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BENTHAM & BALLOTS: TRADEOFFS BETWEEN SECRECY AND ACCOUNTABILITY IN HOW WE VOTE

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Allison R. Hayward*

Abstract

The way a group, jurisdiction, or nation votes, and makes decisions binding on their members and citizens, is fundamental and deceptively prosaic. Why do some groups (faculties, Congress, caucuses, HOAs) take public votes in most contexts, accompanied by debate, sometimes heated? Why do others (electorates, labor unions) take private votes (often by ballot cast in a secure setting where “heated debate” is not allowed) in most contexts? Moreover, what should we make of the exceptions to these general forms?

This Article will demonstrate that the hybrid mode of voting – non-debated yet non-secret voting such as in contemporary absentee balloting, in union organizing petitions (so called “card check” campaigns) as well as among corporate shareholders – carries with it the weaknesses of each system without the strengths. Accordingly, where possible the situations that use this hybrid should be reformed to adopt the open or secret modes.

For absentee voting in elections, jurisdictions should provide early voting in controlled locations where the protection against coercion and fraud are possible. In the labor organizing context, the choice of a bare majority through card check must not determine whether the workplace is organized. Instead, it should provide the first step to an organizing election (as a petition places an issue on the ballot). Legitimate grievances about the fairness of union organizing elections, and whether employers are engaging in unfair labor practices, offer no justification for discarding the protection from fraud and coercion secured through a secret ballot. Voting by shareholders can also be non-debated and non-secret, but the diverse characteristics of large and small shareholders counsel for transparency when large institutional investors are engaged in contested corporate voting.

Americans have many opportunities to vote. A mere three million Arkansans may have cast 38 million votes in May 2009 for American Idol favorite Kris Allen. In the process of adopting new terms of service, the social networking site Facebook took a

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vote of its users on the proposed terms.¹ Each of the 6,000 members of the Academy of Motion Picture Arts and Sciences can vote on the recipients of Oscars, tabulated by the firm PriceWaterhouseCoopers.² American Idol lets viewers cast as many votes as they want – Facebook and the Academy follow a one-vote-per-voter rule. None of the systems described above publicize how specific voters voted, but other voting systems reveal, on purpose, how their members vote. Athenians voted by a show of hands, Romans, before the introduction of the ballot, voted individually by voice.³ So did voters in many American jurisdictions in the 19th Century. Members of Congress vote publicly, and how they vote is recorded for posterity.⁴

The way a group, jurisdiction, or nation votes, and makes decisions binding on their members and citizens, is fundamental and deceptively prosaic. Why do some groups (faculties, Congress, caucuses, HOAs) take public votes in most contexts, accompanied by debate, sometimes heated? Why do others (electorates, labor unions) take private votes (often by ballot cast in a secure setting where “heated debate” is not allowed) in most contexts? Moreover, what should we make of the exceptions to these general forms?

As we shall see, both debate-plus-open-voting and nondebate-plus-secret-voting have their strengths and weaknesses. Open voting makes sense when voters are also representatives, so that their constituencies can observe their choices and hold them accountable. It also makes sense when the question before the body encompasses a spectrum of choices, since this method accommodates amendment, as well as compromise. If the issue is complex or arcane, discussion before the vote permits some voter education. Choices can be made quickly, or delayed if more time is needed. Under most procedural systems, a voter in the prevailing side may seek reconsideration of a question, so this form of voting accommodates second thoughts or “voters remorse.”

Secret voting *sans* debate makes more sense when we want the voter to select his own preference, which may otherwise be distorted by coercion, peer pressure, or fraud. Such overweening influence could undercut the legitimacy of the result by distorting the electorate’s opinion. This voting technique works best when there is a limited spectrum of choices – “yes” or “no” on a ballot issue, or a choice among a limited roster of candidates. It is also best preceded by a campaign, so that voters come to the vote having already thought about the alternatives. Lead time is necessary. It also requires advance planning and investment in the means for casting votes, namely voting locations, ballots, monitors, and tabulators.

¹ Facebook Voting Has Ended: New Terms Being Considered Despite Small Turnout, <http://consumerist.com/5226372>.

² Voting for the Academy Awards, <http://www.oscars.org/awards/academyawards/about/voting.html>.

³ Alexander Yakobson, *Secret Ballot and Its Effects in the Late Roman Republic*, 123 HERMES 426, 427 (1995).

⁴ RULE III, RULES OF THE HOUSE OF REPRESENTATIVES.

This Article will demonstrate that the hybrid mode of voting – non-debated yet non-secret voting such as in contemporary absentee balloting, in union organizing petitions (so called “card check” campaigns) as well as among corporate shareholders – carries with it the weaknesses of each system without the strengths. Accordingly, where possible the situations that use this hybrid should be reformed to adopt the open or secret modes. For absentee voting in elections, jurisdictions should provide early voting in controlled locations where the protection against coercion and fraud are possible. In the labor organizing context, the choice of a bare majority through card check must not determine whether the workplace is organized. Instead, it should provide the first step to an organizing election (as a petition places an issue on the ballot). Legitimate grievances about the fairness of union organizing elections, and whether employers are engaging in unfair labor practices, offer no justification for discarding the protection from fraud and coercion secured through a secret ballot. Voting by shareholders can also be nondebated and nonsecret, but the diverse characteristics of large and small shareholders counsel for transparency when large institutional investors are engaged in contested corporate voting.

Section I offers an overview of how different institutions provide for voting, and draws from those examples some principles for choosing a voting method. Section II reviews the history of voting procedures in Britain and in the United States that further illustrates these principles in practice. Section III looks at situations where those principles are not followed, namely in absentee balloting, card check recognition campaigns, and corporate shareholder voting, and evaluates whether these are legitimate exceptions, and what modifications might be appropriate. Section IV concludes this Article.

I. How We Vote

A. Overview

The manner in which groups hold votes may be merely traditional, but tradition can often reflect an appreciation for what procedures render good results. Through voting, groups make decisions; but unlike consulting a shaman, flipping a coin, or tossing darts at a board, voting should aggregate what a group’s members know and what their understanding is of the best choice.⁵

Voting systems must manage two separate characteristics. The first is the character of the decision being made. Is the question before the voter vague, open-ended, transitory or complex? Is focused discussion necessary to educate the voter’s judgment, or can the election take the voter as he comes, after (potentially) a campaign about the merits? Certain decisions are better made in deliberative assemblies rather than by balloting. Debate can bring the question into focus, and can allow a body to make a

⁵ See CASS R. SUNSTEIN, *INFOTOPIA 201* (2006) (“Groups should take firm steps to increase the likelihood that people will disclose what they know”).

prompt decision. An aspect of deliberation is also the flexibility to modify the issue before the vote. Motions can be amended; ballots can't.

Another element to consider is whether the voters will be asked to choose among a large number of alternatives, or whether the vote is yes/no or choice between two viable contenders.⁶ The more alternatives, the more votes may need to be taken. It is simple for a meeting to accommodate a series of votes on amendments that would require separate elections by ballot, and avoid the problem of "cycling preferences" where the electorate end up with a suboptimal choice.⁷

The second characteristic is voter independence, power, or vulnerability. In the context where the vote is cast, is it important at that moment for the voter to be insulated from pressure, so as to express his preference privately, sincerely, anonymously and secretly? Is the vote to be taken among a relatively large body of voters who are not themselves necessarily powerful or influential? Is there danger that the voter will face recriminations after the election for his vote, or is the voter himself powerful and resilient? Is it possible for publicity to permit a briber to confirm that a voter remained bought, but preserve in secret the corrupt deal? Is the voter instead a representative of a larger group, who should be accountable publicly to them?

The characterization of the question before the voter, and the voter's vulnerability, are not alternatives, but are independent characteristics. Taken as such, one can sort contemporary uses of voting modes into categories. This exercise helps identify the typical as well as atypical applications for open or secret voting.

Open Public Voting:

Voters as Representatives: Congress, Parliament, legislatures, local governments and boards, faculty senates, convention delegates

Voters vote as individuals, but decisions require debate, flexibility, or are complicated: Town meetings, business meetings of deliberative bodies such as volunteer organizations, faculties, juries.

⁶ DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* 57 (1987); MICHAEL DUMMETT, *VOTING PROCEDURES* 29 (1984) ("The serious problems of voting procedure arise only when the voters have to choose between three or more possible outcomes."); *see also* Saul Levmore, *Parliamentary Law, Majority Decisionmaking and the Voting Paradox*, 75 VA. L. REV. 970, 988 (1989) (observing that voting paradox suppressed when two choices presented, citing references).

⁷ Techniques of balloting can avoid some of these consequences, for instance by asking voters to rank their preferences. A discussion of these alternative methods is beyond the scope of this paper.

Voters vote as individuals, on set questions: Absentee balloting, vote-by-mail, internet voting, 19th century voting by party-ballots, card check organizational voting, voting by corporate shareholders.

Mandatory Secret Voting:

Voters vote as individuals, but decisions require debate, flexibility, or are complicated: Special situations in parliamentary law where ballots are used, such as personnel decisions.

Voters vote as individuals, on set questions: Australian (secret) balloting in public elections, union elections (organizational as well as regular)

Once sorted, the modes of voting used in various situations reflect the general insight stated before. In organizations where voters are representatives, open voting is necessary to ensure accountability. Even in situations where voters vote as individuals, open voting provides the necessary suppleness and flexibility to redesign the question as members deliberate. Secret voting is used in those situations where neither of these characteristics are important, that is, where voters are voting their individual sentiments on a stationary issue or choice.

B. Why Vote in Secret?

Secret ballot voting should be seen as an important exception, useful in those situations where voters are voting as individuals on a settled issue or roster of issues. Secret balloting requires some planning and infrastructure. We should explore what purpose voting in secret serves that justified its adoption, with that expense, in these situations.

When should voters get to vote in secret? Part of the answer may be what a vote in this kind of situation is meant to accomplish. Secret voting is important in situations where we want voters to register their preference secure in the knowledge that no one will know how they voted. Historically, secret balloting has been instituted in response to fraud, but it can stand on its own in situations where elections need to register the sentiment of a relatively large group about a contested issue of general interest. Condorcet's widely discussed insights suggested that individual voters are more likely to be correct about the choice that is best for them, and for the polity overall. Sincere expression of majority will is likely to choose the best alternative.⁸ Moreover, "voting

⁸ See H.P. Young, *Condorcet's Theory of Voting*, 82 AM. POL. SCI. REV. 1231, 1231 (1988) (summarizing Condorcet's *Essai sur l'application de l'analyse a la probabilitie des descisions rendues a la pluralite des voix* (1785)); Adrian Vermule, *Many-Minds Arguments in Legal Theory*, Harvard Law School Public Research Paper No. 08-02, available at ssrn.com/abstract=1087017.

provides legitimacy to a system by which agents act for the larger group. It serves both to legitimize the agent's choice and to monitor the work of the agent.”⁹

The “best” is a desirable outcome, not only because it may better serve the welfare of the group, but because dissenters, understanding this, will more willingly acquiesce to the majority’s choice (at least in the short run). We especially care about dissenters feelings of legitimacy when the “group” under discussion is a political subdivision.¹⁰ “Love it or Leave it” (or “exit” in Albert Hirschmann’s influential description) is rarely a realistic choice in a polity. Moreover, withdrawal is undesirable if those dissenters' honest perspectives as voters will be necessary for future good decisions on other questions.¹¹ Also, when dissenters feel cheated, their attempt to rectify the direction of government can take antisocial forms.¹² At the very least, they will feel less a part of the process of self-government.¹³

A vote influenced by bribery, extortion, or other forms of coercion may not reflect the voter’s knowledge or honest opinion, will not as reliably lead to the best result, and will not earn the respect of dissenters. It follows that if an election is to serve the welfare of a large group, deserve respect, and keep the peace and order, voting procedures in such contexts should insulate voters from outside influence at the time of voting.

If that is the case, then would this model also counsel against campaigning? One might infer that if undue influence at the time of the vote skews the result, than prior exhortations about the vote are similarly suspect. A candidate may not bribe a voter but instead make a campaign promise that profits the voter. But campaign speech also provides the chance for information sharing, assessments of comparative advantage and disadvantage, deliberation and second-guessing – all potentially occasions for improving the quality of any one voter’s vote.¹⁴ That voter also retains the discretion whether to vote – secretly - for the candidate (and the promise) or not.

Thus, a well-run election in a body where exit is unrealistic, like a political jurisdiction, should restrict as much as possible any opportunities for threats, bribes, or monitoring at the moment of voting. Other voting contexts however, present competing concerns and should be administered differently. Thus, when the voter is also a

⁹ Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 133 (2009).

¹⁰ See ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY 15-20 (1970); Ian B. Lee, *Citizenship and the Corporation*, 34 LAW & SOC. INQUIRY 129, 136-37 (discussing legitimacy and majority rule).

¹¹ HIRSCHMAN, *supra* note 10 at 98-105 (noting the importance of loyalty in public goods context).

¹² See Mike Shuster, *New Wave of Political Unrest, Violence Hits Iran*, NPR, July 30, 2009.

¹³ Thompson & Edelman, *supra* note 9 at 133.

¹⁴ SUNSTEIN, *supra* note 5 at 49-73 (discussing value of deliberation, and occasions for its failure).

representative, votes should be cast openly and each voter's vote identified with him. Only then can colleagues and the constituency observe how the representative is performing in office.¹⁵ Even here, members might be properly insulated at the moment of voting by the use of a secret ballot, if under the circumstances it is more likely that the voters will vote their true sentiments.¹⁶

II. How We Came to Vote These Ways

A. Bentham, Mill and the Secret Ballot

The debate over the ballot in 19th century England between (among others) Jeremy Bentham and John Stewart Mill thoroughly considered the advantages and disadvantages of different modes of voting. The arguments that developed in Britain in the 19th Century over the "ballot" consider the practical consequences of the concerns raised above.

While contested parliamentary elections were uncommon in the 18th century, those that were contested were intense. Couple the intensity of interest with compulsory open voting (sometimes followed by the publication of the poll book) the voting system facilitated buying votes, or retaliating against voters.¹⁷ The Chartist movement demanded, among other things, "the ballot" in the People's Charter published in 1838.¹⁸ Other aspects of the reform agenda came first, among them the reallocation of representation and broadening the franchise. After a 40 year campaign, Britain adopted the secret ballot in 1872.¹⁹

That advocates of the secret ballot faced such opposition seems remarkable today. Yet as recently as the 1860s in Britain, there was little popular support for secret ballots.²⁰ People, and their politicians, criticized the ballot as a way to cloak voters preferences and reduce accountability. The ballot was "un-English" and "un-manly."²¹ Contemporary debate in the American states expressed similar objections.²²

¹⁵ See ROBERT'S RULES OF ORDER NEWLY REVISED § 45 at p. 405 lines 15-20 (10th ed. 2000) (noting that roll call vote usually confined to representative bodies, not appropriate in a mass meeting).

¹⁶ ROBERT'S RULES, *supra* note 15 at §45, p. 398 lines 22-27.

¹⁷ IAN MACHIN, THE RISE OF DEMOCRACY IN BRITAIN, 1830-1918 at 4 (2001).

¹⁸ ASA BRIGGS, CHARTISM 35 (1998).

¹⁹ MACHIN *supra* note 17 at 75.

²⁰ MACHIN, *supra* note 17 at 75.

²¹ MACHIN, *supra* note 17 at 76, JOHN H. WIGMORE, THE AUSTRALIAN BALLOT SYSTEM 13-14 (1889).

²² *Discussions on the constitution proposed to the people of Massachusetts in the convention of 1853* at 113-14 (1854).

Attitudes changed with the broadening of the British franchise in 1868. “Men in humble circumstances” could vote, and scandalous corrupt efforts to secure those new votes provided the rationale for a renewed campaign for the secret ballot.²³ Parliament finally adopted a secret ballot in 1872.²⁴ Better to settle for the “un-manly” secret ballot than permit bribery and coercion of voters.

The secret ballot debate in Britain was about more than political expediency. Many of the leading political thinkers of the period at one point or another offered theoretical justifications for (and against) the secret ballot. Jeremy Bentham, in his *Essay on Political Tactics*, set forth his vision of proper voting.²⁵ In public assemblies, Bentham observed, their procedures should provide publicity for debates and recorded voting.²⁶ In this context, representatives will be constrained to do their duty, the public will have greater confidence in their decisions, the public’s wishes can be known to representatives, and a constituency can know their representative’s record.²⁷ Bentham rejected concerns arguments that public debate and voting in representative assemblies would lead to public pressure for unwise policies, or expose members to “hatred” or permit representatives to seduce their constituencies in favor of “dangerous propositions.”²⁸ Bentham was confident that publicity in a representative democracy, by giving voice to all perspectives in a debate, would educate the public and more likely permit representatives to choose policies in the interest of society than a system conducted in secret.²⁹

Yet Bentham recognized that sometimes legislative business should not be publicized. If publicity would aid the enemy, injure unnecessarily innocent persons, or inflict excessive punishment on the guilty, assemblies could exclude such business from publication. Bentham intended these to be narrow exceptions. “Secresy is an instrument of conspiracy; it ought not, therefore, to be the system of a regular government.”³⁰

²³ MACHIN, *supra* note 17 at 76-77. Individual voice voting also took many days to finish. See WIGMORE, *supra* note 21 at 10 (reporting that one election in Mayo County took 57 days).

²⁴ WIGMORE, *supra* note 21 at 15-17.

²⁵ Jeremy Bentham, *An Essay on Political Tactics*, in THE WORKS OF JEREMY BENTHAM (1843) (Vol. II).

²⁶ *Id.* at 311-15. At the time (1838), Parliament’s rules prohibited outsiders from observing its proceedings, or for anyone to report on parliamentary business. However, these rules were routinely violated, to the point that the House of Commons set aside a gallery to accommodate “shorthand writers” from the newspapers. *Id.* at 316. Under the French Constitution of 1814, all deliberations of the Chamber of Peers were made secret. *Id.* at 317.

²⁷ *Id.* at 311-15.

²⁸ *Id.*

²⁹ *Id.* at 311-15.

³⁰ *Id.* at 315.

Although Bentham concluded that publicizing the votes of representatives was necessary and proper, he also saw the need for an exception “in all cases in which there is more to fear from the influence of particular wills, than to hope from the influence of public opinion.”³¹ In particular, Bentham observed that secrecy is suitable in mass elections, because it impedes vote buying, since the buyer cannot observe whether the voter followed through on the contract.³² Secrecy should only protect that actual vote – for Bentham the debate and campaign before taking the vote is essential for legitimacy and public education.³³ “With this mixture of publicity, secret voting appears to me then, most suitable for elections; that is to say, the most suited to prevent venality and to secure the independence of the electors. In political matters, I do not see any other case in which it can be recommended as a general rule.”³⁴ Similarly, reformer George Grote noted that as the electorate increases in size, it is less useful to think of their votes as “responsible” to society, and more proper to think of their votes as their individual honest opinion.³⁵

Bentham counseled that the secret vote must be truly secret (or publicity truly public), or an even more debilitating system could arise. “The most detrimental arrangement would be that of demi-publicity” because “individuals would thus be exposed, in all their votes, to every seductive influence, and would be withdrawn from the principal tutelary influences. This is the system which it would be proper to establish, if we would secure punishment to probity, and reward to prevarication.”³⁶

The advocates of the British secret ballot did not prevail at first but they did not rest, as we know. It would be wrong to dismiss their opponents’ arguments as quickly as Bentham did. John Stuart Mill, in his 1862 book *Considerations on Representative Government*, argued against the secret ballot.³⁷ Mill’s concern was instead the message

³¹ *Id.* at 368.

³² *Id.* at 368.

³³ *Id.* at 369.

³⁴ *Id.* at 369. Bentham does observe that “when circumstances render a hidden influence suspected,” an assembly’s open vote can be followed by a vote by ballot to ascertain the real wish of the assembly. *Id.* His example contrasts the public votes of the 1788 Polish permanent council on the question of withdrawal from Russian domination with the secret votes. The public vote favored Russia, the secret vote favored Polish independence.

³⁵ ALEXANDER BAIN, *THE MINOR WORKS OF GEORGE GROTE* 22 (1873).

³⁶ Bentham, *supra* note 25 at 370.

³⁷ JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 205-28 (1862) (1991 reprint). Mill’s father, James Mill, was by contrast an early advocate of the secret ballot, and believed that open voting allowed a few powerful men to control elections. See Frank O’Gorman, *The Secret Ballot in Nineteenth-Century Britain*, in ROMAN BERTRAND, *THE HIDDEN HISTORY OF THE SECRET BALLOT* 22-23 (2006); Joseph H. Park, *England’s Controversy Over the Secret Ballot*, 46 *POL. SCI. Q.* 51, 52 (1931). A recent critique of Mill’s views is Annabelle Lever, *Mill and the Secret Ballot: Beyond Coercion and Corruption*, 19 *UTILITAS* 354 (2007).

to the voter – that his vote was his to use for his benefit, not something exercised in trust for the public good. Mill rejected the notion that one’s vote was a “right” and that “this one idea, taking root in the general mind, does a moral mischief outweighing all the good that the ballot could do, at the highest possible estimate of it.”³⁸

A number of pernicious consequences flowed from the notion that a vote is a “right” according to Mill. If the vote belongs as a matter of right to the voter, why should he not be allowed to sell it?³⁹ Why should he cast it based on his opinion of the public good, rather than his own pleasure or caprice?⁴⁰ Mill instead held that in an election, the voter “is under an absolute moral obligation to consider the interests of the public” and thus voting should be performed “under the eye and criticism of the public.”⁴¹

Yet even Mill admitted that in situations where a large number of voters are compelled to vote the bidding of a powerful individual, then the secret ballot might be justified. “When the voters are slaves, any thing may be tolerated which enables them to throw off the yoke.”⁴² But Mill contended that such influence on British voters was declining. While thirty years previous the problem was coercion, now the “much greater source of evil is the selfishness . . . of the voter himself.”⁴³ Mill cited as evidence the growth of bribery, for to him this demonstrated that the voters “now vote to please themselves” rather than landlords or aristocrats.⁴⁴ Or as a pamphleteer proclaimed: “He who votes by ballot votes as an individual, he who votes before the world, votes as a component part of a public body.”⁴⁵

Worst of all, in Mill’s view, would be a system providing voters ballots to vote in their own homes. Mill believed the voter must vote in a public poll or another office open to the public and under the eye of a responsible official. “The proposal which has been thrown out of allowing the voting papers to be filled up at the voter’s own residence, and sent by the post . . . I should regard as fatal.” To Mill, this manner of voting displayed none of either system’s salutary benefits, while providing for unchecked corruption. “The briber might, in the shelter of privacy, behold with his own eyes his bargain fulfilled, and the intimidator could see the extorted obedience rendered irrevocably on the spot; while the beneficent counterinfluence of the presence of those

³⁸ MILL, *supra* note 37 at 206.

³⁹ *Id.* at 206.

⁴⁰ *Id.* at 207.

⁴¹ *Id.* at 208-09; *see also* Discussion on the Constitution, *supra* note 8 at 119.

⁴² *Id.* at 209.

⁴³ *Id.* at 210-11.

⁴⁴ *Id.* at 212.

⁴⁵ FRASIER’S, vol. III (March 1831) *quoted in* Park, *supra* note 37 at 55.

Conversely, Montesquieu favored open voting, as it provided a means for those of higher rank to direct the lower classes. MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Hafner 1949) (Vol. I, Bk. 2 at 12-13). Yet Montesquieu believes voting in assemblies should be secret. *Id.*

who knew the voter's real sentiments, and the inspiring effect of the sympathy of those of his own party or opinion, would be shut out."⁴⁶

B. The American Ballot Experience

In the United States, the debate over the state-published secret ballot, called the "Australian ballot" resembled in many characteristics the British ballot debate, with a distinctively American emphasis on the sovereignty of the people. In the 1890 Kentucky Constitutional convention, delegates debated whether to impose the Australian ballot in a state that had used voice voting. Advocates of the reform made Bentham's argument that votes in a representative assembly should be public, but election by the people should be by secret official ballot.⁴⁷ Because when the people vote they decide in their sovereign capacity, "they are responsible to nobody but themselves and their God." When agents of the people vote in assemblies, however, they should be accountable to their electors, and thus their votes should be public.⁴⁸

In America, the issue in most states was not the "ballot" per se, but confidentiality, or what John Wigmore called "compulsory secrecy" at the polling place.⁴⁹ Most American jurisdictions voted by ballot but American ballots were not "secret" ballots.⁵⁰ Voters brought their own ballots to a central polling place. While this might theoretically provide an almost limitless range of choice, in practice ballots were prepared not by voters but by parties (or factions). Parties would print out the slate of candidates for all offices, and voters would choose a ticket, then deposit it at the polls.⁵¹ Generally, voters would make their way through a crowd to their voting window with their ticket, hand it

⁴⁶ MILL, *supra* note 37 at 220. Mill was unpersuaded by arguments that convenient voting will improve turnout. To Mill, the apathetic voter who cannot be bothered to go to the polling place is also the most likely voter to give his vote "on the most trifling or frivolous inducement." *Id.*

⁴⁷ PROCEEDINGS AND DEBATES IN THE CONVENTION, Vol. II, at 1818 (1890).

⁴⁸ Interestingly, delegates described the motives of the supporters of voice voting (in the previous constitutional convention of 1849) as in part to "prevent any agitation in this State upon the slavery question" by permitting wealthy interests that favored slavery to know each voters vote. PROCEEDINGS, *supra* note 47 at 2002.

⁴⁹ See Wigmore, *supra* note 21 at 21, 50.

⁵⁰ A handful of jurisdictions retained voice voting into the 19th century. *Id.* at 150-51 (1934). Richard Bensele reports that their eventual transition to ballots was not out of concern for voter's independence or privacy, but simply because population growth made voice voting impractical. RICHARD FRANKLIN BENSEL, THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY 56 (2004).

⁵¹ John Reynolds and Richard McCormick, *Outlawing "Treachery": Split Tickets and Ballot Laws in New York and New Jersey, 1880-1910*, 72 J. OF AM. HISTORY 835, 836 (1986); BENSEL, *supra* note 50 at 14-15. The tickets could be distributed before election day, individuals or by having the slate printed in the newspaper. *Id.* at 14.

inside to an election official, who would then deposit it in a ballot box out of reach of the public.⁵²

While the American private ballot system was more closed than that afforded in open voice voting, voters could (and did) exercise more discretion over their vote than might at first appear. Voters could alter their party ballots, by writing on a preferred choice or pasting in the name of another candidate provided by that campaign.⁵³ Thus, simply because a voter took and cast a Republican ballot did not prove the voter had voted for every candidate on the Republican slate. Furthermore, simply because a party had nominated a specific individual did not prevent members from bolting and voting for another, or for the rival party's nominee – or from tearing off the names of disfavored candidates and voting the rest.⁵⁴

But the private ballot system, as a form of “demi-publicity” criticized by Mill and Bentham, also allowed malefactors to distribute misleading or fraudulent ballots. Local parties could print up their own slates to oppose the regular party nominees (or demand money to distribute the “correct” ballot).⁵⁵ Opposing parties could circulate “bogus” rival ballots.⁵⁶ Amid the tricks, the party-ballot system could accommodate a variety of voters' preferences, but did not secure the privacy of that vote.

“Australian” secret ballot reformers seized both on the vote bribery facilitated by non-secret voting, and the use of irregular ballots to “trade” votes between candidates (even of different parties) as reasons why purity in elections required a secret ballot, printed by the state, and distributed under the control of authorities in a polling place.⁵⁷ Between 1888 and 1900 Australian ballot reform swept the United States.⁵⁸ Some party leaders, for their part, also saw the Australian ballot as a way to save money, impede access to the ballot by maverick candidates, and thwart disloyal local ballot distributors.⁵⁹

⁵² BENSEL, *supra* note 50 at 11-14.

⁵³ Reynolds & McCormick, *supra* note 51 at 845. BENSEL, *supra* note 50 at 44. Parties could manufacture distinctive ballots that could be verified by sight at a distance, but then would need to bear the costs of centralized printing and distribution. *Id.* at 47-48. Customizing one's ballot would have been harder for illiterate voters, but the availability of pasters offered even them the means to modify their written ballots. *See id.* at 17 n. 24, 33.

⁵⁴ *See* ROBERT C. BROOKS, POLITICAL PARTIES AND ELECTORAL PROBLEMS 425 (1933) (describing large numbers of “bob-tailed” Democrat ballots omitting Horace Greeley's name in 1872 Presidential contest).

⁵⁵ Reynolds & McCormick, *supra* note 51 at 847.

⁵⁶ *Id.* at 846.

⁵⁷ *Id.* at 849, Wigmore, *supra* note 21 at 50-57.

⁵⁸ HARRIS, *supra* note **Error! Bookmark not defined.** at 154-55; JOHN C. FORTIER, ABSENTEE AND EARLY VOTING 9 (2006).

⁵⁹ Reynolds & McCormick, *supra* note 51 at 850-52.

Standardization was not without costs. “What had been a relatively fluid and informal electoral process, dominated by the local party organizations, now became a more formal proceeding, still dominated by the major parties but with vastly more authority vested in the party elite.”⁶⁰ Moreover, the social function of voting was being eclipsed by a view of voting as a private and independent activity. Herbert Croly, in 1909, echoing Mill from the century before, objected:

Independent voting and the splitting of tickets is essential to a wholesome expression of public opinion; but insofar as such independence has to be purchased by secrecy its ultimate value may be doubted.... It is curious that with all the current talk about the wholesome effects of “publicity” the reformed ballot sends a voter sneaking into a closet in order to perform his primary political duty.... In the long run that vote which is really useful and significant is the vote cast in the open with a full sense of conviction and responsibility.⁶¹

The secret ballot brought with it new challenges. Is the ballot designed so that voters can easily choose their preferences? For instance, the “Massachusetts ballot,” now the modern standard, organized candidates by office; the “Indiana ballot” listed columns of candidates by party.⁶² The Massachusetts ballot was more conducive to independent voting and split tickets; the Indiana ballot encouraged straight ticket voting, but took less time to vote, reduced “roll off” and (by incorporating symbols for the parties) was easier for uneducated or illiterate voters to use.⁶³ However, California state courts found the Indiana form burdened voters who did not wish to vote the party ticket and was unconstitutional under the state’s constitution.⁶⁴

Can voters verify their choice or correct a mistake? Pre-election voter education, such as distributing sample ballots in advance, reduced voter confusion but added to the expense of the election.⁶⁵ Is access to a place on the ballot impeded, so that voters trade an array of choices for confidentiality?⁶⁶ Evidence suggests that ballot access restrictions in a handful of southern states saved the presidency for Harry Truman in 1948, and New

⁶⁰ *Id.* at 858.

⁶¹ HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* 341-42 (1909) (1963 reprint).

⁶² HARRIS, *supra* note **Error! Bookmark not defined.** at 155. An earlier commentator described the two forms as the Australian ballot (candidates by office) and the Belgian ballot (candidates by party.) Charles Chauncey Binney, *American Secret Ballot Decisions*, *AMERICAN LAW REGISTER* (Feb. 1893) at 115.

⁶³ HARRIS, *supra* note **Error! Bookmark not defined.** at 155-61.

⁶⁴ Binney, *supra* note 62 at 116 (discussing *Eaton v. Brown*, 31 P. 250 (Cal. 1892)).

⁶⁵ HARRIS, *supra* note **Error! Bookmark not defined.** at 189-90.

⁶⁶ FREDERICK CHARLES SCHAFFER, *THE HIDDEN COSTS OF CLEAN ELECTION REFORM* at 59-60 (preventing “fusion” candidates); *see also* *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (subjecting state ballot access rules to a balancing test).

York's denial of Eugene McCarthy's ballot access suit in 1976 helped elect Jimmy Carter.⁶⁷

Are there voters who cannot read, or read the language of the ballot? Among some the motives for adopting the state-printed Australian ballot was exactly this – to disenfranchise illiterate voters.⁶⁸ An early point of contention was whether illiterate or blind voters could seek assistance in casting a “secret ballot.” In Kentucky, the court concluded that the voters’ right to vote included “the right to avail themselves of whatever reasonable aid and information may be necessary to enable them to cast their ballots understandingly . . .”⁶⁹ In neighboring Tennessee, however, the courts upheld a secret ballot law that prohibited voter assistance, concluding that “with little effort the unlettered voter can soon become as well acquainted with the printed name of his candidate and with his face . . .”⁷⁰ The Tennessee decision placed the secrecy of all ballots above the convenience of illiterate or handicapped voters.

Are there incentives at work that lead local election administrators to make the ballot confusing? Ballots can be organized a number of ways, and a jurisdiction that fluctuates among types can sow voter confusion even if its intentions are to “improve” the ballot. Richard Niemi and Paul Herrnson recently surveyed the many different forms of contemporary ballots, noting many that included confusing or seemingly contradictory instructions.⁷¹ Whether a presidential ballot contains the name of the candidate for president, or the names of the “electors” to the Electoral College, can have tremendous consequences.⁷²

⁶⁷ Judith L. Elder, *Access to the Ballot by Political Candidates*, 83 DICK. L. REV. 387, 388-89 (1978).

⁶⁸ See SCHAFFER, *supra* note 66 at 22; John Crowley, *The Secret Ballot in the American Age of Reform*, in BERTRAND, *supra* note 37 at 59-60 (noting coalition of interests supporting Australian ballot); ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 142-43 (2000).

⁶⁹ Binney, *supra* note 62 at 118 (discussing *Rogers v. Jacob*, 88 Ky 502 (1889)); accord *Pearson v. Supervisors*, 21 S.E. 483, 485 (Va. 1895).

⁷⁰ Binney, *supra* note 62 at 118-19 (discussing *Cook v. State*, 90 Tenn. 407 (1891)). Even in such a jurisdiction, an illiterate voter could vote using a marked sample ballot, or indicate his choice with a paster. *Id.* at 121 (discussing pasters); see generally FORTIER at 10.

⁷¹ Richard Niemi & Paul Herrnson, *Beyond the Butterfly: The Complexity of U.S. Ballots*, 1 PERSPECTIVES ON POLITICS 317 (2003). This article's author maintains a site devoted to old ballots that offers examples of the many ways ballots can be poorly designed. See <http://www.scribd.com/group/75995-ballots-ballots-ballots>.

⁷² Spencer Albright, *The Presidential Short Ballot*, 34 AM. POL. SCI. REV. 955 (1940) (tracing history of “short ballot” listing candidates’ names); BROOKS, *supra* note 54 at 435 (noting that “nonpartisan” lists of presidential electors on 1928 Mississippi and Florida ballots intended to confuse illiterate Negro voters).

Even when the instructions are clear, voters make mistakes. How will nonconforming ballots be counted, if at all? Can election administrators number ballots, so that in a recount or contest a voter can identify his ballot and can clarify his intent? State courts confronted with such systems split on whether such numbering was inconsistent with a guarantee of a secret ballot.⁷³

Do administrators try to skimp, by printing fewer ballots than needed? Do they try to make do with fewer polls by placing time restrictions on voting, or allowing long lines to form? As population increased, election administrators were faced with growing expenses in guaranteeing the secret ballot, in locating and staffing polling places, printing ballots and other materials, and tabulating returns.⁷⁴ Yet citizen outcry for greater election administration budgets was seldom heard.

Beyond the practical concerns, the old arguments persist – what does the secret ballot mean for deliberation and voter accountability? Does democracy lose something when a jurisdiction implements secret, state printed balloting? Voting in public is expressive, and a moment for citizens to talk, argue, reason, and inform and perhaps strengthen their opinions.⁷⁵ Some critics of the secret ballot regretted the passing of the public election, or of party ballots, as a time of great civic engagement and unparalleled interest in elections.⁷⁶ “Were people inclined to vote when there was no music and no flags – nobody to belt and nobody to cheer – and no hourly publication of the state of the poll?”⁷⁷

⁷³ Ritchie v. Richards, 47 P. 670, 673 (Ut 1896) (holding that ballot numbering was not unconstitutional under state secret ballot requirement); Ex Parte Owens, 42 So. 676 (1906); THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 605-06 (1868).

⁷⁴ Irregularities in polling places could then form the basis for a challenge. See Perry v. Hackney, 90 N.W. 483 (N.D. 1902) (challenging precinct returns due to improper placement of booths in private home).

⁷⁵ JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE 211-21 (MIT ed. 1991) (decrying absence of debate informing modern vote); Bruce Ackerman & James Fishkin, *Deliberation Day*, 10 J. OF POL. PHIL. 129, 130 (2002); Saul Levmore, *The Anonymity Tool*, 144 U. PA. L. REV. 2190, 2225 (1996) (“My observation has been that the law chooses between anonymity and identifiability, depending on lawmakers’ assessment of the tradeoff between revelation and reliability”) A recent article advocating open voting for accountability reasons is Geoffrey Brennan & Philip Pettit, *Unveiling the Vote*, 20 BRITISH J. OF POL. SCI. 311, 326-27 (1990). To reach this conclusion, the authors explicitly assume that open voting would not encourage “bribery, blackmail and intimidation.” It is not clear this assumption is justified. See also Daniel Sturgis, *Is Voting a Private Matter?*, 36 J. OF SOCIAL PHIL. 18 (2005).

⁷⁶ Reynolds & McCormick, *supra* note 51 at 857; BENSEL, *supra* note 50 at x and n.8 (2004). O’Gorman, *supra* note 37 at 38 (noting change in tone of British elections). Bensel observes that saloons were commonly used as polling places, which helped motivate turnout among some subset of voters. *Id.* at 9.

⁷⁷ Park, *supra* note 37 at 85. Or parties -- In Oregon, where all votes are cast by mail, voters mark their ballots with friends. See Michelle Cole, *It’s More Than a Vote in*

Contemporary research suggests that voters are much more inclined to vote when social pressure is present, in the form of surveillance or other forms of monitoring. One recent study found that voter turnout increased dramatically among a study group that was told their voting records, and those of their neighbors, would be reported to them.⁷⁸ To be sure, such monitoring need not be in the form of open voting,⁷⁹ but the absence of election day cacophony ushered in with the secret ballot made voting less entertaining and less compelling.

Some voters might find open voting intimidating, but one could argue that a more self-confident voting base could make sounder public decisions, even if fewer individuals participate.⁸⁰ Others might also question whether disputes at the moment of voting improve the quality of the vote, or simply irritate people and drive opinions further apart. In any case, tabulation is transparent when votes are cast publicly.⁸¹

Moreover as we have seen, the public vote permits verifiable vote-buying, bribery, and extortion, and the privately printed ballot handed a voter could be a nonstandard or fraudulent one.⁸² Even under the Australian ballot, voter buyers conceived of methods to police their contracts, such as the Tasmanian dodge,⁸³ or paying

Oregon, Its' a Party, THE OREGONIAN, Oct. 26, 2008 at A01; Timothy Egan, *Living Rooms Replace Polling Booths in Oregon's Mail-In Senate Election*, N.Y. TIMES, Nov. 21, 1995 at A19.

⁷⁸ Alan S. Gerber, Donald P. Green & Christopher W. Larimer, *Social Pressure and Voter Turnout: Evidence from a Large Scale Field Experiment*, 102 AM. POL. SCI. REV. 33, 39-40 (2008).

⁷⁹ See Christian Grose & Carrie Russell, *Avoiding the Vote: A Theory and Field Experiment of the Social Costs of Public Political Participation*, 23, Presented at the 2009 Annual Meeting of the Southern Political Science Association, New Orleans, Louisiana, http://www.allacademic.com/meta/p283184_index.html (contending in caucus context that reminding voters their vote would be open suppressed turnout).

⁸⁰ *Contra Socialist Workers Party v. Hechler*, 890 F.2d 1303, 1309 (4th Cir. 1989) (noting that secret ballot protects voters from scorn and ridicule; concluding that state law requiring nomination petition signers to declare intent to vote for candidate violated state secret ballot guarantee).

⁸¹ Sturgis, *supra* note 75 at 25.

⁸² Sturgis, an advocate of open voting, proposed a system that would require the voter to cast his vote privately, but how he voted would be published after the election. *Id.* at 18. He argues that this will thwart vote buying; however such would not be the case where, as has been the case historically, voter bribery is repeated from one election to the next.

⁸³ Wigmore, *supra* note 21 at 82; BROOKS, *supra* note 54 at 427; J.J. McCook, *Venal Voting: Methods and Remedies*, THE FORUM (1892) at 163. Bought voters could also make a predetermined mark on a ballot, such as by using a distinctive paster or writing in a predetermined fictitious candidate, as a means of identifying their ballot and demonstrating they had voted as requested. *Id.*

voters to stay away from the polls.⁸⁴ These ills are present even when a particular voter voluntarily reveals his vote. Schemes through which bribed voters voluntarily mark their ballots so as to identify their votes burden those voters who refuse to partake in the scheme, and schemers may correctly infer that they have cast hostile votes.⁸⁵

In modern regimes, concerns about voter independence have dominated those who favor the deliberative spectacle of open voting. Today, conventional notions of democracy seem almost reflexively to include secret ballot elections.⁸⁶ Article 25 of the International Covenant on Civil and Political Rights extends to every citizen the right to vote in elections that “shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”⁸⁷ Article 14 of the European Constitution requires secret ballots in election to the European Parliament.⁸⁸ The European Human Rights Convention likewise called for periodic elections by secret ballot.⁸⁹ OSCE election inspection reports decry the slightest evidence that a vote might be cast in a nonconfidential context, even by inadvertence.

III. Nonconforming voting procedures

Whatever the relative merits of open or secret voting, one form of voting, to Bentham and Mill, was defective. Neither saw any justification for a “nonsecret ballot” – a situation where a ballot is marked, but away from the protection of the polling place, in situations where the voter is unprotected from coercion or influence.

In modern voting we depart from the vision both Bentham and Mill articulated. Today, we vote by ballot in conditions lacking compulsory secrecy, but public accountability and deliberation is also nonexistent. Both Bentham and Mill believed these kinds of situations were intolerable. Even if one assumes that a voter has voluntarily waived secrecy, these modes of voting do not serve to protect other voters,

⁸⁴ SCHAFFER, *supra* note 66 at 116-17 (buying abstention), McCook, *supra* note 83 at 172.

⁸⁵ *Nabors v. Manglona*, 829 F.2d 902, 905 (9th Cir. 1987) (rejecting argument that bribed voters had waived right to secret ballot)

⁸⁶ See Mark Braden, *Early and Absentee Voting*, in INTERNATIONAL ELECTION PRINCIPLES IN DEMOCRACY AND THE RULE OF LAW 218-19 (John Hardin Young, ed., 2009)

⁸⁷ ICCPR, Dec. 16, 1966, 999 UNTS 171, reprinted in 6 ILM 368 (1967) (entered into force Mar. 23, 1976. The Covenant is monitored by the UN’s Human Rights Committee, which is empowered to hear citizens’ complaints. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L 46, 64 (1992). The US is not a signatory. One signatory to the Covenant, Switzerland, entered a reservation to recognize that some canton elections are by public assembly not ballots. *Id.*

⁸⁸ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union OJ 2008 C115/1.

⁸⁹ ECHR, Mar. 20, 1952, 213 UNTS 262 (entered into force May 18, 1954).

who may wish not to waive secrecy but are treated as recalcitrant or subjected to other pressure.⁹⁰

An ever increasing number of ballots are cast by mail, away from the compelled confidentiality of the polling place. Whereas 25 years ago only about 5% of the total votes cast were cast away from the traditional election-day polling place, in 2000 that percentage had risen to 14%, and in 2004 to approximately 22%.⁹¹ In 2008, it appears that an unprecedented number – about 30% -- of voters cast their ballots before Election Day, either at early polling locations or by voting absentee away from a polling place.⁹²

The “demi-publicity” problem is not confined to public elections. In “card check” labor organizing campaigns, voters are asked to cast a vote in favor of union representation in frequently coercive situations. Moreover voting by corporate shareholders is not anonymous and susceptible of influence and coercion. Why is confidentiality not protected in these contexts? Should it be?

A. Absentee Voting

1. History

States possess great discretion in election administration, so the history of the absentee ballot, like the secret ballot, is a history of state politics. Vermont first extended an “absentee” vote to civilians in 1896.⁹³ Its law, however, required that the absent voter cast a vote on election day at a polling place in the state.⁹⁴ Kansas was the next state to provide absent voting, in 1901.⁹⁵ Five additional states joined the movement in 1913,

⁹⁰ See Charles B. Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusions in Political Affairs*, 47 MICH. L. REV. 180, 194-95 (1948) (noting secrecy requirement prevented reprisals against recalcitrant voters, and served a social interest rather than an individual interest).

⁹¹ FORTIER, *supra* note 58 at 19.

⁹² Michael McDonald, *The Return of the Voter: Voter Turnout in the 2008 Presidential Election*, 6 THE FORUM, Article 4 (2008) at 4. Some jurisdictions have seen absentee voting rates soar; in 2008 in Colorado almost 79% of the total vote case was cast early, with 80% of that early vote cast by mail-in absentee ballot. McDonald, (*Nearly*) *Final 2008 Early Voting Statistics*, updated Jan. 11, 2009, at <http://election.gmu.edu>. In Florida, early voting made up almost 52% of the total vote, and mailed-in absentees comprised 40% of that early vote. *Id.*

⁹³ HELEN M. ROCCA, A BRIEF DIGEST OF THE LAWS RELATING TO ABSENTEE VOTING AND REGISTRATION 5 (1928); BROOKS, *supra* note 54 at 452-53. Absent voting was first made available to soldiers in the Civil War, and also instituted during the Spanish-American War and World War 1. HARRIS, *supra* note **Error! Bookmark not defined.** at 283; Duncan Campbell Lee, *Absent Voting*, 16 J. SOC’Y OF COMP. LEGIS. 333, 334-37 (1916) .

⁹⁴ ROCCA, *supra* note 93 at 5.

⁹⁵ ROCCA, *supra* note 93 at 5, BROOKS, *supra* note 54 at 452.

and by 1928 all but three states had provided at some point for absent voting.⁹⁶ The vast majority of these laws allowed the voter to vote before election day, either by appearing in the registrar's office or before an officer qualified to administer an oath.⁹⁷ If the latter, once the voter has filled out his ballot in the officer's presence "in such manner that the secrecy of the ballot is preserved", sworn to his qualifications and reason for absence, the voter could return it to the election office by election day.⁹⁸ Commentators observed that so long as these laws ensured that ballots "would be voted under some public auspices and transmitted to the proper precincts protected from dishonesty and without violating the voters' confidence" that absent voting was little threat to the integrity of elections.⁹⁹

As voters needed to comply with a variety of prerequisites to vote absentee, few took advantage of absentee voting. In 1922, out of an electorate numbering 2,300,000 in New York City, 329 absentee votes were cast.¹⁰⁰ In 1928, notwithstanding that California had an absentee ballot law, a technicality forced President Herbert Hoover to travel to Palo Alto, California to cast his vote.¹⁰¹ Joseph Harris, writing in 1934, estimated that the absentee vote constituted less than one half of one percent of the votes cast.¹⁰²

Absentee voting had its detractors, and the wave of adoption was followed by a second wave of retrenchment. In 1914, the California voters rejected an absent voter's act by 244,855 to 390,337.¹⁰³ The *Los Angeles Times*, for one, editorialized against the initiative as "a dangerous experiment" that "opens the door for fraud upon the electorate."¹⁰⁴ New Jersey repealed its law as applied to civilians in 1926, as did Indiana

⁹⁶ ROCCA, *supra* note 93 at 5; FORTIER, *supra* note 58 at 10.

⁹⁷ BROOKS, *supra* note 54 at 453, ROCCA, *supra* note 93 at 6. States varied on the reasons a voter could give for needing an absentee ballot – as of 1928, when Rocca authored her study, 25 states required the voter be "unavoidably absent or necessarily absent without specifying a particular cause. Other states enumerated the kinds of absences that could qualify for absent voter privileges, such as illness, disability, or necessary business travel. *Id.* at 7.

⁹⁸ HARRIS, *supra* note **ERROR! BOOKMARK NOT DEFINED.** at 64, 90-91, 291.

⁹⁹ Victor J. West, *1921 Laws Respecting Elections*, 16 AM. POL. SCI. REV. 460, 464 (1922).

¹⁰⁰ EDWARD M. SAIT, AMERICAN PARTIES AND ELECTIONS 554 (1927). In 1928, the New York Board of Elections imposed a literacy test for first-time voters who expected to be absent on election day. *First Voters Face Tests*, N.Y. TIMES, July 26, 1928 at 4.

¹⁰¹ Philip Kinsley, *Hoover Forced to Travel 3,000 Miles to Vote*, CHI. DAILY TRIB, Aug. 17, 1928 at 4.

¹⁰² HARRIS, *supra* note **Error! Bookmark not defined.** at 293-94. Yet Harris observes that in Michigan, where the absentee law was significantly less burdensome, the absent vote was still miniscule. *Id.* at 296.

¹⁰³ John A. Lapp, *Absent Voting*, 10 AM. POL. SCI. REV. 114 (1916).

¹⁰⁴ *Every Voter Suppose to Be a Legislator*, LOS ANGELES TIMES, Oct. 4, 1914 at II2.

in 1927, after “serious complaints of fraud.”¹⁰⁵ The Supreme Court of Kentucky found its absent voter law unconstitutional in 1921, as inconsistent with the state’s constitutional requirement that “all elections by the people shall be by secret official ballot, furnished by the public authorities to the voters at the polls, and marked by each voter in private at the polls, and then there deposited.”¹⁰⁶ The Supreme Court of Pennsylvania held its law unconstitutional in 1925.¹⁰⁷

More recently, legislators have broadened the availability of absentee voting in many states by adopting “no excuses” absentee balloting. That is, a voter can apply for and vote an absentee ballot even if able to reach the polls on election day.¹⁰⁸ Not surprisingly, absentee voting increased in these states – California’s absentee turnout went from about 5% at the time its “no excuses” law was enacted, to over 30% in 2004.¹⁰⁹ California also adopted permanent absentee status in 2002, under which the state will send the voter an absentee ballot each election without the voter requesting a ballot each time. In 2005 21% of all registered California voters had permanent absentee status.¹¹⁰

Innovations like “no excuses” absentee voting and permanent absentee status, by broadening the base of voters voting outside the protection of the polls, would logically increase the availability of absentee ballots for fraud. But even in jurisdictions where these innovations have not been adopted, a culture of absentee fraud can flourish. With

¹⁰⁵ HARRIS, *supra* note **Error! Bookmark not defined.** at 283. New Jersey’s legislature repealed its absentee ballot law in 1926, in part because of the opportunity for fraud, but also because relatively few voters took advantage of it, and the state found it expensive to print numerous ballots to accommodate just a few voters. ROCCA, *supra* note 93 at 5, BROOKS, *supra* note 54 at 456.

¹⁰⁶ Clark v. Nash, 234 S.W. 1 (Ky 1921); HARRIS, *supra* note **Error! Bookmark not defined.** at 284. The Kentucky Court observed that the law has been passed as an emergency measure during World War I, and the legislature “overlooked this provision of the Constitution” of 1891. 234 S.W. at 2. The California Supreme Court, confronted with essentially the same question, ruled in 1983 that an election conducted by mail did not conflict with the state constitutional guarantee of a secret ballot. Peterson v. City of San Diego, 666 P.2d 975 (Cal. 1983). Justice Grodin, concurring, noted the potential for fraud and coercion when ballots were cast outside a polling place, but agreed that in context the specific law was constitutional. *Id.* at 980; *see also* Bridgeman v. McPherson, 45 Cal. Rptr.3d 813 (Cal. App. 2006) (law requiring overseas voter voting by fax to waive right to secret ballot did not violate California constitution secret ballot clause).

¹⁰⁷ BROOKS *supra* note 54 at 452; In re Contested Election in Fifth Ward of Lancaster City, 126 A. 199, 201 (1924) (requiring personal presentation of a ballot, disqualifying absentee ballots and changing result of city council election).

¹⁰⁸ FORTIER, *supra* note 58 at 13.

¹⁰⁹ *Id.* at 14.

¹¹⁰ *Id.* at 14.

the cooperation of a willing notary, for example, even the affidavit provisions of these stricter laws provide no guarantee against fraud.¹¹¹

2. Absentee Ballot fraud and Virginia's Fightin' Ninth

Aggressive absentee ballot tactics have been a perennial issue in southwest Virginia, particularly Virginia's Ninth Congressional District, and an examination of that jurisdiction provides a number of vivid examples of fraud.¹¹² One practice, known as "black satchelin" involved candidate and party workers visiting voters, often with that voter's absentee ballot already in hand, to mark the ballot and pay the voter.¹¹³ "The Black satchel brigade, consisting of the registrar, a notary public, an electoral board member, and a sack of applications and ballots, could effectively bring the entire election machinery to the homes of sympathetic voters. Even more egregious was the practice of voting dead or fictitious persons by absentee ballot."¹¹⁴

From before World War II through the 1960s, absentee ballot fraud in southwest Virginia was common practice, and it was not uncommon for 25 percent of the vote in such counties to be cast absentee.¹¹⁵ In a case involving Dickenson County returns in 1943, absentee ballots were cast in the name of people living in other states.¹¹⁶ In other precincts, 350 of 450 total registered voters voted absentee.¹¹⁷ In the 1953 election seven percent of the votes cast in the Ninth were by absentee, while the rate elsewhere in Virginia was about one percent.¹¹⁸ Tighter requirements passed the Legislature in 1954, but bribery and fraud in absentee votes continued in the Ninth District.¹¹⁹

¹¹¹ *Voter Fraud Charge Names New Yorkers*, N.Y. TIMES, Oct. 28, 1929 at 19. This was the case in Saratoga Springs, NY in 1929, when notaries favoring one candidate for Commissioner for Public Safety, including the candidate's brother, submitted fraudulent absentee ballot applications on behalf of voters registered elsewhere.

¹¹² J. HARVIE WILKINSON, HARRY BYRD AND THE CHANGING FACE OF VIRGINIA POLITICS 223-24 (1968).

¹¹³ Thomas Grubisich, *Absentee Ballot Fraud is a Living Tradition*, WASH. POST, Nov. 6, 1969 at F1.

¹¹⁴ FRANK B. ATKINSON, THE DYNAMIC DOMINION: REALIGNMENT AND THE RISE OF TWO-PARTY COMPETITION IN VIRGINIA, 1945-1980, at 14-15 (2006).

¹¹⁵ *Id.* at 14-15.

¹¹⁶ *Absent Voter Law to Get Test in VA*, WASH. POST, Oct. 25, 1954 at 24.

¹¹⁷ *Id.*

¹¹⁸ Benjamin Muse, *Sense of Guilt Has Flaked Off in Ninth*, WASH. POST, Dec. 12, 1954 at B2. The 4780 absentee ballots cast was nearly twice the number cast in the rest of the state. *Id.* 1952-54 was a high water mark in Virginia two-party competition and voter turnout. ATKINSON, *supra* note 114 at 78; WILKINSON, *supra* note 112 at 228-29.

¹¹⁹ *New Vote Probe Asked*, WASH. POST, Oct. 28, 1967 at D16. Voters were allegedly bribed to vote absentee with cash, food, whisky and coal. *Id.*

In 1968, a federal grand jury indicted ten conspirators for masterminding absentee ballot fraud in the November 1966 federal election.¹²⁰ Over the course of this investigation, putative voters, many poor and illiterate, testified that mail ballot workers had voted for them.¹²¹ Voter testified that a county deputy sheriff and notary had obtained absentee ballots in the voters' names, then visited their homes, where the ballot would be marked either by the voter or the notary, witnessed by the deputy, and notarized.¹²² One individual deputy witnessed 53 absentee ballot applications, and another codefendant witnessed 70 applications, received 21 ballots "in his care" and notarized 100 voted ballots.¹²³ In all, absentee ballots constituted 15.8 percent of the Lee County turnout in 1966.¹²⁴ In the wake of the convictions of seven conspirators for this fraud, in 1968 the absentee vote in Lee County dropped to 8 percent -- still remarkably robust.¹²⁵

In the wake of this prosecution, state reform groups advocated that state absentee ballots be restricted to the military, students, and the disabled.¹²⁶ In 1970, the Virginia legislature rewrote the state's absentee ballot law along the lines advocated by reformers.¹²⁷ The first election under the new restrictions saw a dramatic decrease in absentee votes cast, from 22,747 to 13,679 statewide.¹²⁸

More recently, absentee ballot fraud continues to appear in southwest Virginia. After Charles Dougherty won election as Gate City mayor by two votes in 2004,

¹²⁰ *Ten in Lee County Va, Charged in Vote Fraud*, WASH. POST, Jan 23, 1968 at C3.

¹²¹ *Forgery Charge Made in Va Vote Fraud Trial*, WASH. POST, June 5, 1968 at B3.

¹²² *United States v. Weston*, 417 F.2d 181, 184 (4th Cir. 1969).

¹²³ *Weston*, 417 U.S. at 185. On appeal, defendants noted that the trial court had admitted evidence of nonconforming voting customs in Lee County, relevant to the defendants' case as it indicated lack of criminal intent. Defendants further argued, unsuccessfully, that the Voting Rights Act prohibited them from departing from this "custom" absent the Attorney General's approval. *Id.* at 188.

¹²⁴ *Weston*, 417 U.S.W. at 184.

¹²⁵ 12 Election Judges Held in Fraud Case, *supra* note .

¹²⁶ *Proposals Made to End Vote Frauds*, WASH. POST, June 25, 1968 at B7. Still, in Page County, Virginia, 2,300 of 7,300 total votes cast in the 1968 Presidential election were absentee. Hank Buchard, *Feeble, Illiterate and Young Vote in State's Absentee Ballot Capital*, WASH. POST, Aug. 19, 1969 at C1. This report noted that "any feeble, illiterate, uncertain or otherwise handicapped citizen will find that there are two or three gentlemen who are more than willing, even eager, to help them obtain and mark ballots.

¹²⁷ Maurine McMaughlin, *Absentee Vote Amendments Approved by Virginia House*, WASH. POST, Mar. 14, 1970 at B1; Helen Dewar, *New Virginia Laws Purify the Election Process*, WASH. POST, Dec. 2, 1970 at B2. Oddly, perhaps, the Washington Post editorialized against the reform, asking rhetorically what the state could be afraid of. *Restricting the Ballot in Virginia*, WASH. POST, Mar. 12, 1970 at A18.

¹²⁸ *Absentee Voting Declines Under Tighter Virginia Law*, WASH. POST, Dec. 12, 1971 at 38. In Lee County, the reduction was from 1833 to 345, in Dickenson from 1074 to 150, as compared to the comparable election four years before. *Id.*

opponent Mark Jenkins supporters complained of irregularities committed by the Scott County voter registrar.¹²⁹ Attention soon focused in the absentee vote, since 158 of the 712 votes cast for mayor were absentee, with Dougherty receiving 87 percent of those votes.¹³⁰ In the subsequent investigation, voters testified that they were led to vote in-person absentee by local candidates and instructed how to vote.¹³¹ In tactics reminiscent of the black satchel practices of 20 years before, Dougherty approached voters, often at their homes with absentee ballot applications in hand, then later helped them vote their absentee ballots at the registrar's office.¹³² Over a year after the election, Dougherty was indicted on 37 counts of absentee voter fraud, and eventually convicted of 29 of those counts.¹³³

In adjacent Wise County, Virginia, the 2004 election for Appalachia town council where roughly 20 percent of the votes cast were cast absentee, a criminal investigation led to 244 charges against mayor Ben Cooper for election fraud.¹³⁴ Cooper pled guilty to 233 counts, and was sentenced to 2 years in prison.

Absentee fraud using these techniques is by no means unique to southwest Virginia.¹³⁵ In a 1982 Oklahoma prosecution of absentee voter fraud, that judge justified

¹²⁹ Rex Bowman, *Election Board Looks into Disputed Gate City Vote*, RICHMOND TIMES-DISPATCH, June 18, 2004 at B3. Both candidates were Republicans. The county registrar, Willie Kilgore, is parent to then-attorney general Jerry Kilgore.

¹³⁰ *Small-town Election, Big Time Trouble: Southwest Virginia's Voting Scandal*, ROANOKE TIMES, Feb. 20, 2005 at A1. By contrast, after the scandal broke, in the 2006 town election only 20 voted by absentee. Laurence Hammack, *Fraud Case Puts Skids on Absentees*, ROANOKE TIMES, May 4, 2006 at B1.

¹³¹ *Id.*, see also *Kilgore Brings Up Absentee Voting*, ROANOKE TIMES, May 8, 2005.

¹³² Laurence Hammack, *Witness Says She Got "Help" with Vote*, ROANOKE TIMES, July 21, 2006 at B1.

¹³³ Michael Shear, *Former Mayor is Indicted In Kilgore's Home Town*, WASH. POST, Aug. 3, 2005 at B8; Clifford Jeffery, *Former Gate City Mayor Convicted of Voter Fraud*, RICHMOND TIMES, Dec. 12, 2006. Dougherty was acquitted of two counts, despite witness testimony that he paid for absentee votes with cigarettes and money. *Former Gate City Mayor acquitted; Ex-official not guilty of conspiracy regarding Gate City's 2004 Election*, RICHMOND TIMES-DISPATCH, Feb. 22, 2006 at A1.

¹³⁴ *Absentee Ballot to be Tested, for DNA*, RICHMOND TIMES-DISPATCH, Jan 20, 2006 at B2; *Appalachia Mayor Arrested*, ROANOKE TIMES, May 13, 2006 at B1. The charges included stealing absentee ballots and buying absentee votes with beer, cigarettes, and pork rinds. *Id.*

¹³⁵ Similar absentee frauds have been investigated in Arkansas, see Ronald Smothers, *Blacks Say GOP Ballot Challenges are Tactic to Harass Minority Voters*, N.Y. TIMES, Oct. 25, 1992 at 20; California, see *Hardeman v. Thomas*, 256 Cal. Rptr. 158 (Cal. App. 1989); *Gooch v. Hendrix*, 851 P.2d 1321 (Cal. 1993); Missouri, see *United States v. Townsley*, 843 F.2d 1071 (8th Cir. 1988) (arranging for campaign workers to become notaries, marking collected absentee ballots, assaulting opposing campaign workers); New York, see Matthew Purdy, *5 Bronx School Officials Indicted in Absentee*

accepting a no context plea because “it’s been kind of difficult to put someone in the pokey for this since it has been going on for so long.”¹³⁶ To the extent the public is interested in reforming absentee balloting, ironically that popular pressure in Virginia (and elsewhere) favors *relaxing* absentee ballot standards. The Virginia senate in 2009 passed “no-excuses” absentee voting.¹³⁷ To the extent absentee voting is seen as needing reform, most of the attention is on the error rates of absentee voting, and counsel that easier standards will result in fewer spoiled or rejected absentee votes.¹³⁸ Meanwhile, in

Ballot Fraud, N.Y. TIMES, Apr. 25, 1996 at B1 (coercing elderly and homeless to apply for absentee ballots and voting for them); Jane Perlez, *School Board 2 Focus of Battle In a Bitter Vote*, N.Y. TIMES, June 26, 1986, at B3 (disputing 60 absentee ballots solicited from nursing homes by winning candidate); Pennsylvania, see Michael deCourcy Hinds, *Hearing Opens Into Accusations of Fraud in Pennsylvania Election*, N.Y. TIMES, Feb. 8, 1994 at B7 (winning state senate seat with 80 percent of absentee ballots case); Marks v. Stinson, 1994 WL 146113 (E.D. Pa. Apr. 26, 1994 (not reported) detailing partisan absentee ballot drive, including \$1 per vote bounty); South Carolina, see *United States v. Carmichael*, 685 F.2d 903, 906-07 (4th Cir. 1982) (paying \$10 per absentee ballot bounty, \$5 of which went to voter); Florida, see *5,000 Absentee Ballots are seized in Miami Fraud Inquiry*, N.Y. TIMES, Nov. 12, 1997 at A20; Mireya Navarro, *Florida Jury Urges Absentee Voting Overhaul*, N.Y. TIMES, Feb. 3, 1998 at A10; *18 Are Arrested in 1997 Miami Ballot Fraud*, N.Y. TIMES, Oct. 29, 1998 at A16; Michael Moss, *GOP’s Help for Absentees In a County Is in Court, Too*, N.Y. TIMES, Nov. 18, 2000 at A1 (questioning absentee ballots “corrected” by campaign aides); and elsewhere, see Michael Moss, *Absentee Votes Worry Officials as Nov. 2 Nears*, N.Y. TIMES, Sept. 13, 2004 at A1; *People v. DeGanutti*, 810 N.E. 2d 191 (Ill. App. 2004) (prosecuting campaign workers for filling in, submitting and monitoring the voting of absentee ballots in March 2000 Republican primary).

¹³⁶ *Oklahoma Speaker Tried in Vote Fraud Case*, N.Y. TIMES, Aug. 14, 1982 at 23. Unlike Virginia, Oklahoma has adopted no excuses absentee voting. Compare Ok. Stat. § 26-14-115 with Va. Code 24.2-700.

¹³⁷ *Two Absentee Voting Bills Approved in Virginia Senate*, Hamptonroads.com (date). No excuses absentee voting is the rule in most states, but this is a relatively recent development. See Daniel Tokaji & Ruth Colker, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, 38 MCGEORGE L. REV. 1015, 1021 (2007); Early Voting Information Center, Summary table, at <http://earlyvoting.net/states/abslaws.php>.

This author’s experience has been that the Virginia requirement that voters provide one of a list of reasons for voting absentee is largely perfunctory and construed liberally to allow voters to vote absentee. See also Obama/Biden email, Sept. 29, 2008, on file with author (soliciting absentee votes in Virginia, misstating the Virginia absentee voting restrictions).

¹³⁸ Bob von Sternberg, *Minn Race Spotlights National Problem; Difficulties With Absentee Voting “are the new Hanging Chad” Expert Says*, WASH POST, Dec. 21, 2008 at A3.

the 2008 election 13.5% of the Virginia vote was cast either by absentee or early in-person voting.¹³⁹

Many of the frauds perpetuated in Southwest Virginia relied upon corrupt officials as much as foul play by candidates, activists, or others who were not election officials. Many involved voters willing to sell their vote. Better (or different) laws could do only so much when officials, candidates and voters are willing to enter a corrupt deal. But many other modern absentee voting scandals depend not on a corrupt insider, but porous rules and lax supervision. We turn to one major example of this now.

3. Absentee Voting and the Elderly/Disabled

Many frauds are also perpetuated in situations where the voter is an innocent victim. While some changes to existing absentee procedures could increase integrity somewhat, when balanced against the cost of these reforms, the more practical approach would be to offer early in-person voting in controlled environments rather than continuing to allow the private distribution and collection of ballots.

Elderly and disabled individuals who live in institutions or other long-term care facilities face a number of challenges in voting. They live day to day under the control of staff, such as a social worker or activities director, who are thus able to control whether they may vote at all.¹⁴⁰ Residents may be impaired, but yet only able to vote with the “assistance” of staffers or outside visitors, such as political workers.¹⁴¹ Noted Dr. Jason Karlawish in testimony before the Senate, “Most residents need some assistance with absentee voting and typically a single staff member provided this assistance.”¹⁴² Or residents who desire to vote may be denied access to voting at the subjective call of institutional staff, perhaps because of staffing shortages or logistical problems.¹⁴³ In

¹³⁹ Dr. Michael McDonald, United States Elections Project, (Nearly) Final 2008 Early Voting Statistics, updated Jan. 11, 2009, available at http://elections.gmu.edu/Early_Voting_2008_Final.html.

¹⁴⁰ Dr. Jason Karlawish, Testimony for Senate Special Committee on Aging, Jan. 31, 2008; *see also* Karlawish, et al, *Identifying the Barriers and Challenges to Voting by Residents in Nursing Homes*, 20 J. AGING & SOC. POL. 65, 70-73 (2008).

¹⁴¹ *See* Gramlich v. Cottrell, 499 A.2d 275 (N.J. Super. 1985) (involving a candidate giving assistance to voters in nursing home, finding invalid 18 ballots).

¹⁴² Karlawish Testimony, *supra* note 140 at 4.

¹⁴³ Karlawish, et al, *Identifying the Barriers supra* note 140 at 70. Indiana has enacted a “Nurse Ratchet Law” that forbids staff from interfering in a voting board’s visit to a voter, so long as the time is agreed to by the voter and the board and is during regular business hours. Indiana Code 3-11-10-25(c); 3-14-3-4.

One fundamental logistical issue is whether the voter may vote in the precinct where the institution is located, or whether instead the resident is still technically a domiciliary of their previous home. It may be hard for a resident to admit that they are

states with stricter rules on absentee voting – as in Pennsylvania, which does not allow for delivery of absentee ballots by third parties -- exceptions have been crafted for disabled voters.¹⁴⁴

In these settings, some advocates for elderly voting urge jurisdictions to implement mobile voting.¹⁴⁵ Under these proposals, trained election workers would visit institutions once to register residents, and then at election time to have them vote.¹⁴⁶ Wisconsin operates such a program, by which special voting deputies deliver absentee ballots to these institutions, accompanied by party observers if the parties choose to send them.¹⁴⁷ These special deputies distribute the absentee ballots and are the only individuals (other than a relative who may be present) permitted to assist these voters in voting.¹⁴⁸ In Multnomah County, Oregon, a special 32-member Voter Assistance Team provided off-site assistance to voters with disabilities or special needs both in care facilities in the 2006 election.¹⁴⁹ These efforts began in late October and ended the Friday before the election. The 2006 effort assisted 548 voters in all, but at a cost of \$69.87 per voter, compared with the \$2.08 per voter cost for regular voters in the November 2006 Multnomah County election.¹⁵⁰ These costs would vary depending on the design of the program; for instance a Vermont pilot project offering mobile polling to residents of long-term care facilities took advantage of the generous help of volunteers, used paper ballots, and thus minimized costs.¹⁵¹ Vermont's example may not be a useful model for other jurisdictions where the expected political biases of volunteers would create their own dangers.

These teams may be a better means for assisting and collection ballots from voters in residential care than partisan teams would be, but their integrity rests upon the honesty

not returning to their former home, and in many jurisdictions it is that voter's intent that dictates domicile. *See, e.g.,* Ind. Code 23-5-2-42.5; 3-5-5.

¹⁴⁴ In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election, 843 A.2d 1223 (Pa. 2004),

¹⁴⁵ Karlawish Testimony, *supra* note 140 at 7; *see also* Tokaji & Colker, *supra* note 137 at 1042-43.

¹⁴⁶ Susan Stranahan, *Mobile Polling, For those Who Simply Can't get to a Voting Booth*, AARP BULLETIN, July 14, 2008. As noted above, this alternative may not be as useful for those voters who have yet to establish the facility as their domicile.

¹⁴⁷ Wisconsin State Election Board, *Absentee Voting in Nursing Homes, Qualified Retirement Homes and Community-Based Residential Facilities* (April, 2007) at 4; *see generally* Wis. Stat § 6.875, *see also* Fla. Stat. § 101.655 (“Supervised voting by absent electors in certain facilities”).

¹⁴⁸ *Absentee Voting In Nursing Homes*, *supra* note 147 at 4-5.

¹⁴⁹ Multnomah County Voter Assistance Team Report on the Nov. 7, 2006 General Election, submitted by Mary Schultz, Assistant Director of Elections, Feb. 28, 2007, at 3, 9 (on file with author.)

¹⁵⁰ *Id.* at 3.

¹⁵¹ Email to author from Vermont Secretary of State Deborah Markowitz, March 5, 2009.

of the individual employees. It is not unheard of for such teams to harbor their own partisans. In 2004, a Board of Elections employee sent to assist infirm voters to vote at a nursing home was prosecuted for marking their ballots contrary to their stated preferences.¹⁵²

Others advocate that these voters be allowed to claim “permanent absentee” status. Thus the elderly or disabled voter’s registration would be permanent, and he or she would regularly receive automatically absentee voting materials.¹⁵³ The voter would be saved from apply for an absentee ballot for each election.¹⁵⁴ Yet one can imagine that access to such voters’ mailings could prove a fruitful resource for intermediaries interesting in voting these ballots themselves.¹⁵⁵

Similar issues confront patients in veteran’s hospitals. Although a smaller fraction of these voters may present cognitive challenges, they are still in large measure not physically capable of voting on their own and require the help of their institutional staff. The controversy surrounding voter registration activities in VA hospitals in 2008 overlooked this issue.¹⁵⁶ That oversight is unfortunate. It would make little sense to secure the ability to register veterans to vote if they could not subsequently obtain and vote a ballot.

Under revised VA standards, pre-approved nonpartisan volunteers and personnel may now assist hospital patients to register, apply for an absentee ballot, and mark that ballot.¹⁵⁷ These individuals may not discuss politics, even if prompted by the patient, may not wear political insignia, or direct patients to a partisan registration effort. Time

¹⁵² State v. Jackson, 811 N.E.2d 68 (Ohio 2004).

¹⁵³ See Jessica A. Fay, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 134 ELDER L.J. 453, 473-74 (2006) (summarizing argument).

¹⁵⁴ Permanent absentee status is popular with voters. See Mark DiCamillo, *The Continuing Growth of Mail Ballot Voting in California in 2008*, 1 CAL. J. OF POL. AND POL’Y 1 (2009) (reporting that since introduction in 2002, about a third of all California registered voters are permanent absentee ballot recipients).

¹⁵⁵ See, e.g., *Seven Indicted in Chicago on Vote Fraud Charges*, WALL. ST. J., Apr. 8, 1983 at 25 (scheme involving filling out absentee ballot applications for nursing home residents, dead people, casting ballots in their names). But see Tokaji & Colker, *supra* note 137 at 1037. Tokaji and Colker correctly identify confusing absentee ballot application materials as a burden on these voters, and advocate permanent absentee status instead. This author prefers simplifying that process, rather than creating what she believes is a uniquely tempting tool for fraudulent voting.

¹⁵⁶ See, e.g. Dennis Cammire, *VA Should Allow Voter Drives at its Hospitals*, *Senators Urge*, USA TODAY, July 10, 2008.

¹⁵⁷ See Department of Veterans Affairs, *Voting Assistance for VA Patients*, VHA Directive 2008-053, Sept. 8, 2008, Department of Veterans Affairs, Political Activities Fact Sheet and Certification, at <https://www.va.gov/vaforms/medical/pdf/vha-10-0462-fill-9-08.pdf>; Department of Veterans Affairs, *News Release: VAS Certifies Voter Registration Regulations*, Sept. 8, 2008.

will tell if this system is adequate. If it proves successful, and if the expense of mobile polling programs for elderly or disabled voters residing in institutions proves too expensive, it may make sense for registrars to explore an option similar to this one.

4. Error rates

Finally, apart from the potential for coercion, bribery and other forms of undue influence on the voter, even in the best circumstances voters make mistakes. A voter may fail to register a proper vote for an office, yielding an “undervote” or vote for too many candidates for the same office, yielding an “overvote.” Given the variety of ballot designs and the potential that a jurisdiction’s design might confuse voters, one would prefer a voting system that permitted the voter to correct mistakes. Absentee balloting cannot offer a means to verify that a valid ballot has been cast, without exposing the voter’s secret ballot.¹⁵⁸ Voting in a polling place, using equipment that will reaffirm a voter’s vote before the voter casts it, or at least reject an overvote, gives a voter some opportunity to revise a mismarked ballot.¹⁵⁹

On the other hand, voting absentee provides the voter time to think about the vote, deliberate, and become educated on down-ticket candidates and issues. To the extent absentee voters tend to be better educated and older than election day voters, they may also be more proficient at voting.¹⁶⁰ So, absentee voting might show a reduced “residual” rate, that is, the casting of an invalid vote or failing to vote on an item.

¹⁵⁸ See Eva Galanes-Rosenbaum, *Convenience Voting*, in PEW CENTER ON THE STATES, DATA ON DEMOCRACY (Dec. 2008) at 35. Defendants charged with illegal voting for absentee voters may justify their acts by arguing, as one did, that “the ballots contained too much ‘mumbo jumbo’ for these ‘old timers.’” *Qualkinbush v. Skubisz*, 826 N.E. 2d 1181, 1188 (Ill. App. 2005).

¹⁵⁹ See Stephen Knack and Martha Kropf, *Voided Ballots in the 1996 Presidential Election: A County-Level Analysis*, 65 J. OF POL. 881, 891 (2003) (finding that racial disparity in voided ballots disappeared when voters used technology that rejected overvotes); Michael Tomz and Robert Van Houweling, *How Does Voting Equipment Affect the Racial Gap in Voided Ballots?* 47 AM. J. OF POL. SCI. 46, 59 (2003); PAUL S. HERNNSON, ET AL, VOTING TECHNOLOGY: THE NOT SO SIMPLE ACT OF CASTING A BALLOT, 72 (2008) (listing factors that lead to inaccurate voting). Hernnson also finds that voter verification technology does not improve the accuracy of votes cast as one might expect, in part because voters do not check the paper record. *Id.* at 122-136.

¹⁶⁰ David C. Kimball, *Advanced Voting and Residual Votes*, *Paper presented at the annual meeting of the APSA 2008 Annual Meeting*, Aug 28, 2008, at 8; available at http://www.allacademic.com/meta/p279962_index.html ; see also HERNNSON *supra* note 159, at 100-105 (2008) (presenting findings regarding demographics and ability to cast accurate vote); R. MICHAEL ALVAREZ & THAD HALL, ELECTRONIC ELECTIONS 107-09 (2008) (arguing that electronic voting compares favorably to paper balloting among groups with highest residual vote rates).

The evidence shows that the problem of the miscast or “residual” absentee ballot is real and substantial. Residual vote rates for absentee voters tend to be higher than for early voting or election day voting at the polls.¹⁶¹ In some jurisdictions the differences are striking. In California, for instance, the residual rate in the 2004 election was 1.0% for polling place voting, and 1.3% for absentee voting (out of 4,108,088 absentee ballots counted); in Virginia 0.7% for polling place voting versus 1.1% for absentee voting (of 221,890 absentee ballots counted), and in North Carolina 2.2% versus 4.6% (of 122,984 absentee ballots counted).¹⁶² While some residual undervotes, may be deliberate, the fact that residual voting is also strongly related to ballot design suggests that voter confusion is a significant factor.¹⁶³

Voters may also make mistakes in following the procedures to cast a valid absentee ballot. Improperly signed or sealed absentee ballot envelopes will be rejected.¹⁶⁴ To be sure, absentee ballots are also rejected for other reasons - when they are returned as undeliverable, are replaced with another ballot, or are cast by a voter who is ineligible or deceased. In 2006, an estimated 347,000 mailed absentee ballots were rejected for all such reasons, with about 25,690 of these rejected because of no signature, and 2,993 because the voter used the incorrect envelope.¹⁶⁵

The statistics for military absentee voting are worse; in the 2006 general election, 992,034 ballots were requested through the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”) out of roughly 6 million eligible voters.¹⁶⁶ Voters cast about 333,000 UOCAVA ballots, for a turnout of about one-third.¹⁶⁷ For the 48,628 rejected ballots for which jurisdictions recorded reasons, the most common reason was, not

¹⁶¹ Kimball, *supra* note 160 at 15; *see also* NONPROFIT VOTER ENGAGEMENT NETWORK, AMERICA GOES TO THE POLLS: A REPORT ON VOTER TURNOUT IN THE 2008 ELECTION 15 (2009) (noting impact on turnout of rejected mailed ballots).

¹⁶² Kimball, *supra* note 160 at 35 (Table 3); Election Assistance Commission, Election Day Survey 2004, Ch. 5, Table 1 (2005). The residual rates for votes on ballot measures are substantially higher.

¹⁶³ Kimball, *supra* note 160 at 19. Residual vote rates are lower when ballots feature the option of voting a straight party ticket, which reduces confusion, and when properly marked, prevents overvoting and undervoting, by automatically voting the party’s candidate in each partisan race. *Id.*

¹⁶⁴ McDonald, *supra* note 92 at 5.

¹⁶⁵ Election Assistance Commission 2006 Election Day Survey 16 (2007). The rejected rates vary by jurisdiction: in California 4.1% of civilian ballots received were rejected, in Virginia .7% and in North Carolina 9.1%. *Id.* at 49 (Table 30b).

¹⁶⁶ Election Assistance Commission, 2006 UOCAVA Survey (2007) at 9. This number includes ballots sent automatically under UOCAVA and those requested by individuals. *Id.*

¹⁶⁷ *Id.* at 10. Since jurisdictions do not comply the data consistently, it is not possible to extract how many UOCAVA ballots were rejected as a fraction of the ballots cast. *See id.* at 9-10.

surprisingly given the mobility of our armed forces, that the ballot had been returned undeliverable.¹⁶⁸ Other reasons included untimely delivery to the election administrator, which is a substantial issue for UOCAVA voters and largely beyond the voter's control¹⁶⁹, missing signatures, missing dates, and missing date on the witness's signature. Deficiencies that reflect voter mistakes, like failing to use the correct envelope or sign the outside, should be included with the residual vote data to gain a complete picture of the error rate in absentee voting.

While the percentages of rejected ballots are low overall, in close contests these votes become a flashpoint for contention. Rejected absentee ballots were a major point of dispute between Minnesota Senator Norm Coleman and his 2008 challenger, Al Franken. On Election Day Minnesota officials rejected 12,000 absentee ballots (out of 300,000 cast).¹⁷⁰ According to Coleman, these ballots were cast in substantial compliance with state requirements and in good faith; while Franken argued that deficiencies rendered them invalid.¹⁷¹

The important point is this: that although absentee voters as a group would appear better prepared to vote, given their demographics, absentee ballots have more mistakes on them. Something about voting away from the polls affects a voter's ability to cast a valid ballot. That "something" may be as simple as having a checking device at the polling place to reject overvotes and ballots with illegible marks. This would seem to be a persistent deficiency in absentee voting not readily capable of remedy.

5. Effect on turnout

Even with the issues of fraud, coercion, and error, absentee voting is convenient. Busy voters can set aside time to vote, and need not worry about work schedules, child care, long waits in line, and the other burdens of voting in a polling place. That being the case, one would expect that as absentee voting is made more available, turnout would improve. Those individuals who were kept away from the polls before would now be voting. Voting by mail or voting absentee seems to improve turnout among socioeconomic groups that are already most likely to vote and in the kinds of elections where turnout is typically low.¹⁷² But "convenience alone will not do much to increase

¹⁶⁸ *Id.* at Table 25a.

¹⁶⁹ See Pew Center on the States, *No Time to Vote: Challenges Facing America's Overseas Military Voters* (Jan. 2009); Overseas Voter Foundation, *2008 OVF Post Election UOCAVA Survey Report and Analysis* (Feb. 2008) at 20 (52% of respondents who did not return UOCAVA ballot cite late receipt as reason).

¹⁷⁰ In re Contest of General Election Held on November 4, 2008, 767 N.W. 2d 453 (2009).

¹⁷¹ *Id.* at 459-60. The Minnesota Supreme Court rejected Coleman's argument. *Id.* at 461.

¹⁷² Adam J. Berinsky, et al., *Who Votes by Mail? A Dynamic Model of the Individual-Level Consequences of Voting By Mail Systems*, 65 PUB. OP. Q. 178 (2001) (concluding that vote by mail mobilized voters already predisposed to vote); Jeffrey A.

the participation rates among groups who are either uninterested or alienated from the political process and therefore do not vote.”¹⁷³

The infirm and disabled are an exception to this general rule. These voters rely heavily on absentee ballots, are comparatively less likely to vote in person, but more likely to vote absentee.¹⁷⁴ The modern loosening of absentee rules has made voting more realistic for these voters, although turnout among them remains low.¹⁷⁵ Additional convenience can also only do so much to interest people in politics who are ailing, or possibly facing grave personal crises.

Karp and Susan A. Banducci, *Going Postal: How all Mail Elections Influence Turnout*, 22 POLITICAL BEHAVIOR 223, 233 (2000) (studying turnout effects of Oregon’s vote by mail system); David C. Kimball, *Advanced Voting and Residual Votes*, *Paper presented at the APSA 2008 Annual Meeting*, Aug 28, 2008, at 5; available at http://www.allacademic.com/meta/p279962_index.html (summarizing studies).

¹⁷³ Karp and Banducci, *supra* note 172 at 233.

¹⁷⁴ Tokaji & Colker, *supra* note 137 at 1024.

¹⁷⁵ *Id.* at 1031 (citing sources).

B. Card Check and “Employee Free Choice”

The National Labor Relations Act, like the weather, has been something about which seemingly everybody complains but no one can fix.¹⁷⁶ As union memberships shrink, one of the key points of contention has been how an employer (or the National Labor Relations Board) should measure worker support for a particular union.¹⁷⁷ Traditionally, lawmakers have drawn analogies between union organization as “workplace democracy” and political elections.¹⁷⁸

A union can become the recognized agent for collective bargaining in one of three ways. It may be selected by a majority of the unit’s employees in an NLRB-conducted election.¹⁷⁹ Or the employer may agree to recognize the union once a majority of its workers have signed authorization cards.¹⁸⁰ Finally, the NLRB may order a union be recognized if a majority of workers have signed authorization cards and the employer has engaged in practices that make a fair election unlikely.¹⁸¹ Accordingly, in situations where there is a “question of representation” – typically because a union claims to be the designated representative of a set of employees and the employer disputes that claim – the Act requires the Board to direct an election by secret ballot.¹⁸²

¹⁷⁶ National Labor Relations Act of 1935, 29 U.S.C. §§151-69. The act is intended to protect worker’s rights to organize and bargain collectively with employers. Both labor organizations and employers complain about various provisions of the Act

¹⁷⁷ 29 U.S.C. § 159(a); Arlen Specter and Eric Nguyen, *Representation Without Intimidation: Securing Workers’ Right to Choose Under the National Labor Relations Act*, 45 HARV. J. OF LEGIS. 311, 315 (2008); James J. Brudney, *Neutrality Agreements and Card-check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2004); Matthew Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1 (2008).

¹⁷⁸ Bodie, *supra* note 177 at 15-17; *see also* Thomas v. Collins, 323 U.S. 516, 546 (1945) (Jackson, J., concurring).

¹⁷⁹ Elections can also be conducted, by consent of the employer and the union, by another third party, such as an arbitrator. Gerald Mayer, *Labor Union Certification Procedures: Use of Secret Ballots and Card Checks*, Congressional Research Service, April 16, 2009 at 9.

¹⁸⁰ Again, the union and the employer can negotiate their own card check agreement, which may require a supermajority of employees to sign cards. Mayer, *supra* note 179 at 12, Adrienne E. Eaton & Jill Kriesky, *NLRB Elections versus Card Check Campaigns: Results of a Worker Survey*, 62 Indus. & Lab. Rel Rev. 157, 158 (2009).

¹⁸¹ Mayer, *supra* note 179 at 8.

¹⁸² 29 U.S.C. §159 (c). The ballot may ask employees to support or oppose one union, or to choose among unions as well as whether to be represented at all. *See* Mayer, *supra* note 179, at 9.

Labor organizations complain that this system is unduly burdensome, in that employers presented with authorization cards from a majority of the relevant unit's employees must see that the union has employee support and should be recognized as the collective bargaining unit for the employees. As the law stands now, however, even if the union presents authorization cards from a supermajority of employees, the employer may still insist upon an election.¹⁸³ During the period before the election, unions complain that employers can inundate their employees with anti-union information, intimidate employees, threaten retaliation, bribe employees, and otherwise coerce the employees' judgment, reducing if not eliminating the chances the election will favor the union.¹⁸⁴

Voting at a Certification-Election Day resembles voting at public polls in many respects. Employees present themselves to monitors, who once satisfied with the voter's bona fides, provide a ballot, and direct the voter to a booth.¹⁸⁵ After the voter marked the ballot, a worker under the scrutiny of an NLRB agent deposits the ballot into a ballot box.¹⁸⁶ Election contests are heard by the NLRB. Notably, of the 102 representation election cases closed by the NLRB in February 2009, unions won 68.¹⁸⁷

Authorization "card check" campaigns resemble absentee balloting in some respects. Individuals supporting the union solicit signatures from employees one-on-one, often at home and away from observation by others.¹⁸⁸ The encounters can be unpleasant. Solicitors have threatened workers, or misrepresented the effect of signing the card to obtain signatures.¹⁸⁹ Union organizers may forge authorization cards.¹⁹⁰ Workers may be offered gifts and other inducements by unions and employers to sway their opinions,

¹⁸³ 29 U.S.C. § 159(c).

¹⁸⁴ See Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, Economic Policy Institute Briefing Paper #235, May 20, 2009, at 4-5; *NLRB v. St. Francis Healthcare*, 212 F.3d 945 (6th Cir. 2000) (discussing standard for determining if employer has "threatened" employees); Eaton & Kriesky, *supra* note 180, at 158 (summarizing studies).

¹⁸⁵ See *Newport News Shipbuilding and Dry Dock Company*, 243 NLRB 99, 101-02 (June 26, 1979) (describing voting procedures).

¹⁸⁶ *Id.*

¹⁸⁷ NLRB Election Report, Cases closed February 2009, Summary Table 1: Outcome of Collective Bargaining Elections (Mar. 11, 2009) at 11

¹⁸⁸ See *Strengthening America's Middle Class Through the Employee Free Choice Act: Hearing Before the Subcom. On Health, Employment and Labor*, 110th Cong. 5 -7 (2007).

¹⁸⁹ *Id.*, see also Specter, *supra* note 177 at 320-21; *Brookland, Inc.*, 221 NLRB 35 (1975); *Planned Bldg. Servs* 318 NLRB 1049 (1995). The NLRB at present does not scrutinize campaign material or representations for inaccuracy. See *Midland National Life Ins. Co.*, 263 NLRB 127, 132 (1982).

¹⁹⁰ See *Perdue Farms*, 328 NLRB 909, 911 n. 13 (1999) (quoting from NLRB Casehandling Manual Procedures on Investigating Forgeries).

or individuals may sign just to bring the transaction to a prompt and pleasant conclusion.¹⁹¹ “In the context of a union organizing drive, peer pressure from fellow workers and from the union to sign union membership cards may make it difficult for an employee to express genuine feelings about the union.”¹⁹² As in political elections, bribing voters is not permitted, but conflicting NLRB interpretations have made the standard here murky.¹⁹³ Similarly, supervisors may call organizers aside, and counsel them against engaging in this protected activity, unlawfully threaten them with dire consequences, or promise advantages if the employee ceases their activities.¹⁹⁴

At present, the closest analogy in politics to a card check effort is a petition drive, as in both sufficient signatures merely trigger an election by secret ballot on a question.¹⁹⁵ But under proposed revisions titled the “Employee Free Choice Act” (EFCA) a card check effort that obtained a bare (absolute) majority of the unit’s workers signatures would bring all relevant workers, whether or not they like it, under the collective bargaining representation of the union with no separate election.¹⁹⁶ At present, the employer, although not capable logistically to argue against the union’s efforts during the card check drive, has the opportunity to reach workers with its perspective during the campaign before the election.¹⁹⁷ Under the proposed revisions to federal labor law, this

¹⁹¹ See Sarah A. Reid, *Smithfield: Union Vote Leaves others Unfazed*, FAYETTE OBSERVER, Dec. 21, 2008.

¹⁹² Susan Johnson, *Card Check or Mandatory Representation Vote? How the Type of Union Recognition Procedure Affects Union Certification Success*, 112 ECON. J. 344, 350 (2002) (noting that mandatory voting systems reduce recognition rates by about 9 percent); see also Chris Riddell, *Union Certification Success under Voting versus Card-check Procedures: Evidence from British Columbia 1978-1998*, 57 INDUS. & LAB. REL. REV. 493, 509 (2004) (concluding that shift from card-check to voting reduced union certification by 19%).

¹⁹³ Bodie, *supra* note 177 at 12-13; see also NLRB v Shrader’s, 928 F.2d 194 (6th Cir. 1991) (gifts of hats and shirts); NLRB v. Labor Servs. 721 F.2d 13 (1st Cir. 1983) (alcoholic drinks); NLRB v. Savair Mfg. 414 U.S. 270 (1973) (waiver of initiation fee for signers only).

¹⁹⁴ See e.g. *Impressive Textiles*, 317 NLRB 8 (April 25, 1995) (threats of termination for advocating vote for union recognition); *Cox Fire Protection*, 308 NLRB 793 (Sept. 15, 1992) (threat against employee for filing unfair labor practice charge)

¹⁹⁵ The union needs 30% of the unit’s employees signatures to obtain an election, but as a matter of practice unions only proceed when they have in hand over 50%, because experience shows that employees defect from the union’s cause once the campaign is under way. Richard Epstein, *The Case Against the Employee Free Choice Act*, Working Paper 452 (January 2009) at 9. Thus under the EFCA card check drives would likely replace elections. *Id.*

¹⁹⁶ H.R. 1409 111th Cong. 1st Sess. (introduced Mar. 10, 2009). One author calls the EFCA “the most transformative piece of labor legislation” since the NLRA of 1935. Richard Epstein, *supra* note 195 at 7.

¹⁹⁷ Brudney, *supra* note 177 at 832. Employers may also enter neutrality agreements with unions, consenting to recognize the union based on the card-check effort only. See

opportunity disappears. Thus, if revised, a card check authorization effort would be analogous to a one-sided petition drive with the power, alone, to amend existing law.¹⁹⁸ To be sure, this change in the law would prevent supervisors and employers agents from threatening, coercing or bribing employees not to support the union, but one wonders whether the appropriate remedy for these unfair labor practices is to cut the employer's perspective out of the campaign.¹⁹⁹

Thus, under EFCA, we encounter an even more extreme example of Bentham's "demi-publicity" than in the absentee balloting context. At least absentee balloting occurs within the requisite time limits and deadlines of a particular campaign. A union authorization card can be deemed "current" for a year or more after being signed, and cannot be revoked by the worker.²⁰⁰ Here, a worker is approached by one party to the contest, and compelled to vote for union representation or face the unpleasant

Professional Janitorial Service of Houston, Inc., 353 NLRB No. 65, 2008 WL 5273523 (Dec. 17, 2008) (describing card check under neutrality agreement); Epstein, *supra* note 195 at 20, Brudney, *supra* at 825-31. Thus employers can bind their workers without holding an election. Epstein, *supra* at 20. Legislation has also been crafted to prevent such agreements, see Brudney, *supra* at 841; H.R. 1176, 11th Cong. 1st Se.. (introduced Feb. 25, 2009). Interestingly, while employers can collude with labor representatives via neutrality agreements, if two unions are vying for recognition it is illegal for the employer to assist one of them. See Garner/Morrison LLC, 353 NLRB No. 778, 2009 WL 196069 (Jan. 27, 2009).

¹⁹⁸ Moreover, the union has the ability to define the bargaining unit (even after the cards are gathered, in essence drawing their "district lines" after the vote), and may proceed to collect worker's signatures without notice, and not subject to any specific time limit. Epstein, *supra* note 195 at 29-30, 47. Notably, authorization cards may only be used to organize a workplace that is *presently* nonunion. They may not be used in an effort to deauthorize a union. *Id.* at 45. Nor may employers participate in the signature gathering process, or launch its own effort. Brudney, *supra* note 177 at 852. Once the union is certified as the bargaining representative, it is entitled to a nonrebuttable presumption of majority status within the workforce for a reasonable time, typically one year. See *Virginia Mason Medical Center v. NLRB*, 558 F.3d 891, 894 (9th Cir. 2009); *but see Dana Corp.*, 351 NLRB No. 28 (modifying recognition bar in situation where union recognized via neutrality/card check was challenged within 45 days, due to uncertainty that card check demonstrates real majority support).

¹⁹⁹ Eaton & Kriesky's survey indicates that workers experience less coercion in card check organizing campaigns than secret ballot elections. Under existing law that would be expected, since presently card check campaigns are conducted under a private neutrality agreement, typically supervised by an arbitrator. See Laura J. Cooper, *Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator*, 83 INDIANA L. J. 1589, 1589-90 (2008); see also *Professional Janitorial Service of Houston*, 353 NLRB No. 65 (card check under neutrality agreement conducted by American Arbitration Association); *Dana Corp.*, 351 NLRB No. 28, 2007 WL 2891099 (Sept. 29, 2007) (same).

²⁰⁰ Epstein, *supra* note 195 at 43.

consequences of refusing. Unlike absentee balloting, where a self-confident voter might be able to avoid a campaign worker's prying eyes, there is no hypothetical case where the voter can exercise his choice confidentially.²⁰¹ The organizer either walks away with a signed card, or he doesn't.

Furthermore, because card check efforts need not be publicized, nor the identities of supporters released, there is no way for a worker whose name had been fraudulently added to the union's list to detect the fraud – at least the voter whose absentee ballot is intercepted by a third party may notice it missing, or find out on election day that a vote has already been cast in his name.²⁰² And, of course, unlike voting a secret ballot under the supervision of some neutral overseer, the worker is vulnerable to coercion and/or fraud. Furthermore, unlike a public meeting to vote for representation, he cannot hear competing arguments, ask questions, or observe the attitude of his colleagues. Finally, the card check process is only available in the situation where a workplace is being organized. It is not available if employees want to change their representative from one union to another one, or want to rescind recognition.²⁰³ The EFCA card check elements are thus analogous to offering convenience voting for some offices or ballot questions, but not others.

If we reject the “demi-publicity” of card-check organizing, then which is better – secret ballot or open meetings? Are there situations where one alternative is preferable? History teaches us that while union organizing and representation elections need not always be unpleasant, they have that potential. The purpose behind the NLRA, after all, was to increase industrial peace in an often hostile context. The rise of the neutrality agreement/card check model via private contract between unions and employers provides a useful alternative already for those situations where each side can work with the other.²⁰⁴ Those that remain subject to the NLRA restrictions are the organizing

²⁰¹ See *Excelsior Underwear*, 156 NLRB 1236 (1966) (employee cannot claim privacy right to keep union sentiments secret from the union).

²⁰² See *Brudney*, *supra* note 177 at 861 (noting that authorization cards are presumed valid).

²⁰³ Certain unions have a poor history of running elections once designated as collective bargaining agent, and overall union elections are controlled by incumbent officers with the support of the parent union. See, e.g., *JAMES B. JACOBS, MOBSTERS, UNIONS AND FEDS* 92 (2006) (challenger candidate murdered); *ROBERT FITCH, SOLIDARITY FOR SALE* 169-71 (2006); *Democracy in AFSCME DC37 in NYC*, *UNION DEMOCRACY REVIEW* #168 (May-June 2007) (noting that inconvenient polling location allowed local president to remain in office). One could argue that true employee free choice would necessarily include extending card check recognition to changes in affiliation and rescission of recognition.

²⁰⁴ *Cooper*, *supra* note 199 at 1593-94. By declaring “neutrality” the employer is also preventing workers from voting on the issue, and one might question how the employer can rightfully the authority to waive a worker's right to vote on representation. See *Dana Corp./Metadyne Corp.*, 351 NLRB No. 28 (Sept. 29, 2007) (employees petitioned for decertification following voluntary certification by employer).

campaigns that are tense, contested, and unpleasant. Therefore, it is unlikely that a “public meeting” alternative would work, for all the reasons noted above, in those workplace campaigns that now proceed under the NLRA.

Thus, we should follow the teaching of history, experience, and Jeremy Bentham, and preserve employee access to the secret ballot in the labor organizing context. We should probably do more to ensure that union elections in general are free from fraud, coercion and bribery, and enforce the law equally against management and labor. Secret ballot elections are no guarantee – experience has shown that they too can be used as a tool of fear and manipulation, as the unhappy histories of certain trade unions will attest.²⁰⁵ Those matters reach beyond the task of this Article, which has been to explain the importance of the secret ballot in certain settings, especially those where voters have reason to fear retribution. Fewer contexts present a clearer example of this than the contested union organizing election.

To the extent unions are correct to complain about existing NLRB election practices, the correct solution is to reform the elections, not craft an end run around them.²⁰⁶ To the extent unions are correct to complain about delays in holding elections, perhaps the law should impose timelines. To the extent the “political model” of union certification elections is flawed, as Matthew Bodie suggests, perhaps other means need to be crafted to provide workers a better factual picture of what organization will mean for them.²⁰⁷ We should not make the mistake of looking at the contested election context as the only avenue available to labor organizers, when in fact this may be a shrinking share of the whole. Private contractual procedures for gauging employee support are available and increasingly common. The election route may become atypical, as the truly difficult certification efforts will be the ones that dominate there. It would be unwise in future policymaking to let this tail wag the dog.

C. Shareholder voting practices

Corporate governance, and thus corporate voting, is a creature of state law.²⁰⁸ For most substantial for-profit corporations, the rules are thus dictated by Delaware law, since Delaware is the dominant locus for incorporation. Under Delaware’s corporate code, shareholders vote to elect directors, typically by plurality vote.²⁰⁹ Shareholders also vote on bylaw amendments, resolutions, mergers, and amendments to the Certificate

²⁰⁵ See *Mob Influence at Its Worst: The Case of Local 560*, 7 TRENDS IN ORGANIZED CRIME 40, 44-50 (Winter 2001) (summarizing abuse of union elections by Provenzano).

²⁰⁶ Epstein, *supra* note 195 at 31; Specter, *supra* note 177 at 331-34.

²⁰⁷ Bodie, *supra* note 177 at 69-73.

²⁰⁸ See *Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990) (noting shareholder voting rights matter of state corporate law).

²⁰⁹ Marcel Kahan and Edward B. Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L. J. 1227, 1232 (2008); Del. Gen. Corp. L. §§211(b), 216.

of Incorporation.²¹⁰ If the corporation is listed in a stock exchange, the exchange may also require shareholder votes in additional contexts.²¹¹ These votes are cast on “ballots,” away from any protective polling location, and in fact the identity of the voter is on the ballot. The corporation can see who has voted and how they voted. Is this voting process legitimate, given the concerns raised throughout this article about non-public, non-confidential balloting?

Corporate voting, especially in large, publicly-traded companies, has characteristics not shared by the other forms of voting discussed above. One challenge peculiar to shareholder voting is the volatility of the corporation’s “electorate.” Unlike voters, who register and vote based mostly on domicile, or workers, who are part of a collective bargaining unit determined by their job, the shareholder franchise is based on possession, perhaps fleeting, often indirect, of an intangible asset. Some shareholders hold stable portfolios over time, but many do not. Simply because someone possesses shares as of a certain date may say little about their stake in the operation of the company, or their knowledge of its operations.²¹²

Moreover, investors may loan their securities to others, and with it, the votes associated with those shares.²¹³ Those borrowers may be acquiring the shares simply for their vote, and thus would be able to vote without having anything meaningful at stake.²¹⁴ “Empty voting” by investors who have hedged their positions has been controversial, and it is hard to think of an analogous situation in politics where large voting blocks would cast their votes “insincerely.”²¹⁵

Unlike a voter or worker, the identity of the beneficial shareholder may not be known, if, as is frequently the case, the owner of record is not the individual investor, but a broker or other nominee.²¹⁶ If investors have elected to be treated as an objecting beneficial owner (OBO) the company will never know their individual identities, but can only convey voting materials to intermediaries.²¹⁷ For example, in a recent proxy battle, Target Corporation had to “campaign” via press release with its shareholders, instructing them in simple if clumsy terms to “vote the WHITE proxy card,” and “not to return any

²¹⁰ DGCL §§109, 216, 242, 251, 271; *see also* JONATHAN R. MACEY, PROMISES KEPT, PROMISES BROKEN 201 (2008).

²¹¹ *See* NYSE Listed Company manual 312.03(c); Chicago Stock Exchange Rule 19(m).

²¹² *See* Grant M. Hayden and Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 453 (2008).

²¹³ Megan Thompson-Mann, The Millstein Center for Corporate Governance and Performance: Policy Briefing No. 2; *Voting Integrity: Practices for Investors and the Proxy Industry*, PLI Order No. 14548 (Sept. 22, 2008) at *531.

²¹⁴ Hayden & Bodie, *supra* note 212 at 485-86.

²¹⁵ Macey, *supra* note 210 at 215 (discussing Compaq shareholders alleged empty voting in merger with HP).

²¹⁶ Kahan and Rock, *supra* note 209 at 1237-43.

²¹⁷ *Id.* at 1244-45.

proxy card sent by Pershing Square.”²¹⁸ Target can't “target” this message to the shareholders who would care, and ends up communicating with a larger public that is not involved. This makes for an inefficient “campaign” but also means that the corporation at this stage is unable to coerce or unduly influence the shareholder. Yet this situation is fleeting - once the vote is cast, management could see who voted how, and lobby shareholders or the transmitting intermediaries whose votes are against management's position.²¹⁹

Moreover, beneficial shareholders may not in fact control their votes. Under Delaware law and decisions, if a intermediary nominee votes shares against the wishes of the investor, or otherwise prevails on the investor to vote his proxy a certain way, that is a private matter between those parties, and not a matter of concern to state regulators.²²⁰ If the investor never receives the materials, the custodian may vote the “uninstructed” shares as it sees fit.²²¹ Voters can also change their votes. Even after an investor casts a vote or instructs the custodian of the shares how to vote, he may reverse that vote – until the end of voting a shareholder may cast multiple votes, and only the proxy cast last in time determines the votes of the shares.²²² Shareholders can enter into “voting trusts” that bind them contractually to vote a certain way, and can “buy” votes.²²³ Many shared traits in other voting contexts – an identifiable and relatively stable electorate to whom a campaign can be directed, who cast votes directly, on ballots where there is some means for imposing ballot integrity, are simply not present in corporate voting.

In the context of this study, corporate voting would seem to share some of the unappealing traits identified above with absentee and card check voting. A shareholder casts a vote outside a setting shielded from influence or coercion. In fact, similar to the card check setting, a shareholder can be approached again and again during a voting

²¹⁸ *Target Corporation Advises Shareholders to Vote Their WHITE Proxy Card Today*, BUSINESSWIRE, May 26, 2009.

²¹⁹ ROBERT MONKS AND NEIL MINOW, CORPORATE GOVERNANCE 194 (2d ed. 2001). Moreover, in a contested election for a corporations Board, incumbents can charge their campaign expenses to the company, but challengers cannot. Lucian Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 690 (2007).

²²⁰ Kahan and Rock, *supra* note 209 at 1233.

²²¹ *Id.* at 1250. Corporate voting rules do not distinguish between nonvoting as a result of apathy, and “disenfranchised” nonvoting because the shareholder did not receive voting materials. Brokers may votes these shares on routine matters, custodian banks may not. *Id.*

²²² See Yair Listokin, *Management Always Wins the Close Ones*, 10 AM. L. AND ECON. REV. 159, 161-62 (“[A]t some point in the voting process, management obtains highly accurate information about the likely voting outcome and, based on that information, acts to influence the vote.”)

²²³ Macey, *supra* note 202 at 217; Hayden & Bodie, *supra* note 212 at 484, Del Code § 218 (a), (c).

period to “re-vote.”²²⁴ Corporate voting would thus be classified as a form of “demi-publicity” that our analysis suggests is illegitimate.

Do the differences between shareholder voting and the other forms we looked at mean that the shareholder voting context is not susceptible to the same analysis? Not all shareholders are alike, and it is in their differences that important distinctions appear that may lead us to different conclusions under our model.²²⁵ In a large- publicly traded corporation, small shareholders, unlike voters or workers, would likely find that “exit” from the corporation, perhaps fleeing to a competitor or financial substitute, is easier (and maybe even preferable) than researching and voicing an opinion through voting.²²⁶ So whatever influence or pressure they may suffer when casting their vote can be avoided easily, if they so choose. The small investor vote nevertheless sits out there as a potential check against managerial excess, and a means for better managers to take control of the enterprise by purchasing the shares.²²⁷ One scholar, accordingly, described shareholder voting as a means of error correction, rather than a source for general decisionmaking.²²⁸ The concerns we have about oppression of voter's judgment in the union organizational or absentee balloting contexts aren't as strong here.

But not all corporations are large, publicly traded companies. How does open voting fare in closely held corporations, when shares may be relatively illiquid and exit is thus difficult?²²⁹ Here, the other characteristics of mass voting are also not present. Voting in closely held corporations is more like voting on a committee, faculty or HOA, face to face, where votes are usually cast openly after motions and debate. We don't see the logistical impediments to open voting with debate that exist in mass elections. To the extent coercion or duress are present, the legal system has relegated those concerns to the private law arena. Moreover, contests for control in the nonprofit context, where shareholders are altogether lacking, are pursued either by attempting to place sympathetic

²²⁴ Monks and Minow, *supra* note 219 at 195.

²²⁵ See J.W. Verret, *Pandora's Ballot Box, or a Proxy with Moxie? Majority Voting, Corporate Ballot Access, and the Legend of Martin Lipton Reexamined*, 62 BUS. LAW. 1007, 1025 (discussing challenge of setting governance rules when shareholders are not monolithic).

²²⁶ See Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VANDERBILT L. REV. 129, 138 (2009). There is no evidence that small shareholders find psychic rewards from participating in corporate governance. See Harry Hutchison & Sean Alley, *Against Shareholder Participation: A Treatment for McConvill's Psychonomicosis*, 2 BROOK. J. CORP. FIN. & COM. L. 41 (2007).

²²⁷ If corporate malfeasance becomes widespread, shareholders and voters become justifiably upset, and reform is articulated through the public political system. See Arthur R. Pinto, *The European Union's Shareholder Voting Rights Directive From an American Perspective: Some Comparisons and Observations*, FORDHAM INT'L L. J. 587, 594 (contrasting politics of disperse US stockholdings with concentrated European holdings).

²²⁸ Thompson & Edelman, *supra* note 226 at 130.

²²⁹ See Hayden and Bodie, *supra* note 212 at 479-80.

individuals on the Board of the group, or recruiting members who can then pressure the organization to change priorities.²³⁰

To assert that there is no political gamesmanship or coercion in these contexts would be naïve, but given the number and diversity of such bodies, it is hard to imagine how mandated secret voting would be implemented. Moreover, open voting with debate, discussion and the potential for reconsideration, as observed at the outset, is the most flexible and accommodating form for taking votes. On balance, corporate voting does not present a situation where the secret ballot is helpful for ascertaining the will of participants.

Larger institutional shareholders of publicly traded corporations fall at the opposite end of the spectrum from the small shareholder. These investors are more analogous to representatives (of their beneficiaries, perhaps, or of other shareholders), and, like members of Congress or Parliament, in our model should appropriately cast a public vote. Where it makes little sense for the individual shareholder to have to register a public opinion on the board of directors or a merger, a large shareholder such as a union pension fund, TIAA-CREF or Calpers has the resources to bring questions before the shareholders and advocate for change.²³¹ Activist hedge funds make it their business to agitate for corporate change.²³² These shareholders should engage openly, sharing research, views, arguments, and responding to the corporation's defenses and counterproposals.²³³ It is good for the corporation, other investors, as well as the economy if that engagement, and the votes cast in its wake, are public.²³⁴ Moreover, larger investors may be the ones that engage in insincere “empty voting.” If a vote on a corporate matter is to have legitimacy with all shareholders, these large shareholders may need to be monitored.²³⁵

²³⁰ See *Nonprofit Takeovers: Regulating the Market for Mission Control*, 2006 B.Y.U. L. REV. 1181, 1195-99 (2006).

²³¹ See Verret, *supra* note 225 at 1030-31 (noting increased feasibility of contested elections with less expensive proxy solicitation).

²³² *Id.* at 1031-32.

²³³ Macey, *supra* note 210 at 203 (noting greater capacity for participation of large shareholders); Hayden & Bodie, *supra* note 213 at 487-88 (noting power of pension funds, criticisms of CalPERS for pursuing political agenda). Hayden & Bodie also acknowledge the controversy surrounding sovereign wealth funds, which invest foreign government assets into private American companies. *Id.* at 489-91.

²³⁴ In fact, the beneficiaries of share holdings, like pensioners or fund investors, might benefit as beneficiaries from knowing more about how their representatives vote, but that is an argument beyond the scope of this paper. Monks and Minow, *supra* note 219 at 195,96; Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255 (arguing that activist institutional shareholders owe a duty of loyalty to other beneficial shareholders).

²³⁵ Macey, *supra* note 210 at 215-16; Thompson & Edelman, *supra* note 226 at 156. Thompson & Edelman urge that corporate law return to the basic rule aligning voting and economic interests. *Id.* at 166.

Corporate law scholar Lucian Bebchuk, however, has called for the secret ballot in all voting on directors.²³⁶ He contends that the lack of confidentiality distorts the voting of institutional investors in favor of incumbents. These investors, banks, funds, and other players in the financial world, will have business interests better served by remaining on good terms with corporate insiders, then by voting for challengers who are better for overall shareholder value.²³⁷ Yet this is a problem with conflicting interests, and one not unique to corporate voting. It isn't clear the problem disappears with a "secret ballot" cast in circumstances akin to an absentee ballot.²³⁸ Just as with absentee voting, if the investor wants to show corporate incumbents how its shares voter, it can. The problem is when **no one else** can see.²³⁹ Bebchuk acknowledges that the SEC had required (as of 2003) mutual funds to disclose how they voted, but believes this is inadequate because fund investors will base decisions on "investment performance" not whether the fund voted one way or another.²⁴⁰ This would appear to acknowledge that in some, if not many cases, a self-interested vote for the incumbent is also a vote for economic performance. At that point, if our worry is about shareholders voting for bad management, the conflict problem may vanish.

Substantial differences between "corporate democracy" on the one hand, and workplace or public democracy on the other hand, mean that the model developed at the outset applies differently. The exchange between these representative institutional shareholders and the corporation is more analogous to a legislative debate, or oversight of administrators, than an election requiring the protection of the secret ballot.

IV. Conclusion

The debate over the ballot in England, as well as the imposition of the secret ballot in the United States, left us with a powerful means to evaluate forms of voting. There are situations where votes should be cast openly following discussion and deliberation. In other situations, voting a secret ballot under the auspices of the state or some neutral party is a better method. But a hybrid of these – where votes are cast away

²³⁶ Confidential voting was a prominent issue for activist shareholders (especially the United Shareholders Association) in the early 1990s, but waned after 1994. See Roberta Romano, *Does Confidential Proxy Voting Matter?* 32 J. LEGAL. STUD. 465, 476-77.

²³⁷ Bebchuk, *supra* note 219 at 704-05. Other empirical studies indicate that adopting confidential voting does not affect corporate voting outcomes. Romano, *supra* note 237 at 506.

²³⁸ Bebchuk does not suggest that shareholders vote in polling places, and it is difficult to imagine how a large publicly traded corporation could implement such a system.

²³⁹ Once we see these large investors as akin to representatives instead of individual voters, then the "secret voting" system resembles the secret parliamentary voting Jeremy Bentham argued so vigorously against. See *supra* notes 26-30.

²⁴⁰ Bebchuk, *supra* note 219 at 706.

from the view of others, and without the protection of a neutral, incorporate the weaknesses of each alternative without their strengths.

We should be reluctant to implement voting on these terms, and should seek to restructure the existing occasions of non-public non-secret voting to either protect the secrecy of the vote or open up antecedent deliberation and accountability. Absentee voting is popular, but experience demonstrates that the benefits that come with convenience must be balanced against the potential for fraud, coercion, and error. We should take similar lessons from the labor organization experience, and not subject workers to nonsecret nonpublic card check “votes.” Corporate voting is sufficiently different that the secret ballot’s own weaknesses weigh more heavily in the balance, and in the end nonsecret proxy voting may be the best means for beneficiaries and the public to keep large institutional investors in check.