

## THE DUTY TO VOTE IN AN AMERICAN CITY

*Nate Ela* \*

*The duty to vote is making a comeback. Compulsory voting has long struck legal scholars and political scientists as the ultimate game-changing electoral reform—but one almost unimaginable in the United States. Yet even as states controlled by Republicans have made a coordinated effort to limit voting rights, some progressives have begun charting a path to make voting a universal civic duty. Cities offer a promising place to start.*

*Voting has in fact been made a legal duty in the United States—precisely once. That story has never been told. This article excavates the history of compulsory voting in an American city. In 1889, voters in Kansas City, Missouri approved a poll tax that applied only to eligible voters who failed to cast a ballot in local elections. This duty to vote remained in force during four local election cycles, from 1890 to 1896, when the Missouri Supreme Court struck it down in *Kansas City v. Whipple*.*

*How and why did voting become a duty in Kansas City? And what happened during this singular electoral experiment? The article describes how a newspaper publisher brought the case for compulsory voting to Kansas City, by echoing claims made elsewhere that it would cure the purported evils of universal suffrage and mitigate the ills of machine politics. The provision was added to the city's first home rule charter following three tumultuous years for local politics, when the rising political power of organized labor and Black leaders had unsettled alliances and begun to reshape the electorate. Ultimately, bureaucratic conflict and legal uncertainty prevented collection of the poll tax. Despite high expectations, it did not substantially increase turnout—either among the responsible businessmen that proponents believed were failing to do their civic duty, or more generally among the city's eligible voters.*

*Kansas City's unprecedented experiment offers political, practical, and legal lessons for today. It suggests that proposals to make voting a duty might*

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*receive political support in places that progressives might find surprising, and for reasons they could find troubling. It highlights how the division of administrative labor in running elections could prevent some U.S. cities from making voting a duty, and empower others. It points to how local government law and specific state constitutional provisions would prove crucial to determining municipalities' power to make voting a duty. Finally, it speaks to recent unfounded concerns that a duty to vote would violate the 24th Amendment.*

*Kansas City's forgotten experiment offers a key starting point for reconstructing the untold history of compulsory voting in the United States. It also provides crucial lessons for people who would hope to see the duty to vote emerge once again in an American city.*

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*The United States should require all of its citizens to vote. Doing so will push back against voter suppression and tear down barriers to participation because the best way to protect the right to vote is to underscore that it is also a civic duty.*

- Amber Herrle and E.J. Dionne, Jr. (2020)<sup>1</sup>

*Adoption of compulsory voting in the United States is about as likely as being corralled by a red-dyed rope.*

- Richard L. Hasen (1996)<sup>2</sup>

## INTRODUCTION

American democracy, scholars and the public have come to agree, appears increasingly in jeopardy.<sup>3</sup> Democratic backsliding has many causes, among them the strategy of winning elections by creating regulations that selectively disenfranchise voters—a type of “politics without guardrails” aimed at eliminating electoral competition.<sup>4</sup> In the 2021 legislative session, at least 17 states enacted 28 laws with provisions that make it harder for Americans to vote.<sup>5</sup> The Supreme Court has invited and enabled this wave of restrictive

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<sup>1</sup> Amber Herrle and E.J. Dionne, Jr., *Why Shouldn't Voting be Mandatory?* Brookings Institution, July 24, 2020, <https://www.brookings.edu/blog/fixgov/2020/07/24/why-shouldnt-voting-be-mandatory/>

<sup>2</sup> Richard L. Hasen, *Voting Without Law*, 144 PENN. L. REV. 2135, 2179 (1996)

<sup>3</sup> STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018); TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018); Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. \_\_ (2022); *Still Miles Apart: Americans and the state of U.S. Democracy half a year into the Biden Administration*, BRIGHT LINE WATCH, June 2021 Survey, <http://brightlinewatch.org/still-miles-apart-americans-and-the-state-of-u-s-democracy-half-a-year-into-the-biden-presidency/> (“experts perceive grave threats from bills that encroach on the political independence of local election officials and that restrict mail voting.”) *Biden's Approval Remains Steady... Many Americans Think our Democracy is Under Threat* NPR/PBS NEWSHOUR/MARIST POLL (Jul. 2, 2021) <http://maristpoll.marist.edu/npr-pbs-newshour-marist-poll-bidens-approval-rating/#sthash.oV7MyEGk.dpbs> (“67% of Americans, including majorities of Republicans, Democrats, and independents, believe American democracy is ‘under threat.’”)

<sup>4</sup> LEVITSKY & ZIBLATT, *supra* n. 2 at \_\_ (2016) (describing Republican gerrymandering and manipulation of voter registration, voter ID requirements, voting hours, and polling locations as examples of politics without guardrails); GINSBURG & HUQ, *supra* n. \_\_ at 160-61 (2018) (describing strategies of voter suppression, and reluctance of courts to address them).

<sup>5</sup> Brennan Center for Justice, “Voting Laws Roundup: May 2021” <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021> (updated to include laws enacted by mid-June 2021).

measures, by striking down and narrowing key sections of the Voting Rights Act.<sup>6</sup> Congress, meanwhile, has failed to pass legislation to protect voting rights. The right to vote has always been contested.<sup>7</sup> Americans are engaged in a renewed struggle over how much it can be restricted.

What if voting were not simply a right, but also a legal duty? Making voting mandatory could be game-changing for American democracy, as legal scholars and political scientists have periodically observed.<sup>8</sup> Yet scholars have typically concluded it can't or won't happen here.<sup>9</sup> The prospects for such a fundamental reform do seem bleak, especially at the federal level. If the U.S. Senate can't eliminate the filibuster and defend voting rights, how could it make voting a legal duty?<sup>10</sup> Yet as political scientist Arend Lijphart once noted, pessimism can fuel a self-fulfilling prophesy: "if even the supporters of compulsory voting believe that its chances are nil—and hence make no effort on behalf of it—it will indeed never be adopted!"<sup>11</sup>

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<sup>6</sup> See *Shelby County v. Holder*, 570 U.S. 529 (2013); *Brnovic v. DNC*, 594 U.S. \_\_\_ (2021).

<sup>7</sup> ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 424 (2000).

<sup>8</sup> Ekow N. Yankah, *Compulsory Voting and Black Citizenship*, 90 *FORDHAM L. REV.* 639, 666 (2021) (concluding that "compulsory voting is a contribution to securing a shared view of equal Black citizenship"); Malcolm M. Feeley, *A Solution to the "Voting Dilemma" Problem in Modern Democratic Theory*, 84 *ETHICS* 235 (1974); Alan Wertheimer, *In Defense of Compulsory Voting*, in *PARTICIPATION IN POLITICS* 276–96 (R. J. Pennock and J. W. Chapman eds. 1975); Richard L. Hasen, *Voting Without Law*, 144 *PENN. L. REV.* 2135 (1996); Arend Lijphart, *Compulsory Voting is the Best Way to Keep Democracy Strong*, *CHRON. HIGHER ED.* Oct. 16, 1996, <https://www.chronicle.com/article/compulsory-voting-is-the-best-way-to-keep-democracy-strong/>; Arend Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, 19 *AM. POL. SCI. REV.* 1 (1997); Sean Matsler, *Note: Compulsory Voting in America*, 76 *S. CAL. L. REV.* 953 (2003); Lisa Hill, *Low Voter Turnout in the United States: Is Compulsory Voting a Viable Solution?* 18 *J. THEORETICAL POL.* 207 (2006); *Note: The Case for Compulsory Voting in the United States*, 121 *HARV. L. REV.* 591 (2007); Howard Schweber, *Compulsory Voting*, talk at U. Maryland Constitutional Schmooze (2014), [https://digitalcommons.law.umaryland.edu/schmooze\\_papers/191/](https://digitalcommons.law.umaryland.edu/schmooze_papers/191/)

<sup>9</sup> See, e.g., Wertheimer *supra* n. \_\_\_ at 293 ("The very reasons that account for the failure of political thinkers to consider compulsory voting also preclude its adoption."); Hasen *supra* n. \_\_\_ at 2179; Matsler *supra* n. \_\_\_ at 978 ("the likelihood of such a system ever existing in America remains slim... it is all but certain that it would face defeat at the hands of the very political factions whose dominance and legitimacy it threatens."); Schweber *supra* n. \_\_\_ at 1 ("I mentioned the practice [of compulsory voting] at a meeting of political scientists and was laughed at quite vocally by a senior colleague who insisted there was no such thing.")

<sup>10</sup> Mike DeBonis & Seung Min Kim, *Sinema and Manchin Confirm Opposition to Eliminating Filibuster, Probably Dooming Democrats' Voting Rights Push*, *WASH. POST.*, Jan. 13, 2022, [https://www.washingtonpost.com/politics/biden-set-to-visit-senate-democrats-in-a-final-improbable-pitch-for-voting-rights-action/2022/01/13/fde533b6-7475-11ec-8b0a-bcfab800c430\\_story.html](https://www.washingtonpost.com/politics/biden-set-to-visit-senate-democrats-in-a-final-improbable-pitch-for-voting-rights-action/2022/01/13/fde533b6-7475-11ec-8b0a-bcfab800c430_story.html)

<sup>11</sup> Lijphart, *Unequal Participation*, *supra* n. \_\_\_ at 11.

Some have kept hope alive. In 2015, President Obama mused that the U.S. might do well to make voting a duty.<sup>12</sup> Elections scholar Nicholas Stephanopoulos suggested that compulsory voting might begin at the local level, then spread to state and federal elections.<sup>13</sup> Political science has seen its own turn toward empirical and normative work on compulsory voting,<sup>14</sup> with some scholars anticipating scenarios in which the reform is tested somewhere in the U.S.<sup>15</sup> And the liberal columnist E.J. Dionne and progressive political strategist Miles Rapoport have launched a campaign to turn the policy proposal into reality—through a recent Brookings Institution report targeting politicians, a book written for the general public, and a legislative push in statehouses.<sup>16</sup> Legislators have introduced bills to make voting a duty in Massachusetts, Connecticut, and California.<sup>17</sup> Their sponsors recognize the bills are unlikely to pass, but together with the effort by Dionne and Rapoport they have drawn attention and sparked debate.<sup>18</sup>

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<sup>12</sup> Stephanie Condon, “Obama Suggests Mandatory Voting Might be a Good Idea.” CBS NEWS, Mar. 18, 2015 <https://www.cbsnews.com/news/obama-suggests-mandatory-voting-might-be-a-good-idea/> (quoting President Obama as saying “It would be transformative if everybody voted—that would counteract money more than anything.”)

<sup>13</sup> Nicholas Stephanopoulos, *A Feasible Roadmap to Compulsory Voting*, THE ATLANTIC, Nov. 2, 2015 (outlining how compulsory voting might start with a blue city in a red state, and then spread to the rest of the country); Joshua Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1069 (2017) (citing Stephanopoulos for the proposition that a duty to vote implemented at the local level could spread to the rest of the nation).

<sup>14</sup> See, e.g., Emilee Booth Chapman, *The Distinctive Value of Elections and the Case for Compulsory Voting*, 63 AM. J. POL. SCI. 101 (2019); Sarah Birch, *The Case for Compulsory Voting*, 16 PUB. POL. RESEARCH 21 (2009); JASON BRENNAN AND LISA HILL, *COMPULSORY VOTING: FOR AND AGAINST* (2014); SHANE P. SINGH, *BEYOND TURNOUT: HOW COMPULSORY VOTING SHAPES CITIZENS AND POLITICAL PARTIES* (2021).

<sup>15</sup> See, e.g., Shane P. Singh & Neil S. Williams, *Compulsory Voting: The View from Canada and the United States*, in *A CENTURY OF COMPULSORY VOTING IN AUSTRALIA* 235-58 (M. BONOTTI & P. STRANGIO, EDS., 2021)

<sup>16</sup> The Working Group on Universal Voting, *Lift Every Voice: The Urgency of Universal Civic Duty Voting*, The Brookings Institution (2020) (hereinafter *Lift Every Voice*); E.J. DIONNE JR. & MILES RAPOPORT, *100% DEMOCRACY: THE CASE FOR UNIVERSAL VOTING* (2022).

<sup>17</sup> An Act Concerning Universal Civic Duty Voting, Conn. S.B. 180 (2021); An Act to Amend Section 2000 of the Elections Code, relating to Elections, Cal. A.B. 2070 (2020); An Act Making Voting Obligatory and Increasing Turnout in Elections, Mass. H. 653 (2019).

<sup>18</sup> Will Haskell and Miles Rapoport, *Connecticut Should Require Voting As a Civic Duty*, HARTFORD COURANT, Jan. 26, 2021; Michael Hamad, *Senate Democrat proposes bill requiring mandatory voting in elections by 2024*, HARTFORD COURANT, Jan. 28, 2021; Karen Faasuliotis, *Opinion: Haskell bill to make voting mandatory is unconstitutional*, DANBURY NEWS-TIMES, Jan. 29, 2021; Andy Craig, *Mandatory voting bad, unconstitutional idea*, HOUSTON CHRONICLE, June 16, 2022. <https://www.chron.com/news/article/Opinion-Mandatory-voting-bad-unconstitutional-id-17247253.php>.

In discussions over whether voting can or should be made a duty<sup>19</sup> in this country, a fact is sometimes glossed over, or missed completely: compulsory voting *has* been tried in the United States—precisely once.<sup>20</sup> On April 8, 1889, voters in Kansas City, Missouri approved a city charter that made voting a duty. It did so by creating a poll tax for all eligible voters—at the time, men over age 21—that was waived by turning out to vote in city elections. The city implemented this policy in four local election cycles, starting in 1890, though its efforts to collect the tax were clouded by legal uncertainty. Ultimately, a test case resulted in the Missouri Supreme Court’s 1896 decision in *Kansas City v. Whipple*, striking down the charter provision.<sup>21</sup>

We know surprisingly little about the one time that compulsory voting was tried in America. As the historian Alexander Keyssar observed in his landmark account of suffrage in the United States, “the subject of compulsory voting still awaits its historian.”<sup>22</sup> This remains the case. Scholars and proponents sometimes cite *Whipple* in passing,<sup>23</sup> but we have no historical account of how and why voting became a duty in Kansas City, and what happened when it became the law of the city.

This article tells this story for the first time. It identifies the actors who placed compulsory voting on the agenda in Kansas City; suggests how tumultuous labor and racial politics may have drawn civic leaders from both major parties to the unprecedented policy; describes the arguments proponents made for the reform; traces the struggles to implement and enforce an unprecedented electoral regulation; and maps the legal positions taken as the city defended its penalty for non-voters in Missouri’s courts. This history suggests that the motivation for compulsory voting was not particularly progressive. Kansas City’s white political and business elite appears to have been drawn to make voting a duty in hopes of diluting the growing influence of working-class and African-American voters, by

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<sup>19</sup> This Article focuses on efforts to make voting a legal duty, with some legal consequence, such as a fine or fee, should that duty go unfulfilled. There is, to be sure, an important distinction to be made between various types of duties, and it is possible that voting could be a moral, ethical, or civic duty, but not a legal one. For the sake of brevity, in what follows I generally use “duty” as shorthand for “legal duty.”

<sup>20</sup> Although this Article examines the only case in U.S. history in which compulsory voting has been enacted as law and implementation attempted, it is worth noting that voting was made a duty in several instances during the colonial period, and that bills to make voting mandatory has been repeatedly proposed in various states since the 1880s. *See* section I.A., *infra*.

<sup>21</sup> *Kansas City v. Whipple*, 136 Mo. 475 (1896).

<sup>22</sup> KEYSSAR, *supra* n. \_\_ at 424, n. 19.

<sup>23</sup> *See e.g.*, Hasen, *supra* n. \_\_ at 2175 n. 163 (citing *Whipple* as counterpoint to First Amendment objections to compulsory voting); Schweber, *supra* n. \_\_ at 11 (noting *Whipple* was never appealed).

ensuring that the city's "responsible" men of business turned out to vote.<sup>24</sup> The impulse to make all men vote in Kansas City resonated with the anxieties of white elites concerning the exercise of suffrage by working-class African Americans and immigrants during the Gilded Age—and particularly in the years between the end of Reconstruction and the rise of Jim Crow disenfranchisement laws.

The story of Kansas City is no mere historical curiosity. As interest in compulsory voting sees a resurgence, the case study developed here offers lessons for people who hope to again make voting a duty, starting with local elections. To assess the democratic potential and possible pitfalls of reviving this reform during a moment that has its own echoes with the Gilded Age and the Redemption Era, we should know what happened last time around.<sup>25</sup>

Kansas City offers three types of lesson: political, practical, and legal. The first challenges the emerging conventional wisdom concerning how, where, and why municipal leaders would want to make voting a duty. The second contributes to recent discussions of policy design, pointing to how the division of labor of election administration would inform how and where a local duty to vote could be implemented.<sup>26</sup> The final set of lessons concerns how state and federal law shape municipal authority to make voting a duty.

In drawing lessons from the case study, I avoid re-treading analysis in prior work. I describe how proponents made their case in Kansas City, but do not intervene in recent normative debates over making voting a duty.<sup>27</sup> Nor do I review how compulsory voting has affected voting behavior in other countries,<sup>28</sup> or opine on whether there is a federal constitutional right *not* to vote.<sup>29</sup> These questions are important, but prior work has helped point the way for proponents or opponents of compulsory voting.

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<sup>24</sup> See sections I.B. and I.C., *infra*.

<sup>25</sup> K. Sabeel Rahman, *From Economic Inequality to Economic Freedom: Constitutional Political Economy in the New Gilded Age*, 35 *YALE L. & POL. REV.* 321 (2016); Kimberly S. Johnson, *The Neo-Redemption Era? APD in the age of #Black lives matter*, 6 *POL. GROUPS & IDENTITIES* 120 (2018). I am indebted to Janet Moore for pointing out the resonance not only with the Gilded Age but also with the Redemption Era.

<sup>26</sup> Proponents have typically focused on the need to allow for blank ballots, to avoid the problem of compelled speech. See, e.g., *Note: The Case for Compulsory Voting*, *supra* n. \_\_ at 601. More recently, the working group convened by Brookings focused on the need to be attentive to how fines or fees for non-voting are enforced, and their distributional effects. *Lift Every Voice*, *supra* n. \_\_ at 50.

<sup>27</sup> Cf. JASON BRENNAN AND LISA HILL, *COMPULSORY VOTING: FOR AND AGAINST* (2014).

<sup>28</sup> Maurice Dunaiski, *Is Compulsory Voting Habit Forming? Regression discontinuity evidence from Brazil*, 71 *ELECTORAL STUDIES* \_\_ (2021).

<sup>29</sup> See, e.g., *Note: The Case for Compulsory Voting*, *supra* n. \_\_ at 598-600 (analyzing whether there is a right not to vote implicit in the U.S. Constitution).

My aim is different: to use history as a means of identifying challenges, opportunities, dilemmas, and contradictions that proponents of compulsory voting may encounter as they seek to make voting a duty in local elections. The first half of the article, in Part I, tells the story of compulsory voting in Kansas City. It places the proposal in the context of skepticism among white elites during the Gilded Age concerning the wisdom of universal male suffrage, and then follows the local campaign to include the policy as part of the municipal charter, make the case for its enactment, and overcome challenges to its implementation. Part I closes by analyzing the logic of the Missouri Supreme Court's decision that compulsory voting violated the state constitution.

The Article then draws lessons from the case study. Part II takes up political and pragmatic lessons. The politics that produced a duty to vote in Kansas City suggests that the path to reform envisioned by today's progressive revivalists might not be so straightforward. Compulsory voting might serve to dilute the influence of organized groups and segments of the electorate that local progressives might otherwise hope to empower. Indeed, it might ultimately be enticing to conservatives concerned about losing their grip on power. The case study also highlights how policy implementation depends on administrative details. As officials in Kansas City realized, a city must be able to identify its residents, determine which are eligible voters, and then identify and sanction non-voters. As in Kansas City, municipalities today that rely on county and state agencies to maintain lists of residents and voters, and to carry out local elections, would face hurdles to implementing a duty to vote.

Part III draws legal lessons from the case study. The first concerns municipal authority to administer elections. This issue of local government law arose in Kansas City, and the Missouri Supreme Court struck down the local measure because of a purported conflict with state law. Today, the viability of a duty to vote in local elections would turn on municipal authority. I map where municipalities are empowered to make voting a duty, and conclude the reform is viable in a wider range of states than previously supposed. I also analyze how the intent or likelihood of a reform to create extra-local effects could affect state courts' willingness to uphold compulsory voting at the local level. This, together with the likelihood of state legislative preemption, suggests why proponents should consider how a duty to vote in local elections may be protected by a state constitutional right to local self-government.

Part III also addresses an issue of federal law that opponents of compulsory voting have recently raised. This is the argument that compulsory voting constitutes a poll tax in violation of the 24<sup>th</sup> Amendment or *Harper v.*



*Virginia State Board of Election*.<sup>30</sup> At first blush, the Kansas City poll tax provision might seem to support this claim. But I conclude that the asserted claim is in fact a non-issue, at least so long as a non-voter retains the right to vote in subsequent elections. That was the case in Kansas City, and no one today is suggesting anything otherwise.

Making voting a duty could be a game-changer for American democracy. Although it might seem an inherently progressive reform, the experience of Kansas City in the 1880s and 1890s suggests how its reemergence could present twenty-first century progressives with both opportunities and dilemmas. Learning from the past can help today's reformers be thoughtful and strategic as they work to bring about a duty to vote—and envision how cities might serve as launching points for deepening American democracy.

### I. THE DUTY TO VOTE IN KANSAS CITY

In the late 1880s, Kansas City's political elite came to favor making voting a duty, and managed to enact the policy. People elsewhere had advocated compulsory voting, but this was the only place since independence that would actually try to implement the reform. The history that follows does not aim to identify generalizable factors that are necessary or sufficient to enact a duty to vote in an American city. One case cannot, of course, do so much.<sup>31</sup> And the factors that favored the enactment of compulsory voting 130 years ago are not necessarily the same as those that would favor its reemergence today. Nevertheless, Americans curious about how a duty to vote might reemerge today could learn at least as much from our own relatively neglected history of compulsory voting as from drawing comparisons with a “model case” such as Australia.<sup>32</sup>

This, then, is a deliberately presentist history.<sup>33</sup> “The emergence of new concerns in the present,” the historian Lynn Hunt has noted, “invariably

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<sup>30</sup> 383 U.S. 663 (1966) (holding a state poll tax to violate the Fourteenth Amendment guarantee of equal protection).

<sup>31</sup> See Stanley Lieberson, *Small N's and Big Conclusions: An Examination of the Reasoning in Comparative Studies Based on a Small Number of Cases*, in WHAT IS A CASE? EXPLORING THE FOUNDATIONS OF SOCIAL INQUIRY 108 (CHARLES C. RAGIN & HOWARD S. BECKER, EDS. 1992) (observing that “a small number of cases is a bad basis for generalizing about the process under study”).

<sup>32</sup> See MONIKA KRAUSE, MODEL CASES: ON CANONICAL RESEARCH OBJECTS AND SITES 32 (2021) (arguing for more studies of neglected cases, since “by focusing on model systems, researchers are not considering the full range of variation ... [and] some objects that have value in and of themselves may never be studied and understood”). For an example of taking Australia as the model case, see Lisa Hill, *Compulsory Voting in Australia: A Basis for a “Best Practice” Regime*, 32 FED. L. REV. 479 (2004).

<sup>33</sup> For readers uninitiated to the terms of debate among professional historians,

reveals aspects of historical experience that have been occluded or forgotten.”<sup>34</sup> Renewed interest in compulsory voting, particularly in cities, invites a return to Kansas City in the late 1880s. Revisiting that moment reveals how voting once became a duty in America, and sheds light on how and where the reform might reemerge.<sup>35</sup> This is distinct from imagining that events will unfold in precisely the same way. History may on occasion rhyme, and today’s politics do echo those of the Gilded Age and Redemption Era in certain respects.<sup>36</sup> But we should not expect this history to simply repeat.

A note on sources and methods before proceeding. I am aware of no archival collection that reveals the private reflections of the actors in this drama. Instead, I draw extensively on articles from Kansas City newspapers—the *Star*, the *Times*, and the *Daily Journal*. These reports were produced for public consumption—to both inform and persuade readers. In using articles from newspapers that had political agendas, there is some risk that the bias of the sources will skew our understanding of events.<sup>37</sup> Here, however, the sources’ bias is part of the story. The slant in how newspapers covered compulsory voting informs the narrative, pointing to why compulsory voting caught the fancy of elites and electoral reformers.

#### *A. Universal Suffrage and Compulsory Voting in the Gilded Age*

Compulsory voting was part of political discourse during the Gilded Age, if not a central concern. By the time it came to Kansas City, the reform had been debated and elsewhere for at least a decade. Later, clauses enabling compulsory voting would be written into three state constitutions.<sup>38</sup> The

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presentism can be understood as “a pejorative for the faulty understanding of the past in terms of the present.” Jeffrey R. Wilson, *Historicizing Presentism: Toward the Creation of a Journal of the Public Humanities*, PROFESSION, Spring 2019, <https://profession.mla.org/historicizing-presentism-toward-the-creation-of-a-journal-of-the-public-humanities/>

<sup>34</sup> Lynn Hunt, *Against Presentism*, PERSPECTIVES ON HISTORY, May 1, 2002 <https://www.historians.org/publications-and-directories/perspectives-on-history/may-2002/against-presentism>

<sup>35</sup> At the same time, we should approach the past, as Hunt suggests, with a sense of humility or wonder, rather than a presumption that people then were morally inferior to those of us who have come after. *Id.* The prejudices of the day—and, as we will see, there were many—informed elite interest in compulsory voting in Kansas City. Rather than imagining we have overcome such prejudices, we might instead ask how the prejudices of our own time could inform renewed interest in this reform.

<sup>36</sup> Rahman, supra n. \_\_; Johnson, supra n. \_\_.

<sup>37</sup> Jennifer Earl, Andrew Martin, John D. McCarthy, and Sarah A. Soule, *The use of newspaper data in the study of collective action*. 30 ANN. REV. SOC. 65 (2004).

<sup>38</sup> Such clauses were amended into the constitutions of Massachusetts, North Dakota, and Oregon. Henry J. Abraham, *What Cure for Voter Apathy?* 39 NAT’L MUNI. REV. 346, 346 (1952). Of the three, Massachusetts is the only in which the provision has not been

impulse was not particularly progressive. Instead, the notion that voting should be a duty resonated with critiques of the dangers posed by universal suffrage, and the perceived threat of African Americans and women gaining the right to vote. Making voting mandatory was just one of several ideas that reformers proposed to address these threats, and the potential for election fraud.

Proponents of compulsory voting in the late 1800s looked back to colonial-era precedents. As colonies, Georgia and Virginia each enacted laws to levy fines for non-voting, though the former apparently did not enforce the provision and the latter only did so rarely.<sup>39</sup> Proponents also cited local ordinances that mandated voting at some town meetings in colonial Massachusetts and New York.<sup>40</sup>

Civic reformers and legislators in Massachusetts led the way in putting compulsory voting back on the agenda in the late nineteenth century. As early as 1875, Reverend Joseph Cook, an influential Boston clergyman and author, delivered sermons on the need for “compulsory voting, with fines for absence from the polls.”<sup>41</sup> He proposed this as part of a set of election and civil service reforms, which would also include disenfranchising the illiterate.<sup>42</sup> By 1883, having visited the Wyoming territory, where women could vote, Cook advocated for compulsory municipal suffrage that included literate women.<sup>43</sup> In 1885, Hazard Stevens, a Massachusetts legislator famous for making the first documented ascent of *təqʷuʔməʔ*—the volcano that white settlers named Mount Rainier—introduced a bill to make voting compulsory.<sup>44</sup> In presenting the bill, he noted that nearly one in four of Boston’s 66,000

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repealed. MASS. CONST., art. LXI (“The general court shall have authority to provide for compulsory voting at elections, but the right of secret voting shall be preserved.”)

<sup>39</sup> Hasen, *supra* n. \_\_\_ at 2173-74 n. 154.

<sup>40</sup> See *Compulsory Suffrage*, BOSTON EVENING TRANSCRIPT, Mar. 9, 1885 at 2 (“An ancient by-law of the towns in 1660 imposed a penalty of six pence on any voter who failed to attend town meeting, and thirteen pence if he left it before it was over.”). Political scientist Frederick William Holls, in making the case for compulsory voting in 1891, quoted a 1643 ordinance from Southampton, Long Island:

It is ordered that whatsoever matters or orders shall be referred to the publick vote euery man that is then and there present and a Member of the Courte shall give his vote and suffrage eyther against or for any such matters and not in any case be a neuter.

Holls, *Compulsory Voting* 1 ANNALS AM. ACAD. POL. & SOC. SCI. 586, 591 (1891).

<sup>41</sup> *Remedies for American Dishonesty*, BOSTON EVENING TRANSCRIPT, Apr. 3, 1875, at 8.

<sup>42</sup> *Id.*

<sup>43</sup> *The Monday Lectureship*, BOSTON EVENING TRANSCRIPT, Mar. 5, 1883, at 8.

<sup>44</sup> DeeDee Sun, *Changing the Name of Mount Rainier? The new effort from Washington tribes*, KIRO 7 NEWS, Apr. 23, 2021, <https://www.kiro7.com/news/local/changing-name-mount-rainier-new-effort-washington-tribes/RZ7STJYDNLGPNCHZY62CRWI/>

voters failed to turn out at the last election, and made clear who he thought stood to benefit if all turned out:

These recreant citizens are not the dangerous and debased voters, the mere voting cattle, bought up with a glass of liquor or a dollar poll tax and voted in swarms at the dictation of others. That class, unfortunately, are always on hand at every polling-place, and always will be as long as unscrupulous politicians and hungry office-seekers furnish a market for their votes. They are always ready to vote often and early.

But these absentee voters, on the other hand, include many intelligent and educated citizens, men of high character and position... who are too much absorbed in private pursuits to attend to their public duty...

Thus these absentees are the very voters most needed. They are the intelligent, the industrious, the non-partisan, the very men who cannot be bought, who cannot be cajoled, and who cannot be driven.

Would not the accession of such voters, twenty per cent. of the whole number, raise immeasurably the average of the electors? Would they not more than counterbalance the dangerous and corrupt voters?<sup>45</sup>

Hazard's argument, at least on its first hearing, was unpersuasive. One report noted his 1885 bill "was received with ridicule and almost unanimously voted down."<sup>46</sup>

The next year, Stevens reintroduced the bill, and it fared much better. Although it fell short of passing in the lower house by a vote of 49 to 44, the bill "met with universal respect," according to the *Boston Evening Transcript*: "Those who opposed it did so solely on the ground of expediency or practicability, admitting that the idea and principle of the bill were right."<sup>47</sup> Stevens reprised his argument that "the absentees represent the better, not the worse voters."<sup>48</sup> This time, he suggested that "free suffrage" without compulsory voting posed an existential threat to an urban democracy:

Already in the larger cities it is openly declared that free suffrage is a failure. If a failure in the cities, which contain one-fifth of the entire population of the country, how long can it last in the nation at large? And when free suffrage fails, when the people no longer govern, who then, sir, is to govern, and how is that ruler to maintain his power?<sup>49</sup>

Stevens cited as precedent colonial-era laws in Massachusetts and Maryland that required freemen to attend town meetings and stay until the end, as well as the fact that every Athenian citizen during the time of Pericles

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<sup>45</sup> *Compulsory Suffrage*, *supra* n. \_\_\_\_.

<sup>46</sup> *Enforcing the Duty of Suffrage*, BOSTON EVENING TRANSCRIPT, Jul. 2, 1886 at 2.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

was compelled to “choose his side in every political contention.”<sup>50</sup> He observed that the idea was spreading: a Harris J. Chilton of Baltimore had introduced a similar bill in Maryland’s legislature.

Chilton, a Baltimore attorney who later moved to Philadelphia, became a leading advocate for compulsory voting. Apart from the Maryland bill, he pushed for a bill in New York, visited Kansas City during its experiment with compulsory voting, and worked to have a bill introduced in Pennsylvania.<sup>51</sup> Like Cook and Stevens, Chilton argued that compulsory voting, bundled with other voting reforms, was needed to cure the ills of urban democracy. “All the evils of government result from neglecting the exercise of the right of the franchise,” Chilton wrote in lobbying New York legislators. “It was by this neglect on the part of the citizens of New York that Tweed became master for years in New York City, and was enabled to rob the people of millions of dollars.”<sup>52</sup>

Concerns among elite white men about extending suffrage to African Americans and women motivated interest in compulsory voting. Such concerns appeared in the pages of the *North American Review* in the years after the Boston brahmin C. Allen Thorndike Rice bought and began editing the magazine. Harvard professor Francis Parkman, a critic of women’s suffrage, wrote in 1878 that “the success of an experiment of indiscriminate suffrage hangs on the question whether the better part of the community is able to outweigh the worse.”<sup>53</sup> William Scruggs, a Nashville attorney then serving as President Cleveland’s ambassador to Colombia, asserted that states had a duty “to consider whether suffrage may be more beneficially exercised by the many or the few.”<sup>54</sup> Scruggs, unsurprisingly, preferred suffrage for the few. Instead of compulsory voting, he explained how state laws

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<sup>50</sup> *Id.*

<sup>51</sup> Harris J. Clinton [sic], *Compulsory Voting Demanded*, 145 N. AM. REV. 685 (1887) (urging the New York legislature to make voting a duty, and proposing model language for a bill); Harris J. Chilton, *An Act to Make Voting Compulsory*, 1 ANNALS AM. ACAD. POL. & SOC. SCI. 611 (1891); *Maryland Will Try It*, K.C. TIMES, July 30, 1893 (relating Chilton’s visit to Kansas City and his plan to introduce a law modeled on its provision in the Maryland legislature during the 1894 session); *Compulsory Voting*, THE SCRANTON REPUBLICAN, Oct. 16, 1899 (describing the bill Chilton prepared for the consideration of the Pennsylvania legislature).

<sup>52</sup> Clinton [sic], *supra* n. \_\_\_. New York’s governor would announce his support for a trial of compulsory voting in his annual address for 1889, and again the next year. Holls, *supra* n. \_\_ at 590-91. As with other proponents, he pointed to a local ordinance from the 1600s as precedent—in the case of New York, a 1643 ordinance from Southampton. *Id.* at 591.

<sup>53</sup> Francis Parkman, *The Failure of Universal Suffrage* 127 (263) N. AM. REV. 1, 7 (Jul.-Aug. 1878)

<sup>54</sup> William L. Scruggs, *Restriction of the Suffrage* 139(336) N. AM. REV. 492, 492 (Nov. 1884).

disenfranchising the “ignorant and vagrant,” whites and African Americans alike, would not violate the Fourteenth and Fifteenth Amendments.<sup>55</sup> These critiques of universal suffrage carried weight. Parkman was a leading opponent of the campaign for female suffrage, and Scruggs sought to justify the restrictions on African American’s political rights that marked the end of Reconstruction.<sup>56</sup>

Chilton and his allies did not disagree with the premise of these articles. Chilton’s plea for New York to make voting mandatory, which appeared in the *Review* a few years after Scruggs’ article, worked from a similar starting point. But it arrived at a different conclusion. Rather than disenfranchising ignorant and vagrant voters, Chilton would instead require the right-thinking, responsible classes to perform their civic duty, and thereby deprive the recently-enfranchised masses of any chance of winning. This strategy echoed that of leading suffragists such as Elizabeth Cady Stanton, who notoriously urged people to “think of Patrick and Sambo and Hans and Yung Tung who do not know the difference between a Monarchy and a Republic, who never read the Declaration of Independence or Webster’s spelling book, making laws for Lydia Marie Child, Lucretia Mott or Fanny Kimble.”<sup>57</sup>

The push for compulsory voting aligned with other electoral reform projects. The Gilded Age was a time both of machine politics in America’s cities, and allegations of widespread electoral fraud.<sup>58</sup> Advocates of compulsory voting also favored reforms ranging from revised nomination procedures to adoption of the “Australian Ballot,” which would keep voters’ decisions secret (and, as a result, require voters to be able to read a ballot without assistance).<sup>59</sup> Many of these other reforms were implemented around

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<sup>55</sup> *Id.* at 496-97.

<sup>56</sup> See KEYSSAR, *supra* n. \_\_\_ at 122-24. Historians of the Dunning School would later elaborate on the racist arguments made in the wake of Reconstruction, asserting that the expansion of the franchise to African Americans was a mistake that had produced widespread corruption. Eric Foner, *Forward* in THE DUNNING SCHOOL: HISTORIANS, RACE, AND THE MEANING OF RECONSTRUCTION ix-xii (JOHN DAVID SMITH AND J. VINCENT LOWERY, EDS. 2013).

<sup>57</sup> See Linda Lopata, *Politics of Precedence*, National Susan B. Anthony Museum & House (citing ANN D. GORDON, THE SELECTED PAPERS OF ELIZABETH CADY STANTON & SUSAN B. ANTHONY, VOL. II: AGAINST AN ARISTOCRACY OF SEX 196 (2000)). I am indebted to Niko Bowie for pointing out this parallel between suffragists and proponents of compulsory voting.

<sup>58</sup> See *id.* at 123 (working-class immigrant voters “purportedly were prone to voting illegally, irresponsibly, and against the interests of their betters. Charges of corruption and naturalization fraud were repeated endlessly.”); Peter H. Argersinger, *New Perspectives on Election Fraud in the Gilded Age* 100 POL. SCI. QUARTERLY 669, 686 (1985) (observing that “election fraud, whatever its precise level or influence, was a common characteristic of Gilded Age election”).

<sup>59</sup> See KEYSSAR, *supra* n. \_\_\_ at 142-43 (describing the role of the Australian ballot in efforts to combat fraud, and its rapid spread after being first adopted in 1888); TRACY

the same time that Kansas City would make voting a duty. Louisville became the first U.S. jurisdiction to adopt the secret ballot in 1888, and New York led the way among states the following year.<sup>60</sup> When voting became a duty in Kansas City's 1890 municipal election, it was also for the first time a secret process.<sup>61</sup>

Compulsory voting might be understood as the less-successful cousin of reforms that gained widespread adoption. In the late 1800s, the secret ballot spread to elections nationwide.<sup>62</sup> More infamously, state laws restricting voting rights swept the South, beginning with Mississippi's institution of a strict residency requirement, poll tax, and literacy test in 1890.<sup>63</sup> Compulsory voting figured in debates around suffrage expansion and electoral reform during this period, but never took hold beyond Kansas City. It became the forgotten cousin of Gilded-Age electoral reforms.

Other jurisdictions did eventually take steps toward creating a duty to vote. By one count, some 57 bills providing for compulsory voting in some form were introduced in Massachusetts, Maryland, New York, Indiana, Connecticut, Wisconsin, Rhode Island, California, Maine, and Kansas between 1888 and 1952; none passed.<sup>64</sup> Legislatures in North Dakota, Massachusetts, and Oregon each advanced constitutional amendments to authorize compulsory voting.<sup>65</sup> Voters in North Dakota and Massachusetts approved these by referenda in 1899 and 1918, respectively; Oregon voters rejected the proposed amendment in 1920.<sup>66</sup> In neither North Dakota nor Massachusetts did the legislature ever act based on this power.<sup>67</sup> Despite the abundance of proposals, we know little about the specific circumstances in which they failed to become law.<sup>68</sup>

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CAMPBELL, *DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION—1742-2004* 98 (2005) (noting “the secret ballot served as an effective tool to disenfranchise poor whites, illiterate immigrants, [and] Southern blacks”).

<sup>60</sup> KEYSSAR, *supra* n. \_\_ at 142-43.

<sup>61</sup> *Glorious! Democracy Wins the Day*, K.C. TIMES, Apr. 9, 1890 at 1.

<sup>62</sup> KEYSSAR, *supra* n. \_\_ at 143.

<sup>63</sup> *Id.* at 111.

<sup>64</sup> Abraham, *supra* n. \_\_ at 346-47.

<sup>65</sup> *Id.* at 346.

<sup>66</sup> *Id.*

<sup>67</sup> While the provision was later repealed from the constitution of North Dakota, in Massachusetts the legislature still has express authority to make voting a duty. MASS. CONST., Art. LXI (“The general court shall have authority to provide for compulsory voting at elections, but the right of secret voting shall be preserved.”)

<sup>68</sup> Understanding the reasons for *non*-enactment could be just as useful for contemporary proponents as the lessons to be learned from the lone case in which a U.S. jurisdiction did make voting a legal duty. I expect to pursue this line of inquiry in future work, but it is beyond the scope of this article.

Although compulsory voting failed to become an American institution, it caught on elsewhere. Belgium made voting a duty in 1892, and around thirty countries have adopted compulsory voting, though fewer have implemented and enforced the duty.<sup>69</sup> Perhaps for this reason, some American election scholars suggest the practice seems foreign—or even un-American.<sup>70</sup> Looking back to Kansas City recovers a vision, even if fleeting, of compulsory voting as an American institution.

### *B. Setting the Agenda in Kansas City*

Voting likely would not have become mandatory in Kansas City but for William Rockhill Nelson. In a letter to his friend Theodore Roosevelt in the summer of 1912, Nelson, the founder and longtime editor and publisher of the *Kansas City Star*, recounted:

Several years ago I had a charter amendment drawn for Kansas City under which a poll tax was remitted on evidence that the man had voted. This was adopted but was held unconstitutional by a perfectly arbitrary political decision of the Missouri Supreme Court.<sup>71</sup>

Nelson couldn't keep the law from being struck down. But he did succeed, practically single-handedly, in putting compulsory voting on the city's policy agenda.

Nelson arrived in Kansas City in 1880, after practicing law and working in local politics in Indiana, where he grew up. On arriving in the boomtown, he founded the *Star*, which he published and edited until his death in 1915. Nelson created the *Star* as a politically-independent newspaper, something new for Kansas City. Although he did not write much that appeared in the

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<sup>69</sup> Lisa Hill reports that the countries that have supported and enforced compulsory voting laws include Argentina, Australia, Austria, Belgium, Brazil, Cyprus, Fiji, Greece, Italy (at least until 1993), Liechtenstein, Luxembourg, Nauru, Peru, Singapore, Switzerland (one canton), Uruguay, and Venezuela (until 1993). Lisa Hill, *Compulsory Voting Defended* in JASON BRENNAN & LISA HILL, *COMPULSORY VOTING: FOR AND AGAINST* 116 n. 15. (2014).

<sup>70</sup> Hasen, *supra* n. \_\_ at 2174 (“Most Americans with whom I discuss the idea, including academics, bristle at the thought of such a law”) quoting Michael G. Colantuono, *Comment, The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL L. REV. 1473, 1503 (1987) (“Compulsory voting is fundamentally inconsistent with the individualism of American political culture”) and RUY A. TEIXEIRA, *THE DISAPPEARING AMERICAN VOTER* 154 (1992) (compulsory voting is “antithetical to American values”).

<sup>71</sup> CHARLES ELKINS ROGERS, *WILLIAM ROCKHILL NELSON: INDEPENDENT EDITOR AND CRUSADING LIBERAL* 253 (1948) (quoting letter from William Rockhill Nelson to Theodore Roosevelt, 24 July 1912, part of the Theodore Roosevelt papers in the Library of Congress).



paper, the *Star* was seen to communicate Nelson's views. As William Reddig, a *Star* editor, put it:

[Nelson] could never bear the thought of the *Star* having any voice but his own. "The *Star*," he said repeatedly and firmly, "is the Daily W. R. Nelson." Readers of the *Star* had the impression that Nelson was speaking to them personally each afternoon.<sup>72</sup>

The paper quickly became a force in local politics. Nelson's mission, and that of the *Star*, was municipal reform: anti-corruption, anti-machine. Nelson was also a real estate developer and a proponent of the city beautiful movement, and is credited with developing the city's parks.

When Nelson took a position, he was committed to winning. Reddig relates an anecdote, possibly apocryphal, that suggests Nelson's willingness to fight. Joseph Davenport, who had served a one-year term as mayor in 1889, tried to make a comeback in 1892, but felt slighted by the *Star*. He came to Nelson's office, spoiling for a fight, and the editor was knocked down. At this point, four *Star* staffers supposedly threw the mayor down a flight of steps. Nelson is claimed to have told them "the *Star* never loses"—which, according to Reddig, "had a humorous sound, as it was usually uttered just after the paper had taken a drubbing at the polls."<sup>73</sup>

Nelson first put compulsory voting on the agenda in 1886. It was pitched in an article with no byline—a typical practice at the time—just after the November elections.<sup>74</sup> William Warner, a Republican, had won a seat in Congress by 700 votes out of 15,000 cast. For Nelson, this was apparently too close for comfort. Total voter registration was about 18,000, which the *Star* observed was probably at least 1,000 shy of all the eligible voters in the city. (At the time, only male citizens over age 21 who met residency requirements were eligible.)

Had there been a full vote in the 1886 general election, the *Star* surmised, Warner would have won handily:

the conditions of the campaign were such as to make the inference reasonable that the bulk of the unrecorded votes would have gone to Warner. If Warner had been defeated it would have been entirely due to the neglect of probably 4,000 voters in Kansas City to do their duty, and his majority would have been at least 2,700 in the District instead of 700 if the full vote of Kansas City had been polled.<sup>75</sup>

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<sup>72</sup> WILLIAM M. REDDIG, *TOM'S TOWN: KANSAS CITY AND THE PRENDERGAST LEGEND* 39 (1947).

<sup>73</sup> *Id.* at 42-43.

<sup>74</sup> K.C. STAR, Nov. 5, 1886.

<sup>75</sup> K.C. STAR, Nov. 5, 1886.

But how to ensure a full vote? The *Star* envisioned a tax that would apply only to non-voters.

In this initial foray, the *Star* proposed a \$25 poll tax that would be waived by casting a ballot. It is difficult to say with accuracy how much this would be in current dollars, but it would have made non-voting quite costly. Based on purchasing power, a \$25 tax then would be about \$700 in today's dollars; by other measures it would be several thousand.<sup>76</sup> The *Star* concluded that no resident would want to pay such a price—and so all would vote.

The *Star* urged legislators to run with the idea. “Missouri should be the pioneer state in this electoral reform,” the paper suggested, “and the matter should be brought before the legislature this winter.”<sup>77</sup> Kansas City presented the next-best option: “If the legislature is not willing to try the experiment throughout the State it may begin with Kansas City. The charter of this city may be amended to provide the essential conditions.”<sup>78</sup> The proposal to make voting a local duty fit with the *Star*'s trademark focus on local news.<sup>79</sup>

Over the next two years, the *Star* kept pitching the idea to legislators in both Missouri and Kansas.<sup>80</sup> Like proponents elsewhere, the *Star* framed the proposal as way to prevent the ills associated with universal suffrage. Female suffrage soon provided a hook for pushing compulsory voting. Late in 1886, the Kansas legislature passed a bill to give women the right to vote in municipal elections.<sup>81</sup> That winter, with the law having gained the governor's signature, *The Star* looked on with trepidation. “Nearly all of the lower and vicious classes go and vote,” it warned, while “many of those belonging to the better classes are indifferent to the blessings and rights of the ballot.”<sup>82</sup> The way to lessen “the hazards of universal suffrage” was clear: institute a penalty for not voting, and induce everyone to go to the polls.<sup>83</sup> A later article suggested such a fine “is the only way open for making suffrage universal and securing people from the dangers of a partial and vicious vote.”<sup>84</sup>

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<sup>76</sup> [www.measuringworth.com](http://www.measuringworth.com)

<sup>77</sup> K.C. STAR, Nov. 5, 1886.

<sup>78</sup> *Id.*

<sup>79</sup> Susan Jezak Ford, “William Rockhill Nelson: Newspaperman, 1841-1915” *Missouri Valley Special Collections Biography* (1999), [https://www.kchistory.org/islandora/object/kchistory/53A115244/datastream/OBJ/download/Biography\\_of\\_William\\_Rockhill\\_Nelson\\_1841-1915\\_Newspaperman.pdf](https://www.kchistory.org/islandora/object/kchistory/53A115244/datastream/OBJ/download/Biography_of_William_Rockhill_Nelson_1841-1915_Newspaperman.pdf)

<sup>80</sup> K.C. STAR, Feb. 8, 1888 (proposing that the Missouri legislature impose a \$50 poll tax).

<sup>81</sup> *LWVK History*, League of Women Voters of Kansas, <https://lwvk.org/about-lwv-of-kansas/lwvk-history>. In the April elections the following year, Susannah Medora Salter would become the first female mayor of a U.S. city when she won election in Argonia.

<sup>82</sup> K.C. STAR, Feb. 11, 1887

<sup>83</sup> *Id.*

<sup>84</sup> *An Inducement to Vote*, K.C. STAR, Feb. 26, 1887.

The *Star* portrayed the poll tax as an urban reform that should spread nationwide. It urged the Kansas and Missouri legislatures to adopt compulsory voting as a complement to franchise expansion, to “place every city under the government of the law and order people, and prevent a control by the rabble.”<sup>85</sup> Eventually, the practice would need to spread: “There will be no complete elections, no absolutely full expression of the popular will of the people, until a law of this nature stands upon the statutes of every state in the Union.”<sup>86</sup> Yet despite the *Star*’s ambitions, its pet policy did not find support in either Jefferson City or Topeka.

### *C. Gaining Traction on Unsettled Political Terrain*

After years without action by state legislators, compulsory voting proponents finally gained traction in Kansas City in 1889. What convinced local political elites to make voting a duty, when nowhere else had done so? First, they had the authority. Kansas City was poised to become a home-rule city, with its own charter and power to regulate municipal elections. Second, this new power arrived after three especially tumultuous years for local politics. A surge in organizing by labor and African-American political leaders was scrambling party alliances and frustrating business leaders. With the political terrain becoming increasingly unsettled, compulsory voting may have presented a way for leaders from both major parties to dilute the influence of emerging, highly mobilized segments of the electorate.

The Missouri Constitution of 1875 granted municipalities of at least 100,000 residents the power to draft a home rule charter.<sup>87</sup> At the time, Kansas City was not close to this threshold; it grew from 32,000 residents in 1870 to 55,000 in 1880. But the city was booming, and its population more than doubled during the 1880s, reaching 132,000 in 1890.<sup>88</sup> In 1887, the state legislature passed an act authorizing a city census and laying out the process for drafting a city charter.<sup>89</sup> That fall, a board of freeholders was elected to begin drafting charter provisions.<sup>90</sup> Compulsory voting was not part of the first proposed charter, which was voted down in the fall of 1888. That December, a new board of freeholders gathered to draft a second charter.<sup>91</sup>

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> MO. CONST. of 1875, art. IX, sec. 16.

<sup>88</sup> *Kansas City Population History*, <https://www.biggestuscities.com/city/kansas-city-missouri>

<sup>89</sup> James W. S. Peters, *Home Rule Charter Movements in Missouri with Special Reference to Kansas City*, 27 ANNALS AM. ACAD. POL. & SOC. SCI. 155, 158 (1906).

<sup>90</sup> *Id.*

<sup>91</sup> *The Freeholders Organize*, K.C. STAR, Dec. 16, 1888, at 7.

Again, the poll tax was not on the agenda, at least at first.<sup>92</sup> But proponents soon got their provision added to the draft, as Nelson’s paper trumpeted in January of 1889: “Seed planted by *The Star* some time ago has borne fruit in a proposition by the board of freeholders to incorporate in the new charter a poll-tax to apply to municipal elections.”<sup>93</sup>

Why would the city’s civic leaders have decided to use their newfound power in this unprecedented way? The notion of making voting a duty had been circulating for years both nationally and, thanks to Nelson’s efforts, in Kansas City. It is impossible to say for certain why the freeholders now decided to act on it, since the private papers of key actors do not seem to have survived. But the shifting political terrain in the cities on both sides of the Missouri River, and a surge in the power of both organized labor and African-American voters, suggests why leaders of both major parties might have felt unsettled—perhaps to the point that compulsory voting offered a way to reinforce the power of white elites and business leaders.

This unsettled political terrain was in part the result of Black political leaders beginning to break with the Republican party, and potentially take large numbers of voters with them. Before the Civil War, when Kansas City was a relatively small city of just 4,400 people, only 190 residents were Black; of these, only 24 were free.<sup>94</sup> After the war, the city grew quickly, in part due to the arrival of formerly enslaved people leaving rural Missouri. During the 1860s, the Black population of Kansas City grew by nearly 20 times; the African-American community tripled as a share of the city’s population (see Table 1). As the city grew over the following decades, the foreign-born and African American share of the population kept pace with the share of U.S.-born whites.

TABLE 1. POPULATION OF KANSAS CITY, 1860-1900<sup>95</sup>

Year	Total Pop.	White			Foreign			Black		
		Census Count	%	% Chg.	Census Count	%	% Chg.	Census Count	%	% Chg.
1860	4,418	4,228	96	-	n/a	-	-	190	4	
1870	32,260	28,484	88	+674	7,679	24	-	3,764	12	+1,981

<sup>92</sup> Instead, committees formed to address topics such as corporate powers, city limits, ward boundaries, powers of council, revenue, appropriation of private property, public improvements, franchises including the water works. There was also a committee for addressing legal issues. K.C. TIMES, Dec. 19, 1888.

<sup>93</sup> *A Local Poll Tax*, K.C. STAR, Jan. 28, 1889.

<sup>94</sup> U.S. CENSUS, POPULATION OF THE UNITED STATES IN 1860: MISSOURI 292 <https://www2.census.gov/library/publications/decennial/1860/population/1860a-23.pdf>.

<sup>95</sup> U.S. Census data. 1870-1900 data from SCHIRMER, *supra* n. \_\_\_ at 29. 1860 data from U.S. CENSUS, POPULATION OF THE UNITED STATES IN 1860: MISSOURI 292 <https://www2.census.gov/library/publications/decennial/1860/population/1860a-23.pdf>.

1880	55,785	46,484	83	+63	9,301	17	+21	8,143	10	+116
1890	132,716	119,016	90	+156	20,858	16	+124	13,700	11	+68
1900	163,752	146,090	89	+23	18,410	11	-12	17,567		+28

The Black population continued to grow through the 1870s. With the fall of Reconstruction, thousands of African Americans “Exodusters” fled political violence and repression in southern states in 1879, heading to Kansas in hopes of freedom and free land.<sup>96</sup> After coming up the Missouri River, many remained in Kansas City, Kansas and its sister city across the river, rather than continuing on to claim farmland.<sup>97</sup>

The growing Black community would become part of a surge of labor activism in the 1880s. As in the rest of the country, the Knights of Labor were a growing force in Kansas City. They became only more so during a strike in 1885 and 1886 against the Union Pacific railroad, along its southwest line; membership in the Kansas City area grew to some 4,000 members across 21 assemblies.<sup>98</sup> As it did elsewhere in the country, the Knights worked across the color line to forge an interracial working-class coalition.<sup>99</sup>

In the spring of 1886, the Knights flexed their independent political muscle, mobilizing workers to swamp the Republican convention in Kansas City, Kansas and support Thomas Hannan, an Irish stonemason, as the nominee for mayor in the newly-established city.<sup>100</sup> Hannan was swept to office with overwhelming support from Black wards, together with a multi-ethnic white coalition.<sup>101</sup> Hannan’s victory shook the political establishment, having split conservative Republicans and Democrats; it ushered in three years of working-class Republican rule on the Kansas side of the river.<sup>102</sup> Hannan used the city’s administrative power to take on business interests on both sides of the river, including forcing favorable terms with a powerful cable car company owned by one of the most influential businessmen in Kansas City, Missouri.<sup>103</sup>

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<sup>96</sup> See SHERRY LAMB SCHIRMER, *A CITY DIVIDED: THE RACIAL LANDSCAPE OF KANSAS CITY, 1900-1960*, 27 (2002); John McKerley, *The Long Struggle Over Black Voting Rights and the Origins of the Pendergast Machine*, KANSAS CITY PUB. LIB., <https://pendergastkc.org/article/long-struggle-over-black-voting-rights-and-origins-pendergast-machine>.

<sup>97</sup> SCHIRMER, *supra* n. \_\_ at 27.

<sup>98</sup> LEON FINK, *WORKINGMEN’S DEMOCRACY: THE KNIGHTS OF LABOR AND AMERICAN POLITICS*, 119-20 (1983).

<sup>99</sup> PHILIP S. FONER, *ORGANIZED LABOR AND THE BLACK WORKER, 1619-1981*, 47-63 (1974).

<sup>100</sup> FINK, *supra* n. \_\_ at 123.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 124-25.

Hannan's assertion of working-class power drew the ire of business interests. They railed against him in local business-friendly newspapers, and even threatened that they might have "to rely on an alternate armed force, the Law and Order League"—a vigilante group that had been created to oppose the Knights of Labor during the Union Pacific strike.<sup>104</sup>

Yet despite business opposition, Hannan won election again in the spring of 1887. He appeared to have established a durable, interracial working-class constituency. This "extraordinary new popular alliance," as the historian Leon Fink describes it, included C.H.J. Taylor, an African-American lawyer who urged against Republicans taking the Black vote for granted, and had served as city attorney under a prior Democratic administration.<sup>105</sup> In part due to Taylor's support for Hannan, the political alliances of Kansas City's Black community began to split. Some aligned with the Knights backed Hannan, while others remained aligned with conservative Republicans who sought to defeat him.<sup>106</sup>

By 1888, the new alliances that had reshaped politics in Kansas City, Kansas seemed poised to cross to the larger city on the Missouri side. As in Kansas, Missouri Republicans had typically spoken in favor of African-American voting rights, but had not nominated Black candidates.<sup>107</sup> Now, in March of 1888, Paul Jones, a Black attorney, ran for the Republican nomination for city attorney in Kansas City, Missouri.<sup>108</sup> Jones won an informal poll at the city's Republican convention, but narrowly lost the formal poll to a white candidate.<sup>109</sup> White and Black Republicans alike opposed his candidacy, out of fears that it could drive the city's whites to vote for Democratic candidates, and leave the Black community worse off.<sup>110</sup>

With his candidacy blocked, Jones split with the Republican party and ran on the Union Labor party ticket.<sup>111</sup> In an open letter and at mass meetings, he urged Kansas City's Black voters to defeat the Republicans who had come to take their support for granted.<sup>112</sup> A former city official who had attended the convention observed that "The colored people of the city are more excited over this Jones matter than I have ever known them to be... It will result in

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<sup>104</sup> *Id.* at 125.

<sup>105</sup> *Id.* at 129.

<sup>106</sup> *Id.*

<sup>107</sup> McKerley, *supra* n. \_\_\_\_.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> McKerley, *supra* n. \_\_\_\_.

<sup>111</sup> *The Three City Tickets*, K.C. STAR, Mar. 27, 1888, at 1.

<sup>112</sup> *Will Defeat the Ticket: Colored Republicans Determined to Resent the Insult to their Race*, K.C. TIMES, Mar. 28, 1888, at 8; *Last Night's Meeting*, K.C. TIMES, Mar. 30, 1888, at 1; *In Battle Array*, K.C. TIMES, April 3, 1888, at 8.

the colored voters bolting the Republican ticket, or at least a part of it. There are 3,000 negroes registered here and their influence will be felt.”<sup>113</sup>

For its part, the *Star* sought to cool tempers, reprinting an article from the *Gate City Press*, a Black newspaper aligned with the Republicans, arguing that the lack of support for Jones’ candidacy was simply an honest mistake.<sup>114</sup> The Democratic *Times* rejoiced in the turmoil, repeatedly pushing Black voters to recognize Republican hypocrisy and support Democrats.<sup>115</sup> Taylor, now in Washington as President Cleveland’s emissary to Liberia, wrote to endorse Jones and urge Black Kansas Citizens to recognize the “election in Kansas City [as] the period of your salvation,” and elect the Democratic slate.<sup>116</sup> Jones did not win as a third-party candidate, but he secured the most votes of any Union Labor candidate.<sup>117</sup> While the Republican candidate won the race for city attorney, he did so with the narrowest margin of any Republican on the ballot.<sup>118</sup> Meanwhile, a white candidate for auditor who in his prior position as sheriff had a history of going easy on enforcing vagrancy laws against African Americans won as the candidate of another third party, the Law and Order League, in circumstances that suggest Black voters may have thrown their support to him as a way to reject the Republican ticket while not aiding Democrats.<sup>119</sup>

Political alliances remained unsettled through the fall election season. In October, a new African-American political organization convened, with the founder arguing for the Black community to split its vote as a way of combating race prejudice.<sup>120</sup> The group met nightly through October, with Taylor, back in town, addressing one meeting and, according to the *Times*, “show[ing] why the colored people should cease being the political slaves of the republican party.”<sup>121</sup> Meanwhile, the Union Labor party nominated a full slate of candidates for county offices, and refused to endorse or fuse with Republican candidates.<sup>122</sup> Pastors in the city’s Black churches threw their efforts into mobilizing their congregants to vote, with one going so far as to read “the names of all the members of his congregation who had neglected to

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<sup>113</sup> *Colored Republicans Angry*, K.C. STAR, Mar. 27, 1888, at 1.

<sup>114</sup> *A Plea for Sound Sense: The Kansas City Colored People’s Newspaper Discusses the Situation*, K.C. STAR, Mar. 31, 1888 at 2.

<sup>115</sup> *A Chance to Show Manhood*, K.C. TIMES, Mar. 28, 1888, at 4. *Dependence on Colored Men*, K.C. TIMES, April 25, 1888, at 4.

<sup>116</sup> *A Stirring Indorsement*, K.C. TIMES, April 3, 1888, at 4.

<sup>117</sup> McKerley, *supra* n. \_\_\_.

<sup>118</sup> John W. McKerley, *Citizens and Strangers: The Politics of Race in Missouri from Slavery to the Era of Jim Crow*, Ph.D. Diss., U. Iowa, Aug. 2008, at 224-25.

<sup>119</sup> *Id.* 219-20, 225.

<sup>120</sup> *A Colored Democratic Club*, K.C. TIMES, Oct. 6, 1888, at 5.

<sup>121</sup> *Independent Colored Men Meet*, K.C. TIMES, Oct. 12, 1888, at 5.

<sup>122</sup> *The Union Labor Convention Repels Republican Advances—A County Ticket Named*, K.C. TIMES, Oct. 7, 1888, at 8.

register, [and] admonish[] them against the evil of neglect and the sin of being derelict in their political duties.”<sup>123</sup> Reports of rampant registration fraud by African Americans suggest the extent to which white political elites feared the level of mobilization among new Black voters.<sup>124</sup> The recorder of voters threw organizers out of his office, grilled would-be voters on their place of residence, and vowed to have those he couldn’t prevent from registering investigated and arrested for fraud.<sup>125</sup>

The results of the November election were close. Several local races saw a difference of one percent between Republican and Democratic votes, with votes for Union Labor and Prohibition party candidates accounting for more than the margin between the major party candidates.<sup>126</sup> With the city’s racial politics still unsettled, third parties continued to surge. Against this backdrop, it seems plausible that major party leaders saw compulsory voting as means of diluting the influence of mobilized but unpredictable segments of the city’s electorate.

#### *D. Making the Case*

When the poll tax appeared on the draft city charter in January 1889, some details had changed from what the *Star* had pitched previously. The tax would now be \$2.50, and revenues would go to the city’s educational fund.<sup>127</sup> The assumptions about the need for the provision and its effects remained the same. The *Star* again estimated that at least 4,000 citizens neglected to vote at city elections, presuming that those votes would be “in the interests of official honesty and public welfare.”<sup>128</sup> In February, a front-page headline announced the freeholders had adopted the provision the paper had pushed since 1886.<sup>129</sup>

Now the freeholders needed to make the case for adopting the charter. In March, three of them appeared before the Commercial Club to explain the charter. O.H. Dean led the discussion. Dean, a Democrat and prominent lawyer who had been in the running for nomination by President Cleveland as a federal judge, chaired the freeholder’s legal committee.<sup>130</sup> He explained to the assembled businessmen that “[t]he great disgrace and scandal of this

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<sup>123</sup> McKerley, *Citizens and Straggers*, *supra* n. \_\_\_ at 219 n. 108 (quoting K.C. STAR, Nov. 5, 1888).

<sup>124</sup> *Fraud Openly Practiced*, K.C. TIMES, Oct. 5, 1888, at 5.

<sup>125</sup> *Id.*

<sup>126</sup> *Results in the County and City*, K.C. TIMES, Nov. 8, 1888, at 3.

<sup>127</sup> *A Local Poll Tax*, K.C. STAR, Jan. 28, 1889.

<sup>128</sup> *Id.*

<sup>129</sup> *Citizens to be Taxed for Not Voting*, K.C. STAR, Feb. 9, 1889.

<sup>130</sup> *The Times Gossiper*, K.C. TIMES, Jul. 28, 1889 (recounting overwhelming support from city’s lawyers for Dean to be nominated to U.S. District Court bench).



country is the mismanagement of municipal affairs, and the incurring of large city debts without corresponding improvements. The cause of this has been that business men do not take the same interest in public affairs that they do in their personal business affairs.”<sup>131</sup> The framers of the new charter, Dean continued, were dedicated to “eliminating politics from and infusing business judgments into municipal affairs.”<sup>132</sup> As reported by the *Star*, Dean explained how mandatory voting would protect the interests of capital:

The great prosperity of Kansas City Mr. Dean attributed to the low tax rates here and the limitations fixed by the organic law upon extravagant expenditures and dishonesty on the part of officials. For this reason eastern capital has come and erected magnificent buildings, knowing that the city taxes would not wipe out the income from their property. As long as the bond raising and tax levying possibilities are kept in bounds this prosperity and influx of capital will continue. Unless the business men of the community take an interest in municipal affairs and vote as they should, the tax levying power is liable to be increased and assessments will always be up to the limit. The speaker ventured the assertion that half of those present had not registered for the special charter election. The voters at the general election are fewer in number by far than those in the city. In order to get out a full vote, the freeholders had inserted [the poll tax].<sup>133</sup>

Even as Dean was called to explain the poll tax, the provision remained a relatively minor part of a charter that would wholly remake the powers of municipal government and upgrade the booming city’s infrastructure. When the *Kansas City Times* published a sprawling summary of the entire charter, the article ran under the title “The City to Supply Water.” The poll tax appeared as the eleventh of fourteen “miscellaneous provisions” buried at the end, after the main sections that redefined the powers of city offices and provided for municipal infrastructure.<sup>134</sup>

The charter received overwhelming business support, perhaps because the booming city so needed these major improvements. In early April, a meeting of some 150 businessmen endorsed the charter, with only one dissenter.<sup>135</sup> The poll tax received passing notice, when Thomas Bullene, a leading local merchant, asked if the provision included any exception for disability or absence from the city.<sup>136</sup> Bullene knew his way around city government, having served on council and then briefly as mayor in the early 1880s.<sup>137</sup> The

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<sup>131</sup> *Mr. Dean on the Charter*, K.C. TIMES, Mar. 27, 1889.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *The City to Supply Water*, K.C. TIMES, Feb. 9, 1889

<sup>135</sup> *The Charter Indorsed*, K.C. TIMES, Apr. 6, 1889.

<sup>136</sup> *Id.*

<sup>137</sup> Thomas Brockway Bullene (1828-1894) Papers finding aid. The State Historical Society of Missouri Research Center-Kansas City.

freeholder replied that there was no such exception—since “they wanted to leave no loop hole.” The *Times* reported that Bullene drily observed, “The city would have gotten rich this year.”<sup>138</sup>

As freeholders made the case for the tax, its revenue potential emerged as a point in its favor. The next night, Dean again appeared at a meeting to advocate for passage. Dean now said that revenues would go to “sanitary purposes,” and noted that “if the law had been in operation at the last election a snug sum would have been collected for the city hospital.”<sup>139</sup> Some nonvoters would not be able to pay, and Dean explained that they could discharge the penalty “by work on the roads.”<sup>140</sup>

The charter referendum was held on April 8. In an editorial titled simply “Vote for the Charter,” the *Star* observed that “the only section that is liable to create opposition is the section establishing a poll tax, or properly speaking, imposing a penalty for a failure to vote.”<sup>141</sup>

The referendum succeeded, but on very light turnout. In all, 4,208 votes were cast, far fewer than in other recent elections.<sup>142</sup> For some promoters, this underscored the need for the poll tax. The *Times* praised the fact that the charter surpassed the four-sevenths threshold for approval, with 3,439 votes in favor, and just 769 against.<sup>143</sup> The *Star* found the low turnout dispiriting: “it is unfortunate, to say the least, that a permanent charter for the government of a city of at least 150,000 people, and at least 30,000 voters, should be adopted by 3,430 votes.”<sup>144</sup> Nevertheless, the *Star* congratulated citizens on approving three needed provisions: a sewer to replace a polluted creek, street cleaning, and the poll tax.<sup>145</sup>

In May, an election was held to select the first cohort of members for the city council’s newly-created upper house. The poll tax was not in effect, and turnout was again light. That “serves to emphasize the wisdom of the \$2.50 poll tax,” the *Star* concluded. “This section of the charter will be in force at the next general city election, and it is believed that its wholesome effect will be seen in bringing the full vote... A majority of men will certainly not be anxious to pay for neglecting to perform a public duty.”<sup>146</sup>

In the months leading up to the spring 1890 elections, the threat of a penalty seemed to be driving unprecedented interest in registration. “Perhaps there is no topic in this city at the present time that is accorded more attention

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<sup>138</sup> *The Charter Indorsed*, K.C. TIMES, Ap. 6, 1889.

<sup>139</sup> *It Had No Opponents*, K.C. TIMES, Apr. 7, 1889.

<sup>140</sup> *Id.*

<sup>141</sup> *Vote for the Charter*, K.C. TIMES, Apr. 8, 1889.

<sup>142</sup> K.C. TIMES, Apr. 9, 1889.

<sup>143</sup> *Id.*

<sup>144</sup> *The New Charter*, K.C. STAR, Apr. 9, 1889.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

than the subject of poll tax,” the *Star* reported.<sup>147</sup> “Young and old men who heretofore had taken little or no interest in elections and the movements of assessors are awakening and surveying the situation.”<sup>148</sup> The Recorder of Voters predicted a vote of at least 20,000—just shy of the largest vote ever cast in the city.<sup>149</sup>

Expectations continued to build. When ward registration closed at the end of February, the *Times* reported “news from the different ward offices indicates that unusual interest is being taken in the coming election.” The *Times* predicted that “the American love of the right of suffrage and the American antipathy to paying \$2.50 poll tax will bring about such a full registration by March 18 that the few remaining will be at home sick on election day and afterward, as quietly as possible, pay the \$2.50 poll tax.”<sup>150</sup> The *Times* hailed this flood of registration. “It is very important that all democrats should see to it that they are registered,” the paper exhorted. “The party has an excellent chance of getting hold of the reins of city government this spring and a lack of registration should not prevent it.”<sup>151</sup>

Amid the rush to register, the *Star* noted a related rush to become a citizen. Crowds appeared at the courthouse, as residents sought naturalization papers.<sup>152</sup> The paper attributed this to the new provision: “The poll tax... is causing many foreigners to qualify as voters. They are also being whipped into qualifying by people ‘who desire their votes.’”<sup>153</sup> It seems dubious that the city could have forced a non-citizen to vote or pay a poll tax, particularly since non-citizens could not vote; ultimately, that issue was not raised in the eventual litigation. But if non-citizens were lining up to become naturalized so that they could vote and avoid the tax, at least some may have heeded the warning that there would be no loopholes.

As the deadline for registration at the board of elections central office loomed, the *Times* reported that the recorder had hired “a large force of extra clerks” to handle registration predicted to be “the greatest in the history of the city.”<sup>154</sup> Now the recorder estimated total registration of nearly 40,000, reporting that “the indications are that every voter registering will cast his ballot.”<sup>155</sup> With many longtime residents registering for the first time, the *Times* predicted turnout would come in several thousand higher than in the

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<sup>147</sup> *Must vote or pay tax*, K.C. STAR, Feb. 6, 1890/

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Ward Registration Closed*, K.C. TIMES, Feb. 27, 1890.

<sup>151</sup> *Id.*

<sup>152</sup> *Naturalization Booming*, K.C. TIMES, Mar. 8, 1890.

<sup>153</sup> *Id.*

<sup>154</sup> *Eager Voters*, K.C. TIMES, Mar. 16, 1890.

<sup>155</sup> *Id.*

1888 presidential election.<sup>156</sup> The paper expressed confidence in how this would change the electorate. “The remarkable part about it,” the *Times* observed, “is that the new registration is made up of wealthy citizens, who would naturally be supposed to take the most interest in good municipal state and national government.”<sup>157</sup>

### *E. Anticipating Problems*

Even as expectations built up, so did the list of problems that city officials and observers began to foresee. Some involved the logistics of implementing compulsory voting. Others pointed to potential legal deficiencies.

Weeks before the April 1890 election, people started to realize the challenges of verifying who had voted and then taxing non-voters. First, one had to determine who was subject to the tax. As it turned out, some people might be taxed even though they hadn’t met the residency requirements. To qualify to vote, one had to have resided in Missouri for a year, and in the city for sixty days.<sup>158</sup> This meant that any man who had moved to Missouri after April 8, 1889 was ineligible to vote—and yet would be subject to the tax if he had moved to Kansas City before January 1, 1890.<sup>159</sup> The *Star* noted the bind this created for some new residents, but did not suggest whether anyone had come up with ideas to resolve it.

City officials faced their own predicaments. Different offices were tasked with running elections, keeping the tax rolls, and prosecuting non-payment. The city charter said that the recorder of voters would give voters a certificate, but the recorder was not a city officer. “Recorder of Voters Hope,” the *Star* reported, “said that he had nothing to do with the poll tax, but if certificates are required from his office it will require an addition to the force, as there would likely be 20,000 to issue.”<sup>160</sup> It was unclear who might foot the bill.

The city treasurer, meanwhile, would be responsible for collecting the tax. He started to think about how to do so. Taxes were due on May 1, meaning the treasurer would have just a few weeks to compare the names of the taxpayers in the tax books with the names of the voters recorded in the poll books.<sup>161</sup> According to the *Star*, Treasurer Peak said it “was likely such an arrangement could be made, though he and Mr. Hope are averse to the removal of the books from one office to the other. If some such plan is not

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<sup>156</sup> *Eager Voters*, K.C. TIMES, Mar. 16, 1890.

<sup>157</sup> K.C. TIMES, Mar. 17, 1890.

<sup>158</sup> *Must Vote or Pay Tax*, K.C. STAR, Feb. 6, 1890.

<sup>159</sup> *Id.*

<sup>160</sup> *The Poll Tax’s Validity*, K.C. STAR, Feb. 15, 1890 at 2.

<sup>161</sup> *Id.*

adopted, certificates must be made out, a work requiring an additional force and considerable time.”<sup>162</sup> Again, this would mean more expenses.

People brainstormed possible solutions. One city official suggested an ordinance could direct the recorder of voters to either submit his poll books to the city comptroller or treasurer, or, failing that, send along a duplicate list of the names of those who had voted.<sup>163</sup> With about 20,000 names, the official estimated that a clerk could transcribe 1,000 per day, for a cost of \$100.<sup>164</sup> Another proposal suggested hiring 83 part-time clerks, with one at each precinct to hand out tickets to each voter. This, however, would be about twice as expensive as simply transcribing the names by hand.<sup>165</sup>

Things might have been easier if Kansas City could have created its own voter registration system. Whether the city had that power was discussed soon after the charter was adopted, amid a broader debate concerning which state laws applied to a home rule city.<sup>166</sup> The freeholders agreed that the new charter superseded all prior state laws, but could be abridged by a state law that expressly applied to cities over 100,000.<sup>167</sup> Voter registration, however, was an exception: the state constitution gave the legislature exclusive authority to provide for voter registration in municipalities over 100,000 inhabitants.<sup>168</sup> Kansas City had gained new powers in adopting its charter, but voter registration was not among them.

Other issues were less straightforward. Two months before the election, a local lawyer argued that the poll tax violated the Missouri Constitution.<sup>169</sup> Byron Sherry, who had previously been a criminal court judge in Kansas, identified the clause that the Missouri Supreme Court would eventually cite in striking down the charter provision.<sup>170</sup> Article 10, section 3 of the Missouri Constitution provided that:

Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and all taxes shall be levied and collected by general laws.<sup>171</sup>

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<sup>162</sup> *Id.*

<sup>163</sup> *Poll Tax Exemption*, K.C. STAR, Feb. 22, 1890 at 3.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Charter Problems*, K.C. TIMES, Apr. 10, 1890.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> K.C. STAR, Feb. 15, 1890 at 2.

<sup>170</sup> JESSE A. HALL & LEROY T. HAND, HISTORY OF LEAVENWORTH COUNTY KANSAS, 283 (1921).

<sup>171</sup> K.C. STAR, Feb. 15, 1890 at 2.

Sherry noted that some residents could not qualify to vote, since they had not lived in the state for a year, and concluded that the provision forced them to do an impossible act. “The law discriminates against a class,” he argued, “and I do not think it is sound. They might as well undertake to discriminate against a certain color. The law is not uniform in its operation since some may pay the tax by voting while others cannot.”<sup>172</sup>

These concerns triggered some discussion of amending the provision before it went into effect. The question arose in mid-February, when a new charter amendment committee convened. After the first meeting, the chairman announced that “there was no disposition to attempt a change in the poll tax system;” another member suggested that it “be let alone for a year or two [since] the charter was yet new and should be fully tested before any experiments were made.”<sup>173</sup>

The question persisted. At the next meeting someone proposed to substitute the word “voter” in the charter, as a replacement for resident.<sup>174</sup> Again, the suggestion was batted down. An alderman who sat on the charter revision commission noted that the substitution, “if it were legal, would exempt all who cannot vote and claim that the present law works hardships. City Counselor Slavens holds that the law is constitutional, and I would not like to have it knocked out. There are many laws besides the poll-tax law that have hardships in them.”<sup>175</sup> For his part, Slavens said the change “would not do, as the object of the law was not only to make men vote, but also to force them to become qualified voters. If an exception were made in favor of those who are not voters, many of them might not exert themselves in taking out papers, or would not be particular about registering.”<sup>176</sup> Even as the poll tax raised bureaucratic and legal issues, officials pushed to implement it, motivated by expectations that it would remake city politics for the better by bringing out a wave of responsible new voters.

#### *F. Compulsory Voting in Practice*

After months of building expectations, turnout in the April 1890 election was underwhelming. Although 9,000 more ballots were cast in the race for mayor than the year before,<sup>177</sup> “the most surprising feature of the election,” the *Star* observed, “was the comparative lightness of the vote.”<sup>178</sup>

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<sup>172</sup> *Id.*

<sup>173</sup> *The Charter Committee*, K.C. TIMES, Feb. 19, 1890.

<sup>174</sup> *Voters and the Poll Tax*, K.C. STAR, Feb. 25, 1890 at 5.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Ben Holmes Elected*, K.C. STAR, Apr. 9, 1890 at 1.

<sup>178</sup> *The Result*, K.C. STAR, Apr. 9, 1890 at 4.

Dissatisfaction with candidates at the top of each ticket, the paper suggested, caused “a widespread apathy” among voters. Nevertheless,

it was supposed that the novelty of the Australian system and the \$2.50 penalty for not voting would bring out a full vote. That such was the intention of the people is evident from the fact that over 36,000 names were registered. Of these less than 23,000 persons actually voted, leaving 13,000 stay-at-homes, who, after having taken the trouble to register, preferred to risk the fine of \$2.50 for not voting rather than submit to party dictation which was obnoxious to them.<sup>179</sup>

For its part, the *Times* did not focus on the turnout. Instead, with Democrats sweeping the mayor’s office and most seats on council, it praised how the secret ballot had led the defeat of the Republican machine.<sup>180</sup> Democrats were pleased, but the duty to vote had not in this first deployment had the transformative effect envisioned by its boosters.

What the tax did create, was confusion. How would it be enforced? At the beginning of May, the city auditor passed the tax books to the treasurer, along with the names of every male resident, against whom the tax might be assessed. The treasurer, however, refused to receive the books or collect the tax, and the city counselor declined to pass any opinion on whether the tax was legal. By early June, the *Star* was pressing the city officials to act, noting that the charter provided for a \$25 fine to be imposed daily against any official who failed to carry out an official duty. The treasurer, however, replied that he had always been ready to collect the tax, but no one had approached with an interest in paying.<sup>181</sup> A city councilor, meanwhile, suggested that the poll tax simply be added to the personal tax of anyone unable to produce a certificate demonstrating that they had voted.

To encourage voluntary compliance, the city briefly offered a discount on the tax. Notices appeared in the *Times*. “By walking up to the captain’s office and settling now the non-voters may secure a discount on their poll tax,” one promised. “The charter makes its collection compulsory and the dodgers will find neglect expensive.” Another added that for June there would be a rebate of four percent on the tax, and two percent in July.<sup>182</sup> These efforts fell flat. In early August, the *Times* praised twenty-three “patriotic men” who had approached the treasurer to pay the tax; but compared to some 20,000 non-voters, this was “lamentably small.”<sup>183</sup>

A struggle soon broke out between the treasurer and the recorder of voters. The treasurer had lists of residents that the auditor had spent several thousand

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<sup>179</sup> *Id.*

<sup>180</sup> *Glorious! Democracy Wins the Day*, K.C. TIMES, Apr. 9, 1890 at 1.

<sup>181</sup> *The Poll Tax Situation*, K.C. STAR, Jun. 9, 1890.

<sup>182</sup> *The Cost of a Vote Lost*, K.C. TIMES, Jun. 10, 1890.

<sup>183</sup> K.C. TIMES, Aug. 8, 1890.

dollars to produce.<sup>184</sup> But these were useless without knowing who had voted, and the recorder of voters refused to turn over his books.

The issue dragged on. In August, the treasurer sent a letter to the recorder of voters, explaining that “I am being urged by the medical officer of the city to collect the poll tax,” but that he could not do so without a list of non-voters.<sup>185</sup> The recorder “flatly refused” to hand over his books, but invited the treasurer to send men over to copy the lists by hand. He estimated that would take two men about two weeks’ time.<sup>186</sup> Meanwhile, the *Times* reported, the sanitary fund was “lamentably short,” and the city physician was pressing to collect the nearly \$50,000 that would result from the poll tax.<sup>187</sup>

Rather than taking the matter to the city counselor, the treasurer approached the alderman who chaired the city council’s sanitary committee, who had the greatest take in the potential tax revenue. He was convinced to introduce an ordinance authorizing money to hire the clerks needed to copy the voting rolls.<sup>188</sup>

By early September, clerks from the auditor’s office were transcribing lists in the recorder of voters’ office.<sup>189</sup> Meanwhile, the treasurer kept trying to collect the tax voluntarily, by mentioning it in every notice sent out regarding residents’ personal taxes. Yet even as people came in to pay their personal taxes, hardly any paid the poll tax. By the end of the year, only a trickle of revenue had come in from people voluntarily paying their poll taxes. The *Times* reported that 292 non-voters had paid a total of about \$700, but some 13,000 others had not—despite the fact that their unpaid taxes increased by two percent, or five cents, each month.<sup>190</sup> It became clear that once the list of non-voters was ready, the treasurer would forward it to the city attorney, who would use them to sue every non-voter delinquent in paying the tax.<sup>191</sup>

It became clear that the city would have to enforce the tax, and test its legality, if it was to have any hope of seeing significant revenue—or pushing people to vote. “The large majority are waiting for some one to test the constitutionality of the law,” the *Times* surmised. “There is much doubt on this point and it accounts for the delay in paying the tax.” While in theory the tax promised a large source of new revenue for the city hospital, the paper lamented that, to date, “the amount collected will not pay for the printing of

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<sup>184</sup> *Id.*

<sup>185</sup> *Recorder Hope’s Decision*, K.C. TIMES, Aug. 9, 1890.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Municipal Briefs*, K.C. TIMES, Aug. 12, 1890; *Hayes, Bowes and Thomas*, K.C. TIMES, Aug. 19, 1890.

<sup>189</sup> *The Auditor Will Collect*, K.C. STAR, Aug. 29, 1890; *Not in a Hurry to Pay*, K.C. TIMES, Sept. 14, 1890.

<sup>190</sup> *Few Have Paid Poll Tax*, K.C. TIMES, Nov. 23, 1890.

<sup>191</sup> *Not in a Hurry to Pay*, K.C. TIMES, Sept. 14, 1890.



the books and the clerk hire.”<sup>192</sup> Finally, in February of 1891, the treasurer turned over the poll tax lists to the city counselor, who said that he would file one or two suits to test the legality of the provision, “singling out persons who are able to meet the suit without serious inconvenience.”<sup>193</sup>

And then, nothing happened. By summer, the *Star*, and presumably Nelson, were fed up. Declaring the tax a “fizzle,” the paper decried the city’s failure to follow through on its plan to “bring a test case against some poor individual to be chosen by lot,” and use a court’s judgment to then enforce against all the other non-voters who had not paid.<sup>194</sup> The law had become a “dead letter,” and would remain as such, the paper argued, until it was repealed or enforced.<sup>195</sup>

The tax did little to drive turnout the following year. In the lead up to the April 1892 elections, both the *Star* and the *Times* mentioned the tax as a reason for voters to register and vote.<sup>196</sup> “Even though no great effort has been made to collect from those who failed to vote,” the *Times* reminded its readers, “every person who does not vote at the election may one day find himself confronted by the tax collector.”<sup>197</sup> The tone was decidedly speculative. It does not seem non-voters were particularly concerned by the tax. Turnout in the 1892 mayor’s race came in at 15,404—about 25% lower than the prior election.<sup>198</sup> Neither paper mentioned the tax when reporting the results.

Beyond making it doubtful whether the tax would in fact induce turnout, uncertainty regarding whether the city would ever enforce the provision also provoked questions about municipal finances. In the spring of 1892, the *Times* reported that the total value of the city’s real estate had fallen nearly \$10 million since the year before.<sup>199</sup> This posed problems for tax revenues. The poll tax could, in theory, help close the gap—over 30,000 residents had now failed to pay their \$2.50 penalty.<sup>200</sup> But “revenue from this source must remain problematical,” the paper concluded, until the legality of the provision was established.<sup>201</sup>

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<sup>192</sup> *Few Have Paid Poll Tax*, K.C. TIMES, Nov. 23, 1890.

<sup>193</sup> *Will Sue for Poll Tax*, K.C. TIMES, Feb. 21, 1891.

<sup>194</sup> *The Poll Tax Fizzle*, K.C. STAR, Jun. 20, 1891.

<sup>195</sup> *Id.*

<sup>196</sup> *Democrats Should Register*, K.C. TIMES, Mar. 10, 1892; *No Time for Delay*, K.C. TIMES, Mar. 10, 1892; *Get Right with the Recorder*, K.C. TIMES Mar. 11, 1892; *A Rush of Registration*, K.C. STAR, Mar. 14, 1892.

<sup>197</sup> *Democrats Should Register*, K.C. TIMES, Mar. 10, 1892.

<sup>198</sup> *Progress Victorious*, K.C. STAR, Apr. 6, 1892 at 1-2.

<sup>199</sup> *The City’s Valuation*, K.C. TIMES, Mar. 18, 1892 at 6.

<sup>200</sup> *Id.* \$45,000 was not an insubstantial sum relative to city revenues. In 1889, the city collected about \$800,000 per year in general taxation, and another \$1.2 to \$1.5 million for special purposes. *Mr. Dean on the Charter*, K.C. TIMES, Mar. 27, 1889.

<sup>201</sup> *The City’s Valuation*, K.C. TIMES, Mar. 18, 1892 at 6

### *G. The Test Case*

When the city finally acted to enforce the poll tax, it did so with little fanfare. After the 1892 election, the city filed a case against B.T. Whipple, a prominent businessman, for his failure to vote in the 1890 elections. Abram W. Allen, a justice of the peace, ruled in favor of the city. The decision received no notice in the city's papers until months later, when Whipple filed for a rehearing of the case in Jackson County circuit court.<sup>202</sup>

Why did city counselor Frank Rozzelle choose B.T. Whipple, of the thousands of non-voters who had failed to pay their taxes? At least in part, it may have been to make an example of a businessman who had failed to do his civic duty. At least, that was how the *Star* described the decision:

In looking over the list of delinquents who are liable for poll tax Mr. Rozzelle called attention to the fact that it was the rich men of the city who neglected to vote. As a matter of fact, half of the best known business men, bankers and manufacturers, professional men and capitalists, those who have large property interests, will find their names on the list of delinquents. The men who are most directly interested, in a financial way, in the government of the city are the men who seem to take no part in politics and fail or neglect to vote.<sup>203</sup>

This, of course, confirmed the theory that the *Star* and backers of compulsory voting nationwide had promoted all along.

Whipple was also willing to be sued. He consented to be a defendant when Rozzelle "asked the use of Mr. Whipple's name to make a test case of the law."<sup>204</sup> Bringing suit against a wealthy businessman made practical sense. Whipple had the means to defend the suit. He ran a loan and trust company and often served as a trustee for real estate in the city. And he invested in local commercial projects; in 1892 he was a leading investor in a project to build a \$250,000 flour mill and grain elevator.<sup>205</sup> Others might have simply paid the \$2.50 tax and moved on, but Whipple could pay to defend himself through multiple appeals. For his first appeal, Whipple brought on a former judge as his defense counsel.<sup>206</sup>

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<sup>202</sup> *Did you Vote in 1890?*, K.C. STAR, Dec. 21, 1892; *Eight Thousand Interested*, K.C. TIMES, Dec. 22, 1892.

<sup>203</sup> *Did you Vote in 1890?*, K.C. STAR, Dec. 21, 1892.

<sup>204</sup> *The Provision is Legal*, K.C. STAR, Apr. 22, 1893 at 1.

<sup>205</sup> *A Big Flour Mill*, K.C. STAR, Jan. 18, 1892.

<sup>206</sup> *Eight Thousand Interested*, K.C. TIMES, Dec. 22, 1892.

In answer to the complaint, Whipple admitted he had not voted, but argued the charter provision was unconstitutional.<sup>207</sup> The thrust of the argument involved unequal taxation—which would eventually lead the Missouri Supreme Court to strike down the provision.<sup>208</sup> Whipple claimed “that if one man is forced to pay a poll tax every other man should be subject to the same tax,” the *Star* reported. “The city claims that Mr. Whipple is not taxed for not voting, but is subject to a poll tax and it makes no difference to him whether anybody else is taxed or not.”<sup>209</sup>

The case came before Judge James Gibson of the circuit court, who handed down his decision in April 1893.<sup>210</sup> In what the *Times* described as “something of a lecture,” Gibson’s emphasized—in much the same terms as the provision’s proponents—that the poll tax was good public policy. He wrote:

It is a fact much to be regretted, but nevertheless true, that in Kansas City, as an all large cities, there exists a certain class of citizens, good businessman and good citizens in other respects, who habitually absent themselves from the polls on election day, teaming the elective franchise unworthy of their attention, or who are too much and guest in business to attend to that important duty. A certain erroneous idea has crept into the minds of some that it is degrading to vote, some persons seeming to forget that on until exercise at that rate rest the permanency of our republican institutions, especially in the larger cities were congregate certain classes of society who can only be restrained by the conservative elements and such restraint must come from a vigorous and active exercise of the elective franchise. The government of large cities is one of the problems of the age. Good city government comes when honest and efficient officers are chosen to conduct municipal affairs, and bad government is liable to exist when safe and conservative men absent themselves from the polls ignore the duties imposed upon them by the elective franchise and cease to take part in political affairs.<sup>211</sup>

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<sup>207</sup> *It is your duty to vote*, K.C. TIMES, Apr. 23, 1893. Reports conflicted on whether Whipple was sued by the city for not voting in the elections of 1890, or of 1892.

<sup>208</sup> The lower court party briefs are not available, but were summarized by the *Star*.

<sup>209</sup> *Testing its Legality*, K.C. STAR, Feb. 3, 1893.

<sup>210</sup> It was originally slated for a hearing before Judge Scarritt, who had served as secretary of the charter commission—which, the *Times* observed, “intended to have this ordinance fully operative.” *Eight Thousand Interested*, K.C. TIMES, Dec. 22, 1892. Perhaps for this reason, it was moved onto Judge Gibson’s docket. For his part, Gibson had also spoken in favor of adopting the charter during a public debate in 1889, but his endorsement was based not on the poll tax provision, but how the charter dealt with payment of special tax bills. *It had no opponents*, K.C. TIMES, Apr. 7, 1889.

<sup>211</sup> *It is your duty to vote*, K.C. TIMES, Apr. 23, 1893. To the best of my knowledge, Judge Gibson’s opinion was not published. These quotations from the opinion appeared in the *Star*’s coverage of the decision. *The Provision is Legal*, K.C. STAR, Apr. 22, 1893 at 1. They align with those sections the *Times* quoted.

Beyond simply being good policy, Gibson concluded that the poll tax was within municipal authority, and did not conflict with state law or any constitutional provision:

I uphold the tax in question upon the broad ground that in the enlightenment of the present age it is in the power of the state to compel its voters to exercise the elective franchise, and if the state can do so, the city is invested with the same power. It enforces many duties upon the citizen in order to maintain good municipal government. It can go up on his property and abate nuisances in order to preserve the public health; as has been done in some instances, it may destroy private property to check public conflagrations; in short, it can do almost anything that tends to promote and maintain good government. As one of these attributes of authority it can compel all qualified voters to vote at an election in order to obtain a full and perfect expression of public sentiment, and at the same time secure the election of the most competent and worthy men to official position, and in that manner obtain the best municipal government possible. I can see no legal objection to this. I know this is an advanced position, but I take it, believing that in doing so I am simply declaring the law, there being nothing to the contrary in the United States constitution or the constitution or laws of Missouri.

#### THE HIGHEST TYPE OF GOVERNMENT.

It seems to me that the highest type of government is attained when every voter casts his vote and that vote is counted just as it is cast.

If it be claimed that a voter, under our Australian system which confines him to the names on the official ballot, cannot approve of the tickets nominated and appearing thereon, because he does not think the nominees honest or competent, or for other reasons he deems them unfit for the offices for which they were nominated, and by reasons thereof does not wish to vote for any of them, our reply is this. If there are fifty men in the city or county who agree with him in this position, they can by petition have another ticket placed upon the official ballot; if, however, there be not fifty voters of such opinion, then the state or city can well say that in all probability he is mistaken as to the unfitness of some of the nominees on the official ballot; that, at least some thereon are honest and competent, and as a public duty, require him in the interest of society to make a selection from among those whose names are presented.

The charter provision in question does not impair the right to vote, nor does it impede the voter in the exercise of his franchise; it imposes no condition whenever upon his voting, but simply requires him to pay a tax provided he fails to vote.<sup>212</sup>

The *Times* noted an irony of the decision. “Nobody—save, perhaps, the freeholders who drafted it—saw the great benefit which would accrue to the city,” the paper concluded, noting that the decision empowered the city to

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<sup>212</sup> *It is Your Duty to Vote*, K.C. TIMES, Apr. 23, 1893.

collect on nearly \$100,000 in unpaid taxes.<sup>213</sup> If citizens who failed to vote in the referendum on the city charter been able to foresee that they would be fined \$2.50 each, the paper surmised they in all probability would have defeated the charter.<sup>214</sup>

In addition to upholding the duty to vote, the decision promised to be a victory for the city's finances and its public health. "The city will derive enough revenue from the unpatriotic," the *Times* predicted, "to remove its garbage and keep the town in such prime sanitary condition that a cholera germ would not find a resting place."<sup>215</sup> Observers expected that the city would work to collect the unpaid tax. "As there is a fee in it for those connected with the machinery of collection," the *Times* noted, "some active labors may be expected."<sup>216</sup> And this was right, the paper concluded: thousands of "dollars will go where the most good will be done—to the business of municipal improvement." Within days, however, Whipple announced that he would appeal to the state supreme court.<sup>217</sup> The appeal would take years, during which time the city refrained from collecting unpaid poll taxes.

Even though the provision had never been enforced—and might never be—Kansas City during these years continued to be held up as an example of compulsory voting that other jurisdictions might follow, and eventual enforcement of the tax continued to inspire hope as a way to fund the city's budget. The attention became apparent during a visit by Harris Chilton. Passing through during the summer of 1893 on his way to Colorado, Chilton met with city counselor Rozzelle, and gathered information about the workings of the law.<sup>218</sup> Chilton assured officials that Kansas City had "become very widely known through the law," and that he had received inquiries about the provision from a U.S. Senator, a judge in North Carolina, and many others.<sup>219</sup> Since Kansas City had enacted its provision, Belgium had also made voting compulsory, and Chilton relied on these two examples to convince other states to pass a provision. He expressed optimism: Maryland legislators assured him that a compulsory voting bill modeled on Kansas City would pass in the next session (it did not), and Senator Hill from New York had also expressed interest.<sup>220</sup>

In the run-up to the April 1894 election, the poll tax arose once again as a reason that eligible voters should register and turn out to vote. The *Times*

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<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Men Who Forget to Vote Will be Reminded*, K.C. TIMES, Apr. 23, 1893.

<sup>217</sup> *Will be Appealed*, K.C. TIMES, Apr. 27, 1893.

<sup>218</sup> *Advocates Compulsory Voting*, K.C. STAR, Jul. 29, 1893.

<sup>219</sup> *Maryland Will Try It*, K.C. TIMES, Jul. 30, 1893.

<sup>220</sup> *Id.*; *Advocates Compulsory Voting*, K.C. STAR, Jul. 29, 1893.

suggested that it might inspire people to vote who were not otherwise motivated by appeals to patriotism and good government.<sup>221</sup> For its part, the *Star* noted that the law would actually be enforced in 1894, even though it hadn't in prior elections.<sup>222</sup> Given the disarray of voter lists, the paper suggested that the only effective way to ensure one didn't have to pay the tax was to register and vote.<sup>223</sup>

Turnout in 1894 improved on 1892, but did not reach anything close to full turnout. Of 31,200 registered voters, 22,158 cast ballots.<sup>224</sup> Rather than viewing this as a failure, the *Times* celebrated the revenue that could be raised by taxing non-voters.<sup>225</sup> If "rigidly enforced," the tax might "swell the city exchequer to fully \$25,000... [and] add quite enough to the city budget to place it on a par with that of last year."<sup>226</sup> Yet with the case on appeal, the city doesn't seem to have tried to collect.

The poll tax finally received a hearing before the Supreme Court in January of 1895. Reports of the hearing offer a sense of the arguments.

The brief of City Counselor Rozzelle raises the following points: The constitution of the state was the only limitation upon the city in framing a charter for its own government; the provision should not be declared unconstitutional unless it conflicts with some specific clause of the constitution; it does not conflict with the section which provides that taxes shall be uniform on all classes of subjects because licenses are laid on various classes in violation of the ad valorem principle; it does not conflict with the section of the constitution which provides that all elections shall be free and open and that voters shall be privileged from arrest except in cases of felony, for instead of the voter being hindered, the charter provides expressly that his failure to pay the poll tax of \$2.50 shall not abridge his right to vote.<sup>227</sup>

Rozzell then contended that the poll tax did not abridge a voter's right to suffrage, any more than San Francisco's cubic air ordinance regulating apartment buildings abridged the natural right of residents to fresh air.<sup>228</sup>

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<sup>221</sup> *The Usual Clamor for the Voters to Register*, K.C. TIMES, Feb. 19, 1894.

<sup>222</sup> *It is the duty of every citizen to vote*, K.C. STAR, Feb. 17, 1894 at 4.

<sup>223</sup> *Id.* The *Star* also called during the 1894 election season for the active and vigorous prosecution of both illegal voters, and nonvoters. *How to Protect the Ballot*, K.C. STAR, Feb. 11, 1894.

<sup>224</sup> *An Available Fund*, K.C. TIMES, Apr. 18, 1894.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Legality of the Poll Tax*, K.C. JOURNAL, Jan. 16, 1895.

<sup>228</sup> Joshua S. Yang, *The Anti-Chinese Cubic Air Ordinance*, 99 AM. J. PUB. HEALTH 440 (2009).

Rozzelle then turned to colonial precedent for compulsory voting, citing a 1716 Maryland statute that fined non-voters 100 pounds of tobacco, and a provision in Plymouth that fined freemen ten shillings if their failure to vote was not due to an “inevitable impediment.”<sup>229</sup>

Rozzelle also explained how the provision was a better response to fraud and the problems of universal suffrage than restricting the right to vote. He wrote:

The ‘evils of universal suffrage’ is the burden of the vaticinations of our political Daniels and Cassandras and their hoarse voices are never weary prophesying disasters unless the elective franchise is restricted. But we must accommodate ourselves to the final acceptance of this fact that universal suffrage is the cornerstone of our government and that any attempt to hedge it around with prohibitive restrictions and to make it a class privilege will be met with hostility by the people. We believe that the enforcement of this provision of our charter by stimulating the sluggish patriotism and revivifying the enervated public spirit of those citizens who are ignobly content so suffer their elective franchise to ‘rust in them unused,’ to become in their hands and idle, unmeaning and unappreciated thing, will lessen the evil of the unintelligent and purchaseable vote and result in pure elections, better public officials and wiser municipal legislation. We believe that the enforcement of this law will be a long step in the direction of reform, and it may be, indeed, the means of rescuing the hope of purification of politics from the iridescent dreamland to which a fanciful Kansas statement has consigned it and investing it with the soberer hues of their possibility.<sup>230</sup>

To support these claims, Rozzelle quoted statements by the governors of New York and Massachusetts advocating compulsory voting, as well as Professor Holls’ 1891 article on the subject.<sup>231</sup>

These policy arguments were not entirely well received. “One of the dignified judges of the dignified supreme court of Missouri got facetious the other day,” Rozzelle recalled later:

I was expatiating on the duty of all intelligent citizens to exercise the right of suffrage, when Judge Gantt interrupted me with the jocular remark that he understood the trouble in Kansas City was to keep the voters from voting too much instead of too little. I explained, however, that the trouble was the intelligent voters too often thought so little of the right of suffrage that they allowed the disreputable elements to usurp the control of affairs and that if the court would uphold the charter and make every voter who did not vote pay a

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<sup>229</sup> *Legality of the Poll Tax*, K.C. JOURNAL, Jan. 16, 1895.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* See Holls, *supra* n. \_\_.

poll tax we should soon have so many honest voters that the criminal elements would be in the minority all the time.<sup>232</sup>

The hearing presumably addressed the points of law raised by the city and Whipple. But the policy question—how to manage the problem of voters deemed unintelligent or even criminal—was front and center. By early June, Rozzelle, now the ex-city counselor, was expecting a positive decision out of Jefferson City.<sup>233</sup> But it didn't arrive. The Court did not issue a decision in 1895, and it would hear a second oral argument in February of 1896.<sup>234</sup>

Despite the lack of a decision, some still pressed the city to enforce the tax. In the fall of 1895, an alderman argued that the city should raise the needed revenue, since the Supreme Court had sustained the circuit court's ruling.<sup>235</sup> (Given the lack of news from the Court, it is unclear what the alderman was referring to.) Public health was again the reason for urgent action. The revenues, the *Star* reported, could help the health department prevent typhoid and diphtheria outbreaks like those raging in St. Louis, or collect garbage year-round rather than just during summer.<sup>236</sup> The paper, and presumably Nelson, seemed inclined to try to get the city to act. "Suits against 8,000 citizens for not voting," the article concluded, "would at least break the monotony in municipal circles."<sup>237</sup> And still, nothing happened. The following February, with the provision slated for a rehearing, the new city counselor told the assessor to prepare poll tax books for 1896, but only to bother doing so if the law were upheld.<sup>238</sup>

#### H. The Law Struck Down

On December 23, 1896, the Missouri Supreme Court handed down its decision.<sup>239</sup> Before the Court, the parties had argued two central points. First, Whipple contended that the provision violated the Missouri constitution's mandate that taxes apply uniformly to the same class of subjects.<sup>240</sup> Second,

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<sup>232</sup> K.C. JOURNAL, Jan. 20, 1895.

<sup>233</sup> *A Tax of \$2.50 if You Don't Vote*, K.C. STAR, Jun. 5, 1895 at 2.

<sup>234</sup> It is not clear from the available evidence what prompted the rehearing; it may have been related to the departure of Justice Francis Marion Black from the bench in 1894, and the arrival of Justice Waltour Moss Robinson in 1895. Given that the 1896 decision was *per curiam*, it seems unlikely that the Court would have been deadlocked after the 1895 hearing, if it indeed was before just six justices. Nor does Justice Robinson filling the seat that had been occupied by Justice Black seem likely to have altered the outcome.

<sup>235</sup> *To Sue Delinquent Voters*, K.C. STAR, Sept. 30, 1895.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *What Property Escapes Taxes*, K.C. TIMES, Feb. 2, 1896 at 5.

<sup>239</sup> *Kansas City v. Whipple*, 136 Mo. 475 (1896).

<sup>240</sup> *Id.* at 475 (citing Missouri Constitution, Art. 10, Sec. 3 ("Taxes may be levied and



Whipple argued that the tax conflicted with the right of suffrage granted by the Missouri constitution.<sup>241</sup> The city argued that the tax did not conflict with either provision, and was “consonant with public policy in that it enlarges participation in public affairs.”<sup>242</sup>

In a unanimous opinion by Chief Justice Brace, the Court held that Kansas City had the power to enact its charter provision, so long as it did not conflict with the federal or state constitutions.<sup>243</sup> The reasoning with respect to the question of unequal taxation was relatively straightforward. If the poll tax “was stripped of its proviso,” the Court reasoned, “it would be a legitimate expression of the taxing power of the city,” since it would apply equally to all eligible voters resident in the city.<sup>244</sup> However, since it allowed some voters not to pay the tax, the provision discriminated between subjects of taxation in the same class.<sup>245</sup>

The intent of the tax, the Court concluded, was “to impose a penalty upon the voters of Kansas City for not voting rather than for the purpose of raising revenue to maintain a necessary function of the city government.”<sup>246</sup> That this was the purpose of the tax was only underscored by the city’s arguments, by reference to “the views of many learned, thoughtful and experienced publicists,” that voting is both a right and a duty.<sup>247</sup> Even conceding this point, the Court noted, did not require concluding that the duty could be enforced by compulsory legislation.

The Court could have rested there, and simply struck down the provision as a tax that impermissibly discriminated between members of a class. Instead, it explained why compulsory voting also conflicted with the right of suffrage granted by the Missouri constitution. The nature of the power to vote was key to the analysis:

The power is a sovereign power, and in the exercise of it the citizen who possesses it acts as a sovereign; and, standing in the relation of a sovereign to

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collected for public purposes only, and shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax.”)

<sup>241</sup> Whipple at 476 (citing MO. CONST. of 1875, art. II, § 9 (“all elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”) and MO. CONST. of 1875, art. VIII, § 4 (“Voters shall be privileged from arrest while going to, attending and returning from elections, except in cases of treason, felony or breach of the peace.”)).

<sup>242</sup> *Id.* at 477.

<sup>243</sup> *Id.* at 478.

<sup>244</sup> *Id.* at 479

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 480.

<sup>247</sup> *Id.* at 481.

such power, he must have the supreme and independent right of a sovereign to exercise it or not, else it ceases to be a sovereign right.<sup>248</sup>

Working from this premise, the Court distinguished prior laws that had made voting a duty. These had been enacted in a colonial context where the Crown was sovereign, and the people mere subjects. That no law had been enacted to mandate voting since the United States had become independent served to prove that it was incompatible with popular sovereignty in a republic.<sup>249</sup> Because the citizen *qua* elector acts as the sovereign, the court distinguished “the duty of the citizen when he is called on to bear arms, serve on juries, etc.”<sup>250</sup> There, where citizens are not acting as sovereign, the legislature may create enforceable duties.

By this logic, the Court concluded that the duty to vote interfered with the right of suffrage protected by the Missouri constitution. If, as the Court noted, “no power, civil or military, shall at any time interfere to prevent the *free* exercise of the right of suffrage”—its emphasis—then “how can a citizen be said to enjoy *the free* exercise of the right of suffrage who is constrained to such exercise, whether he will or not, by a penalty?”<sup>251</sup> Rather than construing the constitutional provision by its plain meaning—a bar on any interference with the exercise of right to vote—the court also interpreted the provision as preventing the converse: interference with the freedom to *not* exercise the right.

In a coda, the Court concluded that it was “degrading to the franchise” to compare the act of voting to the types of services that had provided exemptions from other poll taxes—such as volunteering for a fire department, or working on the highways. Those services had some monetary value to the public. Voting, by contrast, “is not service at all, but an act of sovereignty above money and above price.”<sup>252</sup> To consider voting a mere service would, it followed, put a price on the vote. This the justices were not willing to do.

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With that, Missouri’s seven justices ended Kansas City’s brief experiment—which remains today the United States’ only experience with compulsory voting. Rather than being simply a historical curiosity, the case of Kansas City offers lessons for people envisioning how the duty to vote might once again emerge in an American city.

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<sup>248</sup> *Id.* at 482.

<sup>249</sup> *Id.* at 482-83.

<sup>250</sup> *Id.* at 483.

<sup>251</sup> *Id.* at 484.

<sup>252</sup> *Id.* at 485

## II. POLITICAL AND PRACTICAL LESSONS FROM KANSAS CITY

This section considers political and practical lessons that can be drawn from the experience of Kansas City. Where might the conditions of political possibility be ripe for this sort of experiment? And what might be the practical obstacles to pushing it forward? The case study of Kansas City, and the obstacles to implementing its duty to vote, offer lessons for contemporary proponents.

### *A. Rethinking the Conditions of Political Possibility*

If there exists a conventional wisdom about compulsory voting in the United States today—other than that it would clash with Americans’ sense of freedom—it is that conservatives would oppose the creation of a duty to vote, and progressives would favor it. It was the conservative Paul Weyrich, after all, who infamously told fellow activists that “our leverage in the elections quite candidly goes up as the voting populace goes down.”<sup>253</sup> Inspired by this instinct, Republicans have pushed state-level legislation that aims to make voting more difficult.<sup>254</sup>

Progressives, meanwhile, have generally pushed to make voting easier, and increase participation. States and counties controlled by Democrats worked to facilitate ballot access during the Covid-19 pandemic.<sup>255</sup> And they have experimented with ways to expand the franchise in local elections to teenagers and even non-citizens.<sup>256</sup>

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<sup>253</sup> Andy Kroll, *The Plot Against America: The GOP’s Plan to Suppress the Vote and Sabotage the Election*, ROLLING STONE, July 16, 2020, <https://www.rollingstone.com/politics/politics-features/trump-campaign-2020-voter-suppression-consent-decree-1028988>

<sup>254</sup> Nick Corasaniti, *Voting Battles of 2022 Take Shape as G.O.P. Crafts New Election Bills*, N.Y. TIMES, Dec. 4, 2021 (noting 33 laws limiting voting passed in 19 states in 2021, with 245 similar bills set to carry over into 2022 legislative sessions) <https://www.nytimes.com/2021/12/04/us/politics/gop-voting-rights-democrats.html>

<sup>255</sup> Quinn Scanlan, *Here’s How States Have Changed the Rules Around Voting Amid the Coronavirus Pandemic*, ABC NEWS, Sept. 22, 2020, <https://abcnews.go.com/Politics/states-changed-rules-voting-amid-coronavirus-pandemic/story?id=72309089>

<sup>256</sup> Grace Ashford, *Noncitizens’ Right to Vote Becomes Law in New York City*, N.Y. TIMES, Jan. 9, 2022, <https://www.nytimes.com/2022/01/09/nyregion/noncitizens-nyc-voting-rights.html>; J.B. Wogan, *Takoma Park Sees High Turnout Among Teens After Election Reform*, GOVERNING, Nov. 7, 2013, <https://www.governing.com/news/headlines/gov-maryland-city-sees-high-turnout-among-teens-after-election-reform.html>

Progressives have also pushed recent proposals for compulsory voting. Democratic state legislators introduced bills in Connecticut, Massachusetts, and California.<sup>257</sup> And the working group on compulsory voting assembled by the Brookings Institution was led by the prominent liberal commentator E.J. Dionne and longtime progressive strategist Miles Rapoport.<sup>258</sup>

This might lead one to assume that if this reform were to reemerge in the United States, it would happen in cities controlled by progressives. That is possible; cities have indeed been innovators when it comes to electoral reforms such as proportional representation, instant-runoff voting, and campaign finance reform.<sup>259</sup> But it would be at odds with the tendency of progressive cities to set the timing of local elections in ways that depress turnout.<sup>260</sup> For example, shifting local elections to align with state and national elections can substantially increase voter participation, and produce an electorate that is more representative in terms of race, class, and partisanship.<sup>261</sup> Yet cities maintain off-cycle elections, and in so doing shape electorates that favor incumbent parties, officeholders, and organized groups.<sup>262</sup> If voting were made mandatory, progressives could find it harder to remain in office; deep-blue cities might become *less* progressive.<sup>263</sup> By their actions, one might expect progressives to prefer *low* turnout in local elections.

The experience of Kansas City further scrambles the conventional wisdom. Voting was not made a duty to support working class policies. Instead, the impetus was fear that the wrong people were voting, and that the right people—responsible men of business—were not. Rather than favoring downward redistribution of power and resources, the push for compulsory

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<sup>257</sup> See bills cited *supra* n. \_\_.

<sup>258</sup> *Lift Every Voice*, *supra* n. \_\_.

<sup>259</sup> See Richard Briffault, *Home Rule and Local Political Innovation*, 22 J. L. & POLITICS 1 (2006).

<sup>260</sup> SARAH F. ANZIA, *TIMING & TURNOUT: HOW OFF-CYCLE ELECTIONS FAVOR ORGANIZED GROUPS* (2014).

<sup>261</sup> Zoltan Hajnal et al., *Who Votes: City Election Timing and Voter Composition*, \_\_ AM. POL. SCI. REV. \_\_ (Online First, Aug. 19, 2021).

<sup>262</sup> Adam M. Dynes et al., *Off-Cycle and Off Center: Election Timing and Representation in Municipal Government*, 115 AM. POL. SCI. REV. 1097 (2021).

<sup>263</sup> This would contrast with the policy effects of enacting compulsory voting, which comparative research has generally found to be progressive, inasmuch as the practice tends to reduce inequality. In her study of compulsory voting in Western Europe and Latin America, Sarah Birch concludes that “mandatory attendance at the polls promotes social equality.” SARAH BIRCH, *FULL PARTICIPATION: A COMPARATIVE STUDY OF COMPULSORY VOTING*, 131 (2008). However, as Professor Lipjhart suggests, it may be that “special features of the American political system, like having so many elections at different levels, may have the impact of not helping progressive causes.” Personal communication with Arend Lijphart, on file with author, Mar. 14, 2022.

voting arose from the same concerns about universal suffrage that elsewhere resulted in poll taxes and literacy tests meant to disenfranchise poor and African American voters.

The political lesson of Kansas City could be that incumbents will only support compulsory voting when they believe non-voters will support their policy priorities—and that forcing these supporters to the polls could reduce the power of a highly-motivated and potentially hostile segment of the electorate. This contrasts with research that has explained expansions of the franchise as a strategic choice by elites to accept redistributive social policy and decrease destabilizing social pressure.<sup>264</sup>

Instead, Kansas City suggests that compulsory voting could gain traction when incumbent political and economic elites are motivated to dilute the power of new, motivated segments of the electorate. This aligns with research explaining why parties elsewhere have supported compulsory voting.<sup>265</sup> In explaining the adoption of compulsory voting in Belgium and western Europe in the late 1800s and early 1900s, Rúben Ruiz-Rufino and Ria Ivandic observe the reform came “as an institutional response from old conservative parties to counterbalance the strength of the Left in the early 1800s... [compulsory voting] was adopted only when old elites could increase their support by activating idle voters or by co-opting new ones.”<sup>266</sup> It is unclear whether the provision in Kansas City would have had such an effect.<sup>267</sup>

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<sup>264</sup> Daron Acemoglu & James A. Robinson, *Why Did the West Extend the Franchise? Democracy, Inequality, and Growth in Historical Perspective*, 115 QUARTERLY J. ECON. 1167 (2000); cf. Adam Przeworski, *Conquered or Granted? A History of Suffrage Extensions*, 39 B.J. POL. SCI. 291 (2009).

<sup>265</sup> Case studies have pointed to the conservative politics favoring adoption of compulsory voting. See, e.g., Anthoula Malkopoulou, *The Conceptual Origins of Compulsory Voting: A Study of the 1893 Belgian Parliamentary debate*, 37 HIST. POL. THOUGHT 152 (2016); Sara John & Donald A. DeBats, *Australia's adoption of compulsory voting: Revising the narrative not trailblazing, uncontested or democratic*, 60 AUSTRALIAN J. POL. & HIST. 1 (2014); Germán López, *Un estudio sobre la reforma electoral conservadora de 1907 y sus posibilidades democratizadoras*, 48 SAITABI 185 (1998); Arturo Maldonado, *The Origins and Consequences of Compulsory Voting in Latin America* 22-52, Ph.D. Diss., Vanderbilt University, Dec. 2015.

<sup>266</sup> Rúben Ruiz-Rufino and Ria Ivandic, *The Devil is in the Detail: The Strategic Adoption of Compulsory Voting in Western Europe* (n.d.), working paper available at <https://www.rubenruizrufino.com/s/CompVoting.pdf>. Other multi-country analyses have come to similar conclusions. ANTHOULA MALKOPOULOU, *THE HISTORY OF COMPULSORY VOTING IN EUROPE: DEMOCRACY'S DUTY?* (2014); Gretchen Helmke & Bonnie M. Meguid, *Endogenous institutions: The origins of compulsory voting laws* (working paper, 2014) [https://www.gretchenhelmke.com/uploads/7/0/3/2/70329843/helmke\\_and\\_meguid.pdf](https://www.gretchenhelmke.com/uploads/7/0/3/2/70329843/helmke_and_meguid.pdf)

<sup>267</sup> Not only was it never enforced, but mobilization by groups like the Knights of Labor declined for other reasons soon after Kansas City adopted its charter. FINK, *supra* n. \_\_ at 133-34.

Nevertheless, this explanation for why elites come to favor compulsory voting fits better than analogies to elite decisions to expand the franchise.

Kansas City helps us think beyond two scenarios in which progressives might envision compulsory voting coming to an American city. In the first, blue city in a blue state creates a duty to vote—the Berkley/Takoma Park scenario. This would fit a trend of progressive local electoral experimentation—from instant-runoff voting and campaign finance regulations to the enfranchisement of teens and non-citizens.<sup>268</sup> Of course, as noted above, compulsory voting might make a blue city *less* progressive.<sup>269</sup> But it is possible that local elites might want to be a first-mover, and adopt a reform that could boost progressives’ chances in state and federal races, even if risked their own reelection.

Progressives might also envision a second scenario. Here, a progressive city in a purple state might enact compulsory voting, in hopes of driving turnout in statewide or national races. This could move a tipping-point state like Wisconsin, Michigan, or Pennsylvania to the left—even if it again jeopardized progressives’ chances in local races. Separately, Nicholas Stephanopoulos and the Brookings report envision something like this scenario: a move by one city produces statewide effects, which pushes other cities and states to respond in kind, starting a virtuous spiral.<sup>270</sup> As I discuss below, this spillover scenario would raise challenging questions of municipal authority.<sup>271</sup>

Kansas City points to a third scenario, which might surprise progressives. This scenario—call it Red-in-Purple—would echo the experience of Kansas City and western European countries. Conservative county or municipal leaders would turn to compulsory voting to activate idle voters seen as necessary to dilute the influence of an emerging liberal segment of the electorate. Conservatives would be called to do their civic duty—perhaps despite skepticism of electoral systems often said to be “rigged.”

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<sup>268</sup> See Briffault, *supra* n. \_\_\_.

<sup>269</sup> This could run counter to the effects that scholars have suggested compulsory voting has produced in other settings. See, e.g., Michael M. Bechtel et al., *Does Compulsory Voting Increase Support for Leftist Policy?* 60 AM. J. POL. SCI. 752 (2016) (concluding, based on a study of Switzerland, that compulsory voting increases support for leftist policy positions in referenda by up to 20 percentage points, by mobilizing citizens at the bottom of the income distribution).

<sup>270</sup> Stephanopoulos, *supra* n. \_\_\_ (“To start, a blue city in a purple state—such as Miami, Florida, Columbus, Ohio, or Philadelphia, Pennsylvania—would have to adopt compulsory voting for its own elections... Why would the city make this switch? ...[partly] for the sake of partisan advantage. Registered non-voters lean substantially more Democratic than registered voters. If they were required to go to the polls, election outcomes would shift markedly to the left.”); *Lift Every Voice*, *supra* n. \_\_\_.

<sup>271</sup> See section III.A.4, *infra*.

The notion of conservative elites compelling people to vote, rather than seeking to make voting harder, could seem implausible—at odds both with rhetorical appeals to freedom, and longstanding use of voter suppression and disenfranchisement as electoral strategy. Kansas City, however, reveals how compulsory voting and obstacles to voting can be two sides of the same coin. Each offers a way to fix the supposed problem of universal suffrage, which lets the “wrong” people win elections by voting *en masse*.

This third scenario could emerge in red states where demographic changes—urbanization, the arrival of immigrants from the coasts or abroad, or generational shifts—are making the electorate less conservative. Consider a conservative county that contains a booming city where new arrivals tend to vote more liberal. Comal county in Texas, a deep red jurisdiction which contains New Braunfels, the fastest-growing city in the United States, could be such a place.<sup>272</sup> Rural counties might embrace compulsory voting to remain dominant in statewide races, and stave off the progressive threat posed by growing cities and suburbs.<sup>273</sup> In Georgia, for example, low turnout among rural whites was key to the Republican losses in the 2020 U.S. Senate runoffs.<sup>274</sup> Similarly, in Texas, turnout by rural voters was key to both Senator Ted Cruz’s victory in 2018 over Beto O’Rourke, and President Trump’s prospects in carrying the state in 2020.<sup>275</sup> Of course, making voting more difficult in some places is not necessarily incompatible with mandating it elsewhere. While the compulsory voting path might seem more plausible if state laws that erect obstacles to voting are struck down, it is also possible that conservatives could look to require turnout by voters in their strongholds, even as they simultaneously seek to make voting more difficult in liberal communities.

As implausible as this scenario might initially seem, it foregrounds a dynamic that was explicit in Kansas City, but does not jibe with progressives’ conventional wisdom. Compulsory voting can be intended to dilute the power of a voting block—whether that be working class and African-American

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<sup>272</sup> Edgar Sandoval, *How This Texas Town Became One of America’s Fastest-Growing Cities*, N.Y. TIMES, Aug. 19, 2021, <https://www.nytimes.com/2021/08/19/us/new-braunfels-texas-growth-census.html>

<sup>273</sup> The suburban vote was critical to Biden’s victory in 2020. William H. Frey, *Biden’s Victory Came from the Suburbs*, Brookings Institution (Nov. 13, 2020) <https://www.brookings.edu/research/bidens-victory-came-from-the-suburbs/>

<sup>274</sup> Stephen Fowler, *Who Stayed Home More in Georgia’s Senate Runoff Campaigns? Rural White Republicans*, GEORGIA PUBLIC BROADCASTING (Apr. 22, 2021) <https://www.gpb.org/news/2021/04/22/who-stayed-home-more-in-georgias-senate-runoffs-rural-white-republicans>

<sup>275</sup> Patrick Svitek and Alex Samuels, *Rural Texans have long helped Republicans. Will that hold true on Tuesday?* THE TEXAS TRIBUNE (Nov. 2, 2020), <https://www.texastribune.org/2020/11/02/texas-rural-republicans-2020/>

voters shifting to third parties in the late 1800s, or particularly mobilized ethnic or racial communities in the 2020s.

### *B. Practical Obstacles*

Kansas City also highlights the administrative challenges that compulsory voting can pose for a city. As they made the case for compulsory voting, proponents in Kansas City devoted relatively little attention to the practical matter of how to implement the duty to vote. Only after the provision became law did they grapple with the administrative details. Were a city today to consider compulsory voting, the challenges of implementation might dissuade people from experimenting with the policy.

The practical question, then and now, is whether a city can identify non-voters in local elections and penalize their failure to cast a ballot. Kansas City illustrates the challenge. A city needs a list of all residents who are qualified to vote; a list of everyone who cast a ballot in a local election; people who can compare these two lists; officials who can issue and collect fines; and the resources to pay for these steps as well as the inevitable litigation.

Kansas City struggled with some of these requirements. It used the assessor's rolls to identify residents, and relied on the recorder of voters to provide lists of those who had voted. When the recorder refused to turn over his books, copying and comparing the lists proved costly. The city eventually mustered the funds needed to collect the poll tax, and seemed ready to have done so had it won the test case.

Today, database technology is much advanced, but similar challenges would confront any city hoping to enforce a duty to vote. Identifying residents who are qualified to vote would be difficult and costly. A list might be compiled by drawing on public records—vehicle registrations, property and local income tax rolls—but it would require cooperation from state agencies. As Kansas City illustrates, cooperation cannot be counted on. Some cities have created rental registries, but these typically do not include tenants. Others have city vehicle taxes, which would provide lists of residents who own cars. At greater expense, a city could purchase data from a firm that compiles public records. In either case, the city would have to deal with missing, incorrect, and outdated records. It is not clear that Kansas City did in fact identify all eligible voters who were living in the city on January 1 of 1890. It is similarly unclear if a city today could accurately assemble such a list—or would be willing to foot the expense.

Alternatively, the duty could apply only to registered voters, rather than all residents eligible to vote. This would let cities focus on voter rolls. Those cities administer their own elections would be in the best position. There, city



officials could develop and maintain lists of voters and non-voters, assess fines to non-voters, and collect that revenue.

In several states, cities do have direct control over administering local elections. In New England—Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut—as well as Michigan, the work of election administration is left entirely to towns and cities, with counties having no role.<sup>276</sup> In places like Massachusetts, where city clerks have the responsibility to carry out a census of voters, such a routine survey of eligible voters could support the implementation of a duty to vote.<sup>277</sup> In some other states—including Florida, Illinois, Maryland, Minnesota, Wisconsin, and Virginia—the work of election administration is divided between counties and cities, with at least some, and in some cases all, towns and cities having control over local elections.<sup>278</sup> In these states, cities would be best positioned, at least as a practical matter, to have the voter data needed to make voting a duty.

Administering a duty to vote could also be straightforward in places with consolidated city-county governments. Combined with the states mentioned above, this yields a map of places where, at least in practical terms, cities are well-positioned to administer and enforce a duty to vote. The map includes consolidated city-counties such as Denver, San Francisco, Philadelphia, Miami/Dade County, and Louisville/Jefferson County; as well as a range of smaller places like Menominee, Wisconsin; Lexington/Fayette County, Kentucky; and Athens/Clarke County, Georgia.<sup>279</sup>

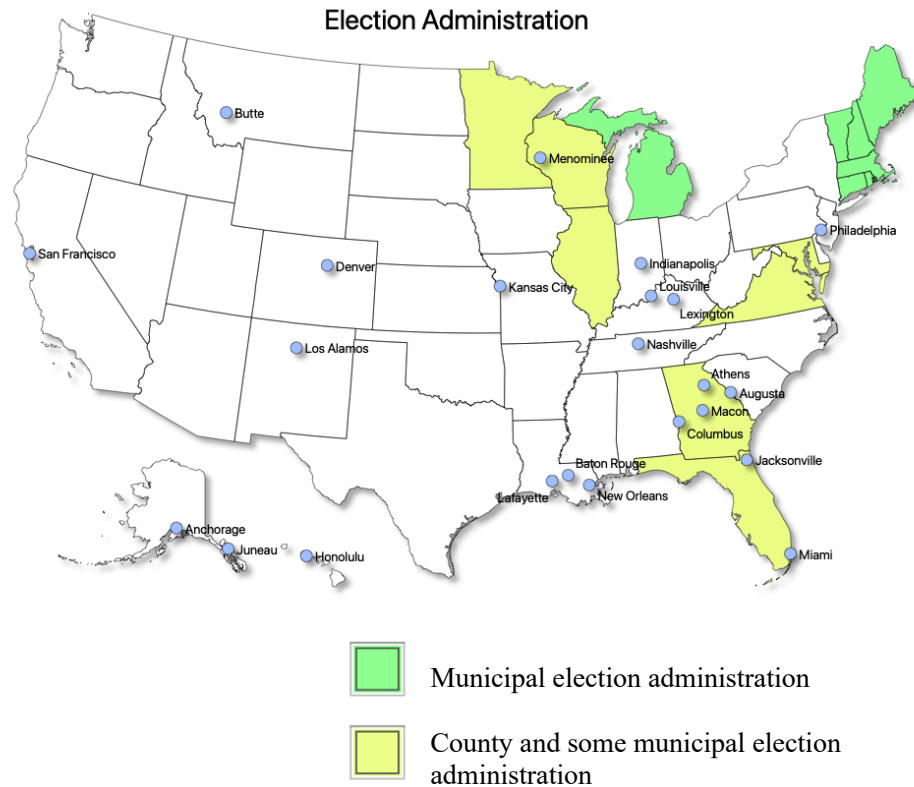
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<sup>276</sup> U.S. Election Assistance Commission, Election Administration and Voting Survey (2020) [hereinafter “EAVS”], <https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys>

<sup>277</sup> In Massachusetts, a resident’s failure to respond to the town census results in the resident being placed on the inactive voter list. See Town of Concord, *Annual Town Census*, <https://concordma.gov/381/Census-Annual-Town> (last accessed Mar. 24, 2022). A similar census could in principle be used to identify residents who are eligible or registered to vote but have failed to turn out in local elections. I am grateful to Niko Bowie for noting how such a census could aid in implementing a duty to vote.

<sup>278</sup> *Id.* Some municipalities in Florida have municipal clerks or canvassing boards that manage elections. Georgia provides in certain situations for joint county-municipal administration. In Illinois, some but not all municipalities have boards of election commissioners. In Maryland, some but not all municipalities have city clerks. By contrast, in other states—such as Minnesota, Wisconsin, and Virginia—counties as well as all cities and towns have local election officials.

<sup>279</sup> There is an extensive list on the Wikipedia entry *Consolidated city-county*, [https://en.wikipedia.org/wiki/Consolidated\\_city-county#List\\_of\\_consolidated\\_city-counties](https://en.wikipedia.org/wiki/Consolidated_city-county#List_of_consolidated_city-counties)



Beyond these states and consolidated jurisdictions, however, municipalities would need cooperation from county- or state-level agencies. This would be the case in most of the country: 36 states give counties exclusive control over election administration.<sup>280</sup> There, city officials would, as in Kansas City in the 1890s, depend on intergovernmental co-operation or simply public access to voter lists to find out which residents were registered to vote, and whom among those had in fact cast a ballot.

In some of these states, city officials could gain access to voter records under existing state law. At a minimum, they would need information about voters' addresses and voting history—data that 16 states and the District of Columbia make available to the public in some form.<sup>281</sup> Whether municipalities would be able to use this data for the purpose of identifying and fining non-voters in local elections would depend on state law. In

<sup>280</sup> EAVS, *supra* n. \_\_\_. In Louisiana, the power rest with parishes.

<sup>281</sup> The states are Arizona, Colorado, Delaware, Maine, Maryland, Minnesota, Mississippi, Missouri, New Hampshire, North Carolina, North Dakota, Ohio, Pennsylvania, Tennessee, Virginia, Wisconsin, and the District of Columbia. See National Conference of State Legislators, *Access to and Use of Voter Lists* (Aug. 5, 2019) <https://www.ncsl.org/research/elections-and-campaigns/access-to-and-use-of-voter-registration-lists.aspx>

Delaware, the case is clearest: “any state agency, county or local government for use in conducting government business may request voter lists for free.”<sup>282</sup> In other states, lists may be requested by any member of the public,<sup>283</sup> though some, like Tennessee, specify that it may be used only for “political purposes.”<sup>284</sup> In places like Ohio and Arizona, city officials would be in essentially the same situation as Kansas City’s clerks; they would have to go in person to the county or state office, and copy lists by hand.<sup>285</sup> In New Hampshire, where people may view but not duplicate the database, they would be out of luck, at least when it comes to directly accessing data managed by state agencies.

There is, however, another option. In places where local governments have limited access to voter information managed by state- or county-level agencies, local officials could turn to private databases.<sup>286</sup> Companies like Catalist and TargetSmart have developed comprehensive lists of registered voters, and many unregistered voters as well.<sup>287</sup> These voter data services are relatively affordable, and for a local government inclined to experiment with making voting a duty they could prove an invaluable and worthwhile investment.

Even in places where municipal officials can access the data needed to make voting a duty, actually enforcing that duty would entail some costs. The city would have to dedicate funds to administering the new voting mandate. If the ordinance were upheld, it is conceivable that the revenue it generated would eventually pay for its own administration. Recall that Kansas City officials aspired to both cover the costs of collecting the poll tax and use the surplus to fund city services. But until revenues started coming in, the city would have to pay for staff to maintain and compare lists, and to prepare for the process of collecting fines. Ultimately, of course, if the goal were full participation in local elections, the optimal result would be very little new revenue—since there would be few non-voters left to fine. In that ideal situation, administrative costs would remain, even as revenues declined.

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<sup>282</sup> *Id.*

<sup>283</sup> *Id.* These include Colorado, Missouri, and North Carolina, among others.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* Ohio law provides that voter data is “Open to public inspection at all times when the office of the board of elections is open for business. Arizona makes voter data “available for public inspection at local election offices.”

<sup>286</sup> I am grateful to Nick Stephanopoulos for noting how private databases could help local officials implement a duty to vote.

<sup>287</sup> See, e.g., Catalist, *Dynamic National Database*, <https://catalist.us/data/> (describing 15 years of work in building the “first ever national voter file not owned by political party or individual campaign) (last accessed Mar. 24, 2022); TargetSmart, *Data*, <https://targetsmart.com/services/> (describing databases that include over 191 million voters and 58 million potential voters) (last accessed Mar. 24, 2022).

If a city did not administer its own elections, or gain access to voter data controlled by county board of elections, a local duty to vote might well be a dead letter. This has happened in cases where local governments have sought to expand voting rights, but have faced opposition from county election agencies. For example, after voters in Yellow Springs, Ohio approved a referendum to permit non-citizens to vote in local elections, the Ohio Secretary of State found the local expansion of voting rights in conflict with state law and ordered the county board of elections not to cooperate.<sup>288</sup>

In many states, then, the practical question of how to administer a local compulsory voting provision would likely become a legal question, of municipal authority over elections.

### III. LEGAL LESSONS FROM KANSAS CITY

Kansas City's experiment demonstrates the importance of state and local government law to whether a city can make voting a duty. Prior scholarship has focused on questions of federal law, such as whether compulsory voting would violate the First Amendment.<sup>289</sup> Recent work such as the Brookings report on the duty to vote has begun to recognize how local government law would shape the potential for compulsory voting to re-emerge in America.<sup>290</sup> This section examines in depth the question of local authority to make voting a duty, before turning to two federal issues that opponents of compulsory voting might raise.

#### *A. The Duty to Vote and Municipal Authority*

Since Missouri was first state to grant home rule powers to municipalities, and because Kansas City had recently passed the population threshold to adopt a home rule charter, the question of authority to regulate elections was not central to the litigation in *Whipple*. The parties stipulated, and the Missouri Supreme Court agreed, that Kansas City had the legislative authority to levy a poll tax, so long as it did not conflict with state law.

Were a city to make voting a duty today, its authority to enact such a law, and potential conflicts with a state constitution or state statute, would be front and center. The question would be whether a city has the power to regulate

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<sup>288</sup> Megan Bachman, *Noncitizen Voting Under Fire*, YELLOW SPRINGS NEWS, Aug. 13, 2020, <https://ysnews.com/news/2020/08/noncitizen-voting-under-fire>

<sup>289</sup> See, e.g. *Note: The Case for Compulsory Voting in the United States*, *supra* n. \_\_.

<sup>290</sup> *Lift Every Voice*, *supra* n. \_\_ at 29-30 (noting that "A local government would have to consider both the state constitution and state statutes to determine if it has the authority to mandate participation in local elections.")

local elections. Professor Joshua Douglas has provided a useful fifty-state survey of this authority.<sup>291</sup> He identifies 25 states where there is no clear statutory or state constitutional impediment to at least some cities regulating elections.<sup>292</sup> In six other states, home rule provisions constrain cities' authority to change voter *qualifications* defined by state law, but may not bar a local law that obligates qualified voters to cast a ballot in local elections.<sup>293</sup> Massachusetts and Vermont empower municipalities to regulate local elections and to amend their charters, respectively, but each requires approval by the state legislature.<sup>294</sup> Only nine states either prohibit cities from altering election procedures or provide that the state's election code exclusively regulates municipal elections.<sup>295</sup> In a few states, it is unclear whether home rule authority would grant power to municipalities to regulate elections in this way.<sup>296</sup>

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<sup>291</sup> Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1101-1111 (2017). Professor Douglas was a member of the commission that wrote the Brookings report, and his analysis informs its conclusions concerning where impediments to a local duty to vote exist.

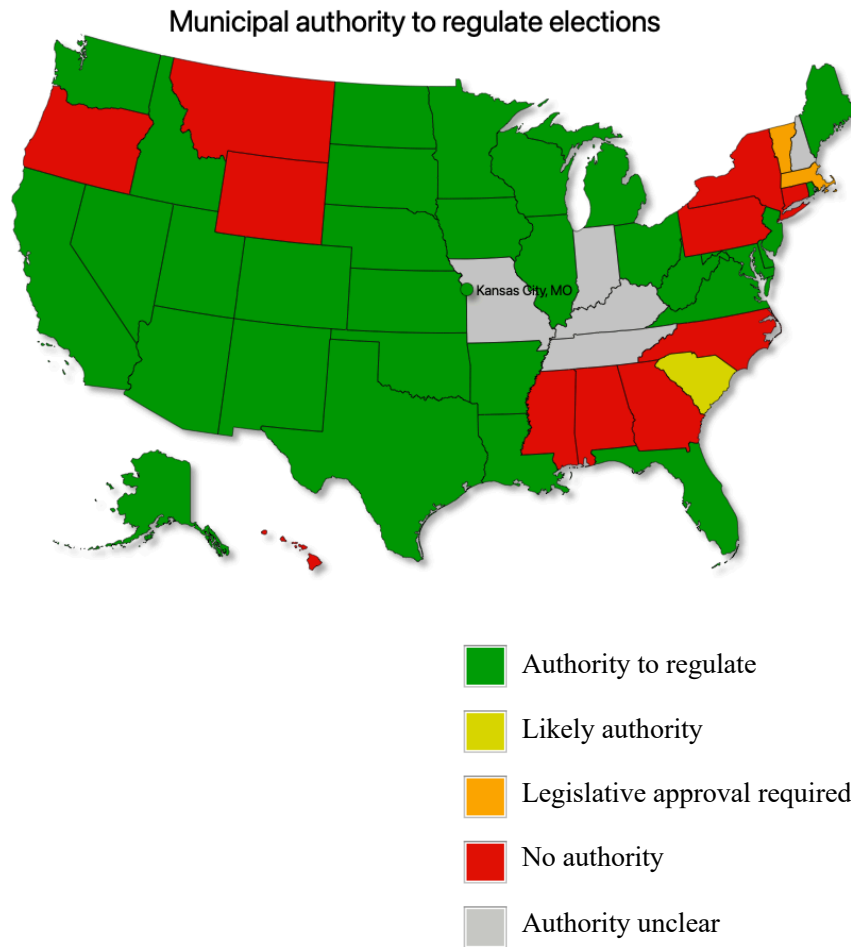
<sup>292</sup> *Id.* at \_\_\_. These states include Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Michigan, Nebraska, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, Virginia, Washington, West Virginia, and Wisconsin.

<sup>293</sup> *Id.* at \_\_\_. These states include Alaska, Connecticut, Delaware, Maine, North Dakota, and South Carolina.

<sup>294</sup> *Id.* at 1105 n. 334 (Massachusetts), 1109 n. 370 (Vermont).

<sup>295</sup> States with statutes that bar municipalities from changing voting procedures, or provide that the state election code exclusively regulates local elections, include Georgia, Hawaii, Mississippi, Montana, New York, North Carolina, Oregon, Pennsylvania, and Wyoming. *Id.*

<sup>296</sup> Indiana prohibits municipalities from regulating conduct already regulated by a state agency, and while the Indiana Secretary of State regulates elections it is possible that a court would find the Secretary of State's regulations do not speak to making voting compulsory, thus allowing a municipality to act. *Id.* at 1104 n.326. Kentucky permits municipalities to take action that is in furtherance of a public purpose, but does not grant authority where "there is a comprehensive scheme of legislation on the same general subject." Professor Douglas observes it is possible that the election code is not a "comprehensive scheme" on the issue voter qualifications, *id.* at 1104 n. 329, and the same could hold true with respect to compulsory voting. Minnesota's state election code covers municipal elections, except when home rule charter cities regulate local elections in their charter; this could mean that if a city charter makes voting a duty the state election code's provisions would not apply. *Id.* at 1105 n. 338. It is also unclear whether the powers granted by New Hampshire's home rule statute would encompass the authority to make voting a duty. *Id.* at 1107 n. 347. Tennessee's home rule statute does not expressly grant authority to make voting a duty in its list of home rule powers, though it is possible a court would interpret a municipality as having that power. *Id.* at 1109 n. 365.



Of course, even in states that empower municipalities to regulate elections, any such regulation may not conflict with a state statute or state constitution. We can identify a few potential conflicts. One, analyzed in the Brookings report, is the constitutional definition of the right to vote.<sup>297</sup> *Whipple* points to two other potential conflicts: clauses involving the free exercise of the right of suffrage, and uniform taxation. I discuss these in turn.

### 1. The Duty to Vote and the Right to Vote

A local duty to vote could conflict with a state's definition of the right to vote. This informs the analysis in the recent Brookings report of where

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<sup>297</sup> To develop a list of states where there are less likely to be impediments, the Brookings working group asked how each state constitution defines voter qualifications. *Lift Every Voice* at 30. This distinguishes between states that define voting qualifications as “grants” and states that define them as “restrictions.” Douglas, *supra* n. \_\_ at 1084.

impediments exist to a duty to vote in municipal elections. The working group identified thirteen states where municipal authority exists to regulate elections, and where a duty to vote would not conflict with the state's definition of the right to vote.<sup>298</sup>

Kansas City provides a limit case. Suppose a city, like Kansas City, tried to compel *all* adult residents—registered or not, citizen or non-citizen, adult or teenager, felony conviction or not—to cast a ballot. Such a provision would conflict with state constitutional or statutory provisions that define voter qualifications in restrictive terms.<sup>299</sup> Any provision so expansive would be struck down, even in states where municipalities have the power to regulate local elections.

That sort of conflict, however, is easy to avoid. A municipal compulsory voting provision could simply state that all residents who are qualified voters—as defined by the state constitution—must vote in municipal elections. Incorporating the state's definition of qualified voters would avoid the potential conflict, and remove at least this impediment to a city enacting a duty to vote.

## 2. Free Elections Clauses

*Whipple* points to another potential conflict, between compulsory voting and state constitutional provisions that prohibit interference with the free exercise of the right of suffrage. While this was one basis for the decision in *Whipple*, contemporary proponents have strong arguments that the opinion of the Missouri Supreme Court was poorly reasoned and should not be followed.

In *Whipple*, the Court held that Kansas City's charter provision conflicted with a clause providing that "all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."<sup>300</sup> A legal duty to vote, Chief Justice Brace reasoned, interfered with the free exercise of the right of suffrage—since the charter provision deprived Kansas Citizens of the freedom *not* to exercise their right of suffrage.<sup>301</sup>

Opponents today might argue that this type of clause conflicts with a state or local duty to vote. Fourteen state constitutions have clauses identical or

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<sup>298</sup> *Lift Every Voice*, *supra* n. \_\_\_ at 30 (identifying some or all cities in Arkansas, California, Illinois, Maryland, Missouri, New Jersey, New Mexico, Ohio, Oklahoma, Rhode Island, South Dakota, Washington, and Wisconsin).

<sup>299</sup> *See*, e.g., Douglas, *supra* n. \_\_\_ at 1082 n. 211 (listing states that restrict the definition of qualified voters in a way that bars municipalities from expanding on the definition).

<sup>300</sup> MO. CONST. of 1875, art. II, § 9. Today, the clause MO. CONST. art. I, § 25.

<sup>301</sup> *Whipple*, \_\_\_\_\_ at

substantially similar to that in the Missouri constitution.<sup>302</sup> In all, some 30 states have a constitutional requirement that elections be “free.”<sup>303</sup> Voting rights advocates hail such clauses as instances of state constitutions providing more substantial protection for the right to vote than does the U.S. Constitution.<sup>304</sup> However, were other state supreme courts to adopt the logic of *Whipple*, such clauses—and particularly those identical to Missouri’s “free exercise of the right” clause—could provide a basis for striking down compulsory voting laws. Such an interpretation would not only jeopardize local provisions, but also state statutes creating a duty to vote—contrary to some observers’ suggestion that pursuing compulsory voting at the state level would be “relatively easy.”<sup>305</sup>

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<sup>302</sup> ARIZ. CONST. art. II, § 21 (“no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage”); ARK. CONST. art. 3, § 2 (“No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted whereby such right shall be impaired or forfeited, except for the commission of a felony, upon lawful conviction thereof.”); COLO. CONST. art. II, § 5 (“no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”); IDAHO CONST. art. I, § 19 (“No power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage”); MONT. CONST. art. II, § 13 (“no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”); NE. CONST. art. I, § 22 (“there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise”); N.M. CONST. art. II, § 8 (“no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”); OKL. CONST. art. III, § 5 (“No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage”); PA. CONST. art. I, § 5 (no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”); S.D. CONST. art. VII, § 1 (“no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”); UTAH CONST. art. I, § 17 (“no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”); WASH. CONST. art. I, § 19 (“no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”); WYO. CONST. art. I, § 27 (“no power, civil or military, shall at any time interfere to prevent an untrammelled exercise of the right of suffrage.”).

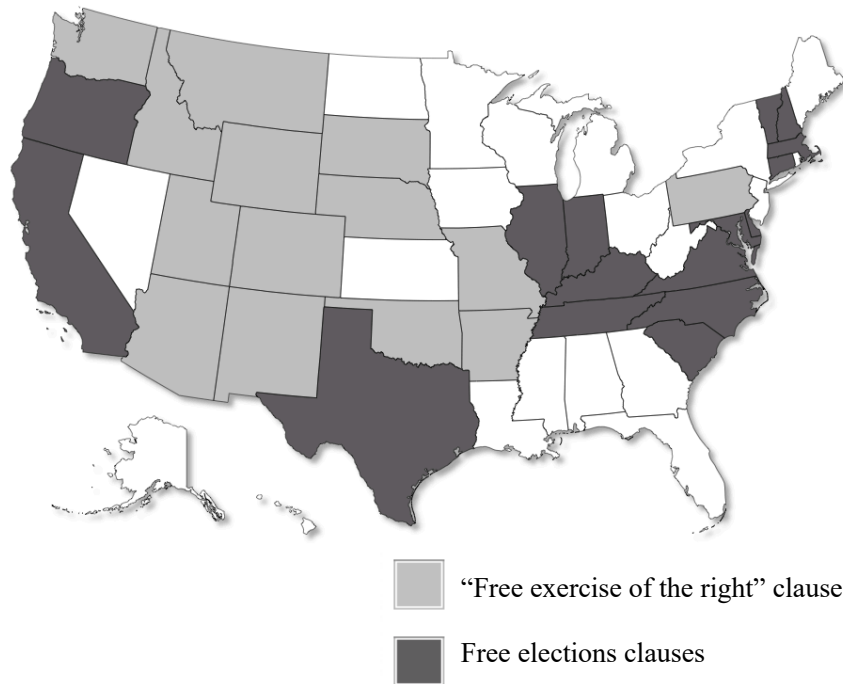
<sup>303</sup> Nat’l. Conf. of State Legislators, *Free and Equal Election Clauses in State Constitutions*, 4 Nov. 2019 (citing constitutional provisions from Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wyoming).

<sup>304</sup> See, e.g., Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 89 (2019) (“Virtually every state constitution includes direct, explicit language granting the right to vote, as contrasted with the U.S. Constitution, which mentions voting rights only implicitly.”); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 871 (2021) (noting that dozens of states provide electoral protections via clauses that declare elections shall be “free,” “free and equal,” or “free and open.”).

<sup>305</sup> *Lift Every Voice*, *supra* n. \_\_ at 29 (suggesting the answer to whether state law would



## Free Elections Clauses



Compulsory voting proponents will need to convince state courts not to follow the reasoning of the Missouri Supreme Court in *Whipple*, the only state supreme court case to address compulsory voting. They will be helped by the flaws in the reasoning by Chief Justice Brace. First, decision does not apply the plain meaning of “free exercise of the right” and “free elections.” These indicates that elections and the act of voting should be free from outside domination; voters should make their own choices, rather than voting the preferences of others.<sup>306</sup> “Free exercise of the right” is better understood as freedom from third-party influence on voters’ decisions, rather than the choice of whether to cast a ballot in a particular election. This interpretation permits voters to make any choice they like when casting a ballot—for any listed candidates, a write-in, or none of the above. Courts would apply the clause in cases involving undue influence on that choice made by voters.

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allow the implementation of civic duty voting “is relatively easy if a state wishes to adopt the practice for statewide elections: States have the authority to regulate their own elections for state offices so long as the rules do not violate the U.S. Constitution or federal law.”)

<sup>306</sup> Merriam Webster Online Dictionary, *Free* (defining the adjective as “2c: enjoying political independence or freedom from outside domination” and “3b: determined by the choice of the actor or performer”) <https://www.merriam-webster.com/dictionary/free>

Non-interference with the free exercise of the right of suffrage does not imply the converse—i.e. a right not to participate in elections.

A purposive interpretation of these clauses reaches the same result. The object of these clauses is to protect elections in general, and voters' choices in those elections, from undue influence. Their point is to help qualified voters exercise their right to vote and express their will, without being dissuaded or coerced by others.<sup>307</sup> The aim of the elections clauses is to promote a full and accurate expression of the peoples' will. To interpret the clauses as helping people *not* to vote would contradict this aim. For voters who prefer not to support any candidates on the ballot, compulsory voting could simply provide a “none of the above” or spoilation option.<sup>308</sup>

Finally, the original intent of the framers of these clauses likely leads to the same conclusion. A full elaboration of this point would turn on the historical details of the drafting and ratification of the relevant clause in each state constitution—a project beyond the scope of this article. But those debates would presumably reveal no concerns about compulsory voting interfering with the free exercise of the right of suffrage, or free elections

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<sup>307</sup> State courts have interpreted the free elections clauses of their respective constitutions along these lines. *See, e.g.*, *Common Cause v. Lewis*, 2019 WL 4569584 (N.C. Super. 2019) at 110 (“the meaning of the Free Elections Clause is that elections must be conducted freely and honestly to ascertain, fairly and truthfully, the will of the people.”); *Wallbrecht v. Ingram*, 164 Ky. 463, 175 S.W. 1022, 1026 (1915) (“[t]he very purpose of elections is to obtain a full, fair, and free expression of the popular will upon the matter, whatever it may be, submitted to the people for their approval or rejection; and when any substantial number of legal voters are, from any cause, denied the right to vote, the election is not free and equal, in the meaning of the [Kentucky] Constitution.”); *Moran v. Bowley*, 347 Ill. 148, 179 N.E. 526, 531 (1932) (“[a]n election is free where the voters are exposed to no intimidation or improper influence and where each voter is allowed to cast his ballot as his own conscience dictates. Elections are equal when the vote of each voter is equal in its influence upon the result to the vote of every other elector—where each ballot is as effective as every other ballot.”); *Winston v. Moore*, 244 Pa. 447, 91 A. 520, 523 (1914) (“[E]lections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as every other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.”); *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (interpreting meaning and purpose of free elections clause in Pennsylvania constitution by reference to its history and in comparison with similar clauses in other states).

<sup>308</sup> Proponents of compulsory voting have frequently proposed this option. *See, e.g.*, *Feeley, supra* n. \_\_ at 241-42; *Matsler, supra* n. \_\_ at 974-76. In practice, when such an option is not made available, “[t]he proportion of spoilt ballots is regularly used in states with mandatory electoral participation as a means of assessing levels of popular disaffection.” SARAH BIRCH, *FULL PARTICIPATION: A COMPARATIVE STUDY OF COMPULSORY VOTING* 55 (2008).

more generally.<sup>309</sup> This was almost certainly the case of the clause included in the 1875 Missouri Constitution; compulsory voting was not on the agenda in the state in the years leading up to its ratification.

An analysis of how and when such clauses appeared in other state constitutions would likely yield similar results. Arkansas, for example, first adopted a “free exercise of the right” clause in its 1874 Constitution.<sup>310</sup> The most similar clause in the 1868 Arkansas constitution makes clear that the concern was not compulsory voting, but instead fraud and undue influence: “The right of suffrage shall be protected by laws regulating elections and prohibiting, under adequate penalties all undue influence from bribery, tumult, or other improper conduct.”<sup>311</sup> A scan of the debates concerning free elections clauses would likely reveal concerns regarding fraud that were typical of the Gilded Age, rather than concerns about compulsory voting.

### 3. Uniform Taxation Clauses

*Whipple* points to a second potential conflict between state constitutions and state or local compulsory voting provisions. The primary basis of the decision was the Missouri constitution’s requirement that taxation be uniform. One analysis of state constitutional provisions concerning tax uniformity identified twelve other states that have similar provisions, mandating that taxes be uniform upon the same class of subjects.<sup>312</sup>

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<sup>309</sup> A North Carolina court has traced the source of that state’s free elections clause, incorporated in the 1776 North Carolina Declaration of Rights, to similar clauses in states such as Virginia, Pennsylvania, and Virginia; these, in turn, drew inspiration from the 1689 English Bill of Rights. *Common Cause v. Lewis*, 2019 WL 4569584 (N.C. Super. 2019) at 111; *see also* John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1797-98 (1992); *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018) (“In accordance with the plain and expansive sweep of the words “free and equal,” we view them as indicative of the framers’ intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process for the selection of his or her representatives in government.”).

<sup>310</sup> ARK. CONST. of 1874, art. III. § 2. (“Elections shall be free and equal. No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted, whereby the right to vote at any election shall be made to depend upon any previous registration of the elector’s name; or whereby such right shall be impaired or forfeited, except for the Commission of a felony at common law, upon lawful conviction thereof.”)

<sup>311</sup> ARK. CONST. of 1864, art. I, § 19.

<sup>312</sup> WADE J. NEWHOUSE, *CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION*, 10 (1959). The states, in addition to Missouri, are Colorado, Delaware, Georgia, Idaho, Louisiana, Minnesota, Montana, New Mexico, Oklahoma, Oregon, Pennsylvania, and Virginia.

It seems unlikely that contemporary proponents would frame compulsory voting as a tax. No one, after all, is fond of new taxes.<sup>313</sup> Perhaps for this reason, the authors of the Brookings report analyze the constitutionality of “fees” and “monetary penalties” for not voting, and conclude that they, along with alternatives such as community service, would survive constitutional scrutiny.<sup>314</sup> Beyond the many good practical reasons to frame the consequence of non-voting as a penalty or a fee, doing so could also help avoid the conflict presented in *Whipple*.

Framing a duty to vote in terms of a tax *benefit*, however, could prove attractive to some promoters. Rather than penalizing non-voting, a policy framed as a tax rebate or waiver, as in Kansas City, could be defended both politically and legally as an incentive to encourage (but not require) voting.<sup>315</sup> Indeed, Dionne and Rapoport suggest that, at least in some states, a refundable tax credit might be a legal means of incentivizing voting.<sup>316</sup> Such a tax rebate, made universally available to eligible voters even if not universally claimed, would presumably not violate a state constitution’s requirement that taxes be uniform.<sup>317</sup>

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<sup>313</sup> Polling by the Brookings working group on civic duty voting found that 63% of those who strongly oppose making voting a legal duty cite the statement “there are already too many government taxes and fines” as a major reason for their opposition. DIONNE & RAPOPORT, *supra* n. \_\_\_ at 95.

<sup>314</sup> *Lift Every Voice*, *supra* n. \_\_\_ at 28; see also DIONNE & RAPOPORT, *supra* n. \_\_\_ at 78 (envisioning “monetary penalties, in amounts similar to parking fines”).

<sup>315</sup> The question of how voting might legally be incentivized has received some scholarly attention. See, e.g., Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1355-59 (discussing the legality and normative case for payments to increase turnout); Pamela S. Karlan, *Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System*, 80 VA. L. REV. 1455, 1472-73 (suggesting that “perhaps the government ought to pay eligible citizens to vote” and addressing the concern that this would commodify the vote). I am grateful to Shane Singh for emphasizing that this was how the Kansas City provision was structured, and Nick Stephanopoulos for suggesting that this approach might be more politically palatable and legally defensible than a fine used to punish the failure to vote.

<sup>316</sup> See DIONNE & RAPOPORT, *supra* n. \_\_\_ at 80 (relying on legal research by Allegra Chapman, Joshua Douglas, Cecily Hines, and Brenda Wright to identify Alaska, California, Mississippi, Minnesota, Nebraska, New Hampshire, New Mexico, Pennsylvania, South Carolina, Washington, West Virginia, and Wyoming as states with statutory language that might support a tax incentive for turning out to vote). Incentives have been upheld by courts reviewing payments for gas needed to drive to polls in Alaska, *Dansereau v. Ulmer*, 903 P.2d 555, 561-64 (Alaska 1995), and a lottery organized by a candidate to promote turnout in a local election in Mississippi, *Naron v. Prestage*, 469 So. 2d 83 (Miss. 1985).

<sup>317</sup> I am grateful to Josh Douglas for underscoring this misunderstanding by the court in *Whipple*, and pointing out that a tax can be uniformly applied, even if a rebate is only claimed by some. The real basis for the court’s objection seems to be that, by offering that rebate, the policy put a monetary value on voting, which is a different matter than the question of tax uniformity. Scholars have addressed the objection of commodification. See, e.g., Karlan, *supra* n. \_\_\_ at 1473 (proposing that voters could receive vouchers that they might use to pay

#### 4. Extra-Local Effects

A further question is whether courts would find a municipal duty to vote as having impermissible statewide effects. This question would inform how courts might analyze a claim that a duty to vote in local elections exceeds municipal authority. As Richard Briffault has observed in situations of local political innovation, “What really seems to matter is the judicial recognition that local control of local governance or politics is both of central importance to the local self determination that is home rule while simultaneously posing little or no threat or cost to the localities or the state beyond local borders.”<sup>318</sup> All things being equal, a municipality that hopes to see its policy survive in court would seek to limit its extra-local effects.

Limiting external effects, however, is in tension with the aspirations of some proponents. Recall that Professor Stephanopoulos imagines a virtuous cycle in which one city adopts compulsory voting, and thereby incentivize other cities and eventually states to follow suit.<sup>319</sup> By making voting a duty and aligning election dates with non-local elections, one city could maximize the influence of its residents’ votes on statewide races, and possibly start this cycle.

In many states, a court would consider such a situation by asking whether the extra-local impacts of a local duty to vote implicate a matter of statewide concern. A city that simultaneously makes voting mandatory and aligns its election day with statewide races would present the hardest test. A court might well interpret a local regulation of elections as being intended to create extra-local effects.

Even if the intent were to simply maximize participation in local elections,<sup>320</sup> limited evidence suggests that making voting a duty in one type of election has spillover effects on other races held concurrently. When residents in one Swiss canton were required to vote on federal referenda, turnout on those questions increased by about 30 percent.<sup>321</sup> The duty to vote on federal referenda increased.<sup>322</sup> When federal referenda appeared on ballots concurrently with local referenda and elections for federal office, for

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for public transportation, or donate to nonprofit organizations).

<sup>318</sup> Briffault, *supra* n. \_\_ at 19.

<sup>319</sup> See Stephanopoulos, *supra* n. \_\_. 3

<sup>320</sup> Moving local elections on-cycle raises turnout, as does making voting mandatory. See Hajnal et al., *supra* n. \_\_; BIRCH, *supra* n. \_\_ at 79 (analyzing turnout effects across jurisdictions and concluding, in line with prior studies, that “compulsory voting—especially when accompanied by sanctions—is associated with higher overall turnout levels.”).

<sup>321</sup> Michael M. Bechtel et al., *Compulsory Voting, Habit Formation, and Political Participation*, 100 REV. ECON. & STATS. 467, 473 (2018).

<sup>322</sup> *Id.* at 473.

which voting was not compulsory, turnout in those latter races also rose, by around 24 percent and 53 percent respectively.<sup>323</sup> The duty to vote in one race drove turnout in other non-mandatory races.

A city in such a situation could contend that increased turnout in non-local races does not implicate statewide concerns. Making voting mandatory in local races might lead more of a city's voters to vote in statewide races, but that does not deprive anyone of their right to vote.<sup>324</sup> Nor does it make statewide elections less free or equal, or implicate the free exercise the right of suffrage by any residents—either in the municipality or beyond. Nor does it affect the integrity of the electoral process, which some courts have considered an important statewide concern.<sup>325</sup> If anything, a duty to vote would make elections *more* pure, by ensuring equal participation.

If a court found a local duty to vote to have statewide effects, that would not necessarily be fatal. Such effects, after all, would be overwhelmingly positive. State have an interest in increasing democratic participation, which is served by a duty to vote. Similarly, aligning municipal and statewide elections enhances democracy both locally and at the state level.

Even if a judge found a local duty to vote to have negative statewide effects, the provision might still be upheld as being intrinsic to local government. Here, cities would argue that the policy falls within a core municipal capacity—determining the selection of local officials. Courts have upheld local election regulations that implicate statewide concerns when those policies are core home rule powers. The Arizona Supreme Court, for example, has held that all administrative matters such as election scheduling and procedure, as well as the constitution of the electorate are squarely municipal concerns—even though statewide concerns may exist in legislating in the area of municipal elections.<sup>326</sup> The same court upheld the city of Tucson's decision to keep off-cycle municipal elections as an exercise of a “purely municipal concern,” despite a direct conflict between the ordinance and a valid state statute that aligned municipal elections with state and federal elections.<sup>327</sup>

Other scenarios would pose less of a challenge for a city to prevail. In San Francisco, for example, the city and county hold off-cycle elections for some local offices, while elections for local ballot measures and other local offices

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<sup>323</sup> *Id.* at 474.

<sup>324</sup> *Compare* State ex re. Brnovich v. City of Tucson, 484 P.3d 624, 631 (Ariz. 2021) (concluding that “if low voter turnout results from disinterest in strictly municipal issues in off-cycle elections decoupled from state and national elections... that does not deprive those voters of their constitutional right to vote.”)

<sup>325</sup> Briffault, *supra* n. \_\_ at 19 (citing Johnson v. Bradley, 841 P.2d 990, 991 (Cal. 1992)).

<sup>326</sup> *See* City of Tucson v. State, 229 Ariz. 172 (Ariz. 2012).

<sup>327</sup> *See* State ex re. Brnovich v. City of Tucson, 484 P.3d 624 (Ariz. 2021).

appear on the same ballot with races for state and federal office.<sup>328</sup> If San Francisco created a duty to vote in all local races, that would presumably increase turnout for on-cycle elections, without standing out as an opportunistic change to the *status quo*.

Cities would also be in a strong position where local election dates are different, or are moved from on-cycle to off-cycle. In most states, this would be the scenario presented.<sup>329</sup> While there would presumably still be some spillover—in the Swiss study, mandatory voting in one election was predicted to slightly increase turnout even in non-concurrent elections—it would not be as readily apparent or easily tied to the reform.<sup>330</sup>

## 5. Preemption and Local Self-Government

Ultimately, proponents of compulsory voting will still face the challenge of express preemption. State legislatures have aggressively preempted progressive policies enacted by cities.<sup>331</sup> Other than where a blue city enacts a duty to vote in a blue state—if, for example, San Francisco were to do so in California—one could expect a state legislature to consider preempting any local effort to make voting a duty. Short of fundamentally remaking home rule authority, there is little that can be done about this.<sup>332</sup> Existing work on compulsory voting at the local level has not considered how to address the threat of preemption.<sup>333</sup>

There are two strategies proponents might develop in anticipation of preemption. First, they could ground their efforts in the legal principle that cities have a constitutional right to self-government. A duty for residents to

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<sup>328</sup> City and County of San Francisco Board of Elections, *Future Elections* <https://sfelections.sfgov.org/future-elections>

<sup>329</sup> Adam M. Dynes, Michael T. Hartney, and Sam D. Hayes, *Off-Cycle and Off-Center: Election Timing and Representation in Municipal Government*, 115 AM. POL. SCI. REV. 1097, 1101 (noting that “most local governments in the US (78% in our sample [of the roughly 1,600 American cities with populations over 20,000]) are chosen in off-cycle elections”).

<sup>330</sup> Bechtel et al., *supra* n. \_\_.

<sup>331</sup> Kim Haddow et al., *The Growing Shadow of State Interference*, Local Solutions Support Center and State Innovation Exchange (March 19, 2019) <https://stateinnovation.org/the-growing-shadow-of-state-interference-preemption-in-the-2019-state-legislative-sessions/>

<sup>332</sup> A group of local government law scholars have proposed to adjust the balance of power between state and local governments by creating a presumption against state preemption, which would require a state legislature to both expressly preempt a power of a home rule city, and articulate a substantial state interest that is narrowly tailored. *Principles of Home Rule for the 21<sup>st</sup> Century*, NAT’L LEAGUE CITIES 24 (2020), <https://www.nlc.org/resource/new-principles-of-home-rule/>

<sup>333</sup> See, e.g., Stephanopoulos *supra* n. \_\_ (envisioning compulsory voting emerging in cities and spreading to states, but not addressing preemption); *Lift Every Voice*, *supra* n. \_\_

vote in local elections would fall squarely within the ambit of that right. Second, proponents could recognize that some state governments will inevitably preempt municipal compulsory voting. Proponents should plan to use such a defeat to raise the profile of civic duty voting, and to set an agenda for enacting the reform elsewhere. I consider each of these strategies in turn.

The move to make voting a duty in local elections is bolstered by recent scholarship on how state and federal constitutions promote democracy and self-government.<sup>334</sup> Most important in this regard is Nikolas Bowie's recent excavation of the history of the assembly clauses in the federal and state constitutions.<sup>335</sup> Bowie traces the origins and motivations behind the original assembly in the constitutions that Pennsylvania, North Carolina, and Massachusetts drafted and ratified prior to the U.S. Constitution. Massachusetts had a tradition of colonial-era town meetings, but Pennsylvania and North Carolina, which did not have such traditions, adopted nearly identical clauses. In each case, the framers appear to have been motivated by the meetings that were called to decide democratically on matters of local governance in the years leading up to 1776. John Adams and Samuel Adams, who each wrote on the importance of popular sovereignty and a form of government modeled on town meetings, were involved in drafting the Massachusetts provision; they advised the framers of the Pennsylvania and North Carolina provisions.<sup>336</sup> Bowie concludes that the history surrounding the drafting of these original assembly clauses demonstrates that "a central purpose of protecting the right to assemble was to protect self-government, not expression alone."<sup>337</sup>

Assembly clauses now appear in 47 state constitutions. These were adopted from the late 1700s through the 1800s, often without debate, and typically with only minor modifications from the models set by Massachusetts, Pennsylvania, and North Carolina.<sup>338</sup> In interpreting the meaning of these clauses, courts have looked to the intent of the framers of the constitutions from which the clauses were copied. An appeals court in Oregon, for example, recently traced the assembly clause included in that state's constitution in 1859 back to the context in which the clause had been adopted in Massachusetts.<sup>339</sup>

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<sup>334</sup> See, e.g., Bulman-Pozen & Seifter, *supra* n. \_\_; Jake Sullivan, *The Tenth Amendment and Local Government*, 112 YALE L. J. 1935 (2003).

<sup>335</sup> Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L. J. 1651 (2021).

<sup>336</sup> *Id.* at 1698-99.

<sup>337</sup> *Id.* at 1727.

<sup>338</sup> *Id.* at 1732-34.

<sup>339</sup> *Id.* at 1734-35 (citing *Lahmann v. Grand Aerie of Fraternal Order of Eagles*, 121 P.3d 671 (Or. Ct. App. 2005)).



Bowie suggests various areas in which applying the state assembly clauses could realize a constitutional right of local self-government. These range from offering a basis for laws that vindicate the people's right to meaningfully participate in a representative government,<sup>340</sup> to questioning the assumptions of the home rule regime that undercuts the powers of local governments vis-à-vis state legislatures.<sup>341</sup> Local civic duty voting provisions would fit squarely within the areas protected by state constitutional assembly clauses. Such provisions, by ensuring full and equal participation in local elections, realize the vision for representative government declared by John Adams. In extending the right of the people to assemble and govern themselves, Adams wrote, such a government should be “in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them.”<sup>342</sup>

Recognizing assembly clauses as supporting the right to local self-government could help proponents of a duty to vote in local elections. It offers a constitutional basis, in nearly every state, for municipal authority to regulate local elections in ways that increase participation and contribute to local government being an accurate representation of the people, even if not an “exact portrait.” State constitutions could be understood to support municipal authority to make voting a duty, rather than conflict with it. A more aggressive argument would be that any state statute purporting to preempt an ordinance in an area fundamental to local self-government—such as ensuring adequate representation via local elections—violates the assembly clause and is invalid. This would test the traditional conception of state and local authority.<sup>343</sup> But even the more limited reading would find constitutional support for a local duty to vote, and undercut any attempt to revive the dicta in *Whipple* that compulsory voting conflicts with popular sovereignty.<sup>344</sup>

Despite this constitutional basis for local action, some state legislatures would still preempt a duty to vote in local elections. Proponents should consider how to turn preemption to their benefit. This might mean enacting

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<sup>340</sup> *Id.* at 1735-36.

<sup>341</sup> *Id.* at 1743-45.

<sup>342</sup> JOHN ADAMS, THOUGHTS ON GOVERNMENT: APPLICABLE TO THE PRESENT STATE OF THE AMERICAN COLONIES (Phila. John Gill 1776), in 4 PAPERS OF JOHN ADAMS 87 (Robert J. Taylor ed., 1979), quoted in Bowie, *supra* n. \_\_ at 1699.

<sup>343</sup> Bowie notes that his proposed powers of local government to self-govern would be subject to state and Congressional preemption. Bowie, *supra* n. \_\_ at 1744. However, as he notes, this reading of the assembly clause would support proposals to change the balance of power between state and local government by constitutional amendment. *Id.* (citing *Principles of Home Rule for the 21<sup>st</sup> Century*, *supra* n. \_\_ at 23-27). In principle, a state supreme court could vindicate the right to self-government by interpreting an assembly clause to require express preemption, articulation of a substantial state interest, and narrow tailoring.

<sup>344</sup> See text accompanying notes \_\_\_, *supra*.

such a provision even in the face of preemption. Scholars of litigation and social movements have noted how even cases that are likely to lose can help set a broader political or movement agenda.<sup>345</sup> Cities have long tested the limits of their authority, to press for change on issues ranging from slavery and immigration to same-sex marriage and abortion.<sup>346</sup> A dispute concerning a municipality's power to increase participation in local democracy, and a state's effort to depress turnout, could draw attention to the issue—whether from national media, lawmakers in other jurisdictions, or the public at large. Picking such a fight would only make sense after developing a compelling frame for the dispute, and tactics for using a loss in one preemption fight to advance civic duty voting nationally. Polling on attitudes toward civic duty voting could point toward a strategy in which losses in preemption battles form part of a broader campaign to make voting a duty.<sup>347</sup>

### *B. The Duty to Vote is Not (Necessarily) a Poll Tax*

Litigation over a local compulsory voting policy would focus on matters of local government law and state constitutional interpretation. But there are federal issues, such as whether compulsory voting constitutes compelled speech in violation of the First Amendment.<sup>348</sup> Rather than retreading terrain covered by others, I consider a different issue, recently raised by some opponents. This concerns whether a duty to vote violates the U.S.

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<sup>345</sup> See, e.g. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2010); Steven A. Boutcher, Anne-Kathrin Kronberg, and Regina E. Werum, *Getting on the Radar Screen: Homeschooling Litigation as Agenda Setting, 1972-2007* 23 MOBILIZATION 159 (2018); Anke Wonneberger and Rens Vliegthart, *Agenda-Setting Effects of Climate Change Litigation: Interrelations Across Issue Levels, Media, and Politics in the Case of Urgenda Against the Dutch Government*, 15 ENV. COMMUNICATION 699 (2021).

<sup>346</sup> See, e.g., Daniel Farbman, “An Outrage Upon Our Feelings”: *The Role of Local Governments in Resistance Movements*, 42 CARDOZO L. REV. 2097 (2021) (comparing local government resistance to the Fugitive Slave Law of 1850 and contemporary deportation policies); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005) (describing the decision by San Francisco officials to perform same-sex marriages in violation of state law); Sarah L. Swann, *Constitutional Off-Loading at the City Limits*, 135 HARV. L. REV. 831 (2022) (describing the effects of attempts by cities to prohibit constitutionally-protected services such as abortion).

<sup>347</sup> *Lift Every Voice*, *supra* n. \_\_ at 31-37 (describing results of survey on making voting a duty).

<sup>348</sup> See, e.g., Singh & Williams, *supra* n. \_\_ at 241-43; Matsler, *supra* n. \_\_ at 972-76.

Constitution's prohibition on poll taxes.<sup>349</sup> As I explain, this should be a non-issue.<sup>350</sup>

Although the duty to vote was created as a poll tax in Kansas City, that framing is unlikely to be repeated. Contemporary proponents have been careful to propose a small fine, rather than a tax, as the penalty for failing to cast a ballot.<sup>351</sup>

Opponents, nevertheless, have seized on the notion that the duty to vote is a poll tax. Or, as some have put it, a “reverse poll tax.” This framing was used by noted voting rights opponent Hans von Spakovsky, in responding to President Obama's suggestion that the United States consider compulsory voting.<sup>352</sup> More recently, it has been deployed to oppose a compulsory voting bill in Connecticut.<sup>353</sup> Whether as a poll tax or a “reverse poll tax,” opponents claim that compulsory voting would violate the Twenty-Fourth Amendment. (Although opponents generally do not cite *Harper v. Virginia State Board of Elections*, they would presumably also claim it violates the equal protection clause of the Fourteenth Amendment.<sup>354</sup>)

They are wrong. The Amendment provides that “The right of citizens of the United States to vote... shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax.”<sup>355</sup> *Harper* similarly addressed a situation in which the right to vote depended on payment of a tax.<sup>356</sup> Had either been the rule at the time of Kansas City's experiment with a poll tax, it would not have barred the city from making voting a duty. Kansas City framed its provision as a poll tax, but it did not prohibit non-voters who failed to pay the tax from voting in subsequent elections.

Recent bills have proposed to levy a small fine against non-voters. None of these has provided that people who failed to pay those fines would lose

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<sup>349</sup> Karen Faasuliotis, *Opinion: Haskell bill to make voting mandatory is unconstitutional*, DANBURY NEWS-TIMES, Jan. 29, 2021, <https://www.newstimes.com/opinion/article/Opinion-Haskell-bill-to-make-voting-mandatory-is-15907888.php>; Hans von Spakovsky, *Compulsory Voting is Unconstitutional*, The Heritage Foundation Commentary: Political Process, Apr. 1, 2015, <https://www.heritage.org/political-process/commentary/compulsory-voting-unconstitutional>

<sup>350</sup> As far as I can tell, it is not an issue that legal scholars have previously considered, perhaps because the answer is so apparent.

<sup>351</sup> E.g. *Lift Every Voice*, *supra* n. \_\_ at 8.

<sup>352</sup> Von Spakovsky, *supra* n. \_\_.

<sup>353</sup> Faasuliotis, *supra* n. \_\_.

<sup>354</sup> 383 U.S. 663 (1966).

<sup>355</sup> U.S. CONST. AMEND. XXIV, § 1.

<sup>356</sup> 383 U.S. 663, 666 (holding that “a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.”).

their ability to vote. This fact won't stop opponents' hand-waiving about the 24<sup>th</sup> Amendment and "reverse" poll taxes. But proponents can safely regard such protestations as mere rhetoric, without any basis in the Constitution.

#### CONCLUSION

Bringing compulsory voting to an American city is both a new idea and a very old one. Just as William Rockhill Nelson did in the 1880s, compulsory voting proponents are once again looking to cities as a starting point for bringing this game-changing democratic reform to state and federal elections. As they do so, there is much to learn from history. The story of how voting became a duty in Kansas City is neither a roadmap for replicating the reform today, nor an indication that any revival would be similarly doomed to fail. Kansas City's experiment with compulsory voting is a largely forgotten moment in America's electoral history worth remembering both for its own sake, and as a means of anticipating dilemmas, contradictions, and opportunities for today's democratic reformers.

Recognizing that the United States has a history of compulsory voting also demands a shift in method. Scholars have often approached compulsory voting as something that has happened elsewhere, beyond our shores. This frames the question of how or whether this reform could happen here as a matter for comparison across space—how do the circumstances of enactment elsewhere compare to conditions here? It also presents the question as an opportunity for hypothetical ruminations on law and morality—were this reform somehow possible, would it be constitutional, or just?

When we appreciate that people in the United States *have* tried to make voting a duty—not just once, but repeatedly—our questions and methods must shift. Comparisons can now be made across time, not just space: how and why have reformers repeatedly sought to use compulsory voting to fix perceived flaws in American democracy?<sup>357</sup> Rather than posing hypotheticals that float in the realm of theory, we can ground answers in empirical data that reveal what happened during previous moments when people tried to make voting a duty.

The case study of Kansas City told here is just a part of the history of compulsory voting in America. It offers an invitation to dig further, to uncover as-yet untold stories. This account is based on relatively low-hanging fruit: digitally archived newspaper articles describing the one case where compulsory voting was enacted. Here, the barrier to implementing the duty to vote is clear: the Missouri Supreme Court's unwillingness in *Whipple* to

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<sup>357</sup> Cf. Jeffrey Haydu, *Making Use of the Past: Time Periods as Cases to Compare and as Sequences of Problem Solving*, 104 AM. J. SOC. 339 (1998).

contemplate the constitutionality of compulsory voting. This helps identify legal obstacles to a duty to vote. But it says less about the political hurdles a reform must clear to become law in the first place.

To better understand the political prospects for compulsory voting—how to prevent a bill from being tabled, or how to keep enabling legislation from becoming a dead letter—we will need to study other moments, and other places. If the history of compulsory voting in the America offers one positive case, in Kansas City, it includes many more negative cases—from Massachusetts and Maryland to New York and North Dakota. These could point to the political conditions that have prevented voting from becoming a duty. To appreciate the possibilities for creating a duty to vote in an American city, one must first visit Kansas City. To develop a broader history of compulsory voting in the United States—and to better analyze the prospects for its reemergence—there remain many roads yet to travel.