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CHANGING THE PEOPLE: LEGAL REGULATION AND AMERICAN DEMOCRACY

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The world in which we live, a world in which law pervades the practice of democratic politics—from advance regulation of public assemblies to detailed rules governing elections—is the product of a particular period of American history. Between 1880 and 1930, states and municipalities increased governmental controls over the full range of nineteenth-century avenues for democratic participation. Prior to this legal transformation, the practice of democratic politics in the United States was less structured by law and more autonomous from formal state institutions than it is today.

Exposing this history challenges two core assumptions that drive the work of contemporary scholars who write about the law of the American political process. First, a study of the nineteenth-century mode of regulating politics belies the existing literature's assumption that law must extensively structure democratic politics. Second, this account of democracy in nineteenth-century America serves as a reminder that elections, political parties, and voting, while critical to democracy, are not the whole deal. It thereby challenges law of democracy scholars to move beyond the existing literature's narrow conception of democracy as elections and to consider more broadly the practice of democracy in America.

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INTRODUCTION

In modern America, law pervades the practice of democratic politics, from the regulation of public assemblies to the minutiae of election administration, and the Supreme Court is perpetually asked to adjudicate political disputes.¹ While we take this highly regulated political process for granted, it has not always been this way.

Today's legalized democracy is the product of a particular regulatory transformation. Between 1880 and 1930, states and municipalities used law to increase governmental controls over the full range of nineteenth-century avenues for democratic participation. Prior to that, the practice of democratic politics in the United States was *less* struc-

¹ Recent, high-profile cases have considered photo-identification requirements for voters, *see Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008), blanket political primaries, *see Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008), corporate spending in political campaigns, *see Citizens United v. FEC*, 130 S. Ct. 876 (2010), the scope of the Voting Rights Act, *see Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009), and transparency in the initiative and referendum processes, *see Doe v. Reed*, 130 S. Ct. 2811 (2010).

tured by law and thus *more* autonomous from formal governmental institutions than it is today.

Elections, in the nineteenth century, were one of an array of political practices through which democracy was accomplished in the newly established American states. Public meetings, petitions, local and national festivities, and even juries and mobs were the normal channels through which citizens, ordinary and elite, enfranchised and disenfranchised, participated in their new democracies.

Nineteenth-century political practice, while not unconstrained by law, was significantly less systematically and formally regulated. There were certainly laws—frequently criminal or customary—that governed individual practices. Nevertheless, regulatory controls were relatively weak and often exercised only intermittently. This mode of regulation had important implications for the people's autonomy and voice in government.

The informality of nineteenth-century elections likely would astonish many contemporary Americans. The state did not provide an official ballot. Political parties operated entirely outside of formal state supervision. At the same time, Americans, including women and free African Americans, freely assembled in public spaces for social and political purposes and exerted some control over the legislative agenda through the practice of petitioning. Juries were widely understood to have a legitimate political function and were insulated from judicial second-guessing.

This repertoire of democratic political practices² changed profoundly in the late nineteenth century as the government increased its control over the channels of political participation through law. Legal changes to American political practice were notably swift and comparatively uniform. In 1888, Massachusetts, New York, and the city of Louisville, Kentucky, became the first jurisdictions to establish an official ballot, thereby giving governmental bodies exclusive authority to issue and distribute ballots on election days.³ Within a decade,

² Charles Tilly's work on contentious politics provides a useful language with which to discuss the change I seek to highlight. See generally CHARLES TILLY, *CONTENTIOUS PERFORMANCES* (2008). Tilly's basic claim is that politics takes place within a repertoire of structured action that has changed over time. His notion of politics is much broader than mine, as is his category, repertoires of contentious politics. See *id.* at 5–7. In particular, my category, the repertoire of democratic political practices, is limited to forms of action that are recognized as *legitimate* ways to make claims on the government. As such, violent forms of politics are excluded. Moreover, while Tilly acknowledges that governments set rules that define the repertoires of contentious politics, *id.* at 7, he does not specifically consider law in explaining the changes he identifies in the repertoires of contentious politics over modern history.

³ *Burson v. Freeman*, 504 U.S. 191, 202–04 (1992). For further discussion of the complicated trajectory of reform in New York, see *infra* notes 116–17 and accompanying text.

“almost 90 percent of the States had adopted the [official ballot, also known as the] Australian system.”⁴ In 1882, New York passed the first law regulating the nomination of candidates by political parties.⁵ By the dawn of the twentieth century, “43 states had enacted some form of primary election law.”⁶ In 1898, South Dakota became the first state to adopt the referendum and initiative—procedures that recast popular sovereignty in a legalized form.⁷ By 1918, 21 additional states had adopted similar reforms.⁸ The 1880s saw the rise of municipal ordinances requiring advance permission to assemble lawfully in public places.⁹ Finally, long-standing efforts to limit the criminal jury to the status of a mere fact finder succeeded in the same period—putting an end to the republican political conception of the jury.

The history of each of these practices reveals a change in the mode of governing the political process. While the changes were decidedly not a transition from nonregulation to regulation, they did significantly increase the government’s ability to structure democratic politics.

This so far neglected history of American political practice challenges central assumptions driving the work of many leading law of democracy scholars.¹⁰ In particular, it challenges two core assump-

⁴ *Burson*, 504 U.S. at 205. Australia was the first country to introduce an official ballot; hence, the official ballot was also known as the Australian system.

⁵ See *People ex rel. Coffey v. Democratic Gen. Comm. of Kings Cnty.*, 58 N.E. 124, 125 (N.Y. 1900) (“Prior to 1882 there was no attempt to regulate by law the conduct of primaries . . .”).

⁶ Adam Winkler, *Voters’ Rights and Parties’ Wrongs: Early Political Party Regulation in the State Courts, 1886–1915*, 100 COLUM. L. REV. 873, 877 n.10 (2000).

⁷ Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL’Y REV. 11, 16 tbl.1 (1997).

⁸ *Id.* Since 1918, only four more states have adopted these direct democracy devices. *Id.*

⁹ Tabatha Abu El-Haj, *Changing the People: Transformations in American Democracy (1880–1930)* 131–84 (Sept. 2008) (unpublished Ph.D. dissertation, New York University) (on file with the *New York University Law Review*) (chronicling trend toward extensive permit requirements for public assemblies in American cities).

¹⁰ Struck by the increasing demands on the Supreme Court to decide cases involving important challenges to and questions about the laws structuring American democracy, a number of important constitutional scholars in the 1980s and 1990s began to push for the “creat[ion of] a ‘field’ of study” focused on the law of the political process—“conceived as a distinct subject of its own” within the broader field of public law. SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* ix (3d ed. 2007) [hereinafter ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 3D]. The effort has been a resounding success. See *id.* (noting gratification of watching “former students and research assistants . . . move into teaching positions themselves in which they are teaching [on the law of the political process] and writing important scholarship in the field”). The two leading casebooks on the law of democracy both were first published in the late 1990s. See SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* (1st ed. 1998); DANIEL HAYS LOWENSTEIN, *ELECTION LAW* (1st ed. 1995). In

tions: First, the existing literature tends to assume that the political process necessarily will be structured by law, featuring debates about the relative merits of one regulatory approach as opposed to another;¹¹ second, scholars conceptualize the field of democratic politics narrowly as elections, focusing exclusively on voters, political parties, money, and, more recently, the administration of elections.

Many of the most prominent figures who write about the law of democracy begin from the assumption that “[t]he kind of democratic politics we have is always and inevitably itself a product of institutional forms and legal structures.”¹² For example, in their paradigm-shifting article on the regulation of political parties, Samuel Issacharoff and Richard H. Pildes begin by observing that “[t]he democratic politics we experience is not an autonomous realm of parties, public opinion, and elections, but a product of specific institutional structures and legal rules.”¹³ The failure to recognize the role of legal institutions in structuring politics, they argue, leads to a naïveté about democratic politics, which in turn leads observers incorrectly to assume that “We the People” exist outside of law and are in control of our representation and our representatives.¹⁴ In recent years, this attitude has crept into the opinions of the Supreme Court. For instance, in 1992, Justice White declared “[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections.”¹⁵

the most recent edition of his casebook, Professor Lowenstein comments wryly that in 1980 he was “the only law professor in America” who “ma[de] election law [his] principal academic specialty.” DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW* xv (4th ed. 2008). A burgeoning law of democracy field of scholarship followed.

¹¹ This first assumption is likely a product of two facts. First, the world these scholars (who often are not historians) experience is one in which legal regulation of democratic politics is pervasive. Second, these scholars started writing in response to the ever-increasing constitutionalization and litigation of American politics in the wake of *Baker v. Carr*, 369 U.S. 186 (1962), and the passage of the 1965 Voting Rights Act. See, e.g., Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 31–32 (2004) (describing constitutionalization of democratic-design and democratic-process issues in United States and other constitutional democracies).

¹² ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 3D, *supra* note 10, at 1.

¹³ Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644 (1998); see also Richard H. Pildes & Elizabeth S. Anderson, *Slings Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2198 (1990) (“Political institutions and decision procedures must create the conditions out of which, for the first time, a political community can forge for itself a collective will.”).

¹⁴ See SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 2 (2d ed. 2001) [hereinafter ISSACHAROFF ET AL. 2D] (“[T]here is no ‘We the People’ independent of the way law constructs democracy.”).

¹⁵ *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

This first assumption—only rarely made explicit—drives the central dilemma of the field: Law must structure politics but the main sources of law (legislatures and courts) are each ill suited to the task. Courts are not institutionally well placed to make nuanced and empirically grounded policy choices. Legislators, meanwhile, are problematic regulators when it comes to the rules governing elections because they are self-interested and are regularly tempted to use legal rules to entrench themselves.¹⁶

The history presented in this Article challenges the assumption that the political process requires extensive legal regulation. There have been extended periods in American history when the practices of politics were far more autonomous from existing legal institutions than they are today. The nineteenth-century, democratic public sphere was significantly more autonomous from the formal institutions of the state.¹⁷ The world in which we live, a world in which law pervades the practice of democratic politics, is the product of a regulatory transformation that took place between 1880 and 1930. The changes created new opportunities for the state to constitute the people in its own image and according to its own interests. The lesson to draw is that the state must have control of the ground rules of politics before existing officeholders can use law to entrench themselves.

Ironically, historians and political scientists also have been oblivious to these regulatory changes and their significance in this regard. While political scientists and historians have studied legal reforms to the electoral process between 1880 and 1930, their work has been concerned primarily with the question of how those legal changes affected electoral participation, choices, and outcomes.¹⁸ Preoccupied with the

¹⁶ See, e.g., Issacharoff & Pildes, *supra* note 13 (arguing judicial intervention may be necessary and appropriate to check increasingly sophisticated efforts of major political parties to lock out potential political challengers).

¹⁷ One way to conceptualize the difference is by analogy to the difference between a pure free market and today's economic markets that are regulated by statutory and administrative law. The nineteenth-century free market was not *free*: The law of contract and tort, not to mention criminal fraud, obviously structured the free market. Nevertheless, it is equally obvious that the difference between market regulation in the nineteenth century and today's mode of government regulation is significant.

¹⁸ See generally J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS* 45–82 (1974) (discussing adoption in Southern states of election regulations such as literacy tests, poll taxes, and primaries and their effect on franchise); RICHARD L. MCCORMICK, *FROM REALIGNMENT TO REFORM* (1981) (arguing that legal and social changes in New York during this period altered political behavior, voter turnout, and modes of governance); FRANCIS FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS STILL DON'T VOTE* 23–38 (2000) (attributing declining voter participation to institutional changes in late nineteenth and early twentieth centuries); JOHN F. REYNOLDS, *TESTING DEMOCRACY* (1988) (investigating election reforms, nature of reform movement, and effects of reforms on electoral behavior); Jerold G. Rusk & John J. Stucker, *The Effect of the Southern System of*

massive drop in voter turnout during this period, they have failed to notice that juries, legislative petitions, and public assemblies were central avenues of political participation in the nineteenth century and that the legal rules governing these practices also changed in the late nineteenth century.

The literature has failed, therefore, to grasp the full extent of the transformation. Even with respect to the electoral reforms they have studied, historians and political scientists have failed to notice the ways that increased regulatory oversight of elections and political parties transformed the very relationship between the state and the democratic public sphere.¹⁹

The history presented in this Article also challenges a second core assumption underlying the work of legal academics who write on the law of democracy: the assumption that democracy and elections are synonymous. The existing literature conceptualizes democratic practice narrowly. Leading figures in the field thus focus their attention exclusively on key aspects of elections (voters, political parties, money, and, more recently, election administration). We find scholarship on continuing limitations on the right to vote—categorical exclusions (as for felons)²⁰ and administrative barriers (such as voter-identification requirements).²¹ There are debates about the Supreme Court's First Amendment doctrine with respect to both political parties²² and campaign finance.²³ Finally, since 2000, scholars are paying

Election Laws on Voting Participation: A Reply to V.O. Key, Jr., in THE HISTORY OF AMERICAN ELECTORAL BEHAVIOR 198, 199–202, 247–50 (Silbey et al. eds., 1978) (analyzing empirical data to determine effects of election reforms on voting behavior in Southern states).

¹⁹ See Abu El-Haj, *supra* note 9, at 1–7 (analyzing this literature).

²⁰ See, e.g., Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1164–69 (2004) (articulating bases for legal challenges to criminal disenfranchisement statutes once it is recognized that such statutes are essentially punitive and not regulatory).

²¹ See, e.g., Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 644–53 (2007) (arguing that debate over photo-identification requirements is incomplete because advocates and critics employ anecdote, analogy, and intuition rather than cost-benefit analysis).

²² See, e.g., Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 173–86 (2005) (arguing that more realistic understanding of multiple and competing aggregations that comprise political parties provides new lens within which to assess judicial decisions on party regulation); Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 793–815 (2001) (arguing in favor of party leaders having First Amendment rights to decide which voters may vote in primary elections); see also Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1773–90 (1993) (recommending judicial restraint where political parties assert their associational rights).

²³ See, e.g., Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 896–97, 913–14 (1998) (arguing campaign finance reform is needed to

more attention to problems of election administration.²⁴ Prominent scholars also often wrestle with the difficulties of fostering a racially integrated polity within our liberal democracy.²⁵ Yet there is a shocking absence of any literature on democratic practices outside of electoral politics.

This limited conception of democracy as electoral politics was certainly not how early Americans understood democracy. The nineteenth-century America described below was a world where elections, political parties, and voting operated as part of a much larger repertoire of democratic practices.

There obviously have been a number of important changes in American democracy in the twentieth century that have significantly advanced the cause of political equality. Nevertheless, we should worry that more participatory forms of political engagement, as well as administrative politics and constitutional litigation, have been defined as outside of the field of scholarly inquiry. We may well be failing to appreciate the richness and multidimensionality of American democracy or the full array of legal questions it poses.

Michael Kang has already reminded us that electoral competition is not an end in itself; it is rather a means to “the ultimate ends” of “democratic debate, greater civic engagement and participation, and richer political discourse.”²⁶ By elaborating the nineteenth-century understanding of democratic politics, I hope to offer an analogous intervention: a reminder to the field that democracy is the project of

cope with “our civic incompetencies,” which must be honestly acknowledged); Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 104–18 (2004) (arguing campaign finance reform’s primary goal should be to reduce impact of small group of wealthy donors who regularly contribute to campaigns while encouraging ordinary citizens to contribute to campaigns by enhancing impact of their small donations).

²⁴ See generally HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* (2009) (proposing creation of “Democracy Index” to rank jurisdictions based on electoral processes); Frank Emmert et al., *Trouble Counting Votes? Comparing Voting Mechanisms in the United States and Selected Other Countries*, 41 CREIGHTON L. REV. 3 (2007) (arguing U.S. electoral system can benefit from adopting approaches used in other nations); Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453 (2008) (explaining importance of, and urging reform to, voter registration systems).

²⁵ See, e.g., Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 794–800 (2008) (defending majority-minority districts because they release African-American and white communities from overriding pressure, imposed by racial polarization, to maintain racial, in-group cohesion and thus facilitate political diversity within racial groups); Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 96–97 (1995) (arguing that Voting Rights Act has been relatively successful at integrating national, state, and local legislative bodies even as other major American institutions remain in practice segregated).

²⁶ Kang, *supra* note 25, at 738.

self-governance, and an invitation to consider more broadly the democratic practices which further that end.

Simply put, discussions regarding the law of democracy should move beyond their limited focus on elections. We should acknowledge that politics takes place in the administrative state and the courts just as often as in the legislature. We should remember that individuals not only vote but also attend church, network on Facebook, blog, and tweet, and we should consider the degree to which the laws that regulate each of these democratic practices enhance or diminish the project of self-governance and the individual's experience of democracy.

I start in Part I with a vignette of early American politics. Its purpose is to highlight the full repertoire of practices that comprised American democracy at the time. It serves to disabuse those inclined toward nostalgia while highlighting the distinct relationship between law and political practice that is my central focus. Parts II–V form the main body of the Article. Part II is structured in three parts: The first is an account of elections and political parties as they functioned and were regulated in the nineteenth century; the second is an account of the central regulatory changes that took place after 1880; the third explains the implications of those changes for governmental power. Parts III, IV, and V use this same tripartite structure to explain the trajectory of change for the remaining practices: petitions to the legislature, public assemblies, and the republican jury. The conclusion returns us to a discussion of the significance of this history for contemporary debates about the law of democracy.

I

A VIGNETTE

From the Founding to the 1880s, elections were part of an array of political practices that included jury service, legislative petitioning, public meetings, attending festive politics, mobs, and participating in the writing and rewriting of state constitutions. This was the repertoire of political practices—some rugged and unsightly, others remarkably effective—through which Americans engaged in democratic politics. It was a repertoire that largely withstood significant changes in the substance of American politics. Legal regulation intersected with these practices on an intermittent and ad hoc basis. The result was a democratic public sphere that was, relatively speaking, autonomous from the formal institutions of the state.

To provide a picture of how Americans engaged in political action during this period, consider the unfolding of a political crisis in Otsego, a frontier county in New York, in the late eighteenth century.

The Otsego vignette illustrates how electoral politics worked in a world in which public meetings, petitions, juries, parades, and a host of rituals such as toasts, cannon fire, and the raising of liberty poles were equally important in the practice of democratic politics.

On April 14, 1791, Federalist Phillip Schuyler was endorsed unanimously for a seat in the New York Senate at a public meeting held in Cooperstown, Otsego County.²⁷ The endorsement reflected deference to the politically powerful frontier developer, landlord, and judge, William Cooper, the central character in this story.²⁸ Nevertheless, the legitimacy of the endorsement depended upon its appearing to be the unanimous and spontaneous decision of the community.²⁹

Later that month Schuyler won his New York Senate seat in part because of the strong turnout in Otsego County.³⁰ New York's Democratic-Republican Governor, George Clinton, who recently had bestowed favors on Cooper (including his judgeship) in the expectation of securing political support, felt betrayed by Cooper's endorsement of a Federalist.³¹

Despite reprisals from the Governor, in 1792, William Cooper decided once again to throw his political weight against Clinton and behind Federalist John Jay.³² His allies in the established Federalist elite were more than happy to have his support because they considered Cooper adept at the art of condescension, required for electioneering in a deference-based world. William Cooper was able to mingle with the common folk and to secure their votes because he was

²⁷ My account of these events is drawn from ALAN TAYLOR, *WILLIAM COOPER'S TOWN: POWER AND PERSUASION ON THE FRONTIER OF THE EARLY AMERICAN REPUBLIC* 161–96 (1995).

²⁸ See *id.* at 163–66 (describing Cooper as “Otsego’s great landlord and benevolent patriarch” and concluding that “unanimity [of endorsement] . . . signaled Cooper’s covert commitment to Schuyler”). The endorsement reflected the deference Judge Cooper was due as the area’s local patron. In the deference-based culture of the early republic, a wealthy patron such as Judge Cooper would have an “interest”—i.e., a “collection of voters, held together by various ties” of loyalty resulting from “economic, social, emotional, [or] customary” connections and debts—that he could produce for a particular candidate on election days. See EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 189 (1988); see also *id.* at 179 (“An essential ingredient in the formation or continuation of an interest was usually economic power in some form But mere wealth, if necessary, was not in itself sufficient. An interest generally involved some personal bond, some favor done, greeting given, hand extended . . .”).

²⁹ See TAYLOR, *supra* note 27, at 232 (noting that goal of “public nominating meeting[s]” was to arrive at “a consensus candidate . . . with unanimous or near-unanimous support” and that goal “fit [with] the new principle of popular sovereignty”).

³⁰ *Id.* at 166.

³¹ *Id.* Judge Cooper’s defection was a violation of the rules of the interest game, and political revenge soon followed.

³² *Id.* at 166–68 (noting also that Cooper’s next application for land grant was denied).

capable of being “‘very civil to the young and handsome of the [female] Sex’” and of “flatter[ing] the Old & Ugly, and even Embrac[ing] the toothless & decrepit in order to obtain votes.”³³

When the election for Governor finally came, the polls were open for five days, one day in each of five locations.³⁴ The parties printed their own ballots and pressed them into the hands of the voters.³⁵ Voter turnout was high, but it included many who were not eligible to vote, and the Federalists intimidated their opponents to prevent them from objecting to the unqualified voters.³⁶

The result was overwhelming victory in Otsego County for John Jay. Judge Cooper planned to celebrate in customary fashion with a lavish public festival, but before the victory celebrations could begin, the election was disputed.³⁷ The state board of canvassers, a majority of whom were Democratic-Republicans, became concerned about Governor Clinton’s prospects if all the votes were counted and so “cast about for grounds to reject the votes from Otsego County.”³⁸ They quickly found irregularities and decided to reject all the ballots from Otsego County, cementing Governor Clinton’s margin for reelection.³⁹

The Federalists considered the election stolen and were enraged.⁴⁰ Some protested on the public streets: “In Kingston, on the Hudson, defiant Federalists gathered to toast Jay, fire a fourteen-gun salute, wave flags, hear a band, parade through the streets, and drink

³³ Letter from Phillip Schuyler to William Cooper (May 7, 1792), in TAYLOR, *supra* note 27, at 169 (thanking Cooper for his efforts and asking him “[w]hen will you write a treatise in Electioneering?”). Cooper (like many Federalists) conceived of the common voter’s role as limited to deferring to his betters. This view is captured in a letter from Cooper to one of the men in his town, whom Cooper had learned did not intend to vote for John Jay and the Federalist ticket. Cooper wrote, “I wish you to give your vote free, but I wish you to give it on the information of your friends, as it is impossible you should know the existing faults of the present administration. You attend to your farm. Others are acquainted with the affairs of the government” TAYLOR, *supra* note 27, at 171.

³⁴ *Id.* at 174.

³⁵ *See id.* (describing election activities of Federalist state committee).

³⁶ *Id.* at 174–75.

³⁷ *Id.* at 176.

³⁸ *Id.* at 177.

³⁹ *Id.* at 178–80. The board determined, among other things, first, that the sheriff, who had processed the ballots from Otsego County, was not authorized to do so because he had resigned his post before the election and, second, that due to a series of delays (fabricated by both political factions), the commission appointing the new sheriff had not been delivered in time. *Id.* at 178. Two other counties’ ballots were rejected due to similar irregularities; both were assumed to favor Governor Clinton by small majorities. *Id.* at 180.

⁴⁰ *Id.*

heavily.”⁴¹ When these Federalists met up with a group of Clintonians, a violent altercation ensued.⁴²

Thereafter, within taverns, at mass meetings, and in the newspapers, Federalists and Clintonians each sought to cast the other as having stolen the election.⁴³ The Clintonians, for example, published “in the *New-York Journal* thirteen affidavits documenting William Cooper’s electioneering excesses.”⁴⁴ Cooper responded with a rebuttal that included recantations from two of the original affiants.⁴⁵ A little while later, “in Cooperstown a public meeting of 119 settlers denounced the hostile affidavits as the work of ‘vagrant persons and unprincipled wretches’ out to destroy ‘a valuable inhabitant among us, the Father of our County.’”⁴⁶

A series of grand jury investigations of the original affiants was undertaken, three of which were eventually dropped and one of which resulted in a not-guilty verdict.⁴⁷ These were followed by two grand jury investigations of Judge Cooper, both of which dismissed all charges.⁴⁸ Alan Taylor reports that the charges were described in a local newspaper as amounting “only to mere trifling imprudences, and not to the most distant appearance of bribery, imposition, fraud, menace or violence.”⁴⁹ Supporters of Cooper publicly celebrated the grand jury decisions, erecting a liberty pole—a traditional symbol of victory against tyranny.⁵⁰

A few months later, supporters of Governor Clinton held their own public meetings. These meetings “charged Judge Cooper with corrupting the election and inciting an insurrection against the state constitution and legitimate government of George Clinton.”⁵¹ Cooper, presumably in response, held an informal special election in which at least 600 participated to choose delegates to solicit the legislature for relief. Five hundred and thirty voters signed “a petition attesting that they had voted for Jay and Van Rensselaer [Jay’s running mate]” in the April gubernatorial election.⁵²

⁴¹ *Id.* at 181.

⁴² *Id.* The same occurred in Albany. *Id.*

⁴³ *Id.* at 183.

⁴⁴ *Id.*

⁴⁵ *Id.* at 184–85.

⁴⁶ Taylor, *supra* note 27, at 185 (quoting Samuel Tubbs & Joel Green, *POUGHKEEPSIE JOURNAL*, July 12, 1792).

⁴⁷ *Id.* at 185–86.

⁴⁸ *Id.* at 186.

⁴⁹ *See id.* at 186.

⁵⁰ *Id.*

⁵¹ *Id.* at 187.

⁵² *Id.* at 186.

By the time the legislature had reconvened, however, the Federalists' momentum had been lost. Only a few counties joined Judge Cooper and his protest delegation to present their petitions to the legislature. The legislature did not investigate very intensively, and, within a couple of months, they confirmed the board of canvassers' decision.⁵³ The election was effectively settled.⁵⁴

The Otsego story is not one to provoke nostalgia. Elite New York politicians, working behind the scenes, manipulated popular opinion and electoral outcomes as they scrambled for power. They lied, cheated, and masked themselves as the people. Moreover, all of this occurred during a period when women and people of color were disenfranchised and excluded from jury service and political parties.⁵⁵

Nevertheless, the Otsego story highlights both the similarities and differences between early and contemporary American political practice. Much of the above is likely to seem pretty familiar. Parties struggle for electoral victories, engage in patronage, and vigorously enforce the procedural election rules available to them when it is to their advantage to do so. Yet aspects of the story are foreign. The candidates were nominated at public meetings, and voting took place over five days amidst festivities. Public protests after the election included political toasts and parades and culminated in the typical rituals of the time—the raising of liberty poles and the burning of effigies. Petitions to the legislature, as well as political uses of the grand jury, were recurring features of the political contest.⁵⁶

The Otsego story also highlights several key differences in the way law regulated the political process. Political parties printed and handed out partisan ballots. Permits were not required for any of the public assemblies. Meanwhile, petitions to the legislature and appeals to juries were central to resolving the dispute, while judges (particu-

⁵³ *Id.* at 191.

⁵⁴ Although the election was settled, the dispute continued for a few months. *See id.* at 191–96 (describing colorful campaign, involving numerous petitions and public meetings, by Clinton's supporters to have Judge Cooper impeached).

⁵⁵ New York first enfranchised men of color in 1821 but in various ways heightened suffrage requirements for them until the ratification of the Fifteenth Amendment. *See* ALEXANDER KEYSAR, *THE RIGHT TO VOTE* 344 tbl.A.2, 365 tbl.A.9 (2000) (listing New York's property, taxpaying, and other suffrage requirements between 1790 and 1855). New York granted women the vote in 1917; however, they had been allowed to vote in elections pertaining to schools since 1880. *Id.* at 399 tbl.A.17, 402 tbl.A.20.

⁵⁶ Both practices played important roles in the American Revolution. *See generally* PAULINE MAIER, *FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765–1776* (1972) (discussing importance of Whig tradition of resistance, including petitioning, in colonies prior to American Revolution); JOHN PHILLIP REID, *IN A DEFIANT STANCE* 198–227 (1977) (arguing that local control of law through political practices such as grand juries minimized violence prior to Revolutionary War).

larly federal judges) played no role in the disputed election at all. For all of its chaos and inequality, democratic politics in Otsego were to a large degree autonomous from government control. Even where official power ultimately could be used to throw out the county's ballots, it could not be used systematically to structure politics.

II

ELECTIONS AND POLITICAL PARTIES

A. *The Practice: 1790–1880*

Elections and political parties have always been central to democratic politics. Through the nineteenth century, however, elections were nothing like the quiet, formal, and individualized exercises they are today. Meanwhile, political parties existed but were considered illegitimate for much of the period.

1. *Elections*

In the early republic, election days were public holidays filled with food, drink, and merriment in which large numbers of enfranchised and disenfranchised Americans participated.⁵⁷ Elections were lively public events, in which “[a]mid the continuous electioneering and political arguments, picnics, drinking, and boisterous celebration went on throughout each polling day.”⁵⁸ As the nineteenth century unfolded, parties took to organizing festivities for election days.⁵⁹

Voting, moreover, was neither the technical nor private experience it is today. Initially, especially in the South, “voting was . . . an oral and public act: [M]en assembled before election judges, waited for their names to be called, and then announced which candidates they supported.”⁶⁰

By the mid-nineteenth century almost all states had changed over to written ballots.⁶¹ At first, voting by ballot meant only that voters

⁵⁷ In the early period, the festive aspect of election days was tied to “treating” constituents to food and drink. Treating—a practice especially dominant in the South and the Mid-Atlantic—was the culminating act of “interest” formation. For a discussion of treating as a tactic of interest formation, see MORGAN, *supra* note 28, at 196–98, 205–07.

⁵⁸ JOEL H. SILBEY, *THE AMERICAN POLITICAL NATION, 1838–1893*, at 143 (1991).

⁵⁹ *See id.*

⁶⁰ KEYSSAR, *supra* note 55, at 28; *see also* ELDON COBB EVANS, *A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES 1–6* (1917) (discussing historical trajectory away from *viva voce* method of voting).

⁶¹ *See id.* (describing shift to written ballots). In 1868, Thomas M. Cooley wrote that “[t]he mode of voting in this country, at all general elections, is almost universally by ballot.” THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 604

were required to write down their choices. In some states, the acceptance of printed ballots was subjected to (ultimately unsuccessful) constitutional challenges.⁶²

Even after the states decided to adopt printed ballots, casting a ballot remained a distinctly public act.⁶³ First, states did not produce the ballots themselves. Instead, political parties took on the role of printing and distributing ballots. Typically, party workers would hand voters a preprinted ballot with their full slate of candidates on the day of the election just outside the polling place.⁶⁴ Second, within the polling place, the process of voting was quite informal.⁶⁵ Voters simply “placed [their ballot] in a box or handed [it] to an official.”⁶⁶ It usually was easy to distinguish among ballots of different political parties “even when folded.”⁶⁷ In part, distinguishing among ballots was easy because, as in New York, political parties opted to use different colors of paper. But even after the Civil War, when states began to require that white paper be used, political parties often opted for different shades or different weights of paper.⁶⁸

Consider New York City’s election of 1834. It took place over the course of three days and featured parades, public gatherings, and violent street brawling.⁶⁹ Each of the city’s fifteen wards had one polling

(Boston, Little, Brown, & Co. 1868). Cooley noted Virginia, Arkansas, Kentucky, and Georgia as the exceptions. *See id.* at 604 n.1. Oregon’s original constitution required *viva voce* voting in popular elections until 1872. Ralph James Mooney & Raymond H. Warns, Jr., *Governing a New State: Public Law Decisions by the Early Oregon Supreme Court*, 6 *LAW & HIST. REV.* 25, 31–32 (1988).

⁶² *See, e.g.*, *Henshaw v. Foster*, 26 Mass. (9 Pick.) 312 (1830) (holding that “printed” vote qualified as “written” vote within meaning of state constitution); *Temple v. Mead*, 4 Vt. 535 (1832) (holding that printed ballot qualified as ballot with candidate’s name “fairly written” thereon).

⁶³ *See* EVANS, *supra* note 60, at 9–10 (describing observation of voters to see what party ticket they selected, along with announcement of voters’ names at polling place).

⁶⁴ KEYSSAR, *supra* note 55, at 28; *see also* EVANS, *supra* note 60, at 8 (discussing variation with respect to collection methods between states); SILBEY, *supra* note 58, at 58–59 (describing efforts of political parties to distribute ballots and to protect their voters from being tricked into voting for opposition).

⁶⁵ *See* SILBEY, *supra* note 58, at 143–44 (describing elections as “open events” where “[a] voter usually did not do much to mask his choice” when casting “party-provided printed ballot”).

⁶⁶ KEYSSAR, *supra* note 55, at 28; *see also* COOLEY, *supra* note 61, at 604 (“[W]here the suffrages are given in [ballot] form, each of the electors in person deposits such a vote in the box, or other receptacle provided for the purpose, and kept by the proper officers.”).

⁶⁷ EVANS, *supra* note 60, at 6.

⁶⁸ *Id.* at 6–8. In 1831, Maine was the first to mandate the color of the paper on which parties were allowed to print their ballots; it was the only state to do so prior to the Civil War. *Id.* at 7–8.

⁶⁹ *See* John Charles Schneider, *Mob Violence and Public Order in the American City, 1830–1865*, at 60–68 (Aug. 1971) (unpublished Ph.D. dissertation, University of Minnesota)

place.⁷⁰ There was no voter registration⁷¹ and no official ballot. Each party printed its own ballots that it handed out to its voters. The ballots were either marked or printed on distinctive colored paper such that there was no secrecy as to how a voter had voted.⁷²

The availability of judicial review, especially with respect to municipal elections, was unclear for much of the nineteenth century. In disputed municipal elections, the issue frequently turned on charter interpretation. In Oregon, for example, the state court's position depended on the text of the city charter being reviewed.⁷³ Similarly, courts in Connecticut and Michigan held that where a charter had a provision to the effect that the city council would be the final judges of the qualification of particular elected officials, judicial review was precluded.⁷⁴

2. *Political Parties*

For the nation's first fifty years, political parties were considered illegitimate "factions" and as such had to act at all times as if they represented the entire people to seem legitimate.⁷⁵ This republican antipartyist ideology prevailed well into the nineteenth century—some argue through the Civil War.⁷⁶

Despite the distrust of political parties during this period, they remained central to early American politics.⁷⁷ They organized public meetings, circulated petitions, and distributed ballots. They also orchestrated parades on national and local holidays as well as on election days. They just had to do so in the name of the people.

(on file with the *New York University Law Review*) (providing detailed account of electioneering activities during 1834 New York election).

⁷⁰ *Id.* at 54, 61. The smallest ward had a population of 7549; the largest, 28,570. Approximately 35,000 votes were cast in total. *Id.* at 53–54.

⁷¹ *Id.* at 61.

⁷² *Id.*

⁷³ See Mooney & Warns, *supra* note 61, at 36–38 (describing Oregon Supreme Court's difficulty in dealing with this issue in two cases: *State ex rel. Mahoney v. McKinnon*, 8 Or. 493 (1880), and *Simon v. Portland Common Council*, 9 Or. 437 (1881)).

⁷⁴ See *Selleck v. Common Council*, 40 Conn. 359 (1873); *People ex rel. Cooley v. Fitzgerald*, 2 N.W. 179 (Mich. 1879) (per curiam).

⁷⁵ For an interesting account of the early Democratic Party's efforts to represent itself as the people, see GERALD LEONARD, *THE INVENTION OF PARTY POLITICS* 35–45, 119, 180–82, 228–29 (2002). Leonard explains how "the democracy," as the party called itself when founded, reconciled its permanence with prevailing antipartyist ideology. *Id.* at 175. For a description of how the layering of public meetings created legitimacy for the Democratic Party, see JEAN H. BAKER, *AFFAIRS OF PARTY* 282–91 (1983).

⁷⁶ Compare SILBEY, *supra* note 58, at 1–45 (describing antipartyism and its demise after 1838), with LEONARD, *supra* note 75, at 228–30 (arguing that antipartyism did not die until after Civil War), and BAKER, *supra* note 75, at 139–40 (same).

⁷⁷ See SILBEY, *supra* note 58, at 14–16 (describing how political parties operated in antipartisan era).

Once parties gained legitimacy in the mid-nineteenth century, their centrality in the repertoire of American political practices became more visible.⁷⁸ Parties soon “evolved into mass movements that broadened the base of politics, albeit without including women and African Americans.”⁷⁹

Political parties established permanent premises at locations where “the faithful gathered to talk politics, drink cider, organize parades and rallies, and read campaign literature.”⁸⁰ In election years, these meetings often took place on a weekly basis as party loyalists solicited new members and prepared for festivities by procuring torchlights, uniforms, and fireworks for parades.⁸¹ Political parties also distributed honorific titles and positions—President, Vice President, doorkeeper—to their members, providing incentives to serve the party as well as a sense of solidarity.⁸² Most importantly, they mobilized the electorate to come out on election days.⁸³

Throughout these various stages of acceptability, American political parties “operated without any legal recognition or restriction.”⁸⁴ Most importantly, the government did not regulate their internal procedures of representation.

B. *Regulatory Change: 1880–1920*

The late nineteenth and early twentieth centuries saw two major changes: first, a significant increase in governmental control over the election process and, second, qualitative shifts in democratic politics, including the end of election days as boisterous public holidays. The central features of the new democratic order included the transformed ideal of citizenship embodied by the educated individual voter, the emergence of the expert-run administrative state as a new locus of policy decision making, the rise of interest groups as a means to influence government, and the breakdown of the gendered construction of citizenship as male.⁸⁵

⁷⁸ See *id.* at 32–45 (describing eventual acceptance of political parties).

⁷⁹ Kermit L. Hall, *The Courts, 1790–1920*, in 2 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* 106, 106–07 (Michael Grossberg & Christopher Tomlins eds., 2008).

⁸⁰ BAKER, *supra* note 75, at 283.

⁸¹ *Id.* at 287.

⁸² *Id.* at 283–84.

⁸³ See SILBEY, *supra* note 58, at 50–59 (describing organizational efforts of political parties).

⁸⁴ Winkler, *supra* note 6, at 876.

⁸⁵ See generally MICHAEL E. MCGERR, *THE DECLINE OF POPULAR POLITICS* (1986) (identifying shift in style of politics toward mix of educational and advertised political campaigning that substantially undermined popular political participation); JAMES A. MORONE, *THE DEMOCRATIC WISH* (1998) (suggesting period brought about unintentional recentering of locus of policymaking in administrative, bureaucratic state, with effects on

The causes of these changes, as well as their effect on the extent and quality of democratic participation, have been described elsewhere. Here, I will focus on the much less discussed effect that increased regulation of elections had on the state's control over the processes of representation.⁸⁶

States always had regulatory responsibilities with respect to elections. At the very least, they regulated who could vote.⁸⁷ In the early republic, suffrage depended on citizenship, property qualifications, taxpaying requirements, and age.⁸⁸ In the period immediately following the Revolution, eleven states allowed free black men to vote, and one granted propertied women the vote.⁸⁹ Property qualifications were soon dropped, and, “[b]y the 1830s, virtually all white men could vote.”⁹⁰ Unfortunately, as more white men gained the vote, state legislatures passed laws disenfranchising women, African Americans, and Native Americans.⁹¹ At the time of the Civil War, all but five states (all in New England) linked suffrage to whiteness.⁹² Many states also enacted laws disenfranchising paupers and felons in the early nineteenth century.⁹³

Other than imposing suffrage requirements and some basic regulations regarding election procedure, states generally had few election

democratic participation); MICHAEL SCHUDSON, *THE GOOD CITIZEN* (1998) (characterizing shift as from politics of affiliation to politics of information with concomitant shift in locus of governance toward experts and bureaucrats); Paula Baker, *The Domestication of Politics: Women and American Political Society, 1780–1920*, 89 *AM. HIST. REV.* 620 (1984) (arguing that central qualitative transformation of period, culminating in adoption of Nineteenth Amendment, was convergence of political experiences of men and women); *see also generally* ELISABETH S. CLEMENS, *THE PEOPLE'S LOBBY* (1997) (discussing rise of interest group politics); PIVEN & CLOWARD, *supra* note 18, at 55–60 (similar); SILBEY, *supra* note 58, at 7, 237–51 (defining new political culture as postpartisan and bureaucratic).

⁸⁶ For an overview of the procedural evolution of voting in the United States with an emphasis on the benefits this evolution offered to the rule of law, see Jill Lepore, *Rock, Paper, Scissors: How We Used To Vote*, *NEW YORKER*, Oct. 13, 2008, at 90.

⁸⁷ For details on suffrage requirements from the Founding to 1855, see KEYSSAR, *supra* note 55, at 26–80, 343–56 tbls.A.2, A.3, A.4 & A.5.

⁸⁸ *Id.* at 29–33. From the Founding until the 1850s, the trend was toward reducing property-related suffrage restrictions. *Id.* at xxii, 27–52.

⁸⁹ Mark R. Wilson, *Law and the American State, from the Revolution to the Civil War: Institutional Growth and Structural Change*, in 2 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA*, *supra* note 79, at 1, 11–12.

⁹⁰ PIVEN & CLOWARD, *supra* note 18, at 5.

⁹¹ *E.g.* KEYSSAR, *supra* note 55, at 54–60; *accord* COOLEY, *supra* note 61, at 753 (noting that all states excluded women, minors, and aliens from voting in general elections).

⁹² Wilson, *supra* note 89, at 12 (noting also that at most four percent of free black population was enfranchised).

⁹³ *See* Keyssar, *supra* note 55, at 61–65 (describing justifications for restricting franchise of paupers, felons, and migrants).

laws prior to 1880. Many had adopted short residency requirements,⁹⁴ but even registration requirements were relatively rare before 1870.⁹⁵

The passage of the Fifteenth Amendment in 1870, which brought African-American men into the electorate, marked a turning point for election regulation.⁹⁶ The most significant immediate impact of enfranchising African-American men was that Southern politics became competitive—remaining so until well after 1887.⁹⁷ The results were monumental for African Americans: Nearly 2000 African Americans were elected to serve in Southern legislatures and in Congress during Reconstruction.⁹⁸ Similar numbers would not be achieved again until the 1970s.⁹⁹

These gains—achieved through federal constitutional intervention—ultimately were short lived. Motivated in part by their belief in white supremacy, in part by their anxiety about universal male suffrage, in places by their genuine concerns about corruption and election fraud, and perhaps most of all by their goal of partisan gain and desire to shape the electorate,¹⁰⁰ reformers above and below the Mason-Dixon line introduced both new suffrage restrictions and new regulations of the procedures of elections.¹⁰¹ Because of these

⁹⁴ *Id.* at 31–33; accord COOLEY, *supra* note 61, at 753–54 (explaining universal adoption of residency requirements).

⁹⁵ KEYSSAR, *supra* note 55, at 151. Massachusetts had a voter registration requirement as of 1801. *Id.* at 152. For a discussion of other early voter registration laws, see *id.* at 65–66.

⁹⁶ Black male political participation began when the Reconstruction Acts of 1867 prohibited Confederate states from denying African-American men from serving as delegates to the new constitutional conventions. Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 299–300 (2000). The Fifteenth Amendment extended this prohibition on discrimination to voting. In the 1880 presidential election, two-thirds of black men voted. See *id.* (summarizing data on black political participation during Reconstruction).

⁹⁷ See KOUSSER, *supra* note 18, at 12–17, 27–29, 41–44 (offering analysis of voter-turnout data to show that Southern politics during last three decades of nineteenth century were marked by stiff party competition and high voter interest until disenfranchising laws took effect).

⁹⁸ Pildes, *supra* note 96, at 300.

⁹⁹ See J. MORGAN KOUSSER, *COLORBLIND INJUSTICE* 19 fig.1.1 (1999).

¹⁰⁰ See KOUSSER, *supra* note 18, at 182–223 (highlighting partisan motivations behind black disenfranchisement in the South); REYNOLDS, *supra* note 18 (arguing that while good government reformers advocated change in New Jersey, legislative change occurred only when it served interests of particular factions); see also KEYSSAR, *supra* note 55, at 156 (“[S]uch laws emerged from a convergence of partisan interest with sincere concern about electoral fraud . . .”).

¹⁰¹ The major exception to the trend away from universal suffrage was the extension of the suffrage to women in 1920. PIVEN & CLOWARD, *supra* note 18, at 45. It should be noted that Keyssar, in his comprehensive history of the contested right to vote in the United States, argues that the turn toward suffrage restrictions started in the 1850s and coincided with the increasing heterogeneity of American society. See KEYSSAR, *supra* note 55, at 77–80. The fundamental problem with his division of the struggle for suffrage into distinct

reforms, people of color, especially in the South, systematically were expunged from the voter rolls and excluded from political parties.¹⁰²

The end result was that from 1880 through the Progressive Era, states radically increased regulatory oversight over elections.¹⁰³ The three most lasting reforms were: the adoption of voter registration laws that required individual voters to register personally and at regular intervals (personal and periodic voter registration); the introduction of an official state ballot (the Australian ballot); and the introduction of party primaries mandated by the states.

New suffrage restrictions began as Southern reforms aimed at narrowing the electorate and securing Democratic control of Southern politics.¹⁰⁴ In the post-Reconstruction period, Southern states introduced (and subsequently constitutionalized) periodic voter registration laws that granted significant discretion to registrars, voting procedures designed to confuse the illiterate, literacy tests, and the poll tax (frequently a cumulative poll tax).¹⁰⁵

The rest of the country did not take long to follow suit. In the North and West, states instituted longer residency requirements and stricter barriers for noncitizens as part of the reforming efforts of Progressives, who sought to end party corruption but often, for various reasons, also opposed allowing recent immigrants to vote in American elections.¹⁰⁶ Between 1890 and 1920, eleven Northern and Western states passed literacy qualifications.¹⁰⁷

periods is that his period of exclusion, in which “[t]he dominant trend . . . was toward a narrowing of the franchise,” *id.* at 80, includes the passage of the Fifteenth Amendment and Reconstruction, which brought African-American men into the electorate.

¹⁰² See KOUSSER, *supra* note 18, at 13–14, 45–47, 262–63 (arguing that outright violence, defiance, and intimidation quickly proved to be unreliable means of preventing undesirables from voting and prompted white Southern elites to turn to legal and eventually constitutional barriers that were remarkably effective).

¹⁰³ For a discussion of New Jersey as a case study of such reforms, see REYNOLDS, *supra* note 18. For the stages of New York’s electoral reform, see *People ex rel. Coffey v. Democratic General Committee of Kings County*, 58 N.E. 124, 124–26 (N.Y. 1900).

¹⁰⁴ PIVEN & CLOWARD, *supra* note 18, at 82. Southern Democrats enacted reforms in order to undo the political effect of enfranchisement. See KOUSSER, *supra* note 18, at 182–223 (arguing that disenfranchisement was consciously enacted to secure Democratic Party hegemony and that both black voters and white, swing-vote dissenters were disenfranchised); see also MICHAEL PERMAN, *STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888–1908*, at 11–36, 245–69, 322–28 (2001) (arguing that disenfranchisers targeted black voters *because* they were black and that partisan entrenchment and desire to reinstitute racial domination must be understood as entwined projects).

¹⁰⁵ See KOUSSER, *supra* note 18, at 45–82 (discussing techniques of disenfranchisement, including voter registration, literacy tests, poll taxes, and white primaries).

¹⁰⁶ PIVEN & CLOWARD, *supra* note 18, at 86–88.

¹⁰⁷ *Id.* at 88. Massachusetts and Connecticut had passed literacy qualifications in the 1850s while the Know Nothing Party was in power. KEYSSAR, *supra* note 55, at 86; see also *id.* at 141–46, 226–30 (describing literacy tests more generally).

States outside the South also instituted their own personal and periodic voter registration requirements.¹⁰⁸ While a few states and municipalities had registration requirements earlier, these had simply required local officials to keep a list of eligible voters.¹⁰⁹ The registration laws passed in the 1880s and 1890s, by contrast, required voters to register in person, often annually, at specific locations, and by specified dates, often well before the election.¹¹⁰ By 1929, only three states operated without a voter-registration requirement.¹¹¹ In 1940, Arkansas was the only exception, due to a unique constitutional provision barring such procedures.¹¹² While the need to verify eligible voters is hard to deny, these registration laws were intentionally cumbersome and thus a significant factor in reducing voter participation throughout the nation, but particularly in the South.¹¹³

Most importantly for my purposes, the period saw the introduction of the Australian ballot, whereby the government took control over producing printed ballots, typically also requiring that ballots be available only in the polling place.¹¹⁴ In 1888, Massachusetts and the city of Louisville, Kentucky, each adopted laws giving government officials, for the first time, exclusive authority to issue and distribute ballots.¹¹⁵ The move for an official ballot began in New York in 1887, but the Governor vetoed bills passed by the state legislature in two

¹⁰⁸ See PIVEN & CLOWARD, *supra* note 18, at 88–93. New York’s first voter registration law was passed in 1880 and applied only to New York City and Brooklyn. In 1890, it was applied statewide. See Coffey, 58 N.E. at 125 (discussing evolution of voter registration requirements in New York grounded in concerns with electoral fraud).

¹⁰⁹ See PIVEN & CLOWARD, *supra* note 18, at 88–90 (describing early voter registration regimes in Connecticut, Maine, Massachusetts, and Pennsylvania).

¹¹⁰ See *id.* at 90–93 (describing adoption of “onerous” and “increasingly restrictive” registration regimes by Northern cities).

¹¹¹ *Id.* at 89. Thirty-one states outside the South had instituted personal and periodic registration laws by 1920. *Id.* at 91.

¹¹² KEYSSAR, *supra* note 55, at 230. Arkansas’s 1874 Constitution provided in relevant part: “nor shall any law be enacted whereby the right to vote at any election shall be made to depend upon any previous registration of the elector’s name” ARK. CONST. of 1874, art. III, § 2.

¹¹³ PIVEN & CLOWARD, *supra* note 18, at 25–29, 37; see also KEYSSAR, *supra* note 55, at 151–59 (“The impact of these laws was highly variable . . . but it can be said with certainty that registration laws reduced fraudulent voting and that they kept large numbers (probably millions) of eligible voters from the polls.”).

¹¹⁴ Some states required sample ballots to be printed in local newspapers. EVANS, *supra* note 60, at 34. The critical difference from the old system was that after the adoption of the Australian ballot, one could not vote a ballot obtained outside of the polling station. For a detailed account of the adoption of the Australian ballot in each of the states as well as the nuances of the variation between states, see *id.* at 36–55.

¹¹⁵ *Burson v. Freeman*, 504 U.S. 191, 203 (1992). The very first reform effort failed in Michigan. See EVANS, *supra* note 60, at 18 (noting that idea was first introduced by Philadelphia civil service reformer in 1882 and discussing failed campaign in Michigan in 1885). Wisconsin adopted a quasi-official ballot in 1887, but it was a “compromise mea-

successive years.¹¹⁶ After receiving “a monster petition from New York City containing over one hundred thousand signatures,” the Governor finally backed down in 1890 and agreed to pass a compromise bill.¹¹⁷

In less than a decade, “almost 90 percent of the States had adopted the Australian system. This accounted for 92 percent of the national electorate.”¹¹⁸ More than any other reform, the official ballot reveals the complex set of motivations at work that drove the increased regulation of elections. The rhetoric, especially in the North, was one of accountability and transparency.¹¹⁹ Progressives were genuinely concerned that the informality and lack of secrecy of the voting process encouraged fraud, intimidation, and corruption.¹²⁰ At the same time, throughout the nation—but most notoriously in the South—the secret ballot served as a literacy test, and reformers often had little sympathy for including the illiterate in the electorate.¹²¹

Early reforms did not immediately implement a single official ballot upon which all voters marked their choices. Reform in New Jersey, for example, came in stages. In the first stage, the state instituted a secrecy requirement, took over printing ballots, and barred crowds and partisan workers from within 100 feet of polling places.¹²² The law, however, did not establish a single ballot. Instead, the state printed separate ballots for parties that qualified. Those ballots, moreover, continued to be available outside the voting booth.¹²³ It was not until the third round of election reform in 1911 that New Jersey established a single ballot, available only in the polling place, upon which voters actively had to indicate which candidate they were selecting for each office.¹²⁴

The third major change was that states and municipalities cracked down on political parties that had, by this time, become notoriously

sure” because political parties continued to control the printing if not the distribution of ballots. *See id.* at 19.

¹¹⁶ *Id.* at 19–20.

¹¹⁷ *Id.* at 20. Evans’s detailed account clearly contradicts the Supreme Court’s claim in *Burson v. Freeman* that New York also adopted the Australian ballot in 1888. *Compare id.* at 19–20, with *Burson*, 504 U.S. at 203.

¹¹⁸ *Burson*, 504 U.S. at 205.

¹¹⁹ *See, e.g.,* Lepore, *supra* note 86, at 94–96 (noting legislatures wanted to “clean up elections”).

¹²⁰ *See* EVANS, *supra* note 60, at 48 (“The greatest weakness of the unofficial ballot was its failure to secure a secret vote.”).

¹²¹ *See id.* at 52–53 (downplaying costs of excluding illiterate voters).

¹²² REYNOLDS, *supra* note 18, at 63.

¹²³ *Id.* at 63–64.

¹²⁴ *Id.* at 142–45.

corrupt, particularly in urban areas.¹²⁵ Most directly, states began regulating internal party procedures for the first time.¹²⁶ Several examples demonstrate this new approach to regulating the political parties. New York passed the first law to regulate political parties' nomination processes in 1882. The law targeted fraud and applied at first only to Brooklyn,¹²⁷ although a year later the legislature extended the law to cover the entire state.¹²⁸ Then in 1898, New York expanded its regulatory efforts by passing its first party primary law, which established procedures for primary elections, conventions, and the selection of party officers.¹²⁹

In 1897, the California legislature passed its first mandatory primary law.¹³⁰ The Supreme Court of California struck down the law in 1898,¹³¹ and in response, the legislature enacted a revised law in 1899. The new law, which mandated that delegates to nominating conventions be elected according to the terms of the statute and denied minor parties the ability to partake of this process—and hence the right to appear on the ballot—also was struck down.¹³²

And as a last example, New Jersey mandated a state-run direct primary for all elected offices in 1911 in its final round of election reforms—the same round that established the single official ballot.¹³³

At the dawn of the twentieth century, “43 states had enacted some form of primary election law.”¹³⁴ Up until this point, American parties had “operated without any legal recognition or restriction.”¹³⁵

¹²⁵ See, e.g., SCHUDSON, *supra* note 85, at 6 (“To reformers at the end of the nineteenth century, [the prevailing] mode of voting seemed not colorfully carnivalesque but corrupt, and they sought to clean it up.”); Lepore, *supra* note 86, at 94–95 (discussing Australian ballot advocate Henry George’s efforts to combat Boss Tweed and reform New York City government). For an overview of Progressive Era attacks on the power of political parties, particularly local party machines, see PIVEN & CLOWARD, *supra* note 18, at 76–81.

¹²⁶ See Winkler, *supra* note 6, at 874 (noting that 1880s and 1890s saw rise of regulations “mandat[ing] parties to adopt specific candidate nomination practices (such as primaries or caucuses) and internal party governance structures . . . [including] party membership rules and ballot access qualifications”).

¹²⁷ *People ex rel. Coffey v. Democratic Gen. Comm. of Kings Cnty.*, 58 N.E. 124, 125 (N.Y. 1900); cf. *Leonard v. Commonwealth*, 4 A. 220 (Pa. 1886) (involving litigation over similar Pennsylvania statute to prevent fraud and bribery in political parties’ nomination processes).

¹²⁸ See *Coffey*, 58 N.E. at 125 (describing subsequent legislation).

¹²⁹ *Id.* at 126.

¹³⁰ *Britton v. Bd. of Election Comm’rs of S.F.*, 61 P. 1115, 1116 (Cal. 1900).

¹³¹ See *Spier v. Baker*, 52 P. 659 (Cal. 1898) (invalidating California primary statute as unconstitutionally enlarging right of suffrage beyond constitutional requirements).

¹³² See *Britton*, 61 P. at 1116–18.

¹³³ REYNOLDS, *supra* note 18, at 142–45.

¹³⁴ Winkler, *supra* note 6, at 877 n.10.

¹³⁵ *Id.* at 876. Such reforms did not come without political struggle. See generally Floyd R. Mechem, *Constitutional Limitations on Primary Elections Legislation*, 3 MICH. L. REV.

In 1900, the Supreme Court of California noted that primary laws were a “bold innovation” worthy of “careful scrutiny” because they limited “the powers of political parties, which heretofore they have freely exercised, of adopting their own modes for the selection of their representatives.”¹³⁶

Progressives sought to rein in political parties in other ways as well. They introduced nonpartisan elections and passed laws limiting what party workers could do on election days.¹³⁷ They targeted the patronage system, famously, by enacting civil service reforms, which removed public jobs from party control,¹³⁸ and, less famously, by passing laws limiting the types of political activities in which government officials could engage.¹³⁹ Reformers also undercut the power of political parties by restructuring city government—for example, by instituting a commission form of government or by establishing independent agencies to take over key city functions.¹⁴⁰

C. *Implications for State Power*

The introduction of voter registration and other voter qualifications was not a significant departure from the past. While voter registration laws critically affected voter turnout (insofar as they raised the cost of voting), they did not entail a significant shift in the state’s regulatory power but rather constituted an advance in election administration procedure. Similarly, even though suffrage restrictions curtailed who could vote and reinstated inequalities into the democratic process—creating normative problems—the law had always erected such barriers. Put differently, while democracies come in more and less

364 (1905) (laying out constitutional challenges to, and considerations regarding, states’ regulation of nomination process).

¹³⁶ *Britton*, 61 P. at 1116.

¹³⁷ See, e.g., *People ex rel. Coffey v. Democratic Gen. Comm. of Kings Cnty.*, 58 N.E. 124, 125 (N.Y. 1900) (noting that New York’s ballot reform included provision “prohibit[ing] electioneering within 150 feet of the polling place”).

¹³⁸ See GLENN C. ALTSCHULER & STUART M. BLUMIN, *RUDE REPUBLIC* 252, 257 (2000) (describing federal civil service reform and its impact on political parties and their reliance on patronage).

¹³⁹ Compare *Ex parte Curtis*, 106 U.S. 371 (1882) (upholding restrictions on political activities of certain federal employees), with *Louthan v. Commonwealth*, 79 Va. 196 (1884) (holding limits on political activities of certain officeholders unconstitutional).

¹⁴⁰ See PIVEN & CLOWARD, *supra* note 18, at 77–79 (describing how business-backed reformers advocated for civil service reform in effort to lessen influence of political parties on city and state governments). In major cities, elected offices (e.g., those for aldermen) were replaced by a system in which city commissioners were elected at large, and the city was managed by political appointees. This was part of the Progressives’ agenda to create a government by administrative agency. See generally JON C. TEAFORD, *THE UNHERALDED TRIUMPH: CITY GOVERNMENT IN AMERICA, 1870–1900* (1984) (highlighting political and historical importance of nineteenth-century municipal government reforms).

egalitarian forms, it is hard to conceive of a democracy functioning without some rules regarding who is a voting member of the polity and how voting is to take place.¹⁴¹

The introduction of the official ballot was different. It replaced processes of self-governance—processes that took place within the democratic public sphere—with formal state processes for dispute resolution. It enabled the state to regulate the inner workings of the political community in ways that had not been available to the state before. The official ballot marked a shift from law's *defining the ground rules of democracy* to law's *defining the processes of representation*—a shift that amounted to a significant change in the mode of governance.

This radical shift in the state's power came about because once the state took on the job of printing the ballot, ballot space became a limited resource. When the political parties produced their own ballots, there was no need to restrict how many parties could vie for office. There was not even a need to restrict the number of candidates running under a given party label. Factions within a party could, and did, produce different ballots. Individual voters also wrote in and struck out candidates.¹⁴²

Once the state established an official ballot, however, access to the limited space on the ballot had to be regulated.¹⁴³ For example, rules had to be established regarding which parties were worthy of inclusion on the ballot.¹⁴⁴ This in turn gave rise to second-order questions: Who was the legitimate candidate of a party? Who within the party could make that decision?¹⁴⁵ These second-order questions gave rise to even further questions: Who were the party's officers, and who

¹⁴¹ Cf. *Luther v. Borden*, 48 U.S. (7 How.) 1, 41 (1849) (“[B]y what rule could [the circuit court] have determined the qualification of voters upon the adoption or rejection of the proposed constitution, unless there was some previous law of the State to guide it?”).

¹⁴² See Mechem, *supra* note 135, at 372 (acknowledging that default rule prior to advent of official ballot allowed voters to write in candidates).

¹⁴³ See *id.* (“Where the Australian ballot law is in force, practical convenience may require limitation upon the number of party tickets which will be *printed* upon the ballot.”); see also EVANS, *supra* note 60, at 29 (“Since it is impossible to print the name of every possible candidate on the ballot, the law restricts . . . candidates whose names are to be printed on the ballot to the nominees of political parties of a certain size and to independent candidates petitioned for by a certain number of electors.”).

¹⁴⁴ See *Britton v. Bd. of Election Comm'rs of S.F.*, 61 P. 1115, 1116 (Cal. 1900) (reviewing legislature's decision to exclude from official ballot “all political parties which did not cast at the next preceding election at least 3 per cent. of the total vote”); see also EVANS, *supra* note 60, at 29–30 (cataloguing how various states defined political parties worthy of ballot access); Mechem, *supra* note 135, at 372 (discussing necessity of guidelines for defining political parties and legal limitations on these guidelines).

¹⁴⁵ Cf. *People ex rel. Coffey v. Democratic Gen. Comm. of Kings Cnty.*, 58 N.E. 124, 126 (N.Y. 1900) (explaining that primary laws embody choice “to permit the voters to con-

would get to decide?¹⁴⁶ Who counted as a member of a political party in the first place, and, again, who would make that decision?¹⁴⁷

Previously, political parties had “chose[n] their own nominating procedures and established their own bodies for internal governance.”¹⁴⁸ As such, these issues had either not arisen or had been struggled over and resolved privately. The state had not had the ability formally to intervene in the inner workings of political parties or to act as the final arbiter of private disputes regarding political representation.

Decisions needed to be made, and the state, as the master of the official ballot, started to make those decisions through primary laws and adjudications under those laws. As one commentator of the period explained:

Where the voters are left free to prepare their own ballots, the State need not concern itself with the question of whether the voters are grouped into political parties or not. It is only when the State undertakes to prepare the ballot and makes its use alone mandatory, that official recognition of political groups or parties becomes necessary.¹⁴⁹

The very structure of the national government creates incentives for two-party politics. In particular, the combination of single-member districts and winner-take-all voting rules creates strong incentives toward a two-party system at the national level.¹⁵⁰ The decision at the

struct the [party] organization from the bottom upwards, instead of permitting leaders to construct it from the top downwards”).

¹⁴⁶ See, e.g., *id.* at 126–27 (deciding whether general committee of county could remove one of its members or whether member was entitled to his office under state’s primary law).

¹⁴⁷ Compare *Schostag v. Cator*, 91 P. 502, 503 (Cal. 1907) (upholding party loyalty test to participate in closed primary on grounds that to do otherwise would be to “deny[] to the governing bodies of the respective parties the right to exclude from participation in their primaries electors who, according to their own standards of party fealty, are not entitled to act with them”), and *Britton*, 61 P. at 1118 (expressing concern that under primary law any voter can choose to vote in political party’s primary, whatever his political beliefs, because “[n]o question may be permitted touching his political affiliations,—past, present, or future”), with *Coffey*, 58 N.E. at 125 (noting that when party leaders were able to set membership tests they often instituted “‘regulations’ under which members who were not congenial . . . were disciplined,” thereby “perpetuat[ing] [the leaders’] power and control”). See also *Mechem*, *supra* note 135, at 373–77 (discussing necessity of tests for party allegiance and possibilities for legislative action).

¹⁴⁸ *Winkler*, *supra* note 6, at 876.

¹⁴⁹ *Mechem*, *supra* note 135, at 370.

¹⁵⁰ See generally ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 122–25 (1957) (explaining how plurality systems encourage two-party systems); MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* 217–20 (1954) (explaining correlation between simple-majority, single-ballot system and two-party system).

state level to establish ballot access rules entrenched this structural two-party tendency as a reality at both the state and national level. Previously, when parties produced their own ballots, any group wishing to challenge the established parties could produce a ballot and campaign. The existing parties had not been able to use law to prevent such challenges. Now, they could.

While laws governing elections existed in the pre-Progressive Era, they had, as we have seen, functioned differently. These laws had defined suffrage and the structures of governance (bicameral legislatures, winner-take-all voting rules). They also had established procedures for voting, although not elaborate ones. In other words, what the state largely had undertaken was to define the boundaries of the political community and the nature of the state.

The introduction of the Australian ballot, by contrast, struck a new relationship between the state and the democratic public sphere. This point was not lost on courts reviewing primary legislation. The Supreme Court of California wrote in 1907:

[T]he conception that a political party is merely a private association of citizens, a conception which in the past found wide acceptance, has, under the development of modern political parties, been very generally abandoned *By virtue of the constitutional provision the state has seen fit to declare that political parties shall be as to their mode of holding conventions and nominating candidates for public office, regarded as public bodies whose methods are to be controlled by the state.*¹⁵¹

Controlling access to the ballot gave the state the power to shape the choices available to the electorate in ways it previously had not been able to. Legislatures took the opportunity to burden third parties by making it difficult for them to secure a place on the ballot or to nominate fusion candidates.¹⁵² In sum, state actors began to remake

¹⁵¹ Katz v. Fitzgerald, 93 P. 112, 113 (Cal. 1907) (emphasis added).

¹⁵² See KEYSSAR, *supra* note 55, at 233 (noting that in some states “‘un-American’ parties were banned from the ballot”). In 1900, reflecting discomfort with the state’s new role, the Supreme Court of California suggested that official ballots that denied minor parties access could be constitutional if they provided blank spaces wherein voters could write the name of the minor candidate of their choice. *Britton v. Bd. of Election Comm’rs of S.F.*, 61 P. 1115, 1117 (Cal. 1900); see also Mechem, *supra* note 135, at 372–73 (describing various views of nineteenth-century courts and siding with position that write-ins are constitutionally required). The U.S. Supreme Court today has taken a diametrically opposite position, characterizing “the objection to the specific ban on write-in voting [as] amount[ing] to nothing more than the insistence that the State record, count, and publish individual protests against the election system *or the choices presented on the ballot*” and insisting that “[t]here are other means available . . . to voice such generalized dissension . . . against . . . constitutionally valid election laws.” *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (emphasis added). The Court also has upheld antifusion laws unlike the early state courts. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (upholding Minnesota’s

the polity in their own image and according to their own interests. Contemporary political scientists and historians, however, largely have missed this point, focusing instead exclusively on how these laws affected electoral choices and outcomes.¹⁵³

III

ACCESS TO THE LEGISLATURE

A. *The Practice: 1790–1880*

The legislative petition was critical within the repertoire of American political practices through most of the nineteenth century. Legislative petitions provided the most direct device through which the people could shape the substance of legislative policy. As two historians comment, “the petition process became—after voting—the primary mechanism for popular involvement in national politics” after 1789.¹⁵⁴ Further, petitioning, unlike voting, was not limited to the enfranchised.¹⁵⁵

Petitions enabled an individual or group of individuals to communicate a grievance to the legislature while simultaneously suggesting a preferred remedy. It was “a right enjoyed by all persons and one which all classes and strata exercised, at least to some degree,” notwithstanding occasional references “to the right as one belonging to a more limited class, such as ‘citizens’ or ‘freemen.’”¹⁵⁶ One scholar writes somewhat colorfully “[w]hether one was a senator or an

1901 ban on fusion candidacies as reasonable effort to reduce election and campaign disorder). A fusion candidate is one who is listed on the ballot as the candidate of more than one political party. A fusion candidacy between a major political party and a third party helps the third party maintain ballot access in the future.

¹⁵³ See, e.g., PIVEN & CLOWARD, *supra* note 18, at 80 (discussing impact of primaries on outcomes and choices). Only a few legal scholars have acknowledged in passing that the adoption of Australian ballot and party primary reforms changed the relationship of the state to the public sphere. See, e.g., ISSACHAROFF ET AL. 2D, *supra* note 14, at 348–52, 362–63, 418 (discussing development of Australian ballot in response to voter fraud and addressing its effects, including restricting candidates and entrenching two-party system); Winkler, *supra* note 6, at 877 (explaining how reforms upheld by courts entrenched two-party system). Neither work, however, explores the implications in depth or considers them in relation to similar reforms of the period.

¹⁵⁴ Richard R. John & Christopher J. Young, *Rites of Passage: Postal Petitioning as a Tool of Governance in the Age of Federalism*, in *THE HOUSE AND SENATE IN THE 1790s*, at 100, 105 (Kenneth R. Bowling & Donald R. Kennon eds., 2002); see also Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right To Petition*, 66 *FORDHAM L. REV.* 2153, 2157 (1998) (discussing history of petition right and its effect on popular participation in politics).

¹⁵⁵ See *infra* notes 172–76 and accompanying text (explaining that petitions enabled broad participation including by disfavored groups).

¹⁵⁶ Mark, *supra* note 154, at 2162 n.21. There is good evidence from the colonial period that the right was exercised by the disenfranchised, including women and people of color. See *id.* at 2182.

orphaned child of a Continental soldier, all citizens claimed an equal right to justice by their right to petition."¹⁵⁷ The content of a petition could not be used to support a charge of seditious libel,¹⁵⁸ but petitions nonetheless had to be worded respectfully, as disrespect might obviate an official's obligation to listen.¹⁵⁹

Legislative petitions often were used to propose legislation and frequently included specific legislative language.¹⁶⁰ They were also used to admonish legislatures that were perceived to be acting against fundamental law.¹⁶¹

Legislatures were legally obligated, originally under customary constitutional law, to consider a petitioner's grievance, although not necessarily to agree to the proposed remedy.¹⁶² To fulfill their obligation of consideration, legislatures set up procedures for processing petitions. In Virginia, for example, petitions typically were referred to a standing committee, which would investigate as necessary using its power to subpoena witnesses, hold hearings, accept depositions, and obtain papers and documents.¹⁶³ Lawyers could appear before it.¹⁶⁴

¹⁵⁷ William C. diGiacomantonio, *Petitioners and Their Grievances: A View from the First Federal Congress*, in *THE HOUSE AND SENATE IN THE 1790s*, *supra* note 154, at 29, 30–31 (describing attitude towards petitioning in 1790 and noting that “members of the First Congress were unencumbered by weighty [English parliamentary] traditions qualifying the people's right to petition”). For an informative account of the formalities associated with English petitions, see Mark, *supra* note 154, at 2171–74.

¹⁵⁸ See Eric Schnapper, “*Libelous*” *Petitions for Redress of Grievances—Bad Historiography Makes Worse Law*, 74 *IOWA L. REV.* 303, 313, 343 (1989).

¹⁵⁹ L.A.S., Note, *The Right of Petition*, 55 *W. VA. L. REV.* 275, 279 (1953) (“Two ancient conditions are that the petition must not use unbecoming or abusive language and that it must be directed to a body with power to act upon it; otherwise, it will not be considered.”); see also Mark, *supra* note 154, at 2170 (explaining that under English parliamentary practice, petitions “could be rejected without consideration” if they were “phrased in terms disrespectful of authority”).

¹⁶⁰ Mark, *supra* note 154, at 2154, 2194.

¹⁶¹ LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 25 (2004); cf. BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN* 58 (Boston, Marsh, Capen & Lyon 1832) (“But, if the rulers should abuse their legitimate authority, and oppress the people by acts of tyranny and cruelty, the people, after petitioning for redress of grievances in vain, *if unanimous*, (otherwise not,) will have a natural right to remove their rulers, choose others in their room and reform the government, and adopt a new constitution if they see fit.”).

¹⁶² Stephen A. Higginson, Note, *A Short History of the Right To Petition Government for the Redress of Grievances*, 96 *YALE L.J.* 142, 143 (1986) (explaining that original right to petition “included a governmental duty to consider petitioners’ grievances”); L.A.S., *supra* note 159, at 279 (explaining that right to petition entails “a corresponding duty residing in the government to receive and entertain petitions in order that the right be efficacious”); see also Mark, *supra* note 154, at 2168–69, 2199–2203 (explaining evolution of petitioning in English law and describing inclusion of right in first state constitutions).

¹⁶³ See, e.g., RAYMOND C. BAILEY, *POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA* 28–29 (1979) (summarizing powers of standing committee); see also Higginson, *supra* note 162, at 164 (describing how John

The committee ultimately would issue a recommendation that the full house could either accept or reject.¹⁶⁵

The new Congress established similar procedures for processing petitions. Petitions were presented “as a regular part of its proceedings.”¹⁶⁶ They were introduced by the petitioner’s representative, who read the basic grievance to the floor. Thereafter, petitions were referred to either an executive office capable of responding or an ad hoc legislative committee, or they could be set aside.¹⁶⁷

While the vast majority of petitions requested private laws responding to the needs of individual citizens, petitions were also used to request the enactment of public legislation. In Virginia, petitions were used to influence decisions about local government, including the drawing and redrawing of county lines.¹⁶⁸ Citizens also petitioned for economic legislation (such as price controls, export limits on staples, inspection systems for export commodities, and paper money), pest regulation, road improvements, and changes to the slave code.¹⁶⁹ The First Congress received more than six hundred petitions that covered topics such as trade policy, war debt, slavery, the prohibition of rum, and pleas to prevent the printing of inaccurate Bibles.¹⁷⁰ A recent study of postal petitions to the federal government between

Quincy Adams, while defending traditional right in 1840s, noted that legislatures were expected to send petitions to committees for consideration, although not necessarily for approval).

¹⁶⁴ BAILEY, *supra* note 163, at 29.

¹⁶⁵ See *id.* at 31 (“The house was bound to give its consideration, but it always reserved the right to reject any petition which sought, in the opinion of the house, unwise or unnecessary action.”).

¹⁶⁶ John & Young, *supra* note 154, at 106. The House received 2924 petitions, and the Senate, 316 petitions, in the first twelve years. The first two weeks of the 1795 session were principally taken up with reading and dealing with petitions, as each legislator considered it his duty to acknowledge every petition received. *Id.* at 106–07; see also STAFF OF H. COMM. ON ENERGY & COMMERCE, 99TH CONG., PETITIONS, MEMORIALS AND OTHER DOCUMENTS SUBMITTED FOR THE CONSIDERATION OF CONGRESS: MARCH 4, 1789 TO DECEMBER 14, 1795, at 1–9 (Comm. Print 1986) [hereinafter STUDY ON PETITIONS] (describing in detail procedures developed in Congress to process petitions).

¹⁶⁷ It is worth noting that as late as 1836, during the controversy over abolitionist petitions, Senator Henry Clay took the position that the proper way to fulfill the obligation to deliberate on received petitions was to send them to an appropriate committee. William L. Van Deburg, *Henry Clay: The Right of Petition, and Slavery in the Nation’s Capital*, 68 REG. KY. HIST. SOC’Y 132, 135 (1970).

¹⁶⁸ BAILEY, *supra* note 163, at 68–89. County size and the location of the county seat were particularly important because counties were the level of government most involved in citizens’ lives. *Id.*

¹⁶⁹ *Id.* at 90–133.

¹⁷⁰ See diGiacomantonio, *supra* note 157, at 31–48 (cataloguing diverse petitions made to First Congress addressing topics ranging from commercial interests to general welfare, arts and sciences, government organization, and war-related claims).

1789 and 1801 shows that petitions were used quite effectively to influence which local communities would be extended mail delivery.¹⁷¹

A broad cross section of society engaged in petitioning.¹⁷² Petitions to the First Congress were submitted by prominent political figures and religious groups as well as on behalf of tradesmen, mechanics, and manufacturers.¹⁷³ The socioeconomic diversity of early Virginia petitioners can be gleaned from the quality of both the writing and paper used:

Some of the petitions contained learned and eloquent discourses, articulately expressed with meticulous handwriting upon fine quality paper. When arguing their cases, authors of these petitions might include references to the classic works of antiquity, the colonial heritage, philosophers such as “the Great Mr. Lock,” or after 1776 to the Virginia constitution. . . . At the opposite extreme were those petitions containing but a brief paragraph expressing the opinions of the signers. Often written upon paper of poorer quality by a hand obviously less accustomed to setting pen to paper, such petitions offer additional evidence that Virginians of all social classes felt free to communicate by petition¹⁷⁴

Petitioning even offered the disenfranchised a voice in government.¹⁷⁵ Early petitions to Congress, for instance, included the signatures of women.¹⁷⁶

While there is a good deal of historical literature about petitioning in the late eighteenth century, there has been little systematic study of its trajectory through the nineteenth century. Legal scholars who study the right of petition have frequently argued that by the 1830s and 1840s—when Congress implemented “gag rules,”¹⁷⁷ tabling

¹⁷¹ See John & Young, *supra* note 154.

¹⁷² See BAILEY, *supra* note 163, at 41 (“The significance of petitioning, both as a source of legislation and as one available means for popular participation in the political process, was considerably enhanced by its widespread use among all social classes. Had only an elite few made use of petitions, they might simply be dismissed as an additional tool for aristocratic domination.”).

¹⁷³ See diGiacomantonio, *supra* note 157, at 31–48.

¹⁷⁴ BAILEY, *supra* note 163, at 26.

¹⁷⁵ See, e.g., LINDA J. LUMSDEN, *RAMPANT WOMEN: SUFFRAGISTS AND THE RIGHT OF ASSEMBLY* 54–58 (1997) (discussing petitioning by women relating to abolition, temperance, and suffrage).

¹⁷⁶ See John & Young, *supra* note 154, at 104 (acknowledging that “[m]any if not most petitions were drafted by members of the local gentry and boasted the signatures of an impressive array of local notables” but pointing out that “many included the signatures of a wide array of people, including, in some instances, women and free blacks”); *id.* at 109–14 (describing petition of Mary Katherine Goddard, Baltimore’s former postmaster).

¹⁷⁷ Between 1836 and 1844 the House of Representatives established a House Rule of Proceeding that barred the reception of abolitionist petitions. See Mark, *supra* note 154, at 2217 (describing original gag rule as adopted in 1836). The first gag rule was the final recommendation of a select committee and stated, in pertinent part, “whereas it is

consideration of petitions on abolition—the right of petition had largely lost its significance.¹⁷⁸ For example, Gregory Mark argues that the universal right to petition had atrophied by the time of the controversy over abolitionist petitions and the House gag rules. Representatives during the gag rule controversy argued that they were required to consider only the grievances in *legitimate* petitions, which they defined narrowly as “petition[s] . . . signed only or primarily by those legitimately allowed to request a redress of grievances.”¹⁷⁹ In particular, “[m]any in the House of Representatives felt that *only those legally entitled to vote* held the right of petition and further implied that a petition signed by those unable to meet that qualification ought to be ignored in direct proportion to the number of illegitimate signatures on it.”¹⁸⁰

These scholars, however, overstate their evidence.¹⁸¹ For one, the first gag rule was passed after a round of petitions seeking the abolition of slavery in the District of Columbia had been sent to a select committee, which had reported that Congress lacked the power to abolish slavery in the District.¹⁸² In other words, the Southern representatives formally fulfilled (however reluctantly) their duty to consider petitions once. The subsequent debate concerned whether Congress could legitimately refuse to continue to engage with the issue. For another, legal scholars underplay the facts of the repeal of the gag rule. In 1841, a motion by John Quincy Adams to repeal the

extremely important and desirable that the agitation of this subject should be finally arrested for the purposes of restoring tranquility to the public mind, your committee respectfully recommends the adoption of the following additional resolution[,] [the gag rule].” David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right To Petition*, 9 LAW & HIST. REV. 113, 130 (1991) (quoting 12 REG. DEB. 4052 (1836)).

¹⁷⁸ See Frederick, *supra* note 177, at 113 (arguing that “[t]he gag rule” against petitions on certain subjects, most notably, abolition, “effectively quashed the right to petition as it had been exercised for centuries”); Higginson, *supra* note 162, at 158–60, 165 (arguing that right to petition, as means for citizens to control legislative agendas, inevitably floundered in face of slavery debate in 1830s and 1840s); Mark, *supra* note 154, at 2159–60, 2216 (arguing that congressional gag rules for abolitionist petitions reflected reality that “the rise of a liberal polity[] gutted [the] petition of its original constitutional and political meaning”). These scholars quarrel only as to whether Congress’s efforts to restrict petitioning on the subject of abolition caused, or merely reflected, the change in significance of petitioning as a political practice.

¹⁷⁹ Mark, *supra* note 154, at 2220.

¹⁸⁰ *Id.* at 2220–21 (emphasis added).

¹⁸¹ See John & Young, *supra* note 154, at 137 n.95 (noting that “Frederick mistakenly contends that the right to petition was ‘little exercised’ following the gag rule controversy” and that “Higginson is similarly wrong to assert that the gag rule had ‘effectively abolished’ the right to petition”).

¹⁸² See Frederick, *supra* note 177, at 129–30.

gag rule was defeated by only three votes,¹⁸³ and within the decade, the gag rule was permanently repealed.¹⁸⁴ Moreover, there is good evidence that some signed the abolitionist petitions out of concern that Congress was infringing on the right of petition.¹⁸⁵ Finally, it is worth noting that state legislatures did not bar abolitionist petitions.¹⁸⁶ At best, the evidence indicates that the substance of the right was contested by the mid-1830s.

Legislative petitioning remained an important political practice long after the debates in Congress over petitions in favor of abolition died down. “[In] the period between the 1830s and the 1910s, the papers of the House and Senate contain hundreds of thousands of petitions on an extraordinary range of topics.”¹⁸⁷ As Richard R. John and Christopher J. Young comment, “this archival treasure-trove furnishes eloquent testimony” against those legal scholars who have suggested that “the gag rule . . . destroyed the effectiveness of the petition process.”¹⁸⁸ If it had, “it is hard to understand why Congress would have continued to debate the issues that petitioners raised, or, for that matter, why Americans would have persisted for so long in organizing large-scale petition campaigns.”¹⁸⁹

Late into the nineteenth century, many postal routes, for example, were established in response to petitions submitted by interested parties.¹⁹⁰ Moreover, petition campaigns were a central strategy

¹⁸³ See Cong. Globe, 27TH CONG., 2D SESS. 2–3 (1842); see also James M. McPherson, *The Fight Against the Gag Rule: Joshua Leavitt and Antislavery Insurgency in the Whig Party, 1839–1842*, 48 J. NEGRO HIST. 177, 187 (1963) (noting petitioning campaign in run up to close vote). John Quincy Adams was not quite as alone in supporting the presentation of abolitionist petitions in Congress as Gregory Mark, in particular, suggests. See Frederick, *supra* note 177, at 118–19, 122–29 (describing debates leading up to first gag rule, in which various congressmen, commentators, and activists spoke up in favor of receiving and considering abolitionist petitions).

¹⁸⁴ See Mark, *supra* note 154, at 2217.

¹⁸⁵ See McPherson, *supra* note 183, at 178 (“Thousands of Northern men and women who had disliked abolitionism now decided that ‘if the issue . . . is to be . . . “Slavery or the right of petition,” they have but one course to pursue.” (quoting Letter from Kennedy to John Quincy Adams (Feb. 10, 1837), collected in Library of Congress Box 90, National Archives & Record Administration Box 20, Record Group 233, National Archives (on file with the *New York University Law Review*))); Van Deburg, *supra* note 167, at 135, 137 (describing Henry Clay’s belief and concern that abolitionists gained support of those who supported constitutional right to have petitions heard).

¹⁸⁶ See Mark, *supra* note 154, at 2227 (“[E]ven into the nineteenth century . . . the South’s state legislatures continued to entertain abolition petitions . . .”).

¹⁸⁷ John & Young, *supra* note 154, at 137–38.

¹⁸⁸ *Id.* at 138.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 121.

of both the women's suffrage and anti-Prohibition movements.¹⁹¹ Finally, many state court cases between 1870 and 1920 arose out of petitions to local and state governments.¹⁹² These cases indicate that government bodies were still formally considering petitions.¹⁹³

Petitioning had changed qualitatively, however, by the end of the nineteenth century.¹⁹⁴ Mark, for example, argues that a modern liberal form of petitioning arose—one that bears little resemblance to the original practice. Rather than serving as sources of legislative language or “vehicles for specific redress of grievances,”¹⁹⁵ petitions became “a tool of democratic mass politics, useful in creating political dramas and highlighting legislative deadlocks, to the detriment of popularly-initiated deliberation on grievances.”¹⁹⁶ They became, in other words, “the sound bites of the nineteenth century.”¹⁹⁷ The flourish and drama associated with the delivery of suffrage petitions in the early twentieth century support Mark's account.¹⁹⁸

There are other indicia that petitioning had changed by the twentieth century. For one, petitions became less important with the rise of public opinion polls and other forms of survey research, which pro-

¹⁹¹ See, e.g., LUMSDEN, *supra* note 176, at 52–53, 56–69 (discussing at length role of petitioning in campaign for women's suffrage); Kris W. Kobach, *May “We the People” Speak? The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. DAVIS L. REV. 1, 82–83 (1999) (noting anti-Prohibition campaign in several states involved unsuccessful petitioning of Congress).

¹⁹² See L.A.S., *supra* note 159, at 280–83 (reviewing state court cases developing petition case law in this period). Some of the cases involved petitions from citizens to their mayor or town council requesting the dismissal of a local official. See, e.g., *Ambrosius v. O'Farrell*, 119 Ill. App. 265 (1905) (involving citizens petitioning mayor and city council to transfer responsibilities of police magistrate to city attorney); *Kent v. Bongartz*, 22 A. 1023 (R.I. 1885) (involving citizens of East Providence petitioning town council to remove police officer).

¹⁹³ See, e.g., *Ambrosius*, 119 Ill. App. at 265 (noting that petition “was presented to the mayor and city council before whom it was read and on motion accepted”).

¹⁹⁴ Although “petitions” still are sent to Congress, it would be a mistake to consider contemporary petitions to the legislature to be the same practice. Today petitions do not trigger formal consideration and function instead primarily as gauges of public opinion. See STUDY ON PETITIONS, *supra* note 166, at 9 (“[While petitions] are sent to the Parliamentarian, who refers them to the committee of jurisdiction[,] . . . [t]he importance of petitioning in the federal legislative process has diminished to the extent that no mechanism [currently] exists for the presentation and consideration of petitions on the floor of the House.”); cf. John & Young, *supra* note 154, at 138 (noting polls have supplanted petitions and Congress no longer officially acknowledges receipt of petitions).

¹⁹⁵ Mark, *supra* note 154, at 2226.

¹⁹⁶ *Id.* at 2160–61.

¹⁹⁷ *Id.* at 2226. Mark suggests that the trend began as “abolitionists worked in concert with friendly congressmen to make certain that the wording of a petition was brief enough that it could be read in its entirety before a gag-rule proponent could rise in objection to its reception.” *Id.* at 2225–26.

¹⁹⁸ See LUMSDEN, *supra* note 176, at 58–69 (describing elaborate efforts to turn petition campaigns into spectacles worthy of reporting—including petition pilgrimage).

vided “more systematic techniques for registering public sentiment.”¹⁹⁹ For another, the expansion of the nation and the federal government after the Civil War, and again during the New Deal, meant that Congress had less time to spend carefully considering petitions.²⁰⁰ Finally, it has been argued that the practice of petitioning mutated into the lobbying industry.²⁰¹

By the turn of the twentieth century, legislative petitioning was no longer a satisfactory means for directing the legislative agenda. Writing in 1927, Leon Whipple noted the diminished effectiveness of petitioning:

Congress has never refused to receive petitions, but too often they go the waste basket route. *These documents have proved of no great value in securing legislative action, even when the signers reached into the millions as in the case of certain petitions for woman’s suffrage.* Their value is in the publicity they receive and in the centering of public attention on those to whom the petition is directed.²⁰²

Petitions had changed substantively. Where once they had provided citizens significant opportunities to influence the legislature’s agenda (as a mechanism to propose legislation and to ensure consideration of important issues), they became an instrument of mass politics—nothing more than an unscientific survey.

B. The Emergence of a New Political Practice: 1880–1920

Americans by the late-nineteenth century had begun to look for alternative ways to shape the legislative agenda. In doing so, they turned to direct democracy reforms, most notably the initiative and referendum. Initiatives in particular gave “citizens the power to place a proposition on the ballot subject to popular vote” so long as they were able to generate the required number of signatures and otherwise satisfy the ballot access procedures set by the state.²⁰³ Referenda, by contrast, allowed citizens a voice with regard to legislation already approved by their representatives. Today, referenda are typically initi-

¹⁹⁹ John & Young, *supra* note 154, at 138.

²⁰⁰ See Jeffrey L. Pasley, *Private Access and Public Power: Gentility and Lobbying in the Early Congress*, in *THE HOUSE AND SENATE IN THE 1790s*, *supra* note 154, at 57, 60 (“[The] kind of individual attention [given] to petitions [in the 1790s] became less possible with the expansion of the government during the Civil War, and virtually impossible in the twentieth century, due mostly to the sheer size of the country and the ever-widening range of activities required to govern it.”).

²⁰¹ See *id.* at 60–63 (suggesting that professional lobbyists emerged from practice of petitioning as nation grew and as practice of petitioning became less effective).

²⁰² LEON WHIPPLE, *OUR ANCIENT LIBERTIES* 106 (1927) (emphasis added).

²⁰³ THOMAS GOEBEL, *A GOVERNMENT BY THE PEOPLE* 3 (2002).

ated by legislatures and thus are often criticized as efforts to pass the buck. The original idea, however, was that it would be primarily citizens who initiated the referendum process.²⁰⁴

The critical distinction between direct democracy and legislative petitioning was that initiatives and referenda operated through voting and used an official ballot. In other ways, direct democracy was a modern adaptation of legislative petitioning.²⁰⁵ By “enabl[ing] citizens to place propositions on the ballot,” initiatives and referenda, like legislative petitions, ensured that particular policies would be considered.²⁰⁶

The movement for direct democracy began in Oregon in the 1880s, and the reforms often were referred to as the “Oregon System.”²⁰⁷ The movement was most successful in the West in the first decades of the twentieth century.²⁰⁸ The first state actually to adopt these devices was South Dakota in 1898.²⁰⁹ By 1908, eight more states had adopted these processes,²¹⁰ and by 1918, thirteen additional states had adopted them.²¹¹ Since 1918, only four more states have adopted these direct democratic forms, beginning with Alaska in 1959.²¹²

Efforts to secure avenues for direct legislation were central to the platform of the Populist movement and the more radical elements of the Progressive movement.²¹³ Direct democracy “was seen as a way to

²⁰⁴ See, e.g., OR. CONST. of 1902, art. IV, §1 (“The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety) either by petition signed by five per cent. of the legal voters, or by the legislative assembly, as other bills are enacted.”).

²⁰⁵ See WHIPPLE, *supra* note 202, at 105–06 (“Extensions of this right [of petition] in the initiative, referendum, and recall in some States already supplement the older method.”).

²⁰⁶ GOEBEL, *supra* note 203, at 3.

²⁰⁷ ROBERT D. JOHNSTON, *THE RADICAL MIDDLE CLASS: POPULIST DEMOCRACY AND THE QUESTION OF CAPITALISM IN PROGRESSIVE ERA PORTLAND, OREGON 121–27* (2003) (describing growth of direct democracy in Oregon).

²⁰⁸ Persily, *supra* note 7, at 13 (“[T]hese early twentieth century institutional changes were concentrated in the Western states . . .”).

²⁰⁹ *Id.* at 16 tbl.I.

²¹⁰ *Id.* Utah did not provide an initiative process for constitutional amendments, and Maine provided only an indirect initiative process. *Id.*

²¹¹ *Id.* Washington, like Utah, limited the initiative process to statutes, and Massachusetts, like Maine, provided only an indirect initiative process. *Id.* Of the thirteen, New Mexico, Maryland, and Kentucky adopted only the referendum and not the initiative. *Id.*

²¹² *Id.* Alaska adopted direct democracy reforms in 1959 on admission to the Union; Wyoming, in 1968; and Illinois, in 1970. Florida adopted an initiative process for constitutional amendments in 1978 but has not adopted the referendum. *Id.* All four states adopting an initiative process in the late twentieth century have limited it in some way.

²¹³ See Sidney M. Milkis, *Introduction: Progressivism, Then and Now*, in *PROGRESSIVISM AND THE NEW DEMOCRACY* 1, 7–9 (Sidney M. Milkis & Jerome M. Mileur eds., 1999) (discussing Theodore Roosevelt and Progressive Party’s “commitment to direct democracy”).

provide the means for political and economic emancipation.”²¹⁴ Putting legislation in the hands of voters was considered a promising remedy to the prevailing impression that the political parties represented only the interests of monopolist corporations—a state of affairs that produced special-interest legislation and economic inequality.²¹⁵ Jane Addams, for one, believed that an effective “welfare state could not be created in the United States ‘unless the power of direct legislation is placed in the hands of the people.’”²¹⁶

As another Progressive spokesman for the referendum put it:

[T]here has arisen in our midst in recent years a powerful plutocracy composed of the great public-service magnates, the trust chieftains and other princes of privilege who have succeeded in placing in positions of leadership political bosses that are susceptible to the influence of corrupt wealth. . . . In this manner the government has become largely a government of privileged wealth, for privileged interests. . . . Against these evils the Referendum is a powerful weapon. It brings the government back to the people, destroying corruption and the mastership of the many by the few.²¹⁷

According to advocates, direct democracy reforms were needed to make government more responsive to a purer conception of the people.²¹⁸ Both Populists and Progressives shared the view that, in addition to being corrupt, the political parties did not represent the people. As Theodore Gilman explained in 1912:

[T]he people now propose to come into closer touch with their representatives by the abolition of the machine, and the substitution therefor of the direct primary, the initiative, referendum and recall. This is all one logical and irresistible movement, in one direction, having as its object the restoration of our form of government to its original purity and ideal perfection, as a government under the control of “We, the people,” who formed it.²¹⁹

²¹⁴ GOEBEL, *supra* note 203, at 5.

²¹⁵ *See id.* at 5, 10–11, 24, 26.

²¹⁶ Milkis, *supra* note 213, at 24 (quoting Jane Addams, Speech at the Second Annual Lincoln Day Dinner of the Progressive Party, Social Justice Through National Action (Feb. 12, 1914), in NATIONALISM: ITS NEED IN OUR SOCIAL, INDUSTRIAL AND POLITICAL GROWTH 7 (1914), *microformed on* The Jane Addams Papers, Reel 42, File 136 (Univ. Microforms Int’l)).

²¹⁷ FRANK PARSONS ET AL., A PRIMER OF DIRECT-LEGISLATION 7 (1906), *quoted in* Persily, *supra* note 7, at 24.

²¹⁸ *See* Milkis, *supra* note 213, at 8 (noting that Progressives sought “the creation of a more direct, programmatic link between government and the people” while attacking political parties).

²¹⁹ Theodore Gilman, Address at a Progressive Rally Held in Yonkers Public High School, The Progressive Party Comes Not To Destroy, but To Fulfill, the Constitution (Sept. 27, 1912), in PROGRESSIVE PARTY PUBLICATIONS, 1912–16, at 5–6 (Theodore

In the struggle to achieve policies and governing bodies that reflected the people's interests, Progressives and Populists turned to law with unanticipated consequences.

C. *Implications for State Power*

The adoption of direct democracy devices drew the democratic public sphere deeper into the state's regulatory purview, even as it did so to protect the people. Once again, the official ballot was the key.

Through much of the nineteenth century, the petitioning process provided the most important avenue by which citizens could have a voice in setting the legislative agenda. Although there were customs as to what was an acceptable tone for a legislative petition, and limited procedural rules as to how petitions were to be presented and considered, the petitioning process was only minimally regulated.²²⁰ Initiatives and referenda recast that process into one involving the official ballot and an election (subject to all the new rules governing elections).

The direct democracy reforms had obvious advantages over the legislative petition. They provided a guarantee that the issues citizens cared about would be considered. They provided more certainty that a proposal would be acted upon, although similar uncertainty as to whether any particular measure would succeed. Given population growth, they offered a more objective measure of a proposal's support at a time that petitions had come to be considered less representative.

Still, these reforms came with a price. By relying on voting and the newly established official ballot, they gave the state formal control over how easy or difficult the process of gaining access to the legislature would be. Rules could be more or less favorable to citizen initiatives, depending on how many signatures were required, within what timeframe, and from whom.²²¹ Moreover, the state, through law,

Roosevelt Collection, Houghton Library, Harvard University) (on file with the *New York University Law Review*).

²²⁰ See *supra* notes 158–61 and accompanying text (discussing formalities and etiquette associated with petitioning).

²²¹ See, e.g., OR. CONST. of 1902, art. IV, §1 (“The whole number of votes cast for Justice of the Supreme Court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted.”). It is worth noting that the Populists and Progressives who advocated direct democracy often advocated for other election reforms as well. In Oregon, for example, the Populists who advocated for the initiative, referendum, and recall also wanted direct primaries, direct elections of senators, unicameralism, the introduction of proportional representation, the administrative reorganization of the state government, and the enactment of corrupt practices acts. JOHNSTON, *supra* note 207, at 117.

was now able to decide *which* of its citizens could place *which* issues on the legislative agenda.²²²

Put simply, by relying on procedures that involved voting, the initiative and referendum ensured that access to the legislative agenda would be available only to legal voters (potentially only to registered voters) rather than citizens (enfranchised and disenfranchised).²²³ When the national government had tried to do exactly that in the 1840s with the House gag rules, many vehemently had argued that such restrictions violated the right of petition precisely because they allowed the House to refuse to consider petitions from nonvoters and petitions on the topic of slavery. Such arguments were now taken off the table because the issue was recast as one of administrative necessity within the context of ballot access rules.

The changes in the ways the people were able to access the legislative agenda are particularly important. Once again, they highlight that the broader transformation under discussion was not simply a transition from nonregulation to regulation. Indeed, the petitioning process was not *free* from the state.

The transition being elaborated here is from one *mode* of governing democratic politics to another. We see a shift from customary practices (legislative and constitutional) that governed the ground rules for submitting petitions to a new legal structure through which the legislature formally could limit whose voices would be heard and what issues the people could raise directly. Ironically, the law that Progressives like Theodore Gilman hoped would guarantee the people's voice in government just as easily could be wielded to shape and even to constrain their voice.

The change with respect to access to the legislature also makes clear that the normative implications of the transition in the mode of governing democratic practice are complicated and varied. In the electoral context discussed in Part II, the transition was quite clearly from a mode of governance that allowed more autonomy for the people to one that allowed less.²²⁴ With respect to access to the legislative agenda, the implications are more complicated. In the West, where legislatures were locked up by corporate interests through corrupt

²²² See *Kadderly v. City of Portland*, 74 P. 710, 712 (Or. 1903) (explaining Oregon's requirements for initiative to appear on ballot).

²²³ Cf. *Woodward v. Barbur*, 116 P. 101, 103–04 (Or. 1911) (striking down statutory provision which did not count signatures from unregistered, legal voters on ground that Constitution's only limit was that signatures be from legal voters).

²²⁴ Autonomy here should be understood as autonomy from the state. Individuals and factions of the people may not have been, and likely were not, more autonomous or free in some absolute sense. Order, however, was maintained largely by nongovernmental institutions.

parties, initiatives and referenda provided a democratic step forward: They provided certainty that the laboring classes' proposals would at least be acted upon.²²⁵ It is much less clear that direct democracy has the same populist effect today.²²⁶ In the context of Western Populism in the late nineteenth century, the legalization of democracy seems to have increased equality, but this effect has not been stable over time.

IV

STREET POLITICS AND THE REGULATION OF PUBLIC SPACE

A. *The Practice: 1790–1880*

Large, often spontaneous gatherings on public streets were another central element of the repertoire of democratic politics that emerged after the Founding. In the closing decade of the eighteenth century, “the streets and public places of the American republic were filled with an extraordinarily diverse array of . . . feasts, festivals, and parades.”²²⁷ Such festive politics, marked by large gatherings in public, persisted well into the nineteenth century.²²⁸ By the mid-nineteenth century, workers, racial minorities, and social movements all used the streets to further their political goals.²²⁹

Public gatherings were triggered by an array of occasions and events (including election days and national holidays) and took many forms (such as public meetings, processions, demonstrations, and soapbox speeches). Michael McGerr comments: “[E]lections in the mid-nineteenth century required the visible endorsement of the people. . . . American politics from roughly the ‘thirties to the ‘nineties

²²⁵ See generally JOHNSTON, *supra* note 207.

²²⁶ See Daniel Hays Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 510 (1982) (showing that observers who have expressed worries that money dominates initiative campaigns, “deceiving the voters and diverting the initiative from its intended function as an instrument to be used by the public at large,” are importantly, if only partially, correct).

²²⁷ SIMON P. NEWMAN, *PARADES AND THE POLITICS OF THE STREET* 2 (1997).

²²⁸ See SUSAN G. DAVIS, *PARADES AND POWER* 49–51 (1986) (describing 1830 military tribute ceremony). See generally MARY P. RYAN, *CIVIC WARS* 58–131 (1997) (discussing importance of public assemblies and events to both associations and democratic citizenship).

²²⁹ See DAVIS, *supra* note 228, at 33 (“The streets enabled workers, poor people, and racial minorities to broadcast messages to large numbers of people, which partly explains the vibrant popularity of parades of all kinds and the variety of autonomously produced mobile performances. The street was shared more equally than any other space.”).

demanded the legitimacy conferred by all classes of the people through parades and rallies and huge turnouts.”²³⁰

National holidays (such as the Fourth of July and Washington’s Birthday) emerged as important opportunities for partisan contests between Federalists and Democratic-Republicans during the early republic.²³¹ These public holidays were filled with processions, speeches, bonfires, public meals, and the drinking of revolutionary toasts—the central rituals of what Jeffrey Pasley and others describe as “festive politics.”²³²

Political and public events frequently triggered parades and street politics. The ratification of the Constitution in 1788, for example, prompted a procession in Philadelphia organized by Federalist leaders and local manufacturers.²³³ In 1813, it was a military victory on the Great Lakes that “gave cause for citywide illuminations and elaborate militia parades.”²³⁴ In 1855, San Franciscans gathered to celebrate the European Allies’ victory over the Russians at Sebastopol with public festivities, complete with a procession.²³⁵ Between four and five thousand people attended the public banquet at the event.²³⁶ By the 1850s, a procession “through the streets with banners and a band was an everyday occurrence[,] . . . a mode of celebration enjoyed by hundreds

²³⁰ MCGERR, *supra* note 85, at 5 (noting this was true notwithstanding that “most of the important political decisions of the nineteenth century occurred in private”); see also RYAN, *supra* note 228, at 94–95 (describing street crowds in 1830s and 1840s and their relation to election competition).

²³¹ See NEWMAN, *supra* note 227, at 46, 65, 83 (showing how during 1790s, Washington’s Birthday and, later, Fourth of July were established as public holidays that quickly became sites of partisan contests and opportunities to criticize governing Federalists). The political meaning of these public holidays was facilitated by the press’ publication and republication of descriptions of them. See DAVID WALDSTREICHER, *IN THE MIDST OF PERPETUAL FETES* 18 (1997) (describing how printed accounts of local celebrations helped create national ideology in which consensus became basis of American patriotism).

²³² Jeffrey Pasley offers a vivid description:

The festivities typically began with a parade or procession in which townsmen would march by trades, militia companies, and other groupings to a church, meeting hall, or public square. There a lengthy program would be held, featuring political and patriotic music (usually including at least one song written for the day), a reading of the Declaration of Independence, a prayer or sermon, and an oration by some local political activist. . . . Finally the assembled group would retire to a hotel, tavern, or outdoor space, depending on the prosperity and location of the organizers, for a community banquet.

Jeffrey L. Pasley, *The Cheese and the Worms: Popular Political Culture and Participatory Democracy in the Early American Republic*, in *BEYOND THE FOUNDERS* 31, 40 (Jeffrey L. Pasley et al. eds., 2004).

²³³ DAVIS, *supra* note 228, at 66.

²³⁴ *Id.* at 67.

²³⁵ MARY P. RYAN, *WOMEN IN PUBLIC: BETWEEN BANNERS AND BALLOTS, 1825–1880*, at 19 (1990).

²³⁶ *Id.*

of militia units, trade associations, fire companies, political parties, reform associations, ethnic brotherhoods, and simple revelers.”²³⁷

Especially during the lead up to the Civil War, public streets and squares were also the sites of political stump speeches. “Such men as William H. Seward, Salmon P. Chase, Lewis Cass, Stephen A. Douglas and numerous other distinguished men” frequently spoke in central squares and other public places.²³⁸

Although the Civil War changed the quality of public gatherings, streets remained important places for political, social, and increasingly ethnic gatherings in the late nineteenth century.²³⁹ Partisan parades continued to be an important part of campaigns and election days.²⁴⁰ New political uses of the streets also emerged. Organized labor and former slaves in particular began to use public spaces to make “demands upon the state” for an eight-hour workday or for full civil rights for people of color.²⁴¹ For example, “[o]n December 2, 1889, hundreds of trade unionists paraded through the streets of Worcester[, Massachusetts,] in a show of strength and determination. ‘Eight Hours for Work, Eight Hours for Rest, Eight Hours for What We Will’ declared a banner held high by local carpenters.”²⁴²

Americans had free access to public spaces for political purposes during this period. Legal regulation of public gatherings was limited to criminal law. As a regulatory matter, the government could lawfully interfere with only those gatherings that actually disturbed the public peace. Because there was no requirement to get an official license to march, “a decision to strike, a meeting’s outcome, or a festive gathering could move quickly from an assembly into a marching line.”²⁴³

American states and municipalities, following English traditions, criminalized gatherings that disturbed the public’s peace. Practically, this amounted to a reliance on state and local crimes of riot, unlawful assembly, disorderly conduct, and eventually municipal prohibitions

²³⁷ *Id.* at 22–23.

²³⁸ *Pound Appointed, He Will Represent Judge [Phalen] in Supreme Court Proceedings, Judge [Phalen] Gives Reasons Why Campus Defendants Should Not Appear for the Court*, EVENING NEWS (Detroit), Sept. 28, 1901, at 6. For further discussion of Detroit’s ordinance restricting public assembly at issue in the trial, see *Love v. Phalen*, 87 N.W. 785 (Mich. 1901).

²³⁹ For a discussion of changes in street politics, see RYAN, *supra* note 228, at 224–26.

²⁴⁰ See MCGERR, *supra* note 85, at 24–29 (explaining that partisan activities after Civil War were organized around militarized parades).

²⁴¹ RYAN, *supra* note 228, at 257.

²⁴² ROY ROSENZWEIG, EIGHT HOURS FOR WHAT WE WILL: WORKERS AND LEISURE IN AN INDUSTRIAL CITY, 1870–1920, at 1 (1983).

²⁴³ DAVIS, *supra* note 228, at 33.

on certain types of crowds. The elements of the crimes varied slightly from state to state and municipality to municipality.²⁴⁴

Under state laws, while a breach of the peace (or in strictly circumscribed situations anticipated breaches)²⁴⁵ could lead to an arrest,²⁴⁶ in the end it was for a jury to decide whether the withdrawal of access was warranted.²⁴⁷ If the charge were unlawful assembly, for example, a jury would have to be convinced that the group “assembled to attain a purpose” through “intimidation and disorder” and that its actions were “likely to produce danger to the tranquillity and peace of the neighborhood, and have a natural tendency to inspire rational, firm, and courageous persons in the neighborhood with well-grounded fear of serious breaches of the public peace.”²⁴⁸ Juries did not always share the sensibilities of authorities.²⁴⁹

Municipal regulation of public gatherings in the nineteenth century similarly focused on criminalizing that which was disruptive. Municipalities regulated gatherings in public with offenses analogous to the crimes of riot and unlawful assembly prior to 1881.²⁵⁰ Some municipalities supplemented these traditional offenses with ordinances criminalizing disruptive crowds.²⁵¹ Nineteenth-century judges and juries, however, were relatively tolerant of the disorder associated

²⁴⁴ For the minor variations in the definition of state crimes, see FRANCIS WHARTON, *A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES* 520–23 (Philadelphia, Kay & Brother 1846). Wharton reproduces Massachusetts’s, Pennsylvania’s and Virginia’s riot and unlawful assembly statutes.

²⁴⁵ For a discussion of the offense of anticipated breach, see Edmund H. Bennett, *Public Meetings and Public Order*, 4 *LAW Q. REV.* 257 (1888). Bennet notes that “[a]n unlawful assembly may be dispersed by a magistrate whenever he finds a state of things existing calling for interference in order to preserve the public peace. He is not required to postpone his action until the unlawful assembly ripens into an actual riot.” *Id.* at 262 (quoting *Charge of King, President, to the Grand Jury, for September Term, 1844*, in 4 *PA. L.J.* 29, 35 (1845)); *accord Riots, Routs, and Unlawful Assemblies*, 3 *AM. L. MAG.* 350, 360–64 (1844) (explaining in more detail when preventative action would be appropriate and what it could entail).

²⁴⁶ See Bennett, *supra* note 245, at 260 (“It is not only the right but the positive duty of all bystanders, when called upon, to assist in arresting the participants in a riotous assembly . . .”).

²⁴⁷ See *id.* at 259 (discussing jury trial for unlawful assemblies).

²⁴⁸ *State v. Butterworth*, 142 A. 57, 60 (N.J. 1928) (involving labor protest against city officials, who were preventing laborers from holding meetings in private hall during industrial strike).

²⁴⁹ See, e.g., Abu El-Haj, *supra* note 9, at 185–207 (recounting series of events revealing divergence between views of various Grand Rapids juries and city’s mayor as to whether Salvation Army processions were sanctionable as disruptive and disorderly).

²⁵⁰ See *id.* at 105–30 (providing account of this regulatory regime based on sample of municipal codes).

²⁵¹ *Id.*

with crowds, especially inconvenience to traffic.²⁵² It is not at all clear that any street gatherings were either charged or successfully prosecuted for creating a public nuisance prior to the Civil War.²⁵³

In sum, a public gathering was lawful as long as it had not become an unlawful assembly or riot under either state or local law. Citizens were not required to ask permission prior to exercising their right of assembly, and, once on the streets, they were entitled to remain unless and until there was a breach of the peace. The government was not considered entitled to regulate in anticipation of any possible disorder.²⁵⁴

The absence of permit requirements for public assemblies prior to 1880 should not be attributed to governmental incapacity. Municipalities by the mid-nineteenth century were both competent and capable of regulating through permit requirements. As William J. Novak has shown, “[n]ineteenth-century legislators used licensing to regulate and control a host of economic activities, trades, callings, and professions.”²⁵⁵

My own research reviewing the municipal codes of large American cities at the time is consistent with Novak’s conclusion.²⁵⁶

²⁵² See *id.* at 124–27 (discussing North Carolina case illustrating tolerance of crowd-related disorder when associated with inconvenience to traffic).

²⁵³ Compare *State v. Baldwin*, 18 N.C. (3 & 4 Dev. & Bat.) 195, 196 (1835) (refusing to find indictment for nuisance where group assembled loudly in street shouting profanities and disrupted singing school because “[t]o render an act indictable as a nuisance, it is necessary that it should be an offence so inconvenient and troublesome as to annoy the whole community”), with *Barker v. Commonwealth*, 19 Pa. 412, 412–13 (1852) (holding that crowd may be indicted for common nuisance because “[t]he streets are common highways, designed for the use of the public in passing and repassing [and thus] [n]o one has a right to obstruct a public street by collecting therein a large assemblage of men and boys, for the purpose of addressing them in violent, loud, and indecent language” (internal quotation marks omitted)). For a discussion of the state of the law and the *Baker* decision, see *Fairbanks v. Kerr*, 70 Pa. 86, 91–92 (1872). In *Fairbanks*, the court described:

A street may not be used, in strictness of law, for public speaking: even preaching or public worship, . . . but it does not follow that every one who speaks or preaches in the street, or who happens to collect a crowd therein by other means, is therefore guilty of the indictable offence of nuisance. His act may become a nuisance by his obstruction of the public highway, but it will not do to say it is a nuisance *per se*. Such a stringent interpretation of the case of *Barker* is scarcely suited to the genius of our people or to the character of their institutions, and would lead to the repression of many usages of the people now tolerated as harmless, if not necessary.

Id. (emphasis added).

²⁵⁴ See *Riots, Routs, and Unlawful Assemblies*, *supra* note 245, at 360–64 (discussing limited situations that would warrant preventative action and what such action could entail).

²⁵⁵ See WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 90–95 (1996).

²⁵⁶ See Abu El-Haj, *supra* note 9, at 118–20 (describing extensive licensing provisions in municipal codes of sixteen cities prior to 1881).

For example, in 1863, Syracuse required a permit to solicit alms,²⁵⁷ to place building materials on city streets,²⁵⁸ and to put on theatrical performances and other forms of entertainment.²⁵⁹ In 1870, New Haven required a permit to place building materials on the streets and to move any building through the streets,²⁶⁰ as well as for public concerts, plays, and certain types of lectures.²⁶¹ A number of cities, moreover, specifically required permits for commercial activities on the public streets. For example, in 1881, it was an offense in Denver “to collect a crowd of people upon the . . . sidewalks or streets” to the interruption of “free passage” while attempting to sell items at public auction “without a written permission from the Mayor.”²⁶² Meanwhile, in Chicago, “a permit in writing from the mayor” was required to

beat any drum or other instrument, or blow any horn or other instrument for the purpose of attracting the attention of passengers in any street in the city of Chicago to any circus, menagerie or show or other thing in said city, tending to the collection of persons on the streets and sidewalks, to the obstruction of the same²⁶³

A permit also was required to play a hand organ or other musical instrument for tips after 9 p.m. and before 9 a.m.²⁶⁴ The ordinance specified that it “appl[ied] only to itinerant musicians and circuses, menageries and side shows, and shall not be construed so as to affect any band of music or organized musical society engaged in serenading, or any civic or military parade.”²⁶⁵

B. Regulatory Change: 1880–1930

By the late nineteenth century, cities began to systematize and tighten their regulatory controls over urban public spaces, including over public assemblies in those spaces. Over time, municipalities settled on ordinances requiring those wishing to gather in public to obtain permission from local officials in advance.²⁶⁶

²⁵⁷ SYRACUSE, N.Y., ORDINANCES ch. 2, § 7 (1863).

²⁵⁸ *Id.* ch. 9, §§ 1, 4–5.

²⁵⁹ *Id.* ch. 5, §§ 1–2.

²⁶⁰ NEW HAVEN, CONN., ORDINANCES, Licenses and Permits, § 12 (1870).

²⁶¹ *Id.*

²⁶² DENVER, COLO., ORDINANCES ch. IX, art. 2, § 7 (1881). Denver also required permits in order to leave building material in streets, alleys, and public places. *Id.* ch. XV, art. 5, § 1.

²⁶³ CHI., ILL., MUNICIPAL CODE § 1622 (1881).

²⁶⁴ *Id.*

²⁶⁵ *Id.* (emphasis added).

²⁶⁶ For more on the alternatives which municipalities considered, see Abu El-Haj, *supra* note 9, at 109–16.

While permit requirements for parades or other gatherings in public spaces were rare in 1881, they were common by 1930.²⁶⁷ As late as 1881, Detroit, San Francisco, St. Paul, Chicago, and Denver had no permit requirements for assemblies in their streets.²⁶⁸ Still, the idea had arisen. Four of the six largest American cities—New York City, Philadelphia, Boston, and St. Louis—already required permits for public assemblies.²⁶⁹ All but one of the ordinances in these cities requiring a permit to gather had been passed after 1860 and applied only to public parks.²⁷⁰

By the 1930s, many American cities had ordinances rendering it unlawful to gather in streets or parks without first obtaining permission from a local official. At least twenty-two cities required a permit for some public assemblies by the 1930s.²⁷¹ These included both the very largest cities at the time—New York City, Chicago, Philadelphia, Detroit, St. Louis, Baltimore, and Boston—and much smaller cities such as Fort Wayne, Indiana; Norfolk, Virginia; and Salt Lake City, Utah.²⁷²

Permit requirements for public gatherings initially were controversial and repeatedly were challenged in state courts. State supreme courts at first were reluctant to accept the ordinances as a lawful exercise of municipal power. All but one of the state supreme courts to review ordinances requiring a permit for a public assembly prior to 1900 found them void.²⁷³ Only the Supreme Judicial Court of Massachusetts held otherwise.²⁷⁴ Over time, however, the ordinances gained judicial approval. Specifically, after the United States Supreme

²⁶⁷ See *id.* at 131–84 (demonstrating that widespread adoption of municipal ordinances requiring permit prior to assembling in public took place after 1881).

²⁶⁸ See DETROIT, MICH., THE REVISED ORDINANCES OF THE CITY OF DETROIT chs. XXXII–L (1884) (regulating streets, alleys, public places, and public property); S.F., CAL., GENERAL ORDERS OF THE BOARD OF SUPERVISORS Order 1588 (1884) (regulating construction and use of streets and public sidewalks); ST. PAUL, MINN., THE MUNICIPAL CODE OF SAINT PAUL (1884) arts. XXXIX, XLV, LXXVII–LXXXVIII (regulating licenses, parks, streets, alleys, public grounds, and sidewalks); CHI., ILL., MUNICIPAL CODE §§ 1686–1703 (1881) (regulating parks and public grounds); DENVER, COLO., ORDINANCES ch. IX, art. 2 (1881) (regulating sidewalks). See generally Abu El-Haj, *supra* note 9, at 132–33 (finding that only 4 cities in sample of 33 of 100 most populous cities in United States at time had permit requirements while 25 in sample did not have permit requirements in 1881).

²⁶⁹ Abu El-Haj, *supra* note 9, at 133.

²⁷⁰ *Id.* at 134–37.

²⁷¹ *Id.* at 139–48.

²⁷² *Id.*

²⁷³ See, e.g., *City of Chicago v. Trotter*, 26 N.E. 359 (Ill. 1891) (overturning permit requirement); *Anderson v. City of Wellington*, 19 P. 719 (Kan. 1888) (same); *In re Frazee*, 30 N.W. 72 (Mich. 1886) (same); *In re Garrabad*, 54 N.W. 1104 (Wis. 1893) (same); *Commonwealth v. Abrahams*, 30 N.E. 79 (Mass. 1892) (upholding permit requirement).

²⁷⁴ *Abrahams*, 30 N.E. at 79.

Court rejected a constitutional challenge to such an ordinance in *Davis v. Massachusetts* in 1897,²⁷⁵ the tide turned against litigation contesting permit requirements.²⁷⁶

Once judicial attitudes shifted, cities rapidly adopted the new regulatory regime despite continued political debate.²⁷⁷ Permit requirements for public assemblies were sufficiently widespread by the 1920s that, when the ACLU surveyed police chiefs on municipal suppression of speech and assembly in 1921 and 1929, it included questions about such ordinances and how they were being applied.²⁷⁸

By 1930, permit requirements were a mainstay in municipal control of social and political gatherings in public places. In 1921, a student note on municipal regulations of public assembly in the *Columbia Law Review* declared that “the more common type of ordinance . . . vests in some city official or group of officials the discretionary power to grant permits for gatherings or processions on the public streets.”²⁷⁹ A 1938 comment in the *Yale Law Journal* on the same topic highlighted “ordinances prohibiting meetings in public places without a permit from some authorized municipal authority”²⁸⁰ and “ordinances requiring permits for street parades,”²⁸¹ as two of the three most important forms of municipal regulation of speech.²⁸² The second incarnation of the model traffic code, which was prepared at the federal level in 1936 by the Department of Agriculture, included a provision requiring permits for “procession[s], or parade[s] containing 200 or more persons or 50 or more vehicles.”²⁸³

It is not entirely clear what prompted the regulatory change. Some historians have suggested in passing that “[f]ear[s] of strikes, gatherings, and mass meetings prompted some cities to legislate limits

²⁷⁵ 167 U.S. 43 (1897).

²⁷⁶ See Abu El-Haj, *supra* note 9, at 347–51 (describing state supreme courts’ relying on *Davis* to uphold permit requirements for public assemblies after 1900).

²⁷⁷ See *id.* at 288–346 (recounting political and legal struggles over permit requirements for public assemblies in Detroit, 1900–1902).

²⁷⁸ See AM. CIVIL LIBERTIES UNION, BLUE COATS AND REDS 8 (1929); AM. CIVIL LIBERTIES UNION, THE POLICE AND THE RADICALS: WHAT 88 POLICE CHIEFS THINK AND DO ABOUT RADICAL MEETINGS 6 (1921).

²⁷⁹ Note, *Control over Street-Meetings by Municipal Authorities*, 21 COLUM. L. REV. 275, 275 (1921).

²⁸⁰ Comment, *Public Order and the Right of Assembly in England and the United States: A Comparative Study*, 47 YALE L.J. 404, 413 (1938).

²⁸¹ *Id.* at 429.

²⁸² *Id.* at 413 (identifying final category of municipal ordinances as “ordinances prohibiting obstruction in the streets”).

²⁸³ BUREAU OF PUB. ROADS, U.S. DEP’T OF AGRIC., *A Model Municipal Traffic Ordinance*, § 42, in MODEL TRAFFIC ORDINANCES 7 (1936). The 1928 version had no such provision. See COMM. ON MUN. TRAFFIC ORDINANCES & REGULATIONS, MODEL MUNICIPAL TRAFFIC ORDINANCE (1928).

on public meetings and assemblies.”²⁸⁴ My own research indicates that it was not labor agitation that prompted the introduction of such ordinances, even though they were frequently used against labor in the early twentieth century.²⁸⁵ Instead, my review suggests that the idea of regulating public assemblies through permits began in public parks and reflected romantic notions of the Progressive parks movement. Cities developed public parks starting in the 1860s to provide respite from the congestion and contagion of urban life. Their creators desired order within the parks and demanded extensive regulation of conduct within them.²⁸⁶ Similar ordinances subsequently were passed requiring permits to parade lawfully or gather in streets. These ordinances were passed largely to repress the Salvation Army and other evangelical groups.²⁸⁷ The licensing of other uses of public space and the period’s general increasing anxiety about urban spaces probably facilitated the introduction of these ordinances regulating social and political gatherings.

Unlike the introduction of electoral reforms or the turn to direct democracy, the introduction of permit requirements for public gatherings was not articulated as an effort either to remedy a perceived problem with existing regulations of public assembly or to reform their quality and practice.²⁸⁸ No single class, party, or political or social movement pushed for reform. Instead, for different reasons in different cities, local officials sought to repress evangelical preaching in public in particular.²⁸⁹

C. *Implications for State Power*

The new ordinances had important implications for governmental power. Under them, city officials were rendered the gatekeepers of public spaces with regard to public assembly. Previously, officials were involved in only those gatherings that disturbed the public peace and only after the gatherings had begun.

²⁸⁴ DAVIS, *supra* note 228, at 168.

²⁸⁵ This might be because the state already had many other more expedient methods for controlling labor at the time.

²⁸⁶ See ROSENZWEIG, *supra* note 242, at 127 (quoting landscape architects seeking social harmony through orderly parks). See generally Geoffrey Blodgett, *Frederick Law Olmsted: Landscape Architecture as Conservative Reform*, 62 J. AM. HIST. 869 (1976) (analyzing influential landscape architect’s vision for urban parks and his role in creating them).

²⁸⁷ See Abu El-Haj, *supra* note 9, at 185, 280, 340–51 (concluding ordinances were largely passed for repressive aims).

²⁸⁸ See *id.* at 342–43 (summarizing experiences of case-study cities).

²⁸⁹ See *id.* at 185–353 (providing detailed description of adoption in cities including Grand Rapids, Boston, and Detroit).

Prior to the introduction of permit requirements, there was, in effect, a presumption that gatherings in public places for social and political purposes were lawful. Citizens had free access to public spaces for such purposes. They did not need to obtain prior consent from government officials. Instead, access was limited by a code of conduct—most importantly, that the assembly would be peaceful. As a result, the government could lawfully regulate only those uses of public space that resulted in breaches of the peace. Judges and juries were relatively tolerant of the disorder associated with crowds. As such, the government's authority to regulate gatherings in public was only intermittent and after the fact.

The new ordinances flipped that presumption: A gathering in public was inherently unlawful unless and until it was authorized by local officials. Put another way, local officials now had a role to play in advance of any public assembly, whatever its nature. In addition, judges became increasingly less tolerant of the disorder associated with crowds.²⁹⁰

The new ordinances solidified the local executive's control over public assemblies in other ways as well. By nullifying the jury's input on the lawfulness of the gatherings being regulated, they ensured that local officials alone would decide which assemblies should be prohibited. From the government's perspective, reliance on the criminal law had been cumbersome and unpredictable. Each element of the criminal offense had to be proven, and the reasonableness of the official's decision to disperse or arrest under the totality of the circumstances was a question for the jury. The factual inquiry was inherently subjective: Had the peace been breached? The new system simplified the factual inquiry into an entirely objective question: Had a permit been sought and granted?

Finally, the permit system added to the government's regulatory arsenal because it simply was tacked on to existing regulations. In 1906, Denver retained the three offenses for regulating public gatherings it already had in place in 1881 (breach of the peace, unlawful assembly, and unlawful crowd)²⁹¹ even as it added extensive permit requirements for parades and gathering in streets and public parks²⁹²

²⁹⁰ See *id.* at 347–53 (analyzing shift in attitudes of state supreme courts toward municipalities' rights to regulate public assembly).

²⁹¹ Compare DENVER, COLO., THE MUNICIPAL CODE OF THE CITY AND COUNTY OF DENVER §§ 1289–91 (1906) (specifying offenses against public peace and quiet), with DENVER, COLO., ORDINANCES ch. VI, art. 3, §§ 1–3 (1881) (specifying offenses affecting public peace and quiet).

²⁹² DENVER, COLO., THE MUNICIPAL CODE OF THE CITY AND COUNTY OF DENVER §§ 1367, 1371, 1716 (1906).

and instituted a complete ban on gatherings for political purposes in the public parks.²⁹³ In 1928, New Haven had two permit requirements. It required permits for street parades,²⁹⁴ and it prohibited “oration[s], harangue[s], or other public demonstration[s]” in the city’s parks absent approval by a public commission.²⁹⁵ These existed alongside its prohibition from the 1870s on unlawful crowds.²⁹⁶

The result of these changes in regulatory structure was that yet another facet of democratic practice—public assemblies—now operated under legal supervision to an unprecedented degree. The impact of the change was most stark from about 1897 until 1939.

During this period, the people gathered in public at the pleasure of the state. City officials had the legal authority (if not always the political power) to prohibit any and all gatherings they considered undesirable as long as their actions were not too transparently repressive.²⁹⁷

In 1939, the impact of city restrictions was lessened when the Supreme Court decided *Hague v. Committee for Industrial Organization*.²⁹⁸ The Court affirmed as a matter of constitutional principle that the people have a right to use public streets for social and political purposes.²⁹⁹ *Hague* upheld the significant but limited propositions that municipalities are not able to prohibit assemblies in their streets and parks at will and that arbitrary, capricious, and dis-

²⁹³ *Id.* § 1372 (“No gathering or meeting for political purposes in the parks shall be permitted under any circumstances.”).

²⁹⁴ NEW HAVEN, CONN., ORDINANCES § 976 (1928).

²⁹⁵ NEW HAVEN, CONN., *Rules and Regulations for All Parks Under Control of the New Haven Commission of Public Parks* § 5, in NEW HAVEN, CONN., CHARTER AND ORDINANCES 607 (1928).

²⁹⁶ NEW HAVEN, CONN., ORDINANCES § 752 (1928) (“No persons shall assemble idly and remain in crowds upon any footway, sidewalk or crosswalk in any street or in any of the public squares of said city, or before any church or public building, . . . and all persons to the number of three or more so assembling, and refusing to disperse when commanded so to do by a police officer, special constable, or mayor of said city, shall be guilty of a misdemeanor . . .”).

²⁹⁷ *Cf., e.g.,* *Comm. for Indus. Org. v. Hague*, 25 F. Supp. 127, 137, 145–46 (D.N.J. 1938) (upholding ordinance requiring permits for public gatherings on condition that city officials follow specified procedures to prevent unconstitutional infringements on rights of association); *Coughlin v. Chi. Park Dist.*, 4 N.E.2d 1, 10 (Ill. 1936) (“[T]he rights of peaceable assembly and of freedom of speech are not infringed by the refusal of a permit to an applicant for the use of a park facility.”); *Love v. Phalen*, 87 N.W. 785, 787–88 (Mich. 1901) (upholding Detroit ordinance requiring permit for public gathering); *People ex rel. Doyle v. Atwell*, 133 N.E. 364, 365–66 (N.Y. 1921) (“It is too well settled by judicial decisions . . . that a municipality may pass an ordinance making it unlawful to hold public meetings upon the public streets without a permit therefor to require discussion.”).

²⁹⁸ 307 U.S. 496 (1939).

²⁹⁹ *Id.* at 515–16 (“[The use of] streets and parks . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions . . . has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”).

criminary licensing restrictions will not be tolerated.³⁰⁰ Permit requirements for public assemblies, however, remained presumptively constitutional.³⁰¹

Hague, in other words, shifted back to a presumption that assemblies in public are lawful as a matter of constitutional law, but it did not reverse the enhanced power of the government over assemblies in public. It did not require a return to the antecedent legal regime, which regulated only assemblies that were actually disruptive and only after they began. Even today, permit requirements enable the government to shape the contours of public assembly, including public protest.³⁰²

V

THE JURY

A. *The Republican Jury: 1790–1830*

Republicanism stressed jury service as a core practice of self-governance. The jury served as an important popular, political check on government (including courts) in two specific ways.³⁰³ First, insofar as enforcement was what realized and fixed the meaning of law, the jury allowed the people to control the law in action. Juries grand and petit, in their applications of law, were to shape the policies of government.³⁰⁴ They determined who would be tried and convicted, and for

³⁰⁰ For a discussion of the Court's failure to fully connect its decision to the antecedent legal regime discussed here, see Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 *UCLA L. REV.* 543, 579, 584–86 (2009).

³⁰¹ See *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (holding that government constitutionally can predicate lawfulness of assembly on obtaining advance permission in case involving no record evidence of official discrimination).

³⁰² In this Article, I have focused on showing that public assembly was an important practice in the repertoire of early American politics and highlighted how it, along with the other practices that constituted that repertoire, changed as the nature of state regulation of them changed. For a discussion of how the regulatory changes discussed here resulted in a narrowing of the substance of the *right* of peaceable assembly, see generally Abu El-Haj, *supra* note 300.

³⁰³ This view was described by an Anti-Federalist as follows:

[T]he established right of the jury by the common law, and the fundamental law of this country, to give a general verdict in all cases when they chuse to do it, to decide both as to law and fact . . . secure[s] to the people at large, their just and rightful controul in the judicial department. . . . The body of the people, principally, bear the burdens of the community; they of right ought to have a controul in its important concerns.

SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828*, at 91 (1999) (quoting Letters from the Federal Farmer, No. 15 (Jan. 18, 1788), in 2 *THE COMPLETE ANTI-FEDERALIST* 315, 319–20 (Herbert J. Storing ed., 1981)).

³⁰⁴ For an historical study emphasizing this role of the jury, see generally REID, *supra* note 56, at 27–64. For a summary of political and democratic understanding of juries from

what. In the early 1830s, Alexis de Tocqueville, writing after his trip to America, described this conception of the jury:

The institution of the jury may be aristocratic or democratic, according to the class from which the jurors are taken; *but it always preserves its republican character, in that it places the direction of society in the hands of the governed, or of a portion of the governed, and not in that of the government. . . . He who punishes the criminal is . . . the real master of society.* Now, the institution of the jury raises the people itself, or at least a class of citizens, to the bench of judges. The institution of the jury consequently invests the people, or that class of citizens, with the direction of society. . . . *The jury is pre-eminently a political institution; it should be regarded as one form of the sovereignty of the people.*³⁰⁵

Second, the republican understanding of the jury included the idea that juries were entitled, even obliged, to nullify unconstitutional laws.³⁰⁶

Jury service remained an important element of democratic politics well into the nineteenth century. Eligibility for service, even more so than suffrage, was by common law the exclusive province of white men.³⁰⁷ Once states passed statutes governing jury service, eligibility was typically connected to suffrage.³⁰⁸ In most states, however, enfranchisement did not automatically translate into a right to jury service.³⁰⁹ The first record of an African-American juror is from 1860.³¹⁰ In 1879, the Supreme Court implicitly acknowledged that newly enfranchised African Americans had a right to serve as jurors when it held that the exclusion of black jurors from the jury of a black defendant violated his equal protection rights.³¹¹ However, a host of

the Founding through the early republic, see Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 218–21 (1995).

³⁰⁵ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 282–83 (Phillips Bradley ed., Vintage Classics 1990) (1835) (emphases added).

³⁰⁶ See *infra* notes 325–39 and accompanying text (discussing controversy over nullification in early republic).

³⁰⁷ See Gretchen Ritter, *Jury Service and Women's Citizenship Before and After the Nineteenth Amendment*, 20 LAW & HIST. REV. 479, 485 (2002) (explaining common law tradition of literally interpreting Latin definition of jury—“twelve free and lawful men, *liberos et legales homines*” (quoting 3 WILLIAM BLACKSTONE, *COMMENTARIES* *352)).

³⁰⁸ See Ritter, *supra* note 307, at 485 (noting that most states limited pool of eligible jurors to electors).

³⁰⁹ This was particularly true for women. See *id.* at 482, 507–12 (analyzing disappointments suffragists faced in persuading state courts that women, like African-American men, should be eligible to serve on juries after passage of Nineteenth Amendment).

³¹⁰ JEFFREY ABRAMSON, *WE, THE JURY* 2 (1994). The trial took place in Worcester, Massachusetts. *Id.*

³¹¹ See *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (“Concluding . . . that the statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored

laws and entrenched practices effectively excluded African-American men from jury service for nearly a century.³¹² The first jurisdiction to allow women to serve on juries was the territory of Wyoming in 1870, but the experiment was short lived, lasting only a year.³¹³ The first state to open jury service to women was Utah in 1898.³¹⁴

The efficacy of the jury as a democratic check was tied to the jury's right to decide questions of law as well as fact.³¹⁵ The right to decide questions of law enabled juries to interpret statutes in line with community sentiments (i.e., democratically) and to undermine unconstitutional laws by refusing to apply them. Unlike contemporary acts of jury nullification, a jury's rejection of a judge's legal interpretation was considered legally justified, or even required.³¹⁶

man when he is put upon trial for an alleged offence against the State . . .”), *abrogated in part by Taylor v. Louisiana*, 419 U.S. 522, 536–37 (1974) (abrogating suggestion that jury service could be limited to males).

³¹² See Charles J. Ogletree, *Supreme Court Jury Discrimination Cases and State Court Compliance, Resistance, and Innovation*, in *TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS* 339, 343 (Paul Finkelman & Stephen E. Gottlieb eds., 1991) (explaining that “thirty years after *Strauder*, blacks were still uniformly excluded from jury service in many states,” often due to highly subjective qualifications such as being of “good moral character” and that “over a century after *Strauder*, minorities continue to be under-represented on juries throughout the nation” (quoting *Franklin v. South Carolina*, 218 U.S. 161, 168 (1910))).

³¹³ See Cristina M. Rodriguez, Note, *Clearing the Smoke-Filled Room: Women Jurors and the Disruption of an Old-Boys' Network in Nineteenth-Century America*, 108 *YALE L.J.* 1805 (1999) (analyzing cultural implications of allowing women to serve on juries using first experiments with mixed juries in Wyoming and Washington territories). Both territories grounded the right to serve on a jury in statutes granting women suffrage. *Id.* at 1812, 1821. Washington's statute passed in 1886, *id.* at 1821, and its experience was similarly short lived, *id.* at 1823.

³¹⁴ ABRAMSON, *supra* note 310, at 2.

³¹⁵ See John Adams, Diary (Feb. 12, 1771), in 2 *THE WORKS OF JOHN ADAMS* 255 (Charles Francis Adams ed., Boston, Little & Brown 1850), *quoted in* Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 *HARV. L. REV.* 582, 605 (1939) (“It is not only [a juror's] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court. . . . The English law obliges no man . . . to pin his faith on the sleeve of any mere man.”); William E. Nelson, *The Province of the Judiciary*, 37 *J. MARSHALL L. REV.* 325, 327–28 (2004) (discussing views of Supreme Court Justice James Wilson and Chief Justice John Jay). *But see generally* Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries To Determine the Law in Colonial America*, 89 *J. CRIM. L. & CRIMINOLOGY* 111 (1998) (arguing that there is very little evidence in published records to support view that criminal juries had right to decide questions of law during colonial period). It is worth noting that the jury's right to decide questions of law was probably less secure in colonial Massachusetts—at least in the courts—than elsewhere. See Howe, *supra*, at 604–05.

³¹⁶ The central distinction here is between the jury's *power* to decide questions of law (most obvious in the criminal context given its right to return a general verdict) and the view that the jury has the *right* to determine the case as it sees fit regardless of the judge's opinion of the law. See Howe, *supra* note 315, at 584.

Institutional features of late eighteenth- and early nineteenth-century courts reinforced the jury's right to decide questions of law.³¹⁷ Trials at the time were presided over by panels of judges, and these judges each separately instructed the jury.³¹⁸ Members of the panel frequently gave contradictory instructions.³¹⁹ Moreover, the "law" was much less certain than it is today. Written judicial opinions were infrequent and official reporters were uncommon at the Founding and through the early republic. John Phillip Reid explains of early national New Hampshire:

[T]here is some evidence that, more often than would today be thought likely, the judges charged a jury with contradictory rulings of law. One reason [was] that, with so few precedents available and no treatises explaining New Hampshire law, judges had on many questions no authority to guide them. Often they just stated the best judgments of their own common sense.³²⁰

Such uncertainty no doubt encouraged jurors to decide the case as they saw fit.

Another institutional reality that facilitated the law-finding role of the republican jury was that judges were not always lawyers. As a result, they were more likely to think of their jobs as facilitating justice than administering law.³²¹

Finally and probably most importantly, there were few grounds for ordering a new trial after a jury had reached a verdict, and there was no way for a court to direct a jury verdict—i.e., to order a verdict without having to submit the case to a second jury.³²² Legal uncertainty, moreover, made it difficult for judges to use the few grounds that did exist for ordering a new trial.³²³

³¹⁷ See Larry D. Kramer, *The Pace and Cause of Change*, 37 J. MARSHALL L. REV. 357, 372 (2004) ("[The] eighteenth-century jury was situated within a procedural system and a legal culture whose every feature helped underscore and reinforce the centrality of lay control.").

³¹⁸ *Id.* at 373.

³¹⁹ *Id.*

³²⁰ JOHN PHILLIP REID, *CONTROLLING THE LAW* 108 (2004).

³²¹ See *id.* at 24–28 (discussing idealization of jurisprudence of common sense, exemplified by lay judges).

³²² Kramer, *supra* note 317, at 373; see also *id.* at 372–74 (noting that single-term courts and lack of training, written precedent, and legal treatises contributed to judges' limited power to constrain juries).

³²³ Cf. Renee B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 518–21 (1996) (arguing that "the written opinion, the official state case reporter, and the establishment of appellate courts with little, if any, original jurisdiction" were central to putting juries under control of courts by providing measures for determining whether juries' decisions were against law).

It is worth pausing over these institutional features because they highlight once again the point that the transition under discussion is between modes of legal regulation, not from nonregulation to regulation. The republican jury was subject to both legal and nonlegal forms of regulation. The critical difference, however, is the autonomy that was possible under the old regime: The ability to decide matters of law allowed for greater jury independence; it entitled the people lawfully to take action opposing the policy preferences of the executive or the judiciary. Over the course of the nineteenth century, these institutional features would disappear as law was professionalized and made more certain.³²⁴

Calls for change, however, arose long before institutional reform. In the late 1790s, Federalist officials challenged the jury's right to decide questions of law, to nullify unconstitutional laws, and to interpret statutes in light of community norms.³²⁵ For example, in the House debates over the Sedition Act of 1798, Representative William Claiborne of Tennessee, a Democratic-Republican, introduced an amendment to the bill that made explicit the American understanding of the jury.³²⁶ Representative Claiborne was keen to ensure that the English libel rule, recently articulated by Lord Mansfield, under which judges had exclusive power to define applicable law, would *not* prevail.³²⁷ Various Federalist representatives, however, objected.³²⁸ Representative James A. Bayard, a Federalist from Delaware, objected on the ground that the “‘effect of this amendment would be, to put it into the power of a jury to declare that this is an unconstitutional law, instead of leaving this to be determined, where it ought to be determined, by the Judiciary.’”³²⁹ Representative Nathaniel Smith objected that the amendment tended to imply the jury could determine the admissibility of testimony.³³⁰

³²⁴ See, e.g., WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW* 165–74 (1994) (arguing that professionalizing pressures on jury's right to decide questions of law coincided with economic demands for certainty and predictability in law).

³²⁵ See Nelson, *supra* note 315, at 325–28 (noting that these principles were undisputed until 1790s). Nelson argues that challenges to the jury's right to decide matters of law were partly a product of the fact that legislation had come to be understood to be the people's law. *Id.* at 328–29. Larry Kramer, however, points out that “only a very small portion of litigation involved statutes” and that “[t]he overwhelming majority of cases were still based on common law.” Kramer, *supra* note 317, at 381.

³²⁶ See Howe, *supra* note 315, at 586 (“And in all cases arising under this act, the jury who shall try the cause, shall be judges of the law as well as the fact.” (quoting 8 *ANNALS OF CONG.* 2135 (1798))).

³²⁷ See Howe, *supra* note 315, at 586.

³²⁸ *Id.* at 586–87.

³²⁹ *Id.* at 587 (quoting 8 *ANNALS OF CONG.* 2136 (1798)).

³³⁰ Howe, *supra* note 315, at 586–87.

In the end, Congress settled on the following: “[T]he jury should have a right to determine the law and the fact, under the direction of the [c]ourt, as in other cases.”³³¹ In light of the debate, the import of the new amendment remained ambiguous.³³² Federalist judges repeatedly instructed juries that questions of law under the Sedition Act were for the court.³³³ For example, when Justice William Paterson presided over a case involving the prosecution of Democratic-Republican Congressman Matthew Lyon, he instructed the jury “that it must treat the Sedition Act as constitutional, unless and until it was ‘declared null and void by a tribunal competent for the purpose.’”³³⁴

The challenge to the jury’s right to determine questions of law, however, did not succeed in the 1790s. In fact, only days before the trial of Matthew Lyon, Justice Paterson himself instructed a “jury in a land confiscation case that both ‘courts and juries were the proper bodies to decide on the constitutionality of laws.’”³³⁵ Justice Chase, meanwhile, was impeached in part for his views on the rights of juries. Among the charges against him at his 1804 impeachment trial in the Senate was that he “*endeavor[ed] to wrest from the jury their indisputable right to hear argument, and determine upon the question of law.*”³³⁶ When Justice Chase was subject to a second impeachment trial in 1805 (this time in the House of Representatives), once again the allegations included that he had “refus[ed] to allow counsel to argue to the jury that the [Sedition] [A]ct was unconstitutional, and [had] den[ied] the jury’s right to rule on the admissibility of evidence.”³³⁷

The question remained very much alive well into the nineteenth century. In 1808, a federal judge instructed advocate Samuel Dexter that he would be in contempt of court should he continue to argue to the jury that the Embargo Law was unconstitutional after the court already had instructed the jury otherwise. Dexter stopped, but when

³³¹ *Id.* at 587 (quoting 8 ANNALS OF CONG. 2137 (1798) (second alteration in original)).

³³² Mark DeWolfe Howe has argued that the best interpretation is that the phrase “under the direction of the court, as in other cases,” as used in the Sedition Law, was meant to suggest only that the jury was bound by the court’s view of the admissibility of evidence and the constitutionality of the law. *See* Howe, *supra* note 315, at 587–88.

³³³ Nelson, *supra* note 315, at 330.

³³⁴ *Id.* at 330 (quoting FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 336 (Philadelphia, Carey & Hart 1849)).

³³⁵ *Id.* at 331 (quoting 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 236 n.24 (Maeva Marcus ed., 1990)).

³³⁶ John D. Gordon III, *Juries as Judges of the Law: The American Experience*, 108 LAW Q. REV. 272, 274 (1992) (emphasis added) (quoting Case of Fries, 9 F. Cas. 924, 934 n.1 (C.C.D. Pa. 1800) (No. 5127)).

³³⁷ Howe, *supra* note 315, at 588 n.20.

he came in the next day, it is reported that he informed the court that while

[n]o man cherished a higher respect, for the legitimate authority of those tribunals, before which, he was called to practice his profession; [it was his] clear conviction, that it was his duty to argue the constitutional question to the jury . . . ; and that he should proceed to do so, regardless of any consequences.³³⁸

During the first decades of the nineteenth century, the jury maintained its right to decide questions of law. Jury charges frequently explained that the jurors “were the judges of the law as well as the fact and were not bound by the judge’s instructions” and that “counsel had the right to argue the law—its interpretation and its validity—to the jury.”³³⁹

B. *A Long Road to Change: 1820–1880*

By the end of the nineteenth century, “[t]he jury was no longer seen as the ‘palladium of liberty’”—a central mechanism for securing popular control of government when necessary.³⁴⁰ Instead, it had been rendered a mere “inherited device by which a court resolves questions of fact,” one which was often considered “a nuisance and an impediment to” the rule of law.³⁴¹

The systematic undermining of the jury’s right to decide questions of law took the better part of the century. Relative to the previously discussed changes in the repertoire of American political practices, we know quite a bit about this change. What the jury literature has missed, however, is that the final nail in the coffin of the republican jury was driven in around the same time as the other changes to American political practice discussed above.³⁴²

Restrictions on the jury’s right to decide questions of law came first in civil trials, in which “[b]y 1820, or at least by 1830, almost everywhere questions of law . . . were no longer the prerogative of jurors.”³⁴³ The trend toward “restrict[ing] jurors to trying only matters

³³⁸ LUCIUS MANLIUS SARGENT, *REMINISCENCES OF SAMUEL DEXTER* 61 (Boston, Henry W. Dutton & Son 1857), *quoted in* 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 346 n.* (1922), *quoted in* Howe, *supra* note 315, at 606. Dexter had been a Federalist congressman and a member of Adams’s administration but became a Democratic-Republican around 1812.

³³⁹ Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 *YALE L.J.* 170, 174 (1964) [hereinafter *Changing Role of the Jury*].

³⁴⁰ *Id.* at 182.

³⁴¹ *Id.*

³⁴² This is largely because the jury literature has been engaged in a separate debate not focused on the political functions of the jury.

³⁴³ REID, *supra* note 320, at 7–8; *see also* Kramer, *supra* note 317, at 378 (“Certainly judges had obtained control of the law in civil cases in most states by the 1830s.”); *accord*

of fact, and to[ward] keep[ing] them from deciding questions of law” was national, although resistance to reform varied by state.³⁴⁴

During the early decades of the nineteenth century, judges began to experiment with a variety of techniques imported from England for restricting the jury, the most palatable of which proved to be the new trial for verdict against law.³⁴⁵ Ultimately, courts adopted two procedural devices—the directed verdict and the special verdict—to control the civil jury.³⁴⁶

Still, the jury’s democratic function was not wiped out. Criminal juries continued to maintain the right to decide the whole case. In 1821, Connecticut provided that in criminal cases, the judge should state his opinion of the law but had to submit the entire case to the jury “without any direction how to find their verdict.”³⁴⁷ In 1827, Illinois’s Criminal Code stated “juries shall in all cases be judges of the law and the fact,” a proviso interpreted to allow only nonbinding instructions in criminal cases.³⁴⁸ Through the 1860s, the Illinois Supreme Court largely upheld the criminal jury’s autonomy with respect to questions of law.³⁴⁹ Further, “[i]n 1841 the Supreme Court of Maine held that the jury in a criminal case had a right to disregard the court’s instructions on matters of law.”³⁵⁰ Finally, in the federal courts, “until 1835, lower court judges and Justices of the Supreme Court, sitting on circuit, . . . time and again specifically instructed juries that they were ‘the judges both of the law and the fact in a criminal case, and [were] not bound by the opinion of the court’”³⁵¹

Howe, *supra* note 315, at 592–613 (discussing judiciary’s evolving approach to juries’ authority to determine law as well as facts).

³⁴⁴ REID, *supra* note 320, at 4.

³⁴⁵ For an account of this development, see generally Lettow, *supra* note 323.

³⁴⁶ See *Changing Role of the Jury*, *supra* note 339, at 170–71, 183–92 (examining Massachusetts as case study for effects of directed verdicts and special verdicts on jury functions in nineteenth century).

³⁴⁷ PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT, Title 22, § 112, at 174 (1821) *quoted in* Howe, *supra* note 315, at 602; *cf.* *Changing Role of the Jury*, *supra* note 339, at 175 (noting that Massachusetts Constitutional Convention of 1820 failed to include proposal that in seditious libel cases juries would have right to decide matters of law because this was already law of land).

³⁴⁸ REVISED CODE OF LAWS OF ILLINOIS § 176 (1827), *quoted in* Howe, *supra* note 315, at 611.

³⁴⁹ See Howe, *supra* note 315, at 611.

³⁵⁰ *Id.* at 596 n.57 (citing *State v. Snow*, 18 Me. 346 (1841)); *cf.* *State v. McDonnell*, 32 Vt. 491, 523 (1860) (instructing jury that its role as judge of law was “nonsensical and absurd theory” but also “the law of this State”).

³⁵¹ Howe, *supra* note 315, at 589 (quoting *United States v. Wilson*, 28 F. Cas. 699, 708 (C.C.E.D. Pa. 1830) (No. 16,730) (last alteration in original)).

Legal scholars wrestled during this period with how to fit the republican jury into new institutional arrangements. In his 1832 treatise, *The Rights of an American Citizen*, Benjamin L. Oliver resituated the principle that the jury provided a check against unconstitutional laws within the emerging fact-law division. He wrote:

[S]uppose an unconstitutional and oppressive law to be enacted either by congress, or by the state authority, which however the courts, for whatever reason, see fit to sustain, if the jury were satisfied that such laws were unconstitutional and oppressive, *they would have the power and the right, and, not only so, but it would be their solemn duty to acquit any prisoner, who might be charged with an offence against such law.*³⁵²

Oliver acknowledged this duty even though he accepted as “a general rule . . . [that] it is the province of the jury to ascertain all facts upon which the decision of the case before them depends, while the law of each case is to be determined by the court.”³⁵³ Oliver’s position amounted to a rebuttable presumption that the judge’s charge accurately reflected the law—one that could be overcome “where the jury *know* the judge to be in an error, or what comes nearly to the same thing, where they are *thoroughly convinced* and *conscientiously believe*, that he has charged the law incorrectly.”³⁵⁴ Oliver noted the objection that because “juries have no adequate knowledge of the law independent of the charge of the court” it is “incongruous” that they should be allowed to “decide . . . contrary to it,”³⁵⁵ but emphasized in response “the excellence of this mode of trial” insofar as it provides “a guardian and protector of civil and political rights.”³⁵⁶

Meanwhile, as a practical matter, jury service remained part of the repertoire of politics. Those on both sides of the slavery question sought to enlist juries. Abolitionists asked juries to find the Fugitive Slave Act unconstitutional, and Southerners asked juries not to enforce statutory prohibitions on importing slaves.³⁵⁷ Each invoked the jury’s right to judge the constitutionality of the law.

By the middle of the nineteenth century, however, the reforming tide was gaining strength as judiciaries began to reign in the criminal jury. In 1843, “New Hampshire [became] one of the first jurisdictions

³⁵² OLIVER, *supra* note 161, at 271 (emphasis added).

³⁵³ *Id.* at 272.

³⁵⁴ *Id.* at 273.

³⁵⁵ *Id.* at 298.

³⁵⁶ *Id.* at 286.

³⁵⁷ See Gordon, *supra* note 336, at 277.

to put criminal juries under the court's control,"³⁵⁸ restricting jurors to deciding questions of fact.³⁵⁹

It was the Supreme Judicial Court of Massachusetts, however, that most aggressively reshaped the American criminal jury. In 1845, it issued a decision that provided a constitutional rationale for putting an end to the republican conception of the jury. To allow a jury to decide matters of law, it argued, was unconstitutional because it undermined the rule of law and the concomitant constitutional guarantee of equal protection.³⁶⁰ This new argument would prove over the long run to have traction in many courts.³⁶¹

Despite the ultimate success of this equal protection argument, what is most remarkable is the resistance the Supreme Judicial Court of Massachusetts faced. Nearly ten years later, at the 1853 Massachusetts state constitutional convention, an amendment was proposed to abrogate the court's decision. It provided: "In all trials for criminal offenses, the jury, after having received the instruction of the court, shall have the right in their verdict of guilty or not guilty, to determine the law and the facts of the case."³⁶²

Proponents of the amendment argued that it was justified because

the jury could respond to a higher law; if the statute before it was iniquitous, the jury should reach its conclusion on the basis of natural laws that were more truly just. . . . Delegates cited the Fugitive Slave Law as the kind of unjust law that a jury could deny enforcement if it had the right to appeal to a higher law.³⁶³

One delegate argued:

[W]henever the rights which we reserve to the people are invaded by any law, I ask, that in that case, a jury coming from the people may be allowed to come in and give their judgment, and rescue the

³⁵⁸ REID, *supra* note 320, at 197.

³⁵⁹ Howe, *supra* note 315, at 596 n.57; *see also* Pierce v. State, 13 N.H. 536 (1843).

³⁶⁰ *See* Howe, *supra* note 315, at 607 (discussing *Commonwealth v. Porter*, 51 Mass. (10 Met.) 263 (1845), which involved liquor-licensing laws that many at time considered unconstitutional); *see also* *Changing Role of the Jury*, *supra* note 339, at 176 (discussing same case).

³⁶¹ *See* *Changing Role of the Jury*, *supra* note 339, at 190–91 (discussing repudiation of juries' right to decide matters of law after 1870).

³⁶² 3 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION TO REVISE AND AMEND THE CONSTITUTION 430–31 (Boston, White & Potter 1853) [hereinafter DEBATES AND PROCEEDINGS IN THE STATE CONVENTION], *quoted in* Howe, *supra* note 315, at 608. The amendment was supported by both Charles Sumner and Benjamin H. Hallett.

³⁶³ *Changing Role of the Jury*, *supra* note 339, at 178.

people, in the name of their declared rights, from an unconstitutional law, or from an unconstitutional interpretation of that law.³⁶⁴

The amendment's opponents, by contrast, took up the rule of law framework laid out by the Supreme Judicial Court of Massachusetts. They argued that "[t]he defendant's security lay in the certainty and predictability of the law, as expounded by impartial judges" and that the jury was not a repository of natural law but of public opinion, whim, and prejudice.³⁶⁵

The proposed amendment was eventually included, after being rewritten to clarify that the court would have the right to grant a new trial after conviction and to address questions of the admissibility of evidence.³⁶⁶ Both the new constitution and the jury amendment, however, were defeated in a popular referendum.³⁶⁷

This was not the end of the matter. In 1855, the Massachusetts legislature challenged the Supreme Judicial Court, passing a statute tracking the language of the defeated constitutional amendment.³⁶⁸ The court responded in kind, interpreting the new provision merely to codify preexisting common law from the 1840s, which allowed for a general verdict, and indicating that any other interpretation would be unconstitutional.³⁶⁹

It was not until after 1880 that the view of the Supreme Judicial Court of Massachusetts took hold in other states.³⁷⁰ For example, the Pennsylvania Supreme Court was an early equivocator on the ques-

³⁶⁴ DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, *supra* note 362, at 455 (statement of Mr. Allen), *quoted in Changing Role of the Jury*, *supra* note 339, at 178. Proponents also claimed that the criminal law was, or should be, simple and thus amenable to being decided by juries. *See Changing Role of the Jury*, *supra* note 339, at 180.

³⁶⁵ *Changing Role of the Jury*, *supra* note 339, at 179. Opponents emphasized the complexity of law and the need for professional interpretations of law. *See id.* at 180–81.

³⁶⁶ Howe, *supra* note 315, at 609.

³⁶⁷ *Changing Role of the Jury*, *supra* note 339, at 183 n.71.

³⁶⁸ *Id.* at 183.

³⁶⁹ Howe, *supra* note 315, at 610 (discussing *Commonwealth v. Anthes*, 71 Mass. (5 Gray) 185, 187 (1855)).

³⁷⁰ Jurisdictions to make the change after 1880 include (in chronological order): Virginia (1881), Tennessee (1881–1929), Pennsylvania (1891–1923), Vermont (1892), United States (1895), Connecticut (1894–1902) and Illinois (1906–1931). *See id.* at 593, 596–604, 612–13, and accompanying footnotes, particularly n.57. States making the change earlier included New Hampshire (1843), Massachusetts (1855), New York (1863), Maine (1865), and Georgia (1870, despite an 1877 constitutional amendment apparently securing the original right). *See id.* at 596–97 & nn.57–58. Louisiana sits on the cusp of this dividing line: "In 1879 the constitution was amended to provide . . . that '[t]he jury in all criminal cases shall be judges of the law and of the facts on the question of guilt or innocence, having been charged as to the law applicable to the case by the presiding judge.'" LA. CONST. of 1879, art. 168, *quoted in* Howe, *supra* note 315, at 597 n.58. This amendment was interpreted in 1885 to mean that the jury was required to follow the judge's instructions. Howe, *supra* note 315, at 597 n.58 (discussing *State v. Ford*, 37 La. Ann. 443, 465 (1885)).

tion of the criminal jury's traditional right; it was not until 1891 that the court made a strong statement against the right, and not until 1923 that this statement was confirmed to be settled law.³⁷¹ The Vermont Supreme Court did not squarely declare that the criminal jury's traditional right to determine the law was against the fundamental maxims of the common law until 1892.³⁷² It similarly was not until 1895 that the U.S. Supreme Court held that determinations of law are the sole province of the judge.³⁷³

C. Implications for State Power

Although the causes of jury reform were largely internal to the legal profession itself, the result reinforced the general shift toward more systematic governmental control of the channels of democratic politics. Judges, not juries, became the agents to adjudicate constitutionally controversial laws and to monitor the executive's enforcement of the law.

Over the course of the nineteenth century, but finally and ultimately during the same period as the other transformations discussed in this Article, the jury was transformed from a hybrid political-legal entity to a solely legal one. Following the Revolution, "[t]he jury . . . had been regarded as a mainstay of liberty and an integral part of democratic government," but by 1900 it had been stripped of all law-finding rights and transformed into "an outmoded and none-too-reliable institution for resolving disputed questions of fact."³⁷⁴

Legal change in this case took the form of closing off a channel of politics by giving judges the authority to reverse jury decisions considered contrary to official interpretations of law. This was accomplished in three ways. First, rules were established so that jury verdicts contrary to official interpretations of law could be reversed.³⁷⁵ Second,

³⁷¹ See Howe, *supra* note 315, at 595–96. The 1891 case was *Commonwealth v. McManus*, 21 A. 1018 (Pa. 1891), which upheld a charge in which the judge told the jury that while it was their constitutional right to decide the law, they had sworn to decide the case on the law and evidence and the best evidence of the law is the court's statement. The 1923 case was *Commonwealth v. Bryson*, 120 A. 552 (Pa. 1923), in which the court stated: "It is the duty of the jury to take the law from the court, to the same extent in a criminal case as in any other, and a trial judge can properly so instruct." *Id.* at 554.

³⁷² Howe, *supra* note 315, at 593 (discussing significance of *State v. Burpee*, 25 A. 964 (Vt. 1892)).

³⁷³ Howe, *supra* note 315, at 588–89 (discussing *Sparf v. United States*, 156 U.S. 51 (1895)). Illinois was particularly late in this transformation and did not fully remove questions of law from juries until 1931. Howe, *supra* note 315, at 610–13.

³⁷⁴ *Changing Role of the Jury*, *supra* note 339, at 192.

³⁷⁵ See Lettow, *supra* note 323, at 507–08 (noting that codification of civil procedure after 1848 enhanced judges' control over juries by codifying procedures both to order new trials and to direct verdict).

rules were created denying the jury the right to decide questions of law, first in civil and later in criminal trials.

Third, the idea that jury decisions contrary to law could be liberty preserving was discursively undermined. This took work—important discursive work—because, as a practical matter, a criminal jury's decision to acquit is unreviewable. The key was changing normative perceptions. Here, constitutional norms proved helpful. The rule of law norm present in all American constitutions was developed and invoked to undercut the traditional and customary constitutional view of the jury as the final check on tyrannical governments. Criminal juries obviously could still acquit defendants for political reasons, but by the end of the century they no longer could do so legitimately.

The removal of the jury, particularly the criminal jury, from the repertoire of American politics reinforced the general tendency of the period toward more systematic government control of the channels of democratic politics, even as both the cause and form of jury reform were distinct from the transformations previously discussed. The ability to decide matters of law had allowed for jury independence. It had entitled the people lawfully to take action opposing the policy preferences of the executive or the judiciary. The new legal rules put an end to that, reining in a fluid and unpredictable democratic forum—this time by eliminating it.

CONCLUSION

Nineteenth-century political practice, while not unconstrained by law, was significantly less systematically regulated by the state. Political parties printed their own ballots. Public parades and assemblies were frequent events that did not require official permits. Citizens, enfranchised and disenfranchised, could influence the legislative agenda through the relatively informal petitioning process, and independent juries had a significant political function.

Between 1880 and 1930, as we have seen, this repertoire of political practices changed. States and municipalities increased governmental controls over the full range of nineteenth-century avenues for democratic participation.³⁷⁶ Altogether, these changes constituted a transformation from one mode of democratic practice to another. The new mode of governance uniformly and significantly increased the government's ability to structure the political process through law.

Prior to the transformation, the precise form of legal regulation varied by practice. For example, the rules governing petitioning were

³⁷⁶ The causes of change, which are multilayered and differ for each practice, are beyond the scope of this Article.

largely customary, whereas the framework for regulating public assemblies was state and local criminal law. What the various forms of early political regulation shared was minimalism—and that minimalism created a legal framework within which political action was largely uncontrolled by government actors. The people had real autonomy from government, if not from social constraints and economic forces, as they sought representation.

The transformation was starkest for political parties. Concerned about rampant corruption, the Progressives succeeded in passing a host of new rules governing elections and political parties. In terms of governmental power, the critical change was the introduction of an official ballot, which both enabled and required the state to regulate political parties in ways that it had not previously done. For most of the nineteenth century, a ballot had been a piece of paper produced by a political party, or a faction within a party, that one stuffed into a box. Once the state insisted that there be a single ballot, that ballot became a limited resource. The state now had to establish rules for distributing access to this newly limited resource.

The introduction of an official ballot gave incumbent politicians and political parties a significant means by which to entrench themselves since the legislature was in a position to define the rules governing access to that ballot. This Article highlights that the major political parties' ability to "alter the rules of engagement to protect [their] established powers from the risk of successful challenge" depends on the state's having control of the ground rules of politics to begin with.³⁷⁷

The newly established official ballot also had implications for initiatives and referenda. Populists seeking to protect the people from a perceived threat of oligarchy championed these direct democracy reforms. As channels for democratic control over legislative policy, these reforms were in certain respects clearly superior to the earlier practice of legislative petitioning—most importantly, because they guaranteed that the issues citizens cared about would be considered.

Yet the initiative and referendum also recast a relatively unstructured political practice, legislative petitioning, into one highly regulated by the state. As procedures that depended on voting with official ballots at official elections, the direct democratic forms entailed that the state would have control over how easy or difficult the process of gaining access to the legislature would be. Rules could be made more or less favorable to citizen initiatives. Moreover, the use of procedures that involved voting made it inevitable that influence over the legisla-

³⁷⁷ Issacharoff & Pildes, *supra* note 13, at 646.

tive agenda would be limited to legal voters (potentially only to registered voters) rather than all citizens. In these various ways, the adoption of the direct democracy reforms also drew the democratic public sphere deeper into the state's regulatory purview.

Other changes also increased governmental controls over political practice. The introduction of permit requirements for public assemblies ensured that the people gathered in public now operated under legal supervision to a degree that was unprecedented. City officials instituted themselves as the gatekeepers of public spaces with regard to public assembly. For the first forty years, this innovation enabled local government officials simply to prohibit public assemblies they found objectionable. Once again, incumbent politicians created a significant legal tool by which to secure their power from challenge.

Finally, the late nineteenth century saw the end of jury service as a political practice. Judges, to the exclusion of juries, claimed a monopoly over adjudicating constitutionally controversial laws and monitoring the executive's enforcement of the law. Judicial control over popular understandings of law has only expanded in the twentieth century as the Court increasingly chooses between different public interest groups' interpretations.³⁷⁸

The legalization of democracy, of course, has had its normative benefits. The combination of population growth and the expansion of the suffrage in the twentieth century make it hard to imagine how contemporary American democracy could function without systematic regulation, at least of elections themselves. Efficiency is not, however, the only value of legalization. When applied fairly, elaborate and specific formal legal rules are thought to guarantee a modicum of political equality for everyone.

The catch is an obvious one: Formal law is *not* a per se guarantee of political equality; all depends on substance and historical context. The regulatory transformation discussed in this Article happened at least thirty years *prior* to the Court's voting rights revolution and the 1965 Voting Rights Act—during a notoriously exclusionary period, especially, but not exclusively, in the South. In fact, political inequality was entrenched through many of the very laws passed during the period (including literacy tests, poll taxes, voter registration, and permit requirements for public assemblies).

³⁷⁸ Cf. Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism*, in Heller, 122 HARV. L. REV. 191 (2008) (discussing influence of political movements on Supreme Court's Second Amendment jurisprudence).

If history teaches us anything, it is that law just as easily can entrench inequality as protect equality.³⁷⁹ In fact, it was normative concerns about legally entrenched political inequality that finally persuaded the Supreme Court to enter the political thicket in 1962.³⁸⁰ Still, equality is more difficult to guarantee when legal regulation is sporadic and social regulation predominant.

My point, however, is that whatever the merits of the legal regulation of politics, it would be folly to ignore the fact that it is only when law structures the processes of representation that governmental officials are able to define the polity in their own image and according to their own interests. The historical periods discussed were exclusionary and frequently tolerated violence on the part of citizens and the state in ways that we do not today. That should not, however, lead one to chafe at the suggestion that there were also costs to legalization—costs, in particular, to the autonomy of the people. The central normative question is whether, once the costs are made visible, there are ways to preserve the norm of equality while scaling back regulations that distort politics by protecting incumbents or by undermining the fluidity and vibrancy of democratic politics.

Before we can engage in that inquiry, however, we will need a better understanding of contemporary American political practice. Democracy and elections, as we have seen, are not synonymous. The history of nineteenth-century democracy provides a reminder that the core of democracy is self-governance.

Even today, elections, while critical to democracy, do not cover the whole range of practices of self-governance. Think for a moment about the avenues of contemporary political practice. How does self-governance happen today? Government itself has changed. Political groups no longer seek only to influence the legislative agenda; they spend at least as much time trying to influence administrative agencies and courts. Moreover, their efforts to influence government take more- and less-formal forms. While elections and political parties are pervasively regulated by law, the administrative state's notice and comment procedures are much more analogous to the nineteenth-century petitioning process.

³⁷⁹ For a provocative overview of the ways that the national government fostered white privilege through law and administrative practice prior to the Civil War and its political implications, see Wilson, *supra* note 89, at 5–13.

³⁸⁰ *Cf. Colegrove v. Green*, 328 U.S. 549, 556 (1946) (opinion of Frankfurter, J.) (cautioning that “[c]ourts ought not to enter [the] political thicket”), *abrogated by Baker v. Carr*, 369 U.S. 186, 230 (1962) (arguing that dismissing legislative malapportionment action “would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions”).

Moreover, associations, both formal and informal, are extremely important to our self-governance. Churches and PTAs—as much as public interest organizations and political action groups—are the heart of political mobilization. Such associational groups come in a variety of forms with various purposes (political, religious, social, service-oriented, and hybrid), various levels of formality, and various relationships to law.³⁸¹ Increasingly, these associations operate both in person and virtually through social networking sites.

Finally, the political activities of individuals and groups are wide ranging. The people certainly donate to campaigns, endorse candidates, and get out the vote, but they do much more. They lobby legislatures and petition administrative agencies. They litigate. They assemble in person but also, and possibly more frequently, online. They blog and tweet, and the more sophisticated of them work hard to create “spin.”³⁸² Political groups today are quite conscious of the importance of cultural politics: The belief that Hollywood is at least as important as Washington is widespread.

A full catalogue and analysis of contemporary American political practice is beyond the scope of this Article. This brief musing, however, suggests that the repertoire of contemporary American political practices is richer than legal scholars who write about American democracy would have us believe. For instance, while the republican jury has been lost, public interest litigation has become a prominent way for the people to shape law, including constitutional law, and to influence politics.

In sum, if we accept the possibility that legal regulation may not be strictly necessary for democracy to function, and if we consider where deregulation might be appropriate to encourage accountability as well as fluid and vibrant political participation, we also must move discussions regarding the law of democracy beyond their limited focus on elections and their component parts. We must work the more participatory political practices—from community organizing, whether

³⁸¹ It is interesting to note that a by-product of the public interest litigation movement has been the development of a cadre of lawyers consciously trying to create associational affiliations (often around identity politics) that can be harnessed to political ends.

³⁸² The concept of “spin” is particularly fascinating. No doubt, and as we have seen, American political groups have always used the media to great effect. Nevertheless, in our postmodern world political groups are much more self-conscious about affecting the media’s “spin.” My focus on “spin” as opposed to the media in general is an effort to address the fact that introducing the media into any catalogue of contemporary political practices creates line-drawing and definitional problems. What is political action? When does social action turn into political action? Not all media reporting or activity properly can be described as political, so how does one draw the line? These questions, however, do not seem to me to be reasons to forgo the enterprise of understanding either American democracy as it actually operates or the law’s role in it.

traditional or internet based, to public interest litigation on both the left and right—into our analyses and our considerations of the law of democracy.

Where exactly such an expanded focus might take scholarship is obviously an open question. I suspect, at the very least, it will require reconsidering the field's limited engagement with the First Amendment. Currently, the law of democracy literature largely limits engagement with the First Amendment to the context of political parties and campaign finance. Once we recognize that a wide variety of associations are important to self-governance, a much broader range of associations, including religious associations, become central elements of the inquiry. Moreover, to the degree that the field has tended to operate outside of an individual-rights paradigm, an expanded field of inquiry could significantly reshape discussions of the First Amendment.³⁸³

For now, however, the central contribution of this Article is the finding that between 1880 and 1930, the government's role in structuring American political practice was significantly enhanced. As such, the claim that politics as "a process of collective decision-making . . . *must operate* . . . through pre-existing laws, rules, and institutions" is overstated.³⁸⁴ While the existing literature assumes that democracy necessarily requires extensive legal structures, this clearly is not true. For extended periods in American history, the political process has been *significantly* less structured by law than it is today.

Institutional practices and legal rules governing democratic politics change over time. The nature and quality of political practice and democratic participation depend on institutional structures, but the relative autonomy of the democratic public sphere from the state depends on the degree to which the institutions that structure politics are legal institutions. Even today, we may need to look beyond legal rules and legal institutions if we wish to foster an autonomous and vibrant participatory democracy.

³⁸³ Cf. Pildes, *supra* note 11, at 40 (arguing that "[u]nderstandings of rights or equality worked out in other domains of constitutional law often badly fit the sphere of democratic politics" and against "the unreflective . . . transfer of rights and equality frameworks" to law of democratic processes); accord Heather K. Gerken, *What Election Law Has To Say to Constitutional Law*, 85 IND. L. J. (forthcoming 2011) (manuscript at 3) (Yale Law Sch. Pub. Law, Working Paper No. 209), available at <http://ssrn.com/abstract=1619882> ("Election law scholars . . . tend to focus on groups and aggregation, rather than individuals and rights, which are the conventional topics of inquiry for most constitutional law scholars.").

³⁸⁴ ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 3D, *supra* note 10, at 1 (emphasis added).