

## LOCAL DEMOCRACY ON THE BALLOT

By Joshua A. Douglas\*

## INTRODUCTION

If all politics is local,<sup>1</sup> then all—or at least most—of election law is local as well. We do not have one uniform election system but thousands of local precincts all running Election Day simultaneously. Local laws play an outsized, yet underscrutinized, role in election administration. Every year, local jurisdictions change their election rules. Taken together, these laws have a significant impact on how we run our democracy.

The results of the 2016 election show that those interested in election law reform must chart a new course forward in a particularly difficult political environment. Republicans now control the White House and both chambers of Congress. The Republican-controlled Senate recently confirmed a conservative, Judge Neil Gorsuch, to the U.S. Supreme Court, meaning that conservatives on the Court will likely continue to enjoy a majority on voting rights issues for years to come.<sup>2</sup> Republican majorities control many state legislatures.<sup>3</sup> Most governors are Republican as well.<sup>4</sup>

Against this backdrop, local election laws represent an untapped area for reform, now more vital than ever. As this Essay shows, localities can reform the election rules for their own elections. Of course, local laws

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<sup>1</sup> See Andrew Gelman, *All Politics Is Local? The Debate and the Graphs*, N.Y. TIMES: FIVETHIRTYEIGHT (Jan. 3, 2011, 10:35 PM), <http://fivethirtyeight.blogs.nytimes.com/2011/01/03/all-politics-is-local-the-debate-and-the-graphs/> [<https://perma.cc/69YN-HCRW>].

<sup>2</sup> See Robert Barnes & Ed O'Keefe, *Immediate Impact: Gorsuch Could Begin Playing Pivotal Role on Supreme Court Starting Next Week*, WASH. POST (Apr. 7, 2017), [https://www.washingtonpost.com/politics/courts\\_law/immediate-impact-gorsuch-could-redefine-supreme-court-starting-next-week/2017/04/07/24e6a9cc-1ae9-11e7-9887-1a5314b56a08\\_story.html](https://www.washingtonpost.com/politics/courts_law/immediate-impact-gorsuch-could-redefine-supreme-court-starting-next-week/2017/04/07/24e6a9cc-1ae9-11e7-9887-1a5314b56a08_story.html) [<https://perma.cc/R9FF-RKCL>] (discussing Justice Gorsuch's "decisive role" in voting rights cases).

<sup>3</sup> NAT'L CONFERENCE OF STATE LEGISLATURES, 2017 STATE & LEGISLATIVE PARTISAN COMPOSITION (2017), [http://www.ncsl.org/portals/1/documents/elections/Legis\\_Control\\_2017\\_March\\_27\\_11am.pdf](http://www.ncsl.org/portals/1/documents/elections/Legis_Control_2017_March_27_11am.pdf) [<https://perma.cc/FX38-93BG>] (showing that thirty-two states had Republican-controlled state legislatures in March 2017).

<sup>4</sup> *Id.* (showing that thirty-three states had Republican governors in March 2017).

cannot override contrary federal or state laws. Yet there are numerous ways localities can alter their own election rules to bring more people into the democratic process. Once normalized, these local rules can influence federal and state policy.

This Essay, focusing particularly on voter-backed local election rules, proceeds in three parts. Part I highlights how local laws play a significant role in dictating voting rights and election rules. Too often election law scholars focus solely on federal or state law. But local laws are also important in defining the right to vote and providing rules for our democracy. New local election law experiments in one place can highlight innovative reforms that other cities and states may eventually adopt. This avenue to election law reform is particularly important given the current political climate.

Part II considers local ballot initiatives in 2016 regarding election laws.<sup>5</sup> It highlights the local push to expand voter eligibility, change electoral structures, and fix campaign finance rules throughout the country. From lowering the voting age for school board elections in Berkeley, California, to altering the election rules in Benton County, Oregon, to adopting public financing in Howard County, Maryland, voters in cities and counties considered various new rules for their elections.<sup>6</sup> The rules that passed will alter how elections operate in those areas. Part II also highlights the need for greater resources—particularly the use of new technologies—for local election administrators to implement voting reforms.

Part III argues that courts, when faced with a judicial challenge to one of these local laws, should generally defer to local rules that expand the electorate or open up the political process to more people, but should not defer to local voting restrictions or rules that tend to aggrandize the majority's control. Deference is particularly warranted for voter-backed initiatives on local election laws that expand access for voters or candidates because the people themselves have ratified those rules. In these instances, the majority has given up some of its own power or limited entrenchment and incumbent control, which allows more people to become involved in the election process.<sup>7</sup> From a normative perspective, representative

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<sup>5</sup> There were also various state ballot initiatives on election law in 2016. This Essay, however, focuses solely on the local ballot initiatives because local laws have generally received scant attention from election law scholars. For a discussion of state ballot initiatives on election law, see Daniel A. Smith, *Direct Democracy and Election and Ethics Laws*, in *DEMOCRACY IN THE STATES: EXPERIMENTS IN ELECTION REFORM* 174–85 (Bruce E. Cain et al. eds., 2008).

<sup>6</sup> See *infra* Part II.

<sup>7</sup> See *infra* Part III.

democracy works best with more people participating, either as voters or candidates.<sup>8</sup> Thus, local laws that enhance democratic participation by expanding the electorate or reducing campaign finance barriers to running for office epitomize the benefits of local democracy and deserve judicial deference.

Focusing on local election laws represents a long-term solution; nationwide reform of our electoral system will not happen overnight. But in twenty to thirty years, if local governments have normalized these democracy-enhancing efforts and courts have upheld the reforms, then it will be easier to enact them on a wider scale. This Essay begins the conversation on how to make that happen.

### I. BACKGROUND ON LOCAL ELECTION LAWS

Federal and state law analysis dominates the study of election law. Most scholars focus on Supreme Court doctrine, federal legislation, or state-level regulation.<sup>9</sup> This emphasis, while important, is underinclusive and therefore misses the reality of election law on the ground. Most election law implementation happens in cities and counties.<sup>10</sup> Moreover, given the current political environment, the local level offers the best chance at reform in the coming years. We gloss over these local rules at our peril.

Cities and counties play a vital role in running Election Day. They administer elections through thousands of county clerks' offices and precincts.<sup>11</sup> Many local election offices issue local poll worker guidebooks that election officials must follow.<sup>12</sup> Often election rules or processes will differ significantly among localities. For instance, one county may use a different voting machine than the county next door.<sup>13</sup>

Some jurisdictions have unique or unusual rules for Election Day. For example, Doña Ana County, New Mexico, uses countywide Voting Convenience Centers instead of location-specific precincts for voting, so

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<sup>8</sup> See *infra* notes 86–94 and accompanying text.

<sup>9</sup> See Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO ST. L.J. 1, 11–12 (2016).

<sup>10</sup> See Justin Weinstein-Tull, *A Localist Critique of Shelby County v. Holder*, 11 STAN. J. C.R. & C.L. 291, 296 (2015) (“Local governments are at the heart of election law because states delegate substantial election administration responsibilities to them.”).

<sup>11</sup> See Joshua A. Douglas, *A ‘Checklist Manifesto’ for Election Day: How to Prevent Mistakes at the Polls*, 43 FLA. ST. U. L. REV. 353, 358–59 (2016).

<sup>12</sup> *Id.* at 372.

<sup>13</sup> See, e.g., Chris Wilson, *How the Wisconsin Recount Could Help Fix American Elections*, TIME (Nov. 30, 2016), <http://time.com/4583933/wisconsin-recount-election/> [<https://perma.cc/ER7B-NS4H>] (“Elections in Wisconsin are supervised by about 1,850 different municipalities in 72 counties, each of which chose their own voting mechanism.”).

voters in that county can cast ballots at any Convenience Center in the county instead of having to go to their home precinct.<sup>14</sup> Two cities in Maryland allow sixteen- and seventeen-year-olds to vote in local elections.<sup>15</sup> Seattle is currently experimenting with campaign finance vouchers as a form of public financing, in which the city gives every voter four \$25 vouchers to donate to any candidate for local office who opts in to the program.<sup>16</sup> These are just a few examples of innovative local election laws that can have a significant effect on local democracy.

This local activity is important for our democratic processes, especially in the current political environment. Given his false rhetoric about voter fraud, Donald Trump and his administration may attempt to enact nationwide voting laws that make it harder to participate in elections.<sup>17</sup> At a minimum, a Republican-controlled Congress is unlikely to champion issues such as updating the Voting Rights Act or reforming campaign finance laws.<sup>18</sup> Instead, Congressional Republicans are more likely to attempt to cabin the reach of existing pro-voter laws like the National Voter Registration Act (the “Motor Voter Law”), which expands

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<sup>14</sup> See *Voting Convenience Centers*, DOÑA ANA COUNTY, <https://donaanacounty.org/node/141794> [<https://perma.cc/JJ2F-GSK5>] (last visited Apr. 17, 2017); Brian Heaton, *Tech Helps End Precinct Voting in New Mexico County*, GOV'T TECH. (June 27, 2012), <http://www.govtech.com/e-government/Tech-Helps-End-Precinct-Voting-in-New-Mexico-County.html> [<https://perma.cc/E5FP-DFRG>].

<sup>15</sup> See Joshua A. Douglas, *In Defense of Lowering the Voting Age*, 165 U. PA. L. REV. ONLINE 63, 63 (2017), <https://www.pennlawreview.com/online/165-U-Pa-L-Rev-Online-63.pdf> [<https://perma.cc/R3VP-W3AX>] (citing Elena Schneider, *Students in Maryland Test Civic Participation and Win Right to Vote*, N.Y. TIMES (Jan. 9, 2015), <http://www.nytimes.com/2015/01/10/us/politics/students-in-maryland-test-civic-participation-and-win-right-to-vote.html> [<https://perma.cc/DK9L-9JH2>]).

<sup>16</sup> See Bob Young, *'Democracy Vouchers' Win in Seattle; First in Country*, SEATTLE TIMES (Nov. 4, 2015, 6:20 AM), <http://www.seattletimes.com/seattle-news/politics/democracy-vouchers/> [<https://perma.cc/D37V-MP6X>]; *Democracy Voucher Program*, SEATTLE.GOV, [http://www.seattle.gov/democracyvoucher/info-for-seattle-residents/faqs#What are Democracy Vouchers?](http://www.seattle.gov/democracyvoucher/info-for-seattle-residents/faqs#What%20are%20Democracy%20Vouchers?) [<https://perma.cc/HMA7-QRLW>] (last visited Apr. 17, 2017).

<sup>17</sup> See Michael Wines, *After Bitter Campaign, Election Positions Trump to Shape Rules on How You Vote*, N.Y. TIMES (Dec. 2, 2016), <http://www.nytimes.com/2016/12/02/us/politics/voting-rights-donald-trump.html> [<https://perma.cc/LV4B-ZFV6>]; Vanessa Williams & Katie Zezima, *Voting Rights Advocates Brace for 'Biggest Fight of Our Lifetime' During Trump Administration*, WASH. POST (Nov. 30, 2016), [https://www.washingtonpost.com/politics/voting-rights-advocates-brace-for-the-biggest-fight-of-our-lifetime-against-trump-administration/2016/11/29/88bcae8-b657-11e6-959c-172c82123976\\_story.html](https://www.washingtonpost.com/politics/voting-rights-advocates-brace-for-the-biggest-fight-of-our-lifetime-against-trump-administration/2016/11/29/88bcae8-b657-11e6-959c-172c82123976_story.html) [<https://perma.cc/XE8D-WQJP>] (discussing Trump's claims of widespread voter fraud before and after the November 2016 election).

<sup>18</sup> See generally ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 183–206 (2015) (documenting the history of the civil rights movement and the push for minority voting rights).

registration opportunities but, critics claim (without much proof), opens the door to voter fraud.<sup>19</sup>

Republicans also control most state governments.<sup>20</sup> As of 2017, thirty-three Governors are Republican, and Republicans have majorities in both chambers of the legislature in thirty-two states, as compared to full Democratic control in only five states.<sup>21</sup> Because conventional wisdom suggests that expanded access to the franchise benefits Democrats politically, Republicans have less incentive to support these measures.<sup>22</sup> Instead, under a mantra of preventing “voter fraud,”<sup>23</sup> Republicans are likely to promote laws like strict voter ID requirements or other rules that make it harder to vote.<sup>24</sup> For example, the Republican-controlled Michigan legislature debated a strict voter ID requirement during its 2016 lame-duck session,<sup>25</sup> and New Hampshire Republican Governor Chris Sununu has publicly supported the repeal of same-day voter registration in his state.<sup>26</sup> It seems, then, that many state governments are unlikely to push voter expansions and instead may pull back on voting rights in the near future.

What’s left? Cities and counties. Local election laws provide a way to secure grassroots support for electoral reform. Once a locality implements an innovative election rule, other jurisdictions can see how it is working. If successful, the practice will become normalized. Other places are then

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<sup>19</sup> See Mark Joseph Stern, *Trump’s Tweet Wasn’t a Distraction. It Was the Start of a Precision Assault on Voting Rights*, SLATE (Nov. 28, 2016, 1:23 PM), [http://www.slate.com/blogs/the\\_slatest/2016/11/28/trump\\_s\\_voter\\_fraud\\_tweet\\_part\\_of\\_an\\_assault\\_on\\_voting\\_rights.html](http://www.slate.com/blogs/the_slatest/2016/11/28/trump_s_voter_fraud_tweet_part_of_an_assault_on_voting_rights.html) [<https://perma.cc/URS5-7CGZ>].

<sup>20</sup> See Jennifer G. Hickey, *Republicans Build on Their Dominance in State Legislatures*, FOX NEWS (Nov. 18, 2016), <http://www.foxnews.com/politics/2016/11/18/republicans-build-on-their-dominance-in-state-legislatures.html> [<https://perma.cc/M2WV-ZR42>] (“Republicans increased their control in state legislatures leaving Democrats with their lowest level since the Civil War.”).

<sup>21</sup> *Id.*

<sup>22</sup> See Ari Berman, *Republicans Used to Support Voting Rights—What Happened?*, NATION (Apr. 14, 2014), <https://www.thenation.com/article/democrats-support-voting-rights-republicans-should-too/> [[perma.cc/B8VY-ZZUF](https://perma.cc/B8VY-ZZUF)] (highlighting Republicans’ recent move away from supporting expansive voting rights).

<sup>23</sup> See Michael Wines, *How Charges of Voter Fraud Became a Political Strategy*, N.Y. TIMES (Oct. 21, 2016), <http://www.nytimes.com/2016/10/22/us/how-charges-of-voter-fraud-became-a-political-strategy.html> [<http://perma.cc/S99L-WB4N>].

<sup>24</sup> See, e.g., Steven Yaccino & Lizette Alvarez, *New G.O.P. Bid to Limit Voting in Swing States*, N.Y. TIMES (Mar. 29, 2014), <https://www.nytimes.com/2014/03/30/us/new-gop-bid-to-limit-voting-in-swing-states.html> [<http://perma.cc/9TQD-MBBY>].

<sup>25</sup> See Chad Livengood, *Voter ID Bills Surface in Michigan’s Lame-Duck Session*, DETROIT NEWS (Nov. 30, 2016, 1:58 PM), <http://www.detroitnews.com/story/news/politics/2016/11/30/voter/94678424/> [<http://perma.cc/FC7A-J8WG>].

<sup>26</sup> See Rick Ganley & Michael Brindley, *Governor-Elect Sununu Says He Wants to End Same-Day Voter Registration*, N.H. PUB. RADIO (Nov. 18, 2016), <http://nhpr.org/post/governor-elect-sununu-says-he-wants-end-same-day-voter-registration> [<http://perma.cc/T9ZW-Y4A7>].

likely to follow suit. In this way, municipalities can be “test tubes of democracy,”<sup>27</sup> trying out new election practices that can spread to other jurisdictions in the near future. For instance, cities should now watch Seattle and evaluate the success of its experiment with using campaign vouchers for public financing.<sup>28</sup> Seattle is the courageous city that has gone first, and if the overall experience is positive, then other cities can use that evidence in support of their own similar initiatives. Academics should study these reforms to discern which ones work best and deserve widespread adoption.

Many jurisdictions allow voters themselves to approve local measures. Seeking to change voting rules at the statewide or national level by convincing partisan politicians to revise the very rules under which they won their elected position is likely harder than convincing local citizens to vote for a proposition that will affect only local elections. Studies show, for example, that Americans generally support campaign finance reform.<sup>29</sup> But entrenched politicians who are winning under the existing system are unlikely to alter those rules.<sup>30</sup> Success is more likely through a local ballot initiative.

In sum, policymakers and scholars have generally focused on national and state election law at the expense of local innovations. But Election Day happens on the ground in cities and counties. Many municipalities have differing rules for campaigning and voting that deserve scrutiny. More significantly, the current political environment demands increased attention to local election rules because that is the only area in which proposals designed to expand voter access are likely to succeed. The next Part considers the 2016 local ballot measures on election rules to assess both how they fared and the possibilities for future reform.

## II. LOCAL ELECTION LAW INITIATIVES ON THE 2016 BALLOT

Voters considered numerous election law measures on local ballots in 2016. The issues included expanding the right to vote to more individuals,

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<sup>27</sup> See Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. (forthcoming 2017) (manuscript at 4, 31) (on file with author).

<sup>28</sup> See *supra* note 16 and accompanying text.

<sup>29</sup> See Nicholas Confessore & Megan Thee-Brenan, *Poll Shows Americans Favor an Overhaul of Campaign Financing*, N.Y. TIMES (June 2, 2015), <http://www.nytimes.com/2015/06/03/us/politics/poll-shows-americans-favor-overhaul-of-campaign-financing.html> [<http://perma.cc/L8E8-ZHJF>].

<sup>30</sup> See, e.g., Michael S. Kang, *To Here from Theory in Election Law*, 87 TEX. L. REV. 787, 790 (2009) (reviewing HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* (2009)) (“[E]ntrenchment, usually along . . . partisan lines, freezes out election reform and encourages self-serving legislative inertia.”).

changing electoral structures and the way elections operate, and reforming campaign finance rules. This Part examines these local ballot measures.

There are two important takeaways. First, categorizing local election law initiatives helps us to understand what areas voters on the ground think need reform. That is, having a systematic comprehension of where grassroots activity already exists will inform the debate moving forward and help advocates determine where to look next. Second, examining these local initiatives makes it clear that we desperately need better resources, such as enhanced voting technology, to improve our election system. If nothing else, then, this discussion of local election rules should create a call to action to policymakers at all levels to dedicate greater resources to electoral innovations.

### A. Local Election Law Reform: 2016 Results

Numerous local election law ballot initiatives popped up across the country in 2016. They fell into three categories: efforts to expand the electorate, proposals to change electoral structures, and attempts at campaign finance reform. Most measures passed.

First, advocates in the Bay Area sought to expand the electorate for certain local elections by lowering the voting age to sixteen or allowing noncitizens to vote in specific local races. These actions follow similar measures previously enacted in a few Maryland municipalities.<sup>31</sup> In Berkeley, California, voters overwhelmingly passed Measure Y1, which allows sixteen- and seventeen-year-olds to vote for members of the school board.<sup>32</sup> Similarly, San Francisco voters enacted Proposition N, which allows noncitizens to vote in school board elections.<sup>33</sup> But San Francisco voters narrowly rejected Proposition F, which would have lowered the voting age to sixteen for all city elections, with about 52.1% voting against

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<sup>31</sup> See Douglas, *supra* note 15, at 63; Douglas, *supra* note 27 (manuscript at 12–15).

<sup>32</sup> Berkeley, California, School Director Election Youth Voting, Measure Y1 (November 2016), BALLOTPEdia, [https://ballotpedia.org/Berkeley,\\_California,\\_School\\_Director\\_Election\\_Youth\\_Voting,\\_Measure\\_Y1\\_\(November\\_2016\)](https://ballotpedia.org/Berkeley,_California,_School_Director_Election_Youth_Voting,_Measure_Y1_(November_2016)) [<http://perma.cc/325T-JG22>] (last visited Apr. 18, 2017) (showing that over 70% of voters approved the measure).

<sup>33</sup> See Rong-Gong Lin II, *San Francisco Measure to Allow Noncitizen Parents to Vote in School Board Elections Leading*, L.A. TIMES (Nov. 9, 2016, 4:02 AM), <http://www.latimes.com/nation/politics/trailguide/la-na-election-aftermath-updates-trail-san-francisco-measure-to-allow-1478692962-htmlstory.html> [<http://perma.cc/27C5-TF2B>]; *San Francisco, California, Non-Citizen Voting in School Board Elections Amendment, Proposition N (November 2016)*, BALLOTPEdia, [https://ballotpedia.org/San\\_Francisco,\\_California,\\_Non-Citizen\\_Voting\\_in\\_School\\_Board\\_Elections\\_Amendment,\\_Proposition\\_N\\_\(November\\_2016\)](https://ballotpedia.org/San_Francisco,_California,_Non-Citizen_Voting_in_School_Board_Elections_Amendment,_Proposition_N_(November_2016)) [<http://perma.cc/PD4Z-CTP4>] (last visited Apr. 18, 2017) (showing that the measure passed with over 54% of the vote).

the proposition to 47.9% voting for it.<sup>34</sup> Given this fairly close result, advocates are likely to put the measure on the ballot again in 2020.<sup>35</sup>

Second, there were numerous local ballot measures concerning electoral structures that will change the way future elections are run. Perhaps among the most innovative was Benton County, Oregon's adoption of ranked choice voting.<sup>36</sup> In this new electoral system, voters will rank their preferences among as many candidates as they wish, instead of just voting for one person per office.<sup>37</sup> If a candidate does not receive at least 50% of all first choice votes, then the candidate with the fewest first choice votes is eliminated, and voters who selected that candidate have their second choice vote counted instead.<sup>38</sup> The process is repeated until there is a candidate with at least 50%.<sup>39</sup> Supporters note that this system will ensure that voters will not feel like they are wasting their vote, as they might in the normal system if they vote for someone who has little shot of winning, such as a third-party candidate.<sup>40</sup> Maine also passed ranked choice voting in 2016 for its statewide elections.<sup>41</sup>

Another structural election change that voters in two cities passed is moving Election Day for local races to November instead of earlier in the year. Using this date will align local elections with federal and state

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<sup>34</sup> See Michael Barba, *Youth Voting Measure Fails*, S.F. EXAMINER (Nov. 9, 2016), <http://www.sfexaminer.com/youth-voting-measure-fails/> [<http://perma.cc/VT86-KZZ2>]; *San Francisco, California, Local Elections Voting Age Reduction Amendment, Proposition F (November 2016)*, BALLOTEDIA, [https://ballotpedia.org/San\\_Francisco\\_California\\_Local\\_Elections\\_Voting\\_Age\\_Reduction\\_Amendment\\_Proposition\\_F\\_\(November\\_2016\)](https://ballotpedia.org/San_Francisco_California_Local_Elections_Voting_Age_Reduction_Amendment_Proposition_F_(November_2016)) [<http://perma.cc/G6KU-NUT9>] (last visited Apr. 18, 2017).

<sup>35</sup> See Press Release, Brandon Klugman, Vote16 USA, Historic Measure Almost Passes: More than 172,000 Vote to Extend Voting Rights to 16-Year-Olds for Municipal Elections (Nov. 28, 2016), <http://vote16usa.org/wp-content/uploads/2016/11/Prop-F-Final-Press-Release-11.28.pdf> [<http://perma.cc/UBS4-L6LS>] (expressing commitment to continue campaigning for a lower voting age).

<sup>36</sup> See Press Release, Blair Bobier, FairVote, Benton County Passes Ranked Choice Voting (Nov. 9, 2016), [http://www.fairvote.org/benton\\_county\\_passes\\_ranked\\_choice\\_voting](http://www.fairvote.org/benton_county_passes_ranked_choice_voting) [<http://perma.cc/WMY2-78V4>].

<sup>37</sup> See *Ranked Choice Voting/Instant Runoff*, FAIRVOTE, [http://www.fairvote.org/rcv#how\\_rcv\\_works](http://www.fairvote.org/rcv#how_rcv_works) [<https://perma.cc/7PYX-FPNY>] (last visited Apr. 18, 2017).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See Bennett Hall, *Ranked Choice Measure Passes*, CORVALLIS GAZETTE-TIMES (Nov. 8, 2016), [http://www.gazettetimes.com/news/local/ranked-choice-measure-passes/article\\_621d78e7-a851-5156-a2c0-bbc2582b00d6.html](http://www.gazettetimes.com/news/local/ranked-choice-measure-passes/article_621d78e7-a851-5156-a2c0-bbc2582b00d6.html) [<https://perma.cc/G57R-BPTZ>].

<sup>41</sup> See Nik DeCosta-Klipa, *Maine Became the First State in the Country Tuesday to Pass Ranked Choice Voting*, BOSTON.COM (Nov. 10, 2016), <https://www.boston.com/news/politics/2016/11/10/maine-became-the-first-state-in-the-country-to-pass-ranked-choice-voting> [<https://perma.cc/7VM6-8CBJ>]. The Supreme Judicial Court of Maine issued an advisory opinion saying that the law would violate the state constitution. Opinion of the Justices, No. OJ-17-1, 2017 WL 2240802 (Me. May 23, 2017).



elections, instead of the current practice of having a separate Election Day for local offices.<sup>42</sup> Voters in Hayward, California,<sup>43</sup> and Jersey City, New Jersey,<sup>44</sup> will now use the November general election date for their own local elections. In addition, San Diego voters passed a proposition that requires citizens' initiatives and veto referenda to appear on the November general election ballot instead of the June primary.<sup>45</sup> These measures will likely increase turnout in local elections and cost less, as the jurisdictions will not need to run a separate Election Day for local races.<sup>46</sup> It may also improve turnout among minority voters.<sup>47</sup>

Voters in several places empowered independent redistricting commissions to take over the line-drawing process for local jurisdictions, instead of relying on elected officials to draw the maps. The measures to create independent redistricting commissions passed in Berkeley<sup>48</sup> and

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<sup>42</sup> See *infra* note 46 and accompanying text.

<sup>43</sup> See *Hayward, California, Charter Amendment to Move City General Elections to November, Measure C (June 2016)*, BALLOTPEdia, [https://ballotpedia.org/Hayward,\\_California,\\_Charter\\_Amendment\\_to\\_Move\\_City\\_General\\_Elections\\_to\\_November,\\_Measure\\_C\\_\(June\\_2016\)](https://ballotpedia.org/Hayward,_California,_Charter_Amendment_to_Move_City_General_Elections_to_November,_Measure_C_(June_2016)) [<https://perma.cc/JMU4-BH7H>] (last visited Apr. 18, 2017).

<sup>44</sup> See *Jersey City, New Jersey, Election Date Change Measure (November 2016)*, BALLOTPEdia, [https://ballotpedia.org/Jersey\\_City,\\_New\\_Jersey,\\_Election\\_Date\\_Change\\_Measure\\_\(November\\_2016\)](https://ballotpedia.org/Jersey_City,_New_Jersey,_Election_Date_Change_Measure_(November_2016)) [<https://perma.cc/Q66Q-LCKB>] (last visited Apr. 18, 2017).

<sup>45</sup> See *San Diego, California, Citizens' Initiatives on the General Election Ballot, Measure L (November 2016)*, BALLOTPEdia, [https://ballotpedia.org/San\\_Diego,\\_California,\\_Citizens%E2%80%99\\_Initiatives\\_on\\_the\\_General\\_Election\\_Ballot,\\_Measure\\_L\\_\(November\\_2016\)](https://ballotpedia.org/San_Diego,_California,_Citizens%E2%80%99_Initiatives_on_the_General_Election_Ballot,_Measure_L_(November_2016)) [<https://perma.cc/4EKC-JBHA>] (last visited Apr. 18, 2017) (allowing for exceptions if the City Council decides to submit the measure to voters earlier than the next November election).

<sup>46</sup> See, e.g., *Election Dates May or May Not Matter*, CANVASS (Nat'l Conference of State Legislatures, Washington, D.C.), Apr. 2016 at 1–2, [http://www.ncsl.org/Documents/Elections/The\\_Canvass\\_April\\_2016.pdf](http://www.ncsl.org/Documents/Elections/The_Canvass_April_2016.pdf) [<https://perma.cc/Z3Q8-G7QJ>] (“When local elections are moved to the same day as state and national elections, voter turnout in the local races increases dramatically.” (quoting Sarah Anzia, author of a book on off-year elections)); *id.* at 3 (noting that cost “savings come from running two elections versus only one”); Zoltan L. Hajnal & Paul G. Lewis, *Municipal Institutions and Voter Turnout in Local Elections*, 38 URB. AFF. REV. 645, 661 (2003) (“Holding city elections on the same day as national or statewide contests could essentially double voter turnout over existing rates in off-cycle city elections.”); Mike Maciag, *Voter Turnout Plummeting in Local Elections*, GOVERNING (Oct. 2014), <http://www.governing.com/topics/politics/gov-voter-turnout-municipal-elections.html> [<https://perma.cc/3A7F-8W6P>] (discussing effects on turnout and cost of moving local elections to coincide with state and federal elections).

<sup>47</sup> See, e.g., Spencer Overton, *Voting Rights Disclosure*, 127 HARV. L. REV. F. 19, 26 (2013) (noting that “[i]n 2010, African Americans in Augusta-Richmond, Georgia, made up a much larger percentage of the electorate in elections held in November (52 percent) than in elections held in July (43 percent)”). See generally Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 58–61 (2014) (recounting Jim Crow history of North Carolina where majority white Democrats moved Election Day from November to August to disenfranchise African-Americans).

<sup>48</sup> See *Berkeley, California, City Council Redistricting Charter Amendment, Measure W1 (November 2016)*, BALLOTPEdia, [https://ballotpedia.org/Berkeley,\\_California,\\_City\\_Council\\_](https://ballotpedia.org/Berkeley,_California,_City_Council_)

Sacramento, California,<sup>49</sup> as did a similar measure to create an advisory redistricting commission in Stockton, California.<sup>50</sup> This activity is significant because elected officials themselves are less likely to enact this reform given that it reduces their own power.<sup>51</sup> These local ballot measures thus represent the voters literally taking election law issues away from politicians and placing them in the hands of citizens who will not have the same level of self-interest.

Term limits were also an issue in several local elections in 2016. In April 2016, Walnut, California voters approved term limits for their city council.<sup>52</sup> Voters in Sweetwater Union High School District, California, enacted a two-term limit for school board members.<sup>53</sup> Similarly, Carroll County, Maryland voters approved a two-term limit for their Board of Education.<sup>54</sup> And Montgomery County, Maryland voters imposed a three-

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Redistricting\_Charter\_Amendment\_Measure\_W1\_(November\_2016) [https://perma.cc/UM3F-2TZ2] (last visited Apr. 17, 2017).

<sup>49</sup> See *City of Sacramento, California, Independent Redistricting Commission, Measure L (November 2016)*, BALLOTEDIA, [https://ballotpedia.org/City\\_of\\_Sacramento\\_California\\_Independent\\_Redistricting\\_Commission\\_Measure\\_L\\_\(November\\_2016\)](https://ballotpedia.org/City_of_Sacramento_California_Independent_Redistricting_Commission_Measure_L_(November_2016)) [https://perma.cc/ZX4E-W9PN] (last visited Apr. 17, 2017). In addition, earlier in 2016, San Diego voters approved procedural amendments for its existing independent redistricting commission. See *San Diego, California, City Council Redistricting Commission and Process Amendments, Proposition A (June 2016)*, BALLOTEDIA, [https://ballotpedia.org/San\\_Diego\\_California\\_City\\_Council\\_Redistricting\\_Commission\\_and\\_Process\\_Amendments\\_Proposition\\_A\\_\(June\\_2016\)](https://ballotpedia.org/San_Diego_California_City_Council_Redistricting_Commission_and_Process_Amendments_Proposition_A_(June_2016)) [https://perma.cc/N7JC-JPYP] (last visited Apr. 17, 2017).

<sup>50</sup> See *Stockton, California, City Council Redistricting Commission, By-District Elections, and Term Limits Amendment, Measure N (November 2016)*, BALLOTEDIA, [https://ballotpedia.org/Stockton\\_California\\_City\\_Council\\_Redistricting\\_Commission\\_By-District\\_Elections\\_and\\_Term\\_Limits\\_Amendment\\_Measure\\_N\\_\(November\\_2016\)](https://ballotpedia.org/Stockton_California_City_Council_Redistricting_Commission_By-District_Elections_and_Term_Limits_Amendment_Measure_N_(November_2016)) [https://perma.cc/GHC8-QKH6] (last visited Apr. 17, 2017).

<sup>51</sup> See Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 332 (2007) (“[L]egislators are the primary beneficiaries of the redistricting status quo, and therefore have a strong incentive not to change the rules that allow them to be reelected time after time. . . . Legislators’ self-interest and adverse court decisions leave critics of contemporary redistricting with only one promising avenue for reform: the popular initiative.”).

<sup>52</sup> See Steve Scauzillo, *Election 2016: Walnut Voters Supporting City Term-Limit Measure*, SAN GABRIEL VALLEY TR. (Apr. 12, 2016, 9:09 PM), <http://www.sgytribune.com/government-and-politics/20160412/election-2016-walnut-voters-supporting-city-term-limit-measure> [https://perma.cc/4LNC-5D7W]; *Walnut, California, City Council Term Limits, Measure A (April 2016)*, BALLOTEDIA, [https://ballotpedia.org/Walnut\\_California\\_City\\_Council\\_Term\\_Limits\\_Measure\\_A\\_\(April\\_2016\)](https://ballotpedia.org/Walnut_California_City_Council_Term_Limits_Measure_A_(April_2016)) [https://perma.cc/VTL6-BN65] (last visited Apr. 18, 2017).

<sup>53</sup> See *Sweetwater Union High School District, California, Board of Trustees Term Limits, Measure CC (November 2016)*, BALLOTEDIA, [https://ballotpedia.org/Sweetwater\\_Union\\_High\\_School\\_District\\_California\\_Board\\_of\\_Trustees\\_Term\\_Limits\\_Measure\\_CC\\_\(November\\_2016\)](https://ballotpedia.org/Sweetwater_Union_High_School_District_California_Board_of_Trustees_Term_Limits_Measure_CC_(November_2016)) [https://perma.cc/CB9W-YFGH] (last visited Apr. 17, 2017).

<sup>54</sup> See Pamela Wood, *Voters Deciding Public Finance for Howard County Elections, Term Limits for Carroll School Board*, BALTIMORE SUN (Nov. 9, 2016, 4:47 PM), <http://www.baltimoresun.com/news/maryland/bs-md-county-questions-20161108-story.html> [https://perma.cc/4VFB-96W9].

term limit for the county executive and members of the county council.<sup>55</sup> These measures help to open up the electoral process to outsiders by limiting how many times incumbents may run for reelection.<sup>56</sup>

Finally, voters in several jurisdictions enacted campaign finance reforms for local elections. Voters in Multnomah County, Oregon, passed a broad “honest elections” measure that includes limits on contributions to candidates and stronger disclosure requirements.<sup>57</sup> Under the new rules, individual contributions to a candidate are limited to \$500, and political advertisements related to local elections must disclose the real identities of the ad’s top five funders.<sup>58</sup> The ballot measure was intended to spark a legal challenge in an effort to overturn both U.S. Supreme Court and Oregon Supreme Court precedent.<sup>59</sup> In June 2016, voters in Orange County, California, enacted a measure to create a campaign finance and ethics commission.<sup>60</sup> San Francisco voters overwhelmingly approved a proposition that prohibits lobbyists from making campaign contributions to elected city officials.<sup>61</sup> And Howard County, Maryland voters enacted a public financing scheme for local elections.<sup>62</sup>

Reviewing the numerous ballot initiatives in 2016 on local election laws provides a few takeaways. A significant number of the proposals on local voting rules passed.<sup>63</sup> Voters were mostly concerned with expanding

<sup>55</sup> See Deb Belt, *2016 Election Results: Montgomery County Voters Approve Council Term Limits*, ROCKVILLE PATCH (Nov. 9, 2016, 10:58 AM), <http://patch.com/maryland/rockville/2016-election-results-montgomery-county-voters-approve-council-term-limits> [https://perma.cc/V83S-V9F2].

<sup>56</sup> See generally Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83, 87–88 (1997) (discussing various benefits and disadvantages of term limits from democratic and policy perspectives).

<sup>57</sup> See MULTNOMAH COUNTY HONEST ELECTIONS, <http://mult.honest-elections.com/> [https://perma.cc/9QHZ-YNWW] (last visited Apr. 17, 2017).

<sup>58</sup> See *id.*

<sup>59</sup> See Nick Budnick, *Multnomah Commissioners Flip After Backlash on Campaign Finance Reform*, PORTLAND TRIB. (Apr. 14, 2017), <http://portlandtribune.com/pt/9-news/354431-234257-multnomah-commissioners-flip-after-backlash-on-campaign-finance-reform> [https://perma.cc/96T5-C6E2].

<sup>60</sup> See *Orange County, California, Ethics Commission Establishment, Measure A (June 2016)*, BALLOTPEdia, [https://ballotpedia.org/Orange\\_County,\\_California,\\_Ethics\\_Commission\\_Establishment\\_Measure\\_A\\_\(June\\_2016\)](https://ballotpedia.org/Orange_County,_California,_Ethics_Commission_Establishment_Measure_A_(June_2016)) [https://perma.cc/TW9J-Y48J] (last visited Apr. 17, 2017).

<sup>61</sup> See *San Francisco, California, Restrictions on Gifts and Campaign Contributions from Lobbyists, Proposition T (November 2016)*, BALLOTPEdia [https://ballotpedia.org/San\\_Francisco,\\_California,\\_Restrictions\\_on\\_Gifts\\_and\\_Campaign\\_Contributions\\_from\\_Lobbyists,\\_Proposition\\_T\\_\(November\\_2016\)](https://ballotpedia.org/San_Francisco,_California,_Restrictions_on_Gifts_and_Campaign_Contributions_from_Lobbyists,_Proposition_T_(November_2016)) [https://perma.cc/WCU2-WUJL] (last visited Apr. 18, 2017).

<sup>62</sup> See Wood, *supra* note 54.

<sup>63</sup> In conducting this research, I studied every local initiative on election law listed on Ballotpedia for 2016 and searched Google for news stories on other measures. The only ones that failed were San Francisco’s proposal to lower the voting age to sixteen, see *supra* note 34; pushes to change the structure of elections from at large to by-district such as in Columbus, Ohio, see Lucas Sullivan,

the electorate, changing electoral structures, and pushing back on large amounts of money infiltrating local elections. Yet the activity so far has been limited to a few geographic areas: cities and counties in California, Maryland, and Oregon. That said, communities in other states also considered various measures, such as initiatives in Columbus, Ohio,<sup>64</sup> and Laredo, Texas,<sup>65</sup> to change the size of the city council, which failed in both cities. Given that most municipalities have the initiative or referenda power, local voter-backed measures can significantly improve the democratic process.<sup>66</sup> More localities should invoke this power to enact positive election law reform. The examples in California, Maryland, and Oregon present models for other communities to consider. They also point to some technical challenges advocates must overcome, as discussed next.

### *B. Need for Better Election Resources*

Many of the reforms discussed above cost money. Expanding the electorate requires both voting technology that can handle new voters for only specific local races and educational outreach to these new voters. Changing the electoral structure takes resources for implementation. Campaign finance reform also relies on expenditures, such as a pool of money to fund ethics commissions or public financing. This section details the specific resources necessary for each kind of local election reform. The key point is that to achieve success with local voting rules, cities, states, and the federal government should allocate significant resources to improve the democratic process. This investment, even at the local level, can have a large impact: not only do local jurisdictions administer local, state, *and* federal elections, but positive innovations in one city can trickle across to other cities and eventually up to state and national policy.<sup>67</sup> That is,

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*Council Ward Issue Destroyed at Polls: 72 Percent of Voters Say No*, COLUMBUS DISPATCH (Aug. 3, 2016, 11:32 AM), <http://www.dispatch.com/content/stories/local/2016/08/02/issue-one.html> [https://perma.cc/LSF2-R9WA]; and several efforts to make particular offices elected instead of appointed, or vice versa, in California, *see, e.g., Antioch, California, Appointed Treasurer Proposal, Measure G (June 2016)*, BALLOTPEdia, [https://ballotpedia.org/Antioch,\\_California,\\_Appointed\\_Treasurer\\_Proposal,\\_Measure\\_G\\_\(June\\_2016\)](https://ballotpedia.org/Antioch,_California,_Appointed_Treasurer_Proposal,_Measure_G_(June_2016)) [https://perma.cc/5TMU-JTWQ] (last visited Apr. 17, 2017). Although it is possible that this research did not catch every ballot initiative on local election law in 2016, voters passed the majority of the ones I uncovered.

<sup>64</sup> See Sullivan, *supra* note 63.

<sup>65</sup> See *Event Filled 2016 Ends*, LAREDO MORNING TIMES ONLINE (Dec. 31, 2016, 3:36 AM), <http://www.lmtonline.com/news/article/Event-filled-2016-ends-10828183.php> [https://perma.cc/8B96-GUSP] (noting the defeat of the proposition).

<sup>66</sup> See Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 695 (2010) (“At the local level, over half of all American cities, covering about seventy percent of the national population, are estimated to have an initiative process. Nearly all American cities have the referendum.” (footnote omitted)).

<sup>67</sup> See Douglas, *supra* note 27 (manuscript at 3–4, 23).

focusing our resources on local voting reforms will have an outsized effect on all elections.

First, expanding the electorate only for local elections (or a subset, like school board elections) requires voting machines or other mechanisms to allow these individuals to vote for local races but not for other offices. For instance, San Francisco and Berkeley both expanded their electorates for school board elections: legal noncitizens in San Francisco and those aged sixteen and seventeen in Berkeley may now vote for school board members.<sup>68</sup> Yet these elections occur at the same time as many other elections for which noncitizens or sixteen- and seventeen-year-olds are ineligible. Thus, the cities need a system that allows certain voters to participate in only specific elections that occur at the same time as other elections.<sup>69</sup> This is not a difficult task, but it requires the proper resources, such as computerized voter rolls and updated voting equipment.

Second, sufficient resources are needed to implement how our elections operate. For instance, adopting ranked choice voting for elections in Benton County, Oregon, requires both updated voting equipment and public education.<sup>70</sup> Moving Election Day for local offices to November to coincide with federal and state elections will require an initial outlay of money, such as to design and print longer ballots, but the change will save resources in the long run.<sup>71</sup> Similarly, independent redistricting commissions require money and other resources to do their jobs effectively, such as the sophisticated software needed to draw maps that comply with all relevant laws.<sup>72</sup>

Finally, local campaign finance reform, ironically, requires money. Local jurisdictions that create ethics and oversight commissions need resources to ensure that these bodies are effective. Public financing requires enough money for candidates to opt in to the system.<sup>73</sup> For example, Seattle's Democracy Vouchers program, which provides each voter in the city with four \$25 vouchers to allocate among candidates for local office

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<sup>68</sup> See *supra* notes 32–33 and accompanying text.

<sup>69</sup> See Douglas, *supra* note 27 (manuscript at 61).

<sup>70</sup> See Hall, *supra* note 40 (noting that to implement ranked choice voting in the county, “the voting method and equipment will have to be certified by the Oregon Secretary of State’s Office, and that will cost money”).

<sup>71</sup> See Maciag, *supra* note 46; Nat’l Conference of State Legislatures, *supra* note 46, at 3.

<sup>72</sup> See, e.g., Angelo N. Ancheta, *Redistricting Reform and the California Citizens Redistricting Commission*, 8 HARV. L. & POL’Y REV. 109, 118–19, 130 (2014) (discussing costs of California’s 2010 redistricting cycle, which used an independent commission comprised of California residents).

<sup>73</sup> Russell Berman, *Seattle’s Experiment with Campaign Financing*, ATLANTIC (Nov. 10, 2015), <http://www.theatlantic.com/politics/archive/2015/11/seattle-experiments-with-campaign-funding/415026/> [https://perma.cc/D3MG-HLWV] (discussing the requirements for candidates who opt in to the program).

who agree to various campaign finance limitations, will rely on money from the public fisc to fund these vouchers.<sup>74</sup>

These hurdles are not insurmountable. They simply require recognition and action: we do not invest enough in our elections, and yet we should, especially if we want to improve the process in the way these cities are contemplating. The fact that these changes require money and other resources is not a reason to reject them. On the contrary, investments in local elections will have corresponding benefits on state and federal elections. Moreover, many local jurisdictions fund their own election systems, meaning that they can enact these reforms without federal or state assistance (although additional funds will certainly help).<sup>75</sup> Recognizing the resources required to implement these actions is an important part of the discussion. The likely benefits of local election reform should serve as a call to local and state politicians to allocate sufficient funds for the proper operation of our democracy.

### III. LEGAL CHALLENGES TO LOCAL ELECTION LAW INITIATIVES

The final question is how courts should handle the inevitable legal challenges that opponents will bring against local election law innovations. Election litigation has become “a routine part of campaign strategy.”<sup>76</sup> Surely new local election law rules will not be immune to this phenomenon. Opponents of these local measures will likely argue (1) that state law preempts the local laws or (2) that state home rule doctrine does not give localities the authority to enact their own election rules.<sup>77</sup> Courts therefore need tools for addressing these arguments.

In another article, I laid down some general precepts for handling challenges to local election laws: courts should defer to laws that expand voting access but scrutinize more carefully laws that have the primary purpose or effect of making it harder to vote.<sup>78</sup> Here, I extrapolate from that

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<sup>74</sup> *Id.* (noting that the city plans to pay the \$3 million cost of the program by raising property taxes).

<sup>75</sup> See Weinstein-Tull, *supra* note 10, at 297 (noting that local governments pay the bulk of election costs in most states).

<sup>76</sup> See Joshua A. Douglas, *Discouraging Election Contests*, 47 U. RICH. L. REV. 1015, 1015 (2013).

<sup>77</sup> See Douglas, *supra* note 27 (manuscript at 4–5). There also could be a challenge to a new local rule under the federal Equal Protection Clause or another federal provision such as the Voting Rights Act, especially if the law restricts the right to vote. Federal election law jurisprudence is fairly well developed. See Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 558 (2015) [hereinafter *(Mis)trusting States*]. Although courts are likely to use this traditional election law analysis for a federal challenge, the approach discussed above also can help courts discern the proper level of scrutiny to apply under current Supreme Court doctrine.

<sup>78</sup> See Douglas, *supra* note 27 (manuscript at 5).

test to provide guidelines specifically for local election law initiatives passed by the voters themselves.

The Supreme Court has waffled between strict and light-touch judicial review of laws enacted through ballot initiatives or referenda, collectively known as direct democracy.<sup>79</sup> Scholars, too, have differed in advocating between more or less deference to voter-enacted laws. For example, over twenty-five years ago, Professor Julian Eule argued that courts should take “a harder look when constitutional challenges are mounted against laws enacted by substitutive plebiscite.”<sup>80</sup> According to Professor Eule, direct democracy can serve as a tool for unwarranted majoritarian control: “Where the structure itself is unable to guarantee a hearing for a variety of voices or to prevent factional domination, courts must pick up the slack and ensure that the majority governs in the interests of the *whole* people.”<sup>81</sup> By contrast, Professor Michael Solimine, agreeing with a recent Justice Thomas dissent,<sup>82</sup> argues that a “hard look” at laws passed through direct democracy is unwarranted because the process and product of voter-backed initiatives is not that different from legislative enactments.<sup>83</sup> Instead, according to Professor Solimine, courts should treat any kind of law, passed by a legislature or the people themselves, the same way.<sup>84</sup> Professor Teddy Rave argues for “rational-basis-with-bite” under a theory that ballot initiative voters owe some measure of duty to the general public, so courts must police “opportunism” by the majority.<sup>85</sup> Other scholars have generally fallen somewhere within this spectrum, with most aligning themselves with Professor Eule’s hard look analysis.<sup>86</sup>

These standards, however, generally do not consider the underlying substance of the ballot initiative at issue, instead seeking a one-size-fits-all

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<sup>79</sup> See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2697–99 (2015) (Thomas, J., dissenting).

<sup>80</sup> Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *YALE L.J.* 1503, 1558 (1990).

<sup>81</sup> *Id.* at 1559.

<sup>82</sup> *Ariz. State Legislature*, 135 S. Ct. at 2697 (Thomas, J., dissenting).

<sup>83</sup> See Michael E. Solimine, *Judicial Review of Direct Democracy: A Reappraisal*, 104 *KY. L.J.* 671, 672–74, 697 (2016) (“I think Justice Thomas has it right that constitutional challenges to the products of direct democracy in federal court should be subject to the same scrutiny as legislative and executive action.”).

<sup>84</sup> *Id.* at 697. Importantly, Professor Solimine notes that his analysis applies only to federal court review of state initiatives. *Id.* at 674 n.15. State court review, and any review of local voter-backed enactments, is outside the scope of his argument. It is not clear whether he would adopt the same test to federal or state court review of local election law initiatives, the subject of my inquiry.

<sup>85</sup> See D. Theodore Rave, *Fiduciary Voters?*, 66 *DUKE L.J.* 331, 374 (2016).

<sup>86</sup> See Solimine, *supra* note 83, at 680 n.60.

approach to judicial review of the products of direct democracy.<sup>87</sup> But where it comes to the very rules under which we hold our elections, the substance of the new law—and in particular whether it expands or restricts the opportunity to participate in our democracy—is vitally important.

Courts should defer to voter-backed initiatives that expand the electorate, improve the voting system, or open up the process to more candidates. These rules do not pose the risk of majoritarian opportunism, but instead are efforts by voters to increase the political power of others or to reform the democratic process to better reflect the overall views of the electorate. By contrast, courts should not defer to laws that restrict voter or candidate access, which often represent the majority's efforts to exclude minority factions from the political process in an attempt to aggrandize power or entrench itself.

When voters adopt a rule that includes more people in the electorate, they are typically diluting their own influence in the process. The addition of more people to the voter rolls necessarily means that prior individual voters will make up a smaller percentage of the electorate, such that each person's vote is worth slightly less. Thus, laws that expand the electorate, such as for noncitizens or young individuals, necessarily represent the majority's view that including more people in the electorate is worth the resulting loss in the value of their own vote. The majority is reducing its own comparative power based on its belief in enhancing democratic representation for others. Even if the majority chooses to include more people in the electorate because it believes these new voters will align politically with the governing class and will make that majority stronger, the result is still an expansion of democracy for these new individuals. That is, democratic expansion is a normative good, irrespective of the political motivations or ramifications.

A court deciding a judicial challenge to a local expansion of the electorate should recognize that the law is an attempt to enhance democratic participation. Increasing voter engagement warrants judicial deference. As Professor Rick Hasen has explained, courts should adopt a "Democracy Canon" in which judges hold "a thumb on the scale in favor of voter enfranchisement."<sup>88</sup> The fact that the voters themselves have passed this voter enfranchisement, at the expense of their own relative individual power, counsels even more strongly in favor of a democracy canon for local election rules.

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<sup>87</sup> Professor Eule does recognize that a hard look is not as necessary when "the electorate acts to improve the processes of legislative representation . . ." Eule, *supra* note 80, at 1559.

<sup>88</sup> See Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 71 (2009) (emphasis removed).



Similarly, laws that make the election process more competitive, at the expense of incumbents or entrenched majorities, are democracy-enhancing and warrant judicial deference. The creation of independent redistricting commissions takes power away from incumbent politicians, who have an incentive to draw district lines that favor their own candidacies or help their political party.<sup>89</sup> Term limits open up opportunities for more individuals to run for office. Campaign finance reforms, such as ethics commissions or public financing, generally favor nonwealthy or less-connected outsiders. Ethics commissions theoretically help to root out corruption among political elites and rich donors,<sup>90</sup> while public financing makes it easier for nonwealthy candidates to have sufficient resources to run for office.<sup>91</sup> All of these measures seek to open the process to more people and make elections more competitive. They provide a “safety valve” against “self-dealing” representatives.<sup>92</sup> To use Professor Eule’s language, there is no longer a need for a “harder look” at these measures because they “pose no distinctive threat of majoritarian tyranny. These measures install new filters rather than seeking to bypass the existing ones.”<sup>93</sup>

Courts should construe these democracy-enhancing laws in a manner that recognizes the unique nature of voter-approved electoral reforms. These rules make elections more competitive and open opportunities for more people to participate. Put another way, direct democracy voters are “representative legislators who must vote in the public interest and must not vote in their private interests.”<sup>94</sup> Choosing to include more people in the electorate or reforming the election apparatus to increase competitiveness and reduce incumbency protection serves the public interest in democracy at the expense of a voter’s or incumbent’s own private interest.<sup>95</sup> Courts should therefore defer to local election law initiatives that put the public

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<sup>89</sup> See Stephanopoulos, *supra* note 51, at 332.

<sup>90</sup> *But see* Kayla Crider & Jeffrey Milyo, *Do State Ethics Commissions Reduce Political Corruption? An Exploratory Investigation*, 3 U.C. IRVINE L. REV. 717, 718, 732 (2013) (noting the rise in state ethics commissions after political scandals but finding that ethics commissions generally do not actually reduce political corruption).

<sup>91</sup> See Mimi Murray, Digby Marziani & Adam Skaggs, *More than Combating Corruption: The Other Benefits of Public Financing*, BRENNAN CTR. FOR JUSTICE (Oct. 7, 2011), <https://www.brennancenter.org/analysis/more-combating-corruption-other-benefits-public-financing> [<https://perma.cc/7T5T-KGWR>] (discussing empirical studies that show that public financing promotes more competitive elections).

<sup>92</sup> See Rave, *supra* note 85, at 375, 377–78 (citing THE FEDERALIST NO. 10 (James Madison)).

<sup>93</sup> Eule, *supra* note 80, at 1559–60.

<sup>94</sup> Michael Serota & Ethan J. Leib, *The Political Morality of Voting in Direct Democracy*, 97 MINN. L. REV. 1596, 1596 (2013).

<sup>95</sup> See *id.* at 1598 (“The most basic and foundational obligation [of a direct democracy voter] is that the representative must vote in the pursuit of a credible and good faith conception of the public interest, rather than her private interests.”).

interest above individual voters' private interests, so long as the law does not directly violate an explicit constitutional or statutory requirement.

Further, from a policy perspective, judicial deference to local voting expansions fits the broader principles of federalism. As local governments pass these reforms, they can serve as models for other places, both within the state and across the country. As I discuss in other work, municipalities can serve as "test tubes of democracy," experimenting with local election rules.<sup>96</sup> The best ones will "trickle across" to other cities and eventually "trickle up" to state and national policy.<sup>97</sup> Courts should generally allow election law innovations that expand the electorate or make elections more competitive, unless they run squarely into a federal or state law or regulation that explicitly contradicts these new rules.

Courts ought to encourage localities to experiment with democracy-enhancing election rules; judges should not stand in the way by imposing too-stringent judicial review. As Professor Richard Briffault explains:

[A] number of cities and counties across the country have been actively engaged in examining and revising their local governmental and electoral processes, and in experimenting with new forms of political organization. . . . [T]hese developments nicely illustrate both the capacity of local governments to restructure basic features of their political organization, and their interest in doing so.<sup>98</sup>

Localities are well suited to make these kinds of changes through voter initiatives given the smaller size of the electorate and the values inherent in federalism.<sup>99</sup>

For the same reason that courts should defer to local laws that are democracy-enhancing, however, courts should not defer to local initiatives that restrict the electorate, create electoral structures that protect incumbents, or make it harder for people to run as candidates. A law that has the effect of disenfranchisement enhances the relative power of the voters who support the law at the expense of those disenfranchised. Similarly, a law that protects incumbents benefits the incumbents themselves, making it harder to defeat them even if they fall out of favor

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<sup>96</sup> See Douglas, *supra* note 27 (manuscript at 3).

<sup>97</sup> *Id.* (manuscript at 4).

<sup>98</sup> Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 2–3 (2006).

<sup>99</sup> See Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & C.R. L. REV. 371, 371, 374 (2008) (noting that "local governments may prove even more fruitful agents for social change and policy innovation than the state or federal levels of government" (footnote omitted)).

with voters.<sup>100</sup> That kind of action is fundamentally antidemocratic. As Professor Rave notes, “Direct democracy is ripe for minority exploitation because it lacks many of the structural protections for minorities that are built into a representative democracy.”<sup>101</sup> Courts should therefore give a “harder look” to measures that limit participation or competitiveness.<sup>102</sup>

This approach aligns well with Supreme Court jurisprudence on direct democracy. In reviewing voter-enacted laws, the Court seems focused mostly on “policing for minority exploitation and acting as an equitable brake on majoritarian excess where the structural protections for the minority are weakest.”<sup>103</sup> Election laws that aggrandize the majority’s control by making it harder to vote or by placing barriers to entry for candidates epitomize the concern of minority exploitation and “opportunism.”<sup>104</sup> To use a real-world example, a court would be wise to look more skeptically at a local law extending a mayor’s term from two to four years, as a longer term could represent a form of entrenchment of the ruling politician or his or her party because voters will have to wait longer for a chance to vote the incumbent out.<sup>105</sup> A hard look does not mean that a court will necessarily invalidate the law, as the voters may have had strong reasons, from the perspective of good government, to support this change. Heightened scrutiny simply provides less deference than the court would normally give to a law that expands the franchise or opens opportunities for outsider candidates. The government will have to provide stronger justifications for a new rule that is not democracy-enhancing.

Thus, judicial review of local ballot initiatives on election law should take a two-track path: if the new law is democracy-enhancing by expanding voter or candidate participation, then courts should generally defer to the

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<sup>100</sup> See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 712 (1998).

<sup>101</sup> Rave, *supra* note 85, at 343.

<sup>102</sup> See Eule, *supra* note 80, at 1559.

<sup>103</sup> Rave, *supra* note 85, at 338, 374 (advocating for a rational-basis-with-bite test to review laws enacted through direct democracy).

<sup>104</sup> See *id.* at 366 (suggesting that the Supreme Court, when striking down certain direct democracy measures, has been most concerned about “opportunism” of the majority undoing the minority’s will).

<sup>105</sup> See, e.g., *Marina, California, Four-Year Term for Mayor, Measure V (November 2016)*, BALLOTEDIA, [https://ballotpedia.org/Marina,\\_California,\\_Four-Year\\_Term\\_for\\_Mayor,\\_Measure\\_V\\_\(November\\_2016\)](https://ballotpedia.org/Marina,_California,_Four-Year_Term_for_Mayor,_Measure_V_(November_2016)) [<https://perma.cc/X7VZ-A3M8>] (last visited Apr. 18, 2017) (approving mayoral term increase from two to four years); *Menifee, California, Mayor Term Length Increase, Measure FF (November 2016)*, BALLOTEDIA, [https://ballotpedia.org/Menifee,\\_California,\\_Mayor\\_Term\\_Length\\_Increase,\\_Measure\\_FF\\_\(November\\_2016\)](https://ballotpedia.org/Menifee,_California,_Mayor_Term_Length_Increase,_Measure_FF_(November_2016)), [<https://perma.cc/YJT3-DZ7A>] (November 2016), (last visited Apr. 18, 2017) (expanding the mayoral term from two to four years). This analysis is not meant to suggest, however, that a four-year mayoral term, or any other existing local election rule, is inherently suspect. The key is that the voters are *changing* the preexisting rule, so a court should examine carefully whether the change will have the effect of aggrandizing the majority’s control.

local electorate's preferences on how to run its own elections. However, if a new law leads to disenfranchisement or incumbency protection such that the majority may be creating rules to aggrandize its own power, then the court should employ more stringent judicial review.

This formulation means that courts will be tasked with the initial assessment of whether a new law is democracy-enhancing or restricting. At the margins, this might be a difficult question. Some laws, such as a change to an electoral structure, might have both democracy-enhancing and democracy-restricting components for different groups of voters.<sup>106</sup> But we can trust courts to discern the main import of local election laws using traditional tools of judicial analysis. The key question will be whether the law has the primary purpose or effect of opening the democratic process to more people or instead shutting certain people out. The litigants can bring experts on election law and political science to demonstrate the primary purpose or effect of a law, much like they do already in Voting Rights Act litigation.<sup>107</sup> Moreover, there can be a sliding scale for the amount of deference a court will give: the more factors that point to a democracy-enhancing rule, the more deference the court should provide to the new law, and vice versa.

The level of deference goes to the interpretation of state law as compared to the new local rule. Recall that a judicial challenge will likely derive from an argument that state law either preempts a local election rule or does not give localities the authority to enact specific laws for their own elections.<sup>108</sup> Where there is room for interpretation, courts should read the state law as not interfering with local rules if the local law is democracy-enhancing, but more strictly construe the state law as preempting local measures if the law is democracy-restricting. Given that federal and state constitutions and laws generally provide a floor for voting rights protections, most local measures necessarily will be democracy-enhancing, setting rules for local elections that are more expansive than state laws. Laws that promote greater participation do not require a "hard judicial look."<sup>109</sup> Indeed, most of the measures on the 2016 ballot that passed local

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<sup>106</sup> As just one rudimentary example, moving a polling place could have a democracy-enhancing effect for the voters closer to the new location and a democracy-restricting effect for those who are now further away. Similarly, a redistricting map may benefit some voters over others.

<sup>107</sup> See, e.g., *Perez v. Abbott*, No. SA-11-CV-360, 2017 WL 962947 (W.D. Tex. Mar. 10, 2017) (three-judge court) (considering expert testimony to determine that Texas's redistricting violated the Voting Rights Act for having a discriminatory effect on minority voters), *amended by* *Perez v. Abbott*, No. SA-11-CV-360, 2017 WL 1787454 (W.D. Tex. May 2, 2017).

<sup>108</sup> See Douglas, *supra* note 27 (manuscript at 52).

<sup>109</sup> See Eule, *supra* note 80, at 1559.

constituencies opened the process for voters or made it easier for candidates to run for office.<sup>110</sup>

Deference also involves the detail and strength of the government's justification for the law. Thinking in terms of the traditional tiers of scrutiny for constitutional adjudication, one prong of the test is always whether the government has a sufficient rationale.<sup>111</sup> An election rule that opens the political process to more voters or candidates has a positive effect: improving democratic participation and legitimacy. Thus, a court need not require much more from a government defending a voter-backed election law that is democracy-enhancing.<sup>112</sup> The court should uphold the law if the government can demonstrate the rule's democracy-enhancing purpose or effect (so long as the law does not discriminate or *directly* violate a constitutional precept or state-level mandate). By contrast, a court should require a much more detailed and stronger justification for a new election rule that restricts voter or candidate access to the democratic process. As Professor Eule suggests, courts should take a hard judicial look when the majority enacts an initiative that harms minority representation or tends to entrench the majority's power.<sup>113</sup> In the language of tiers of scrutiny, courts should require the government to show that the new law furthers something akin to a compelling interest for rules that are democracy-restricting, but something similar to a mere important interest—which can be the increase in access and participation itself—for laws that are democracy-enhancing.

This rule provides scope and clarity for a court construing a local election rule. To be sure, the test does not clear up all of the difficult doctrinal questions a court might face when wading into the world of election law. But it should help courts analyze new local election rules in a way that enhances democratic representation. Perhaps most importantly, the test gives broad leeway to local jurisdictions to experiment with local election rules that bring more people into the democratic process. Localities

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<sup>110</sup> See *supra* Part I.

<sup>111</sup> See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1982) (noting that to determine the constitutionality of an election rule, courts must consider “the precise interests put forward by the State as justifications for the burden imposed by its rule” and then evaluate “the extent to which those interests make it necessary to burden the plaintiff's rights”); see also *(Mis)trusting States*, *supra* note 77, at 558.

<sup>112</sup> See Eule, *supra* note 80, at 1559–60 (noting that a hard look is unnecessary for voter-enacted laws that lead to enhanced representation).

<sup>113</sup> *Id.* at 1559 (“On occasions when the people eschew representation, courts need to protect the Constitution's representational values.”); see also *id.* at 1573 (explaining that “courts should be willing to examine the realities of substitutive plebiscites—that the unspoken assumptions about the legislative process that so often induce judicial restraint deserve less play in a setting where they are more fanciful” (footnote omitted)).

should have breathing room to experiment so that the best election rules can spread to other areas.

In sum, courts should employ light-touch judicial review when considering challenges to voter-backed initiatives that expand voter or candidate participation in local elections. Courts should provide deference to local laws that are democracy-enhancing in that the laws include more people in the democratic process. A hard judicial look is warranted only when local voter-backed initiatives result in disenfranchisement or incumbency protection. In 2016, various local jurisdictions enacted laws that increased the size of the electorate or reformed local election rules to limit the power or influence of incumbents. Courts should allow local jurisdictions to continue these democracy-enhancing experiments.

#### CONCLUSION

Local election law measures on the 2016 ballot probably caught the attention of few people outside of the voters who considered them. An analysis of the 2016 local initiatives on the rules for voting and elections reveals that, in many localities, voters enacted measures that expanded the electorate, changed electoral structures to make local elections more competitive, and reformed campaign finance rules to help outsider candidates. In light of these results, there is likely an opportunity to make further changes to election structures and processes through future local ballot initiatives. This avenue for change is especially important in the current political environment. Republican control of all three branches of the federal government and the majority of state governments means that federal or state reform designed to expand voter and candidate access is unlikely to occur in the near future. Local laws provide a meaningful way to improve our election processes.

Keeping this reality in mind, courts should generally hesitate before striking down voter-backed reforms to local elections that enhance democratic participation. Courts should trust the wisdom of voters who pass local measures that expand the electorate or make it easier to challenge incumbent politicians, especially if, in doing so, the current voters are reducing their own comparative power. However, courts should require governments to provide stronger justifications for laws that result in disenfranchisement or incumbency protection because these new rules may represent attempts by the majority to keep itself in power and shut others out.

Local rules on voting rights and campaign practices represent a vital area of growth for election law moving forward. While courts should defer to local election law innovations that are democracy-enhancing, academics

and concerned citizens have an important role to play as well. We should recognize that local election law reform is significant not only for local democracy; it can also influence federal and state policy in future years.