

University of Michigan Journal of Law Reform

Volume 36

2003

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Recommended Citation

John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J. L. REFORM 483 (2003).

Available at: <https://repository.law.umich.edu/mjlr/vol36/iss3/2>

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THE ABSENTEE BALLOT AND THE SECRET BALLOT: CHALLENGES FOR ELECTION REFORM

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Reforms in the recently enacted federal election reform legislation primarily address improving voting at a polling place, but there is a growing share of the electorate who vote away from the polling place through increased use of absentee ballots and vote-by-mail systems. Voters who vote away from the polling place do not have the same protections as those at the polling place. In particular, these voters do not have a secret ballot, as any ballot cast without a drawn curtain behind oneself is potentially subject to coercion, vote buying and fraud.

This Article looks at the tension between the Australian Ballot and absentee voting. Both the Australian Ballot and the Absentee Ballot were electoral reforms of previous generations. The Australian Ballot was instituted by almost all of the states in the 1880s and 90s to combat abuses at the ballot box such as vote buying and coercion by party machines. There were two major periods of absentee ballot reform. In both periods of absentee ballot reform, there was recognition of the dangers of casting a ballot away from a home polling place. Since these early periods of adoption of absentee voting laws, there has been a significant rise in voting away from the polling place. In addition, many of the safeguards implemented by early legislation have been repealed. There are a number of advocates for easier absentee balloting, vote by mail, or even voting over the Internet. Although they emphasize the convenience of such measures, these advocates do not seem to appreciate the privacy concerns that the originators of the absentee ballot did. To the extent that election reform legislation is to be successful in improving the electoral system, it must take note of the trend toward voting away from the polling place and consider the importance of the secret ballot as well as convenience.

INTRODUCTION

While it did not sweep through the political process like a tidal wave as predicted after the 2000 election controversy, election reform legislation at the Federal level finally made its way through Congress two years after the Florida brouhaha. Along the way, there were certainly partisan differences between Democrats and

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Republicans as to the content of election reform legislation, over issues such as the scope of federal standards and the nature of anti-fraud rules.¹ But almost unnoticed in the recent debate is an even more fundamental divide between two visions for the future of American elections. Advocates of one vision see the traditional polling place as the focal point of voting in America, and seek to improve its accessibility, ease of use, integrity and openness to all voters. Those who hold the other vision see the traditional polling place as an inefficient and costly obstacle that discourages voting. They promote convenience voting away from the polling place through “no-excuses absentee ballots,”² and hold out the promise for Internet voting. The clash between these visions flared only occasionally during the congressional debates on election reform,³ and has not been the subject of widespread, robust political debate. Underlying the debate over election reform was a vast gulf between two distinct visions—one a traditional veneration of the act of voting as a civic responsibility, a collective judgment made as neighbors gather together, making supremely individual judgments in the privacy of a curtained voting booth, and the other a sense of voting as a burden, with new technologies available to ease that burden and expand the franchise to more citizens.

There is little doubt that in the past thirty years, the country has moved in the direction of convenience voting and away from the traditional polling place and its safeguards. Many election officials have focused their efforts on reducing barriers to voting and as the complications and costs of maintaining numerous election-day polling places for longer hours have risen, have been attracted by the lower administrative costs of absentee voting, vote-by-mail and early voting. Election officials have also been motivated by the criticism of low turnout rates in America and view absentee voting in its various forms as a way to increase turnout, even though evidence of a correlation between voter turnout and easy absentee voting is limited at best. It is our concern that this shift has altered the proper balance between convenience and the protections of the secret ballot, with too much focus on ease of voting and not enough on protecting the privacy of the voter. As casting ballots away from the polling place becomes more widespread, the

1. See, e.g., Robert Pear, *Bill to Overhaul System of Voting is Seen in Danger*, N.Y. TIMES, Sept. 7, 2002, at A1.

2. This term refers to laws that do not require the voter to supply a reason for obtaining an absentee ballot or vote by mail.

3. Karen Foerstel, *Balloting System Revamp Sags in Senate over I.D.'s: Chances Dim for Fall Potency*, CQ WEEKLY, Mar. 9, 2002, at 637.

possibilities for fraud and coercion expand, and the importance of a civic election day is diminished.

Perhaps not surprisingly, given the Florida-related impetus behind reform, recently passed election reform legislation focuses primarily on improvements at the polling place, including strengthening the protection of the secret ballot, reducing the number of spoiled ballots, securing the availability of accurate voter registration information at the polling place so that qualified voters are not turned away, deterring fraud, and increasing access for all to the polling place.⁴ We are supportive of these legislative changes, but it is worth noting that most of the reforms are less relevant to voting away from the voting booth. In fact, advocates of voting by mail made a concerted effort to exempt their system from reforms aimed at combating identity fraud and reducing the number of spoiled ballots.⁵

Much of federal election reform legislation focuses on reforming the election day polling place, and since of the trend is toward voting away from the polling place,⁶ a substantial percentage of voters will not receive the full benefit of these reforms. It would be wise for reformers to consider the effects of this trend to keep vote by mail and no-excuses absentee voting from opening the door to the kind of electoral fraud and corruption that was prevalent in the late 19th century.⁷ There is a natural tension between the concern for privacy and absentee voting. Privacy cannot be guaranteed unless it is mandatory for voters to vote behind a curtain out of sight of those who might seek to influence a vote. Absentee ballots, by definition, are ballots cast without the privacy protections of the polling place. While absentee ballots have become a necessity, we believe that voting away from the polling place should only be granted in cases of significant need, and not simply for convenience.

This Article focuses on some of these issues first by tracing the history of several reforms in American elections, particularly on the introduction of the Australian ballot at the end of the nineteenth century. The reform was widely and swiftly adopted in response to widespread vote buying, fraud, and partisan coercion

4. See generally Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002).

5. Foerstel, *supra* note 3.

6. See *infra* Part III.C.

7. Corruption was so prevalent that the Australian ballot was introduced to combat it. See e.g., L.E. FREDMAN, *THE AUSTRALIAN BALLOT: THE STORY OF AN AMERICAN REFORM* 30-31 (1968).

that became increasingly evident and embarrassing in the 1880s and 1890s. Second, this Article documents the rise of absentee and mail voting in the United States, indicating how its early advocates championed these reforms in order to enfranchise those who could not vote at their home polling place, but also instituted significant safeguards out of fear that absentee voting might compromise the secrecy and anti-fraud protections of the Australian ballot. Third, we address some of the potential problems with voting outside a polling place and examine recent cases of absentee ballot fraud. Finally, this Article looks at proposed improvements to polling place voting from which vote by mail advocates have tried to exempt themselves.

I. THE ORIGINS OF THE AUSTRALIAN BALLOT

While the Constitution gives Congress the power to regulate the times, places and manner of federal elections,⁸ voting in this country has always been a decentralized activity. Typically, local administrators have conducted elections, with guidance and oversight from state and federal officials. In the 19th century, election practices varied widely, but by the end of the century there was growing concern about widespread fraud and coercion.⁹ Between 1888 and 1892, 38 states adopted the Australian ballot, a reform consisting of a standard ballot and private voting booth, and not long thereafter all states had implemented the reform.¹⁰ It was remarkable how quickly and universally the reforms were adopted, especially as it was adopted voluntarily by each of the states.

The modern American polling place is still very much defined by the events of that revolution in voting. For example, Americans take for granted that voting will take place in private, with a curtain protecting us from the wandering eyes of election officials, party operatives, and nosy neighbors. Such was not the case in the period before the reforms. It was not uncommon in the 19th century for party machines to pay voters for their vote, which could be determined easily because ballots were color-coded and party workers followed voters to the voting booth.¹¹

8. U.S. CONST. art. I, § 4, cl. 1.

9. FREDMAN, *supra* note 7, at ix.

10. *Id.*

11. *Id.* at 22; Allen Thorndike Rice, *The Next National Reform*, 148 N. AM. REV. 386 at 83 (1889).

A. The Australian Ballot

The Australian ballot originated in the colonies of Australia. In 1856, the colony of Victoria passed the first Australian ballot law. The law provided for a private room or booth for the voter to cast his ballot, a system for ensuring that voters only cast one ballot, and an official ballot provided by the state. The ballot contained a list of all the candidates for office, and the voter would cast a vote by crossing off the names of all of the candidates not voted for. Later that year, another Australian colony, South Australia, passed a secret ballot law that was very similar to that of Victoria, but required the voter to mark a cross next to the chosen candidate rather than crossing off unwanted names.¹²

By most accounts, the reform was successful in achieving clean and orderly elections in the Australian colonies.¹³ The success of the secret ballot in the Australian colonies gave momentum to a reform movement in England.¹⁴ There were, however, prominent opponents of such a procedure. Foremost among the critics was John Stuart Mill, who argued that an important part of citizenship was a public declaration of the views of citizens:

In any political election . . . the voter is under an absolute moral obligation to consider the interest of the public, not his private advantage, and give his vote to the best of his judgment, exactly as he would be bound to do if he were the sole voter, and the election depended upon him alone. This being admitted, it is at least a *prima facie* consequence that the duty of voting, like any other public duty, should be performed under the eye and criticism of the public; every one of whom has not only an interest in its performance, but a good title to consider himself wronged if it is performed otherwise than honestly and carefully.¹⁵

Despite the opposition of critics like Mill, an English reform movement for a secret ballot, which had stalled in the first half of

12. FREDMAN, *supra* note 7, at 3–9.

13. *Id.* at 10.

14. *Id.* at 11–12.

15. JOHN STUART MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 232–33 (1946). Some early American progressives echoed Mill's sentiment, but as mounting evidence of corruption in the polling place emerged, progressives came to support the Australian ballot reform. See FREDMAN *supra* note 7, at 38.

the century, began to gain steam.¹⁶ Ultimately, the Ballot Act of 1872 instituted the Australian Ballot in England.

The term "Australian ballot" is now used interchangeably with "secret ballot." Indeed, the central thrust of the Australian ballot is to allow a voter to express his or her preferences in private without fear of coercion from others. However, simply providing a private voting booth, although necessary to privacy, does not guarantee a secret ballot. There are a number of ways that the secrecy of the ballot can be violated. Ballots supplied or pre-printed by the parties can be handed to a voter at the polling place. Ballots can be color coded or given distinguishing marks so that party observers can view from afar which party the voter is choosing. Ballots can also be altered so that they only contain the names of certain candidates.

In order to prevent such violations of secrecy, the Australian ballot included four essential protections: 1) the ballots were printed and distributed at public expense; 2) they contained the names of all the candidates duly nominated by law, either by party convention or petition of voters (a "blanket ballot"); 3) they were distributed only by election officers at the polling place ("exclusive" or "official ballot"); and 4) there were detailed provisions for compartments and other physical arrangements to ensure secrecy in casting the vote.¹⁷

B. Practices that Led to the Adoption of the Australian Ballot in the United States

By the second half of the 19th century, political parties had assumed the leading role in American elections. The parties produced ballots for the polling place, often printing them in distinctive colors and sizes so voters could easily distinguish them (and, perhaps more importantly, so that voters would vote the party line). The ballot would be filled out with the names of the party candidates. A voter would merely need to deposit the ballot in a box, usually in full view of party operatives.¹⁸ City machines would often condition jobs on the submission of the proper ballot, or they might pay money for the confirmed deposit of the proper ballot.

16. *Id.* at 11–12.

17. *Id.* at 46.

18. Jerrold G. Rusk, *The Effect of the Australian Ballot Reform on Split Ticket Voting: 1876–1908*, 64 AM. POL. SCI. REV. 1220, 1221 (1970).

The practice of using written ballots had become widespread in the United States by the middle of the 19th century.¹⁹ The earliest elections in the pre-Revolutionary colonies were conducted by a voice vote or voting by depositing corn or beans in a jar.²⁰ Over time, the colonies began to adopt a written ballot.²¹ Individuals made their own ballots, writing the names of candidates for whom they voted on a piece of paper and brought the paper to an official location.²² By the time of independence, nearly all the new states had adopted a written ballot.²³ The use of printed ballots began in the 1820s.²⁴ Parties began to produce straight ticket ballots, which they distributed to voters at the polling booths,²⁵ a practice that was upheld by the Massachusetts Supreme Court in 1830.²⁶

The introduction of the written ballot was, in some sense, a reform. It created a record of how votes were cast. Even the idea of color-coded ballots or ballots with recognizable party symbols served the purpose of allowing illiterate or non-English speaking people to vote for the party of their choice.

The written ballot alone, without the protections of the Australian reform, however, was susceptible to significant fraud. As the government did not produce the ballots, there was no accounting of how many ballots had been cast, and it was possible to stuff the ballot box.²⁷ Furthermore, the use of color-coded or otherwise recognizable ballots made it simple for ballot peddlers or district captains to buy, and confirm, votes.²⁸ According to a study conducted by Professor J.J. McCook in 1892, an average of sixteen percent of Connecticut voters was up for sale at prices ranging from two to twenty dollars.²⁹

The practice of parties printing ballots for their members was itself prone to fraud. Some political operatives engaged in the practice of “knifing.” If local party bosses had cut deals with the opposition or they did not like a particular party candidate, they would “knife” select candidates, or remove their names from the

19. FREDMAN, *supra* note 7, at 20.

20. *Id.* Kentucky continued the practice of oral voting well into the 19th century. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 21.

25. 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH*, 493–94 (1888).

26. *Henshaw v. Foster*, 26 Mass. (9 Pick.) 312, 317–20 (1830) (holding that a Massachusetts constitutional provision addressing written ballots included printed ballots, as the provision was meant merely to forbid voting by voice).

27. FREDMAN, *supra* note 7, at 21–22.

28. *Id.* at 22; Rice, *supra* note 11, at 83.

29. See *THE NATION*, May 19, 1892, at 369; see also FREDMAN, *supra* note 7, at 23.

party-printed ballot before handing them out, so that the party ticket was voted except for the “knifed” candidates.³⁰ Also, parties sometimes duplicated the color and distinctive markings of an opposing party’s ballot, substituting the names of their own candidates, in order to trick voters.³¹

Finally, the lack of secrecy in the ballot and the practice of tying government jobs and other political favors to votes meant that voters could not vote across the party line. As the pre-printed ballots of each party were of a distinctive color, election observers could determine the party for which the voter had cast a vote. Since big city political machines doled out jobs to loyal supporters, voters knew that their jobs and other political favors depended on voting according to the local party bosses’ wishes.³²

C. *The Australian Ballot Movement in the United States*

All of these practices inspired a reform movement in the states in the late 19th century. Kentucky enacted the first Australian ballot reform law in 1888, but it was limited to the elections in Louisville.³³ Massachusetts enacted the first statewide Australian ballot law later that year.³⁴ By 1910, almost all states had adopted the Australian ballot.³⁵

There were a number of variations in these laws, but the major two types that developed were the Massachusetts model, which listed individual candidates by office, and the Indiana model, which allowed both the “party column ballot,” option, or voting a straight ticket with a single vote, as well as the option to vote by individual office. Purist reformers objected to the Indiana model because the ease of straight ticket voting discouraged split ticket voting, and furthermore because of the model’s potential to tip off party workers when one was not voting the straight ticket.³⁶

30. Alan Ware, *Anti-Partism and Party Control of Political Reform in the United States: The Case of the Australian Ballot*, 30 BRIT. J. POL. SCI. 1, 14 (2000); see also FREDMAN, *supra* note 7, at 28.

31. Ware, *supra* note 30, at 11.

32. See FREDMAN, *supra* note 7, at ix; Henry George, *Money in Elections*, 316 N. AM. REV. 15, 209 (1883).

33. JOHN H. WIGMORE, *THE AUSTRALIAN BALLOT SYSTEM AS EMBODIED IN THE LEGISLATION OF VARIOUS COUNTRIES* 22 (1889).

34. 1888 MASS. ACTS. 436; see also WIGMORE, *supra* note 33, at 25–26.

35. FREDMAN, *supra* note 7, at 98.

36. *Id.* at 47–48.

The passage of these Australian ballot laws did not simply eliminate all fraud and corruption from elections. In New York, for example, party workers abused the provision that voters unable to vote by themselves could be “assisted” by poll workers.³⁷ On the whole, however, the effects of the Australian ballot law were salutary and dramatic. Some of the evidence for its success is anecdotal. After the first election in Louisville conducted under Kentucky’s law, a citizen wrote a letter published in the Boston newspapers noting that

[i]t can hardly be possible that there is a city in the Union where open corruption has been more generally practiced than in Louisville. . . . [I]t is an undeniable fact that in the late election there was, except in one place, no corruption successful, and but little attempted, and that with this evidence of its successful working the chances have greatly lessened that bribery will be tried.³⁸

Another letter to the editor of *The Nation* noted that the Kentucky election was “the first municipal election I have ever known which was not bought outright.”³⁹ Fredman notes that the Massachusetts law that took effect for the 1889 election was an undoubted success. “It was generally agreed that the voting was fair and orderly, and there were more and better candidates.”⁴⁰ In addition to the anecdotal evidence of the success of the Australian ballot legislation, there is empirical evidence of a substantial change in voting. In the period following the adoption of Australian ballot laws, there was a large decline in voter turnout rates. There is no debate in the political science community that such a decline occurred, but there is some controversy as to the reason why. Most commentators give some credence to the idea that the adoption of the secret ballot lowered turnout, either indirectly by diminishing the role of local party bosses, or more directly by weeding out fraudulent or ineligible voters from the statistics.⁴¹

37. *Id.* at 85.

38. Letter from Abram Flexuer to Editor, *BOSTON GLOBE*, Jan. 11, 1889, at 6, *quoted in* WIGMORE, *supra* note 33, at 23.

39. Letter from F. to Editor, *THE NATION*, Dec. 13, 1888, at 476.

40. FREDMAN, *supra* note 7, at 39.

41. See J.C. Heckelman, *The Effect of the Secret Ballot on Voter Turnout Rates*, 82 *PUB. CHOICE* 107, 107 (1995); see also Phillip E. Converse, *Change in the American Electorate*, in *THE HUMAN MEANING OF SOCIAL CHANGE* 276–79 (Angus Campbell & Phillip E. Converse eds., 1972).

The period of the quick adoption of the Australian ballot was followed by another set of reforms in the early twentieth century, the move toward the absentee ballot. Advocates of the absentee ballot saw the justice in expanding the franchise to those who were unable to cast their ballots at their local polling places, but they were also cognizant of the tension between the reforms that led to the Australian ballot and the absentee ballot, which was voted away from the polling place without its privacy protections.

II. THE ORIGINS OF ABSENTEE BALLOTING

Expanding the franchise and ensuring that all who were eligible to vote are able to vote have long been goals in American democracy. The absentee ballot was intended to accomplish those goals. The early impetus behind absentee balloting was war: making sure that soldiers on the battlefield were not disenfranchised by their military service. The Civil War inspired the first major effort for absentee balloting in the United States.⁴² Even then, however, the movement was controversial.

The development of the absentee ballot, like the adoption of the Australian ballot, quickly swept through the states. The major wave of reform that introduced absentee voting to civilians occurred between 1911 and 1924, when 45 of the 48 states adopted some form or another of absentee voting.⁴³ The first laws were often limited to certain elections or certain classes of people, but as one observer noted, as more states adopted such laws, access to absentee ballots was generally broadened.⁴⁴ In this early reform period, however, reformers recognized that absentee balloting could be in tension with the Australian ballot which had been adopted a generation before. As absentee voting took place away from the voter's home voting booth, there were serious questions about fraud and coercion, the same kind of concerns that had been the impetus behind the move to adopt the Australian ballot. Accordingly, many states built in elaborate provisions to safeguard

42. See generally JOSIAH HENRY BENTON, *VOTING IN THE FIELD: A FORGOTTEN CHAPTER OF THE CIVIL WAR* (1915).

43. All but Rhode Island, Connecticut, and Kentucky. P. Orman Ray, *Absent-Voting Legislation, 1924-1925*, 20 AM. POL. SCI. REV. 347, 347 (1926). Kentucky had enacted an absentee voting law in 1918, but the Kentucky Supreme Court held that it was inconsistent with the state constitution. *Clark v. Nash*, 192 Ky. 594 (1921).

44. Paul G. Steinbicker, 32 AM. POL. SCI. REV. 898, 898-90 (1938). For example, Kansas adopted an absentee ballot law limited to railroad workers in 1901 but broadened it in 1911 to cover "any qualified elector." *Id.* at 898, n.5.

voter privacy and the integrity of the ballot.⁴⁵ Courts struck down a number of state laws for violating state constitutional provisions that protected the right to a secret ballot or required voting in person.⁴⁶

The reform period in the early part of the twentieth century produced laws that are the precursors of our contemporary absentee voter laws. Since that period, all states have had some form of absentee voting for civilians as well as military personnel. There was, however, an earlier era of absentee voting largely disconnected from the modern era.

A. Military Absentee Voting During the Civil War

During the Civil War, many states adopted absentee voting laws to allow soldiers to vote in the field. These laws applied only to military voting, and most were discontinued after the end of the war.⁴⁷ These laws pre-date the movement to adopt the Australian ballot, and thus do not directly implicate the tensions between absentee voting and the secret ballot. Nonetheless, a brief look at the adoption of military voting laws during the Civil War is instructive for four reasons. First, it indicates some of the initial reasons for opposing absentee voting. Second, there were a significant number of constitutional clashes, with absentee voter laws coming into conflict with provisions in state constitutions. Third, a number of states that passed absentee voting laws took care to deal with the issues of fraud and secrecy that potentially arise with the introduction of absentee voting. Finally, the period reveals some of the early methods of conducting absentee voting.

During the Civil War, nineteen of twenty-five states in the Union⁴⁸ and seven of eleven states in the Confederacy⁴⁹ provided for some form of absentee voting for soldiers in the field. The hurdles to the passage of absentee voting legislation were political, practical, and constitutional. In the Union states, there was a clear political divide over absentee voting legislation. Republicans

45. *Id.* at 905.

46. *See, e.g., Clark*, 192 Ky. at 594.

47. BENTON, *supra* note 42, at 314–15. The few that survived fell into disuse in the absence of military conflict. *Id.*

48. All but Indiana, Illinois, Delaware, New Jersey, Oregon, and Massachusetts. *See* BENTON, *supra* note 42, at 312–13.

49. All but Texas, Arkansas, Louisiana, and Mississippi. *See id.* at 27–28.

supported measures to provide for voting in the field, and Democrats opposed them.⁵⁰ These differences caused significant battles over these pieces of legislation. Opposition to absentee voting prevailed in a number of states, and in a number of others, efforts to pass legislation were thwarted initially and passed only later in the war.⁵¹ Republicans supported absentee voting because they believed that soldiers should have the right to vote and, since Republicans supported Lincoln's war efforts, they believed that the soldiers would vote Republican. Union Democrats, however, disapproved of how Lincoln was prosecuting the war, and therefore feared that the soldiers would support Republicans and drive Democrats out of office.⁵²

While the debate over absentee voting for Civil War soldiers divided largely along party lines, opponents also raised practical concerns over the possibilities for fraud, corruption and the lack of privacy in voting. First, opponents were concerned that the regular provisions against fraud would not be enforced, as the voting would take place outside of state lines. A majority report of the Committee on Elections in the Michigan House of Representatives expressed this view:

[W]hat power or authority is there to prevent these persons who are not qualified voters, from coming forward and offering to vote, and if objected to, from swearing their votes in? . . . The person so offending, being at the time neither within the jurisdiction of this State, nor in its service, could commit no crime against the State. There being no power to enforce the election laws, the ballot boxes might be stuffed or destroyed by a disorderly rabble, either of soldiers or of people, in the towns through which the commissioner would have to pass on his return to this State⁵³

A similar sentiment was expressed by opponents of absentee ballot legislation in the New Jersey House of Representatives. A majority report from the Committee on Elections asked: "Should illegal votes be cast, judges swear falsely, voters be intimidated, or the ballot box be tampered with by partisan officers, how could the offenders be arrested or the crime punished?"⁵⁴

50. *Id.* at 306–10.

51. *Id.* at 12–14.

52. *Id.* at 308.

53. 1863 MICH. JOURNAL OF THE HOUSE, pt. 2, at 1031.

54. Majority Report of Committee on Elections, Minutes of the House, at 364 (N.J. Mar. 8, 1864), quoted in BENTON, *supra* note 42, at 274.

Another objection was that the chain of control of the ballot was insecure and beyond the voter's control. In New York, a proposed absentee ballot law enabled soldiers to vote by proxy by providing their ballots to persons at home who would cast the soldiers' ballots at a local voting place.⁵⁵ The governor, in vetoing this bill in 1863, noted that the military officers before whom the soldier would prove his vote were not representatives of the state; and the bill did not require the messengers to be sworn, or to deliver the proxies, "but permit[ted] him to destroy or change the proxies and ballots"⁵⁶ The governor also faulted the bill for failing "to protect the secrecy of the ballot"⁵⁷ The ballot could be seen or tampered with by a number of intermediaries who transported the ballot from the field to the polling place. The governor's veto message went on to warn against the potential for fraud: "This brief statement will be sufficient to satisfy all of the many opportunities this bill affords for gross frauds upon the electors in the army and upon the ballot box at home."⁵⁸

The New Jersey Committee on Elections' majority report noted another practical concern over the possibility of manipulation or coercion of a soldier's votes by the military authority:

The soldiers know that an opportunity for a free, full and fair exercise cannot be had in the army while in the midst of an active campaign, even if the Constitution did not forbid. Not a day's notice of the place of voting could be given, because none could foresee where the exigencies of the service would require the men to be on election day. The military authorities could exclude from the camp any papers or documents they saw fit; they could if they thought best, admit certain persons to distribute one class of tickets and refuse passes to other persons; they could on election day, order certain men on duty away from the place of voting; and, in fact, if so disposed, they could in many ways prevent a full and free ballot.⁵⁹

The concerns about fraud and coercion in the absentee ballot system were borne out in one prominent example in New York. The 1864 elections were the first conducted under New York's new absentee voting law. As Democrat Governor Horatio Seymour had

55. *Id.* at 132–34.

56. 1863 N.Y. ASSEMBLY JOURNAL, at 1277.

57. *Id.*

58. *Id.*

59. Majority Report, *supra* note 54, at 364, *quoted in* BENTON, *supra* note 42, at 274–75.

been a staunch opponent of voting in the field, the bill's Republican sponsors had vested the power of enforcing the new law in the Republican Secretary of State.⁶⁰ This development, however, did not deter Seymour from acting; he appointed agents and inspectors to each army corps to collect Democratic ballots from soldiers from New York.⁶¹ The Republican State Committee of New York followed suit by appointing agents and inspectors to collect Republican ballots.⁶² Allegations of fraud soon arose regarding the Democratic inspectors and agents' conduct in the hospitals of Washington and Baltimore where many New York soldiers had been admitted.⁶³

In late October of 1864, Democratic inspectors in Baltimore and Washington were arrested and charged with:

falsely personating and representing officers and soldiers in the United States service, and with falsely and fraudulently signing and forging names of such officers and soldiers . . . [and] blanks issued under the authority of the State of New York for taking the soldiers' votes, for the purpose of transmitting the votes of the soldiers to be used at the general election⁶⁴

The accused were brought before military commissions. In Baltimore, one of the accused pled guilty to forging names, and he and another defendant were found guilty and sentenced to life in prison.⁶⁵ The men arrested in Washington were held and tried, but ultimately acquitted, apparently because much of the potential evidence had been destroyed.⁶⁶

The political opposition and practical objections to absentee voting for soldiers in the field were significant, but the form which most of the debates took was constitutional. In many states attempts to pass legislation to provide for voting in the field clashed with state constitutional provisions requiring that the votes be cast where the voter resided.⁶⁷ These constitutional issues shaped the political debate and caused a number of states to adopt

60. BENTON, *supra* note 42, at 158.

61. *Id.* at 160.

62. *Id.*

63. NEW YORK WORLD, Oct. 28, 1864, *Headline*

64. *Id.*

65. NEW YORK WORLD, Oct. 29, 1864, *Headline*

66. BENTON, *supra* note 42, at 167. For a full account of the incident, *see id.* at 157-70; *see also* DAVID G. CROLY, SEYMOUR AND BLAIR, THEIR LIVES AND SERVICES, WITH AN APPENDIX CONTAINING A HISTORY OF RECONSTRUCTION 131-37 (1868).

67. BENTON, *supra* note 42, at 5.

constitutional amendments.⁶⁸ The central issue was that many state constitutions explicitly or implicitly required voting in person at a local polling location. New York's constitution, for example, stated that an elector "shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere."⁶⁹ Out of the constitutional debate arose a number of state court cases and advisory opinions that shaped the path of absentee voting legislation. This section highlights a few significant cases.

The state constitutional questions were raised largely in the Union states. In the Confederate states, constitutional provisions were not significant barriers to passage of absentee voting legislation, as these states had scrapped their old constitutions after seceding. A number of states, such as Virginia, whose pre-secession constitution had provisions requiring voting in person, passed ordinances at their secession conventions authorizing absentee voting for soldiers.⁷⁰ Others passed legislation without controversy.⁷¹

In the Union states, at the beginning of the war, only one state permitted absentee voting by soldiers. Pennsylvania had passed the Military Absentee Act in 1813 to allow members of the state militia and those in the service of the United States to vote as long as the company the soldier was serving was more than two miles from his polling place on election day.⁷² Subsequently in 1838, Pennsylvania amended its constitution to include a provision that required voters to reside "in the election district where he offers to vote, ten days immediately preceding such election."⁷³ Shortly thereafter, in 1839, the Military Absentee Act was reenacted in substantially the same form as the original 1813 Act.⁷⁴ While the constitutional provision for in-person voting and the Act's provisions for military absentee voting were in conflict, the issue was not resolved until the early part of the Civil War.

Pennsylvania soldiers voted under this 1839 act in the 1861 elections. In 1862, the Pennsylvania Supreme Court ruled in *Chase v. Miller* that the military absentee voting statute was unconstitutional

68. *Id.* at 8–14.

69. N.Y. CONST. of 1846, art. II, § 1 (1894).

70. BENTON, *supra* note 42, at 27.

71. *Id.* at 28. As Benton notes, the seven Confederate states that passed provisions for absentee voting did so during or shortly after their secession. *Id.*

72. Act of Mar. 29, 1813, ch. 171, 1813 Pa. Laws 213–14. New Jersey also passed legislation in 1815 to allow soldiers to vote in the field, but it repealed the law in 1820. Act of Feb. 16, 1815, § 1, 1815 N.J. Laws 16–18 (repealed 1820).

73. PA. CONST. of 1838, art. III, § 1 (1838).

74. *Chase v. Miller*, 41 Pa. 403, 417 (1862).

because it violated the constitution's requirement for voters to cast their ballots in their election district.⁷⁵ The court's opinion indicated that the purpose of the 1838 constitutional amendment requiring in-person voting in local precincts was to further a registry law of 1836, which sought to "identify the legal voter, before the election came on, and to compel him to offer his vote in his appropriate ward or township, and thereby to exclude disqualified pretenders and fraudulent voters of all sorts."⁷⁶ The court ascribed the conflict between the 1839 act and the constitution to "careless legislation."⁷⁷ The Act had been a small part of a large report that had been written in 1834 and was not passed into law until 1839, after the constitution had been amended. The court also noted that there had been no debates as to the constitutionality of the 1839 military absentee voting statute.⁷⁸

In a number of states, the proponents of military absentee ballot legislation recognized the conflict between this legislation and constitutional provisions for in person voting, and undertook to amend their state constitutions in order to pass appropriate legislation.

In response to *Chase*, Pennsylvania amended its constitution in August of 1864, and enacted a new soldiers' voting bill to allow voting in the field in the 1864 election.⁷⁹ In several states, the proponents of absentee voting legislation recognized hurdles in their state constitutions and sought to amend those state constitutions. In Connecticut, the original legislation for absentee voting contained a provision that the legislation would not go into effect until it was submitted for review to the justices of the state supreme court. The court subsequently declared Connecticut's legislation unconstitutional, which led the proponents of the legislation to amend the constitution itself.⁸⁰ Kansas⁸¹, Maine⁸², New York⁸³, and Rhode Island⁸⁴ amended their constitutions to allow military absentee voting and enacted accompanying legislation in time to allow troops to vote in the election of 1864. Maryland adopted a new constitution that took effect in November of 1864 that included a provision to allow military absentee voting, and

75. *Id.* 428–429.

76. *Id.* at 418.

77. *Id.* at 423.

78. *Id.* at 417–18.

79. BENTON, *supra* note 42, at 200–01.

80. *Id.* at 174–78.

81. *Id.* at 110–11.

82. *Id.* at 121.

83. *Id.* at 153.

84. *Id.* at 186.

troops from Maryland were also able to cast votes in the 1864 election.⁸⁵ Nevada, which entered the Union during the war, adopted voting in the field in several ways. Congress had provided by law that a committee of delegates submit a constitution to the people.⁸⁶ In enacting the constitution, the delegates included provisions for soldiers in the field to vote on the constitution.⁸⁷ In addition, the ordinance specified that the same provisions for voting in the field would continue for future elections until the legislature adopted election laws.⁸⁸ In Indiana and Massachusetts, proponents of absentee voting tried to amend their constitutions, but failed; consequently, soldiers from these states were unable to vote by absentee ballot during the Civil War.⁸⁹ Efforts to amend the New Jersey Constitution failed as well, but New Jersey did adopt a constitutional amendment after the war, in 1875.⁹⁰ In Iowa, Wisconsin, Ohio and New Hampshire, the constitutionality of the absentee voting laws was challenged, but their state supreme courts upheld the laws.⁹¹

In a number of other states, courts struck down absentee voter laws. In Vermont, for example, the military absentee voter law included a provision requiring review by the state supreme court. The court held that absentee voter laws were constitutional as they related to presidential electors and federal elections, but were unconstitutional as they related to state and local elections, because they ran afoul of the state's in-person voting requirement.⁹² Such a distinction was adopted in other states as well.⁹³

The constitutional discussions in the states were extensive and centered around the state constitutional requirements for in-person voting, many of which were instituted in an attempt to register voters and cut down on fraud. These early constitutional clashes took place before the institution of the Australian ballot, but they still illustrate some of the difficulties inherent in absentee

85. *Id.* at 248–49.

86. Act of Mar. 21, 1864, ch. 36, 13 Stat. 30.

87. NEV. CONST. of 1864, Election Ordinance, § 2 (1866); *see also* BENTON, *supra* note 42, at 171.

88. *Id.* at 171–73.

89. *Id.* at 281–92, 293–304.

90. *Id.* at 269–80.

91. *Morrison v. Springer*, 15 Iowa 304 (1863); *State ex rel. Chandler v. Main*, 16 Wis. 398 (1863); *Lehman v. McBride*, 15 Ohio St. 573 (1863). New Hampshire's law was upheld in an advisory opinion. *Constitutionality of the Soldiers' Voting Bill*, 45 N.H. 595 (1864).

92. 1865 VT. HOUSE JOURNAL, Extra Sess., at 376–81.

93. *See, e.g., Twitchell v. Blodgett*, 13 Mich. 127 (1865); *Bourland v. Hildreth*, 26 Cal. 161 (1864).

balloting. To the extent that it is easier to recognize fraud at a controlled polling place, absentee balloting avoids those safeguards.

B. Methods of Voting

There were two chief methods of absentee voting during the Civil War. Soldiers would either cast their votes directly or by proxy. In direct voting, soldiers would typically vote at a polling site set up by officers, personally depositing their ballots in a voting box, which would then be sent to the home precinct.⁹⁴ In proxy voting, a soldier would designate a proxy to cast his vote in his home precinct. Proxy voting was used by some states to circumvent the requirements for voting in person in the home election district.

Many states instituted stringent rules and regulations to protect against fraud, such as rules governing the procedures for setting up a ballot box and for transporting the ballots.⁹⁵ Even with such stringent precautions, however, the opponents of absentee balloting still objected that the practice would open the way for fraud.

C. How Many Absentee Ballots were Cast during the Civil War?

There are significant challenges to making an accurate estimate of how extensive absentee voting was during the Civil War. Some records are lost or incomplete. In some states, absentee ballots were not separated out in the vote count.⁹⁶ Despite these difficulties, Benton attempted to quantify absentee voting in the Civil War. On the Union side, there were 2.9 million enlisted soldiers. Accounting for those who were not of voting age, duplicates, those who served in their home precincts and other voting disqualifications, Benton estimates that just over 1.3 million soldiers in the field were eligible voters who could not vote at their home precincts because of their service.⁹⁷ Of these 1.3 million, by extrapolating from the states that kept accurate records, Benton concluded approximately 230,000 soldiers, or one out of ever six

94. BENTON, *supra* note 42, at 15.

95. See, e.g., BENTON, *supra* note 42, at 54 (citing Wisconsin's provisions).

96. New York, Connecticut, Minnesota, West Virginia and Missouri did not separate out absentee ballots. *Id.* at 319.

97. *Id.* at 311.

or seven soldiers, cast votes in the field.⁹⁸ These votes were part of over 4 million cast for president. Subtracting out 1 million votes from states where there was no voting in the field, Benton determined that, where absentee votes were permitted, 7½ % of votes cast were absentee votes.⁹⁹ Benton noted that the soldier vote made no difference in most elections with one notable exception: by 475 votes, Maryland adopted a new constitution that abolished slavery, and the soldier vote was decisive in this case.¹⁰⁰

D. The Fate of Military Absentee Ballot Laws after the Civil War

Many military absentee ballot laws disappeared after the Civil War. As of 1915, when Benton surveyed the laws, he found that only Michigan, Kansas, Maine, New York, Nevada and Rhode Island retained military voting statutes.¹⁰¹ He also noted that many, but not all states retained the changes to their constitutions.¹⁰² While a few provisions for military absentee balloting remained in force, they were obviously not applied, in the absence of a major military conflict in the post-Civil War period.

E. Civilian Absentee Balloting

Despite the prevalent use of absentee voting in the military context in the Civil War, nearly fifty years elapsed before a major move to institute absentee voting for civilians began. Before the reform period beginning in 1911, there were two minor civilian absentee voting statutes passed in Vermont and Kansas,¹⁰³ but both were quite limited in scope. In Vermont, if voters found themselves away from their home precinct, but within the same congressional district, they could vote in their new location after filing a certificate indicating that they were on the list of voters in their former place of residence.¹⁰⁴ The Vermont law applied only to the election of

98. *Id.* at 312–13.

99. *Id.* at 313.

100. *Id.*

101. *Id.* at 315.

102. For example, Missouri in 1875 and Maryland in 1867 omitted the constitutional provisions for military absentee voting when they adopted new constitutions. *Id.* at 314–15.

103. P. Orman Ray, *Absent Voting*, 11 AM. POL. SCI. REV. 116, 116 (1917).

104. *Id.*

state officers, the congressional representative and presidential electors, all of whom would appear on the ballot across the congressional district.¹⁰⁵ The Kansas law was even more limited, applying only to railroad employees.¹⁰⁶

From 1911 to 1913, three states—Kansas, Missouri, and North Dakota—enacted civilian absentee ballot laws, which prompted a movement among nearly all the states to adopt similar legislation.¹⁰⁷ By today's standards, these acts and many other early absentee voter laws may seem restrictive in that they were limited to certain elections and to certain classes of voters. But these laws were the first to provide for statewide absentee balloting for a large class of voters.

Even in these earliest measures, there were two distinct methods of absentee voting. Kansas and Missouri adopted a system whereby a voter who was absent from his home polling location but within the state could present himself at another polling location and cast a ballot. That ballot would then be mailed to the voter's home precinct and counted there.¹⁰⁸ North Dakota's act more closely resembled modern absentee voting arrangements: a voter who anticipated his absence from his regular polling place would apply to the county auditor for an absentee ballot, which could be cast in front of an official notary public at any location (even outside the state) and mailed to the home polling place.¹⁰⁹

The varying state approaches can be ascribed to differences in their constitutions.¹¹⁰ In particular, North Dakota, unlike Kansas and Missouri, had an explicit provision in its constitution that "all elections by the people shall be by secret ballot."¹¹¹ The lack of any secrecy-in-voting clauses in the Kansas and Missouri constitutions made it possible to adopt a very simple system of voting by mail for intra-state voters.¹¹² By contrast, the North Dakota legislation required an elaborate set of procedures for the voter and the official who witnessed the casting of the absentee ballot. The voter was required to apply for an official absentee ballot from the county auditor.¹¹³ The ballots were to resemble regular election ballots except for the tint.¹¹⁴ Prior to the closing of the polls on election day,

105. *Id.*

106. *Id.*

107. P. Orman Ray, *Absent Voters*, 8 AMER. POL. SCI. REV. 442, 442 (1914).

108. *Id.* at 443.

109. *Id.* at 444.

110. *Id.* at 443-44.

111. N.D. CONST. of 1889, art. 5, § 129 (1950).

112. Ray, *supra* note 107, at 443.

113. *Id.* at 444.

114. *Id.*

the voter would appear "before some official having a seal and authority to administer oaths."¹¹⁵ The voter would have to show the official authority his unmarked ballot, and then mark it in the sole presence of this official, ensuring that the official could not see for whom the voter had voted.¹¹⁶ The voter then was to fold his ballot and place it in an envelope that had been provided by the county auditor.¹¹⁷ The official certified that all of these procedures have been followed, and the envelope was mailed to the county auditor, who then sent the envelope to the voter's home polling place.¹¹⁸ The ballot was to arrive at the polling place and be opened before the polls closed on election day.¹¹⁹ The local official at the polling place compared the signature on the outside of the envelope with the signature on file for the application for the absentee ballot; if the signatures matched, the envelope was opened, the folded ballot was placed into the ballot box and the voter's name was crossed off the rolls.¹²⁰

The procedures required under the North Dakota statute bring into stark relief the potential conflicts between the secret ballot and absentee balloting. In particular, there are no safeguards for the voter in the absentee ballot system to ensure he or she is not coerced or paid to vote a certain way. As there is no curtain of secrecy, another person might see the completed ballot. By requiring an official to witness that there was a blank ballot, to watch the voter fill out the ballot without seeing the substance of the vote, and to ensure that the voter casts his ballot with no one else watching, North Dakota attempted to recreate the protections of the polling place. Of course, an unscrupulous official might swear to having followed the procedures without having done so, but this possibility does not detract from the fact that the law provided for procedures to preserve the secrecy of the ballot away from the polling place.

Interestingly, P. O. Ray, a political scientist who catalogued the adoption of absentee ballot laws, notes that even in Kansas and Missouri, which did not have explicit constitutional requirements for a secret ballot, "a reasonable degree of secrecy has nevertheless been insured."¹²¹ Under the Kansas and Missouri system, when the

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 444-45.

121. *Id.* at 443.

voter appeared at a polling place away from this home precinct, after swearing an affidavit as to his voting status, he entered a voting booth and marked his ballot there. Voting officials endorsed the folded ballot and sent it to voting officials in the voter's home county. The one lapse in secrecy was that the voter's name and the endorsement would appear on the ballot itself, rather than on a separate envelope that would be discarded, so that those who opened and counted the ballot could learn the identity of the voter casting it. But to avoid the appearance of impropriety, stringent penalties were prescribed for officials who disclosed how the voter cast his ballot.¹²² Ray, whose writings in the *American Political Science Review* in the early part of this century are generally favorable towards the development of absentee voting, takes care to highlight the provisions in the absentee ballot laws that tried to guarantee a secret ballot. His position might be summarized as follows: Absentee voting is a welcome development allowing voters, whose circumstances make it difficult for them to cast their ballot in their home precinct to exercise their rights to vote. But absentee balloting, while in tension with the secret ballot, need not undermine secrecy if proper safeguards are enacted.¹²³

The adoption of absentee voting laws occurred at a remarkable pace. When Ray surveyed the state laws in the August 1914 edition of the *American Political Science Review*, he could count three enacted laws.¹²⁴ When he later surveyed the laws enacted through 1917, he found that 24 of the then 48 states had enacted absentee ballot laws.¹²⁵ The reasons for such a rapid adoption can be traced to the increased mobility of American workers, particularly among traveling salesmen and railway mail clerks who were necessarily absent from their places of residence on election day.¹²⁶ The United States' participation in World War I provided additional impetus for the passage of absentee ballot legislation.¹²⁷ By 1924, there were only three states without absentee ballot legislation.¹²⁸

Most of these laws were limited in scope. States limited eligibility to select categories of people. Most states allowed absentee voting by members of the military, reflecting both the history of such voting during the Civil War and the more immediate conflict in the

122. *Id.*

123. *See, e.g., id.* at 442-45.

124. Kansas, Missouri and North Dakota had enacted such laws. *Id.* at 442.

125. P. Orman Ray, *Absent-voting Laws, 1917*, 12 AM. POL. SCI. REV. 251, 251 (1918).

126. Charles Kettleborough, *Absent Voting*, 11 AM. POL. SCI. REV. 320, 320 (1917).

127. Steinbicker, *supra* note 44, at 898.

128. This includes Kentucky, which had passed legislation that was later declared unconstitutional. Ray, *supra* note 43, at 347.

First World War. Some states extended eligibility to other transient professions such as railroad workers or specified categories such as university students.¹²⁹ A few states allowed voting for illness or inability to reach a polling place.¹³⁰

States varied on where these absentee votes could be cast. Some, such as Vermont limited them to the same county as the voter's home voting precinct.¹³¹ Others required voting within the state, yet others required that the voter could only cast votes if he was out of state.¹³² Despite the impetus of the First World War for the adoption of absentee voting, almost all states required that the ballots be cast in the United States.¹³³ There was also a great variety in the types of elections in which eligible voters were allowed to cast absentee ballots. Some states limited absentee voting to presidential elections, while others included other federal elections, primaries, local elections, and so forth.¹³⁴

There was even an experiment in voting by mail in Nevada that prefigures Oregon's mail voting system. Ray notes that Nevada was the first state to authorize voting by mail by voters who were neither absent from their home precincts nor kept from the polls by sickness or physical disability.¹³⁵ Such voting was limited to precincts with fewer than twenty voters and its purpose was "to avoid the trouble and expense involved in establishing polling places and appointing election officers in the sparsely settled portions of the state."¹³⁶

As stated above, the two broad types of absentee voting were the Kansas/Missouri model and the North Dakota model. In the Kansas/Missouri model, a voter within the state presented himself at any polling place and cast a ballot, which was then mailed back to the home precinct.¹³⁷ In the North Dakota model, a voter made an application for an absentee ballot, which was mailed to him or her; the voter then took the ballot to a notary public, filled out the ballot and mailed it to the home jurisdiction.¹³⁸ In the early years of the adoption of absentee ballot legislation, both models enjoyed

129. Steinbicker, *supra* note 44, at 899-900.

130. *Id.* at 899.

131. Ray, *supra* note 103, at 116.

132. Steinbicker, *supra* note 44, at 899.

133. *Id.*

134. *Id.* at 900.

135. P. Orman Ray, *Absent-voting Laws*, 18 AM. POL. SCI. REV. 321, 324 (1924); *see also* 1923 Nev. Stat. 207.

136. Ray, *supra* note 135, at 324.

137. Ray, *supra* note 107, at 443.

138. *Id.* at 444.

support. In 1917, 10 states had adopted the Kansas/Missouri model and 14 the North Dakota model.¹³⁹ But states began to favor the North Dakota model, as it allowed for voting out of state, and because states began to allow absentee voting for local office, which would differ from precinct to precinct. By 1938, only Oklahoma used the Kansas/Missouri style plan exclusively, and only five other states used it as an alternative method of absentee voting.¹⁴⁰ The remainder had adopted the North Dakota system.¹⁴¹

III. CONSTITUTIONAL CHALLENGES TO ABSENTEE VOTING

As was the case with military absentee voting during the civil war, there remained constitutional questions surrounding absentee voting. There was still the central issue of whether absentee voting conflicted with state constitutional requirements of in person voting, which were often related to the introduction of registration systems and other safeguards to combat election fraud. In addition, since the Civil War, the states had adopted Australian ballot laws, and a number of state constitutions included provisions that explicitly provided for a "secret ballot." The secrecy provisions in state constitutions and laws made it hard to justify a system of absentee ballots where a voter did not have the protection of the curtain in the polling place to keep secret his voting selections.

These potential conflicts between absentee voting laws and state constitutions resulted in a number of state constitutional amendments and several cases striking down these laws. Notably, Michigan,¹⁴² Maryland,¹⁴³ New York¹⁴⁴ and California¹⁴⁵ amended their constitutions to allow for absentee voting. The California amendment, for example, allowed for voting by "those who by reason of their occupations, are required to travel," and those "engaged in the military and naval service of the United States."¹⁴⁶

There were several significant cases in which absentee ballot laws were found to have conflicted with state constitutions. In 1921, the Kentucky Supreme Court found a 1918 absentee ballot law

139. Ray, *supra* note 125, at 251.

140. Steinbicker, *supra* note 44, at 901.

141. *Id.*

142. John A. Lapp, *Absent Voting*, 10 AM. POL. SCI. REV. 114, 114-15 (1916).

143. P. Orman Ray, *Recent Primary and Election Laws*, 13 AM. POL. SCI. REV. 264, 269-70 (1919).

144. Ray, *supra* note 135, at 321.

145. *Id.*

146. Ray, *supra* note 43, at 348; 1923 Cal. Stat. 283

inconsistent with section 147 of the Kentucky Constitution, which provided that “[a]ll elections by the people shall be by secret official ballot, furnished by public authority to the voters at the polls, . . . and then and there deposited.”¹⁴⁷ This provision had been adopted in 1891, during the height of the Australian ballot reform movement.

In *Pennsylvania Lancaster’s Fifth Ward Election*,¹⁴⁸ the Pennsylvania Supreme Court relied on the constitutional provision that a voter reside in the election district “where he offers to vote” in order to declare a 1923 civilian absentee ballot act unconstitutional.¹⁴⁹ Recall that in *Chase v. Miller*, the same court had struck down an act providing for military absentee voting because it violated the “offer to vote” provision of the constitution. In response to this decision, Pennsylvania had amended its constitution to allow for military absentee balloting. The court in *Pennsylvania Lancaster’s* noted that no such amendment had been made to allow for civilian absentee voting, which indicated to the court that the only class permitted to do so was military voters.¹⁵⁰ The court found that the violation of the “offer to vote” provision was sufficient to declare the act unconstitutional, but it also noted that the act might run afoul of another provision of the constitution, which had been adopted since *Chase*. Article VIII, section 4 of the Pennsylvania Constitution of 1874 included a provision that guaranteed the secrecy of the ballot: article VIII section 4 guaranteed the secrecy of the ballot.¹⁵¹ The court noted that objections to the validity of the act had been raised with regard to this provision, but that a “detailed discussion [was] unnecessary.”¹⁵² It did, however, add that:

[i]t may well be argued that the scheme of procedure fixed by the Act of 1923, for the receipt, recording and counting of the votes of those absent, who mail their respective ballots, would end in the disclosure of the voter’s intention, prohibited by the amendment of 1901 to section 4 of article VIII of the Constitution,—undoubtedly the result if but one vote so returned for a single district. Though this provision as

147. KY. CONST. § 147 (1891). Kentucky’s 1891 Constitution is still in force as amended.

148. 126 A. 199 (Pa. 1924).

149. *Id.* at 200.

150. *Id.* at 201.

151. PA. CONST. of 1874, art. VIII, § 4 (amended 1901) (“All elections by the citizens shall be by ballot or by such other method as may be prescribed by law; Provided, That secrecy in voting be preserved”).

152. *Pennsylvania Lancaster’s*, 126 A. at 201.

to secrecy was likely added in view of the suggestion of the use of voting machines, yet the direction that privacy be maintained is now part of our fundamental law.¹⁵³

In New Mexico, the state supreme court in *Thompson v. Scheier*¹⁵⁴ held an absentee ballot law unconstitutional. The court held that the New Mexico Constitution's requirement that the voter "offer a vote" in his home precinct precluded absentee balloting. New Mexico had passed a constitutional amendment in 1920 to allow for military absentee balloting, but had not authorized the same practice for civilians. In a case later that year, *Baca v. Ortiz*,¹⁵⁵ the court found that military absentee balloting was also unconstitutional because the amendment in question, which had garnered a simple majority, should have been ratified by a three-quarters vote state-wide and by a two-thirds vote in each county. The court therefore applied the *Thompson* ruling to military absentee voting statutes as well, and found them unconstitutional.¹⁵⁶

While today all states have absentee ballot legislation, the constitutional amendments and the court decisions above illustrate that the absentee ballot, while a good and necessary avenue of voting for certain voters, is sometimes inconsistent with other goods in the electoral arena. To the extent that a state's constitution explicitly embraces in-person voting to combat fraud or protect the secrecy of the ballot, it must carve out exceptions for absentee balloting.

A. Procedural Safeguards on Absentee Voting

As early advocates of absentee ballot legislation recognized the tensions between the absentee system and anti-fraud and secrecy provisions, most early laws contained significant procedures to ensure, as much as possible, an untainted and private absentee ballot. The procedures covered the whole process from when the voter applies for an absentee ballot to when the ballot is counted. Political scientist Paul Steinbicker, writing retrospectively at the end of the reform period, noted the extent of such precautions. Steinbicker did not see all of the precautions as justified, such as

153. *Id.* at 201; see also Ray, *supra* note 43, at 348 (discussing *Clark* and *Pennsylvania Lancaster's*).

154. 57 P.2d 293, 302-04 (N.M. 1936).

155. 61 P.2d 320, 321 (N.M. 1936).

156. *Id.*

the regulations in four New England states, which required that the voter “swear that his choices of candidates have been unsubscribed, undictated, and unbought.”¹⁵⁷ But while he argued against excessive precautions that may inconvenience the voter, he was quite insistent that absent ballot laws include “adequate safeguards to prevent abuse.”¹⁵⁸ He noted with approval that the states “are generally careful to prevent fraud and dishonesty in absentee voting.”¹⁵⁹

His observations are striking today, as most of what he considered common and necessary to prevent fraud has been abandoned by the states in the name of convenience. First, he noted, “the absentee ballot is nearly always accompanied by an affidavit blank, usually on the envelope in which the ballot is to be sealed, which must be filled out and attested before a notary or other official authorized to administer oaths.”¹⁶⁰ Second, he remarked that the laws almost invariably provided that “the voter shall mark his ballot in the presence of the attesting official, although in such a manner that the latter cannot know for whom or for what it is marked. Usually, the attesting official must himself make a jurat to the effect that this has been done.”¹⁶¹

Steinbicker notes two exceptions to the generally stringent privacy protections—in Idaho and Michigan. Idaho only required affirmation that “the law had been complied with, and that the ballot has been ‘marked, folded, and sealed in private and secretly.’”¹⁶² Michigan required a similar affirmation and the signatures of two witnesses.¹⁶³ These provisions garner Steinbicker’s scorn as “deserv[ing] criticism on the ground of too easy abuse.”¹⁶⁴

B. Absentee Balloting Today

If the reformers who instituted the absentee ballot could witness today’s absentee ballot system, they would be pleased at its success, but shocked at how it has been implemented. They would see that their efforts to extend voting privileges to those who are unable to

157. Steinbicker, *supra* note 44, at 903.

158. *Id.*

159. *Id.* at 905.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

vote at local polling places have expanded beyond their wildest dreams. The classes of people who are eligible to vote in absentia have expanded enormously. In the early period, many states limited the absentee vote to certain professions, and allowed very limited reasons for absence.¹⁶⁵ Today, absentee ballot laws are loose and generous in their scope. Nearly any eligible voter can vote in absentia in a given election. Correspondingly, the percentage of ballots cast by absentee voters has skyrocketed.¹⁶⁶ However, the early day reformers would be stunned to learn that the many provisions they viewed as essential to a well-functioning absentee ballot system have been stripped away in the name of voter convenience.¹⁶⁷

C. The Rise of Absentee Voting

The percentage of absentee voters at the national level is hard to calculate accurately due to different voting methods, reporting categories, and variations in voter participation in elections at different levels and in different cycles. It is even more difficult to compare such numbers over time. Yet an upward trend is apparent. Steinbicker estimated that in the presidential election year of 1936, 2% of the 45 million votes cast nationwide were absentee ballots.¹⁶⁸ In the 2000 presidential election, 14% of all votes were cast before election day.¹⁶⁹ While this number is still relatively modest, the percentage is on the rise, and is driven by a few Western states where absentee ballot rates are extremely high: in Oregon, which has an all mail voting system, every voter must by necessity cast a ballot away from the polling place;¹⁷⁰ but in recent elections several other states have high percentages of votes cast away from the

165. Ray, *supra* note 135, at 323–24.

166. See *infra* Part III.C.

167. NATIONAL CONFERENCE OF STATE LEGISLATURES, ABSENTEE BALLOTS, at <http://www.ncsl.org/programs/legman/elect/taskfc/absentee.htm> (last visited April 18, 2003).

168. Steinbicker, *supra* note 44, at 898.

169. U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2000 10 (Feb. 2002) (on file with the University of Michigan Journal of Law Reform). Note: this figure does not include overseas military personnel.

170. OREGON SECRETARY OF STATE, VOTE-BY-MAIL: FREQUENTLY ASKED QUESTIONS, at <http://www.sos.state.or.us/executive/policy-initiatives/vbm/faq.html> (last visited April 9, 2003).

traditional polling place, including Washington (66%),¹⁷¹ California (25%),¹⁷² Colorado, Nevada, and Arizona (all about 35%).¹⁷³ The rise in California's absentee voting is instructive. Between the 1962 and 2000 general elections, absentee ballots increased from 2.6% of all votes to 24.6%.¹⁷⁴

Equally striking is the change in the procedures for casting absentee ballots. It is much more convenient for voters to cast absentee ballots, but many of the safeguards viewed as essential by early reformers have been abandoned. While nearly all of the first civilian absentee voting statutes required the voter to appear before a notary public,¹⁷⁵ no state requires that today. The notary requirement is an option in nine states,¹⁷⁶ but the notary can be dispensed with if there are one or two witnesses.¹⁷⁷ Only five other states require a witness in all circumstances, although a good number require a witness if the voter was assisted in voting.¹⁷⁸ Twenty-one states have no requirements for a notary public or a witness.¹⁷⁹

IV. THE IMPLICATIONS OF CONVENIENCE ABSENTEE BALLOTING

Advocates of Oregon's all mail voting system trumpeted its positive effects on voter turnout. The theory is that there are obstacles to voting which mail voting removes. The evidence for such a claim, however, is shaky. First, there is not enough data to make definitive judgments about vote by mail. Second, there is dispute in the scholarly community if vote-by-mail increases voter turnout. A University of Michigan study showed a small increase (6%) in turnout in one election, although it notes that vote-by-mail does not entice non-voters to cast ballots and makes it slightly more

171. WASHINGTON SECRETARY OF STATE, *ABSENTEE STATISTICS FOR THE 2002 GENERAL ELECTION*, at http://www.secstate.wa.gov/elections/absentee_stats.aspx (last visited Apr. 18, 2003).

172. CALIFORNIA SECRETARY OF STATE, *HISTORICAL ABSENTEE BALLOT USE IN CALIFORNIA*, at http://www.ss.ca.gov/elections/hist_absentee.htm (last visited April 7, 2003).

173. U.S. CENSUS BUREAU, *supra* note 169, at 10.

174. *See* CALIFORNIA SECRETARY OF STATE, *supra* note 172.

175. Steinbicker, *supra* note 44, at 905.

176. Alabama, Alaska, Florida, Louisiana, Maine, Minnesota, New Jersey, Oklahoma, and Rhode Island. NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 167.

177. *Id.*

178. Mississippi, North Carolina, South Carolina, Virginia, and Wisconsin require one or two witnesses in all circumstances. *Id.*

179. *Id.*

likely that habitual voters will cast ballots in a given election.¹⁸⁰ Another political scientist argues that vote-by-mail depresses turnout, possibly because it de-emphasizes traditional get-out-the-vote mechanisms.¹⁸¹ He notes that in the same Oregon election that the Michigan study examined that Oregon's rate of voter turnout was not historically high, nor relatively higher than the rate in other elections of that election cycle.¹⁸²

Easy absentee voting has also caused the political parties to become much more involved in promoting their use. Where once there were strong prohibitions forbidding anyone but the voter from procuring an absentee ballot and equally strong restrictions against assistance in filling out absentee ballots, many of these provisions are no longer in effect. This looseness in the laws allowed the parties to become much more directly involved in the absentee ballot process, as it is in the parties' interest to "lock in" their loyal voters before election day.

A. Modern Cases of Abuse of the Absentee Ballot

The rise in absentee voting, the ease of obtaining absentee ballots, and the role of the parties in the process could easily lead to increased fraud and the loss of protections of the secret ballot. Proponents of such developments are quick to downplay the idea that fraud of the type that occurred before the implementation of the Australian ballot could occur again. It is certainly true that elections are much "cleaner" now than they once were, but the opportunity for mischief exists because of the lack of precautions in the use of the absentee ballot. What is to stop an employer, church, union, club, or family from viewing the voter's ballot? Similarly, there are opportunities for unscrupulous partisans to cast ballots for the feeble or unaware. Unlike ballots cast in person, which are in the hands of election officials only for a matter of hours until they are counted, and then usually in the presence of observers

180. Adam J. Berinsky et al., *Who Votes by Mail? A Dynamic Model of the Individual-Level Consequences of Vote-By-Mail Systems*, 65 PUB. OPINION Q. 178, 190–91 (2001); see also Michael Traugott, *Alternative Methods of Voting: Mail, Internet, Unrestricted Absentees*, Address at United States Congressional Briefing: The Mechanics of Electoral Reform: From Registration to Results (Mar. 16, 2001), at http://www.decadeofbehavior.org/policyseminars/er_transcript-traugott.pdf (last visited May 14, 2003).

181. See Curtis Gans, *Comments on Report by Voting Procedures Working Group 6* (June 6, 2001) (unpublished report, on file with the University of Michigan Journal of Law Reform).

182. *Id.* at 7.

from both parties, absentee ballot applications and absentee ballots are in the physical possession of local election officials, often partisans themselves, for weeks or months and are out of the physical view of any outsiders.

There have been a number of serious absentee ballot scandals in recent years that demonstrate the opportunity for fraud in the absentee ballot system. The most dramatic example was the Miami mayoral election of 1997. Many absentee ballots were shown to be forged, coerced, stolen from mailboxes, or fraudulently obtained.¹⁸³ Problems were not peculiar to military ballots; Republican Party officials in Seminole County were accused of inappropriately adding voter identification numbers to thousands of absentee ballot applications.¹⁸⁴ The fraud was so pervasive that Florida courts threw out all of the absentee ballots, overturned the election, removed the declared winner, Xavier Suarez, from office, and installed Joe Carollo instead.¹⁸⁵ In another case in Florida, absentee ballot irregularities in the 1993 Hialeah mayoral contest prompted a judge to order a new election.¹⁸⁶ Absentee ballot fraud in Florida led officials to tighten their standards, but it was precisely those tighter standards—clear postmarks, signatures, dates, voter identification numbers, witnesses—that tripped up so many absentee ballots in the election controversy in 2000. Fraud has not been exclusive to Florida. Other absentee ballot fraud cases have occurred in recent years in Alabama,¹⁸⁷ Connecticut,¹⁸⁸ Indiana,¹⁸⁹ New York,¹⁹⁰ and Pennsylvania.¹⁹¹

183. David D. Porter, *A Dirty Little Secret of Politics*, ORLANDO SENTINEL, Feb. 23, 2002, at A19.

184. *Jacobs v. Seminole Cty. Canvassing Board*, 773 So.2d 519, 521 (2000).

185. *In Re The Matter of the Protest of Election Returns and Absentee Ballots in The November 4, 1997 Election for the City of Miami, Fla.*, 707 So.2d 1170 (Fla. Dist. Ct. App. 1998); Donald P. Baker, *Appeals Court Reinstates Ex-Mayor of Miami: Ruling Invalidates Court Order for New Race After Widespread Fraud*, WASHINGTON POST, Mar. 12, 1998, at A3.

186. Catherine Wilson, *Judge Orders New Election in Hialeah*, TAMPA TRIBUNE, Nov. 8, 1994, at 6.

187. Associated Press, *Final Four Sentenced in Winston County Voter Fraud Case*, July 19, 2001.

188. Tom Puleo, *Tighter Control Sought on Absentee Ballots; Charges in Garcia Case May Prompt Action*, HARTFORD COURANT, June 27, 1996, at A3.

189. Associated Press, *Martinsville Mayor, City Council Member Charged with Election Fraud*, Jan. 6, 2000.

190. Associated Press, *Cattaraugus County Legislator Charged with Filing False Ballots*, Sept. 17, 1999.

191. Marylynn Pitz, *Murphy Arraigned on Vote-Fraud Charges*, PITTSBURGH POST GAZETTE, May 25, 1999, at B1.

*B. Election Reform Legislation in Congress
and Absentee and Mail Voting*

The differences between voting at the polling place and absentee and mail voting were made clear during the election reform debate in Congress last year. The legislation passed by Congress focused primarily on improving the polling place experience with reforms such as improved voting machines, provisional ballots, computerized state-wide registration systems accessible at every polling place, accessibility to the polls and error checking were aimed at the traditional polling place.¹⁹² Strikingly, in the debate on election reform in the Senate, the advocates of the Oregon mail voting system twice sought to have absentee and mail voting systems exempt from provisions of the election reform bill. In particular, they sought exemptions from election reform requirements for error checking of ballots and for a requirement that voters who have registered by mail show a form of identification when voting.¹⁹³ The latter provision was so contentious that it threatened to destroy a bipartisan compromise on the bill.¹⁹⁴ Election reformers hope that reform succeeds in lessening the over-vote and under-vote rates and reducing fraud at the polling place. To the extent that the voting experience at the polls improves in ways that are hard to duplicate in an absentee voting setting, we may very well come to have two distinct kinds of voting.

CONCLUSION

There has been a movement in our country toward voting away from the polling place. The percentage of such votes has risen over the years, and a number of election officials in Western states have been aggressive proselytizers of the view that vote by mail or increased use of absentee ballots is a reform that makes voting more convenient and raises voter turnout. There is no sign that this trend will disappear, and it is not farfetched to imagine the world sketched out by some technologists that voters will cast their votes at their own homes over the Internet.

Convenience of voting is an important goal, but not one that should triumph absolutely over other goals. Convenience of voting

192. Help America Vote Act of 2002, *supra* note 4.

193. S.565, 107th Cong. Amends. 2874, 2937 (2002).

194. Foerstal, *supra* note 3, at 637.

must be balanced with privacy and the secrecy of the ballot. The fact that some people need absentee ballots should not lead us to the conclusion that voting away from the polling place is good for all of us. In addition, increased absentee voting or vote-by-mail are not the only ways to make voting more convenient. There are many ways of making the traditional polling place more accessible, welcoming, efficient and convenient.

The issue with the rise of absentee balloting is not just the greater possibilities for fraud. The vote, in many ways, epitomizes democracy. It should be a meaningful experience, where citizens congregate with their neighbors and affirm their joint commitment to society, where the experience of entering a private, curtained voting booth reaffirms their commitment to individual liberty and the right to choose their leaders. Reducing the vote to the equivalent of filling out a Publishers' Clearinghouse lottery cheapens the experience. In a highly mobile society, absentee ballots are a necessity, but they should remain an option designated for those who are unavoidably absent from their homes on election Day, not as a regular substitute for voting at the polls.

If there must be a more widespread alternative to election Day voting at the polls, early voting at a city hall or other official office at least preserves the sanctity of privacy for a voter, and partially replicates the collective experience of voting. But early voting has a serious downside. A system in which many or most voters cast their ballots before election Day changes the whole nature of a campaign. For better or worse, most citizens do not pay close attention to an election until shortly before the election itself. Not surprisingly, the whole nature of the campaign, including the candidates' strategies and messages, change during the final days and weeks. In the home stretch, the pressure is greater and revelations often emerge, which changes the context of the contest and the voters' evaluation of the candidates. So early voters, by definition, are comparatively uninformed. Voting early is like voting on the outcome of a basketball game at the end of the third quarter.

The desire to reduce barriers to voting, and to make voting more pleasant than burdensome an experience is commendable. Indeed, it is and should be an obligation of a democratic society to make voting perceived positively, while also ensuring against abuse or fraud. Election reform should focus its energies and resources on making election Day work better, which means extending polling hours, perhaps even over a 24 hour period or on a weekend; more and better informed poll workers; more voting machines and

booths to reduce lines; a streamlined and centralized voter registration system in each state to reduce fraud and prevent wrongly turning away duly registered voters. All of these things cost money, and both the federal government and the states should step up and provide the necessary resources.

The absentee ballot was an important reform when it was introduced for military voters in the 19th century and civilian voters in the 20th. But the introduction of the Australian ballot was likewise a significant reform. These two reforms are in tension with one another. The privacy of the vote guaranteed by the Australian ballot system is compromised by the absentee ballot. Early advocates of the absentee ballot understood its value, but also the tension with the Australian ballot. Accordingly, they instituted important safeguards in absentee ballots that sought to preserve some aspects of the secret ballot. In our rush to introduce more voting away from the polling place we forget these safeguards and the abuses that plagued an earlier era. Election reformers would be wise to recall the history of earlier electoral reforms. If they do not do so, the lure of convenience will become even more powerful—until we reach a level of fraud comparable to the 19th Century, and start a new cycle of reform.