*, BRENNAN CTR. FOR JUST. 16 n.61, https://www.brennancenter.org/sites/default/files/2019-08/Report_Ballot_Security_Voter_Suppression.pdf (last visited Nov. 24, 2020).

²³⁶ See Wines, *Critics See Efforts*, *supra* note 104.

²³⁷ Jonathan P. Hicks, *Vacco Fails in His Effort to Have Police Verify City Voters*, *N.Y. TIMES* (Dec. 10, 1998), <https://www.nytimes.com/1998/12/10/nyregion/vacco-fails-in-his-effort-to-have-police-verify-city-voters.html>.

²³⁸ *How America Doesn't Vote*, *N.Y. TIMES* (Feb. 15, 2004), <https://www.nytimes.com/2004/02/15/opinion/how-america-doesn-t-vote.html>.

²³⁹ See Eugene Volokh, *Licenses to Exercise Constitutional Rights*, *WASH. POST* (May 15, 2015, 7:04 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/15/licenses-to-exercise-constitutional-rights/>.

²⁴⁰ See *Voting Rights and Election Administration Hearing*, *supra* note 142 (statement of The Hon. Catherine E. Lhamon, Chair, U.S. Commission on Civil Rights).

²⁴¹ See N.Y.C., N.Y., ADMIN. CODE § 17-167.1 (2020) (altering procedures for amending sex designation on birth records and providing for a third gender marker).

curtails participation in the process by which laws were made and laws and rights enforced.²⁴² As such, opportunities provided to be added to the rolls, which close months before the actual exercise of the franchise and are used not only to determine individual eligibility but the allocation of finite resources with consequent implications for all voters directed to such poll site,²⁴³ are nonetheless structuring of the right. Comprehensive municipal voter registration programs, like New York City's in twenty-five city agencies, ensure that drivers are not privileged in access to registration opportunities.²⁴⁴ However, as client services shift online, the creation of electronic portals, like in Fairfax County, Virginia, on social service agency sites are integral to preventing NVRA compliance from dropping further²⁴⁵ while simultaneously ensuring that language and other necessary accommodations remain available. For some, the requirement for a traditional address can be exclusionary, either at registration, or because of the limitations of software or lack of poll worker training on election day itself, and requires the deterring intercession of law enforcement or other non-election officials.²⁴⁶ The hours and locations offered for registration can generate a discriminatorily disparate opportunity to participate in the political process.²⁴⁷ Also subject to licensure or approval are those collecting ballot-signatures or organizations designated to challenge voters, lending official imprimatur to actors intent on treating voters in a discriminatory fashion.²⁴⁸

²⁴² See Eskridge, *Some Effects, supra* note 17.

²⁴³ See, e.g., OHIO REV. CODE § 3501.18 (2020) (authorizing counties to draw precinct boundaries based on the number of active voters on their registration list).

²⁴⁴ N.Y.C. CHARTER § 1057-a (2020); see also MADISON, WIS., CODE OF ORDINANCES ch. 32, § 32.06(5) (2012) (requiring landlords to provide new tenants with voter registration forms was deemed preempted in *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 940 (W.D. Wis. 2016), *order enforced*, 351 F. Supp. 3d 1160 (W.D. Wis. 2019)).

²⁴⁵ KATE HAMAJI & EMMA GREENMAN, CTR. FOR POPULAR DEMOCRACY, *DEEPENING OUR DEMOCRACY: HOW LOCALITIES CAN EXPAND VOTING RIGHTS* 2, 9, 10 (2018), <https://populardemocracy.org/sites/default/files/20180103%20Voter%20Registration%20Report%20Updated%20Web.pdf>.

²⁴⁶ See Patty Ferguson-Bohnee, *How the Native American Vote Continues to be Suppressed*, AM. BAR ASS'N: HUM. RTS. (Feb. 9, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/how-the-native-american-vote-continues-to-be-suppressed/.

²⁴⁷ *Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting).

²⁴⁸ Benson, *supra* note 89, at 377.

XIV. CONCLUSION

The machines picked, interpreters provided, days opened, parking required, fees assessed, and districts drawn by local election administrators, as well as the dissuasive behavior of other administrators and the impacts of broader accommodation policies or secondary barriers to electoral participation intensified by socioeconomic disparity of even a small populace, can cause extraterritorial ripples. These variations in procedures can serve as "a surprisingly simple and effective way" of ensuring "those with the least education and resources and the most need of gaining political influence . . . remain political losers."²⁴⁹ This "administrative disenfranchisement of eligible voters" occurs "at every stage: before an election, on election day, and during vote tabulation and certification."²⁵⁰ Groups with disproportionately low turnouts, such as new citizens and those with limited English fluency, the visually impaired or people with disabilities, the elderly, minorities, low-income individuals, first-time voters, and those who recently moved are all hindered by these practices and technical minutiae.²⁵¹

Yet localities have the capacity to affirmatively further the franchise, to create opportunities for registration, civic participation, information-sharing, and playing field-leveling. They can go beyond the confines of selecting sites, designing ballots, and maintaining rolls, to facilitating accurate identification, availability of public transit, and de-carceral policies that restore voice in the body politic. They have the ability to name and challenge policies that seek to exclude voters under a guise of accuracy and integrity.

Suffrage is just one of many constitutional rights that localities must interpret and actualize through the unique use of distinctly local powers, both generative and ministerial that permeate with discretion. Unlike other accounts that center on collective action, this argument rests on the constitutional power of the people acting through their elected representatives or their designees. It is the formal recognition of the local government rather than any polis that renders onto these officials, both elective and appointive and stretching from the mayor to administrative employees, authority to so structure rights. Neither

²⁴⁹ Hochschild, *supra* note 18, at 247–48.

²⁵⁰ HAYDUK, *supra* note 183, at 5, 7.

²⁵¹ Richard G. Niemi & Paul S. Herrnson, *Beyond the Butterfly: The Complexity of U.S. Ballots*, 1 PERSP. ON POL. 317, 318 (2003); see Richard L. Hasen, *What to Expect When You're Electing: Federal Courts and the Political Thicket in 2012*, FED. LAW. 34 (2012).

formal amendment nor judicial interpretation of the penumbras of the text of the Constitution are sufficient to realize the encompassed right due to the political and financial realities, and local intervention can either further or hinder such actualization. While some amendments act as corrective, restorative, or reformative of governmental norms or institutions, others elaborate upon non-interference rights to effectuate constitutionally protected decisions and duties which can be accessed only with, or in spite of, city action. Yet, unlike many other rights molded upon municipal hands, the capacity and impact of these franchise-framing actions can vary, particularly amongst localities both by dint of size and, thanks to the contrived nature of our democracy, geographic location.