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## NOTES

### THE CASE FOR COMPULSORY VOTING IN THE UNITED STATES

Voter turnout in the United States is much lower than in other democracies.<sup>1</sup> In European nations, voter turnout regularly tops 80%,<sup>2</sup> while turnout in American elections has not approached this number for at least the past century.<sup>3</sup> Even in the U.S. presidential election of 2004, with the nation bogged down in an unpopular war and with a very tight campaign that left no front-runner, voter turnout was only about 60%.<sup>4</sup>

Although many may disparage the American electorate for being forgetful or lazy,<sup>5</sup> low voter turnout does not necessarily mean that something is drastically wrong with American voters. The decision not to vote can be a rational one. Democratic government is a classic public good, and like any public good it is subject to a free-rider problem.<sup>6</sup> One can enjoy the benefits of living in a free, democratic society whether one incurs the costs of voting — time spent traveling to polls and waiting in line, information costs of choosing whom to vote for — or not. Even potential voters who have a strong preference for one candidate over another are likely to have a rational basis for not voting since the likelihood of any single vote influencing the outcome of an election is negligible. This gives rise to what scholars call the “paradox of voting”<sup>7</sup>: the fact that some people do vote even though a

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<sup>1</sup> DEREK BOK, *THE STATE OF THE NATION* 325 (1996).

<sup>2</sup> *Id.*

<sup>3</sup> Less is known about earlier American history, in part because of problems with the available data. See Walter Dean Burnham, *Those High Nineteenth-Century American Voting Turnouts: Fact or Fiction?*, 16 J. INTERDISC. HIST. 613 (1986). Professor Walter Burnham estimates voter turnout rates in the nineteenth century as generally having been much higher than in recent decades, but at that time there were no voter registration laws, and the right to vote was available to a much smaller subset of the American populace. *Id.* at 640–41.

<sup>4</sup> COMM. FOR THE STUDY OF THE AM. ELECTORATE (CSAE), PRESIDENT BUSH, MOBILIZATION DRIVES PROPEL TURNOUT TO POST-1968 HIGH 12 (2004), available at <http://www.american.edu/ia/cdem/csae/pdfs/csae041104.pdf>.

<sup>5</sup> See, e.g., Jerilyn Feitelberg, Editorial, *Remember — It's the Vote, Stupid*, S.F. CHRON., Oct. 26, 1998, at A17, 1998 WLNR 3972597; William Safire, *For Turnout Turnabout*, N.Y. TIMES, Nov. 4, 2002, at A23.

<sup>6</sup> See MARK N. FRANKLIN, *VOTER TURNOUT AND THE DYNAMICS OF ELECTORAL COMPETITION IN ESTABLISHED DEMOCRACIES SINCE 1945*, at 37–38 (2004); Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2136–37 (1996).

<sup>7</sup> See, e.g., ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 260–76 (1957) (first articulating this paradox); Hasen, *supra* note 6, at 2136.

simple rational choice model of human behavior suggests they ought not to.<sup>8</sup>

One solution to the problem of low voter turnout is to require all eligible voters to vote by law. Approximately twenty-four nations have some kind of compulsory voting law, representing 17% of the world's democratic nations.<sup>9</sup> The effect of compulsory voting laws on voter turnout is substantial. Multivariate statistical analyses have shown that compulsory voting laws raise voter turnout by seven to sixteen percentage points.<sup>10</sup> The effects are likely to be even greater in a country such as the United States, which has a much lower baseline of voter turnout than many of the countries that have already adopted compulsory voting.<sup>11</sup>

The introduction of compulsory laws raises several interesting legal, philosophical, political, and practical questions: Is forcing people to vote an acceptable way of increasing the legitimacy of democratic government, or is it an unjustified infringement of individual liberty? Is it compelled speech in violation of the First Amendment? Does the right to vote imply a right *not* to vote? Will any increase in voter turnout due to compulsion improve electoral outcomes, or will it make things worse by diluting the median level of political knowledge and sophistication among voters?

This Note puts forth arguments in favor of adopting compulsory voting laws in the United States.<sup>12</sup> It argues that compulsory voting is a legitimate infringement upon individual liberty for the purpose of

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<sup>8</sup> Of course, people who choose to vote are not necessarily irrational. Some may gain utility from fulfilling a civic duty that justifies the costs of voting. See Hasen, *supra* note 6, at 2137. Others may vote because they belong to a group in which voting is strongly encouraged through the imposition of informal social sanctions, *see id.* at 2151–52, or because they believe that their act of voting will encourage others to vote. FRANKLIN, *supra* note 6, at 40. Some voters, however, are irrational — cognitive biases cause many people to misperceive their ability to influence the outcome of an election. See George A. Quattrone & Amos Tversky, *Contrasting Rational and Psychological Analyses of Political Choice*, 82 AM. POL. SCI. REV. 719, 733 (1988); William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25, 25, 38–39 (1968). For a survey of rational choice theorists' efforts to explain the paradox of voting, see Hasen, *supra* note 6, at 2138–46.

<sup>9</sup> Simon Jackman, *Voting: Compulsory*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 16,314, 16,314 (2001).

<sup>10</sup> See Arend Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1, 8–9 (1997) (providing a review of the empirical literature on the effects of compulsory voting laws on voter turnout); *see also* Hasen, *supra* note 6, at 2171.

<sup>11</sup> See Lijphart, *supra* note 10, at 9.

<sup>12</sup> For other views supporting compulsory voting, see, for example, Christopher W. Carmichael, *Proposals for Reforming the American Electoral System After the 2000 Presidential Election: Universal Voter Registration, Mandatory Voting, and Negative Balloting*, 23 HAMLINE J. PUB. L. & POL'Y 255 (2002); and Sean Matsler, Note, *Compulsory Voting in America*, 76 S. CAL. L. REV. 953 (2003). For an argument against compulsory voting, see, for example, Katherine M. Swenson, Note, *Sticks, Carrots, Donkey Votes, and True Choice: A Rationale for Abolishing Compulsory Voting in Australia*, 16 MINN. J. INT'L L. 525 (2007).

ensuring that political outcomes reflect the preferences of the electorate. The remainder of this Note proceeds as follows: Part I discusses the problems with low voter turnout in America. Part II identifies the potential benefits of compulsory voting beyond simply increasing voter turnout. Part III responds to some of the legal and philosophical issues raised by compulsory voting in the United States, specifically whether compulsory voting would violate the freedom of speech or some right *not* to vote, and whether Congress could institute compulsory voting by statute. Part IV addresses some of the practical issues raised by compulsory voting, specifically the problem of uninformed and underinformed voters and how compulsory voting laws could be enforced. Part V briefly concludes.

### I. THE PROBLEM OF LOW VOTER TURNOUT IN AMERICA

The presidential election of 2000 led to an unusual situation in which the results of the election in Florida were subject to a recount that would determine who won the presidency.<sup>13</sup> The difference in the number of votes won by the two major candidates was only 537,<sup>14</sup> which meant that the margin of error of the machines used to count the ballots exceeded the margin of victory.<sup>15</sup> Recounts by hand were inconclusive.<sup>16</sup> In other words, the victory of President Bush in 2000 was not statistically significant.

This illustrates that American elections may be little more than expensive, official polls of U.S. citizens.<sup>17</sup> Unlike polls conducted by social scientists, however, U.S. elections are not even particularly well-designed polls because they are not based on a representative sample of eligible voters. Rather, they rely on a racially and socioeconomically skewed sample.<sup>18</sup> Because of this, America could actually achieve a more representative government by doing away with the current election system, and instead polling a large, representative sample of eligible voters,<sup>19</sup> despite the fact that such a mechanism for selecting gov-

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<sup>13</sup> See *Florida Vote Held a "Disaster" In Rights Commission Inquiry*, N.Y. TIMES, Jan. 13, 2001, at A10.

<sup>14</sup> See *2nd Review of Florida Vote Is Inconclusive*, N.Y. TIMES, May 11, 2001, at A29.

<sup>15</sup> Editorial, *The Time for Ballot Reform*, N.Y. TIMES, Nov. 12, 2001, at A18.

<sup>16</sup> See *2nd Review of Florida Vote Is Inconclusive*, *supra* note 14, at A29.

<sup>17</sup> Although this example relates to a presidential election, similar problems due to low voter turnout can occur in congressional, state, and local elections.

<sup>18</sup> See Lijphart, *supra* note 10, at 1; *infra* note 29.

<sup>19</sup> Although there is broad consensus that the demographic characteristics of the voting population are different from those of the overall electorate, there is some dispute among political scientists as to whether that difference actually matters for electoral or policy outcomes. Compare John D. Griffin & Brian Newman, *Are Voters Better Represented?*, 67 J. POL. 1206 (2005) (finding that roll-call votes in the U.S. Senate reflect the preferences of voters but not of nonvoters), Kim Quaile Hill et al., *Lower-Class Mobilization and Policy Linkage in the U.S. States*, 39 AM. J. POL.

ernment leaders seems inherently unfair and might violate the Equal Protection Clause.<sup>20</sup> Given how limited the franchise was until the twentieth century, and the low rates of voter turnout in recent decades, it is likely that no U.S. President has ever received a majority of the votes of the American adult population.<sup>21</sup> In the 1984 election, for example, Ronald Reagan won a “landslide” victory, but received the votes of only 32.9% of the potential electorate.<sup>22</sup> The preferences of the other 67.1% of eligible voters were either for a different candidate or simply left unaccounted for.

There are serious questions about how legitimate a government is when the vast majority of citizens have not elected it.<sup>23</sup> This concern goes beyond the question of whether or not low voter turnout affects substantive policy outcomes (which is unclear<sup>24</sup>). More fundamentally, there is a serious tension with the understanding “that within our constitutional tradition, democracy is prized because of the value of collec-

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SCI. 75 (1995) (finding that underrepresentation of lower-class voters leads to lower state welfare benefits), and Kim Quaile Hill & Jan E. Leighly, *The Policy Consequences of Class Bias in State Electorates*, 36 AM. J. POL. SCI. 351 (1992) (same), with Christopher R. Ellis et al., *The Dynamic Consequences of Nonvoting in American National Elections*, 59 POL. RES. Q. 227 (2006) (finding that Congress does not ignore the preferences of nonvoters). The results of the Ellis study may simply be explained by the fact that there was little difference between the preferences of voters and nonvoters over the time period analyzed. See *id.* at 229. There is no guarantee, however, that the two groups will remain in sync indefinitely. Another study with a similar conclusion, finding that even perfect voter turnout would affect the outcome in only a few Senate elections, noted that this result might not hold because of the variance in the gap between voters’ and nonvoters’ preferences over time. See Jack Citrin et al., *What if Everyone Voted? Simulating the Impact of Increased Turnout in Senate Elections*, 47 AM. J. POL. SCI. 75 (2003). Furthermore, voters and nonvoters might have different priorities even if they share similar preferences, and elected officials might more frequently address voters’ priorities. See Ellis et al., *supra*, at 233.

<sup>20</sup> A similar issue involving the constitutionality of statistical sampling arose prior to the 2000 U.S. Census, when a controversy arose over whether the U.S. Census Bureau could use statistical sampling techniques to calculate census data or whether it had to rely on a raw count of individuals. See *U.S. Will Not Adjust 2000 Census Figures*, N.Y. TIMES, Mar. 7, 2001, at A16. Because the raw count would undercount certain demographic groups, some of the Bureau’s statistical experts favored sampling. See U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, UPDATED SUMMARY: CENSUS 2000 OPERATIONAL PLAN 1 (1999), available at <http://www.census.gov/dmd/www/pdf/2000plan.pdf>. Two groups of plaintiffs filed suit in federal court, alleging that the proposed sampling techniques violated the Census Clause, U.S. CONST. art. I, § 2, cl. 3. The cases reached the Supreme Court, which held, without reaching the constitutional issue, that statutory restrictions prevented the Bureau from using statistical sampling techniques for purposes of reapportionment. See *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 334 (1999).

<sup>21</sup> Cf. Matsler, *supra* note 12, at 954 (noting that the winners of the 1992, 1996, and 2000 presidential elections received votes from less than 25% of the electorate).

<sup>22</sup> CSAE, *supra* note 4, at 2.

<sup>23</sup> Cf. JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 83 (J.M. Dent & Sons 1923) (1762) (“As soon as any man says of the affairs of the state *What does it matter to me?* the state may be given up for lost.”).

<sup>24</sup> See *supra* note 19.

tive self-governance,<sup>25</sup> which is as much about procedure as it is about substance.<sup>26</sup> Indeed, the level of voter turnout as a percentage of eligible voters in many recent elections would not even be sufficient to constitute a quorum for some of the most important American political institutions.<sup>27</sup> But the most serious questions arise not from the sheer number of citizens whose voices are not counted,<sup>28</sup> but from the fact that certain groups are underrepresented.<sup>29</sup> Partly because of disparities in turnout rates by demographic categories, the center of political gravity has shifted toward the wealthiest white Americans.<sup>30</sup> Government may not be giving adequate consideration to the priorities of the poor or of racial minorities.<sup>31</sup>

Many would dismiss these concerns about underrepresentation by pointing out that no one is *denying* the rights of nonwhites or the poor to vote; rather, individuals in those demographic groups are simply choosing not to exercise their rights. If they were sufficiently dissatisfied with the government, then presumably they would change their minds and vote. Given the rational basis for nonvoting discussed above, however, individual dissatisfaction is hardly guaranteed to encourage voting. Even a dissatisfied individual will be unlikely to vote if she realizes that her vote has a negligible chance of affecting the outcome of an election. Thus, even among relatively distinct demographic groups, a majority of whose members may be seriously dissat-

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<sup>25</sup> Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CAL. L. REV. 429, 438 (1998).

<sup>26</sup> See Hasen, *supra* note 6, at 2175.

<sup>27</sup> A majority of the members of either house of Congress must be present in order for the house to do any business. U.S. CONST. art. I, § 5, cl. 1. By statute, six of the nine justices of the Supreme Court must be present in order for the Court to do business. 28 U.S.C. § 1 (2000). In contrast, voter turnout during midterm elections is regularly below 50%. See Int'l Inst. for Democracy & Electoral Assistance, Country View: United States, [http://www.idea.int/vt/country\\_view.cfm?CountryCode=US](http://www.idea.int/vt/country_view.cfm?CountryCode=US) (last visited Nov. 10, 2007). Even in the last two presidential elections, turnout was less than 50% of the voting-age population. See *id.* However, this does not take into account the number of noncitizens, who are ineligible to vote, among the voting-age population. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, VOTING AND REGISTRATION IN THE ELECTION OF 2004, at 3 (2006), available at <http://www.census.gov/prod/2006pubs/p20-556.pdf>.

<sup>28</sup> Although increasing the number of voters would not necessarily prevent elections as close as the 2000 presidential election in Florida, as with any poll, an increase in the sample size will, up to a certain point, appreciably reduce the probability that an election is a fluke — that is, that the official outcome is not the true outcome, but simply a result of random error.

<sup>29</sup> The U.S. Census Bureau consistently reports that voters are more likely than nonvoters to be white, old, well-educated, and wealthy. See, e.g., U.S. CENSUS BUREAU, *supra* note 27, at 10 tbl.C; U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, VOTING AND REGISTRATION IN THE ELECTION OF 2000, at 6 tbl.B (2002), available at <http://www.census.gov/prod/2002pubs/p20-542.pdf>.

<sup>30</sup> See MICHAEL LIND, THE NEXT AMERICAN NATION 183–84 (1995).

<sup>31</sup> For a discussion of whether the underrepresentation of the poor and of racial minorities among voters has an effect on electoral or policy outcomes, see *supra* note 19.

ified with the national political leadership, collective action problems pose a substantial obstacle to any attempts to increase voter turnout.

## II. SOME OF THE BENEFITS OF COMPULSORY VOTING

The most obvious benefit of compulsory voting is that it would lead to higher voter turnout. The increase in voter turnout from compulsory voting laws has been established consistently.<sup>32</sup> Because of the important ideal of self-governance in American political culture,<sup>33</sup> increasing voter turnout is a benefit in its own right. It is also possible that higher voter turnout, and an electorate that is more representative of the American population, would actually change electoral and policy outcomes in ways that better reflect aggregate preferences.<sup>34</sup>

In addition to the direct effect of compulsory voting on turnout, there are also several indirect benefits. First, compulsory voting would reduce the role of money in politics.<sup>35</sup> Political parties would not spend as much money on their get-out-the-vote efforts since high turnout would already be ensured and would be fairly inelastic.<sup>36</sup> Some of the get-out-the-vote money could be shifted to other forms of campaign spending, but not all of it. A significant amount of spending on getting out the vote comes from groups known as 527s (a reference to the tax code) and nonpartisan groups that are not subject to campaign finance laws.<sup>37</sup> These groups are limited in their abilities to campaign expressly in favor of candidates.<sup>38</sup> Presumably, these organizations would shift some funds from getting out the vote to issue ads (which are permissible), but the diminishing marginal effectiveness of those ads would limit this. With this implicit limit on spending, politicians and parties might focus somewhat less on fundraising and be less beholden to donors.<sup>39</sup>

<sup>32</sup> See Hasen, *supra* note 6, at 2170–72; Lijphart, *supra* note 10, at 8–9.

<sup>33</sup> See Post, *supra* note 25, at 438.

<sup>34</sup> See *supra* note 19.

<sup>35</sup> Lijphart, *supra* note 10, at 10; Matsler, *supra* note 12, at 965.

<sup>36</sup> See Matsler, *supra* note 12, at 965. One study found that state parties spend 30–40% of their budgets on “direct voter contact,” including get-out-the-vote efforts. See Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, Strong Parties*, 100 COLUM. L. REV. 598, 616 (2000). In the 2004 election, more than \$350 million was spent on getting out the vote. Michael Moss & Ford Fessenden, *Interest Groups Mounting Costly Push To Get Out Vote*, N.Y. TIMES, Oct. 20, 2004, at A1.

<sup>37</sup> See Moss & Fessenden, *supra* note 36.

<sup>38</sup> See Benjamin S. Feuer, Comment, *Between Political Speech and Cold, Hard Cash: Evaluating the FEC’s New Regulations for 527 Groups*, 100 NW. U. L. REV. 925, 930 (2006) (discussing ramifications for 527 groups who expressly support or oppose a candidate for federal office); Moss & Fessenden, *supra* note 36 (noting that “nonpartisan groups cannot promote a candidate . . . without endangering their tax status”).

<sup>39</sup> On the pernicious influence of money in politics, see, for example, *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976) (per curiam); ELIZABETH DREW, POLITICS AND MONEY 59 (1983).

Another indirect benefit of compulsory voting is that it might lead to the kinds of changes in American political culture that could increase political awareness and engagement. A compulsory voting regime would change the ways in which candidates, political parties, and other political groups develop campaign strategies. For example, compulsory voting might lead to fewer negative campaigns featuring attack ads because such ads generally succeed by selectively *lowering* turnout among targeted groups.<sup>40</sup> Once the prospect of significantly lower voter turnout is removed, candidates would presumably reduce or eliminate the use of this tactic and focus on different, perhaps qualitatively superior, tactics.<sup>41</sup>

More generally, the current political discourse has developed in a system in which relatively few people vote and those who do have relatively homogeneous demographic characteristics. Political organizations have developed campaign messages and strategies that are successful at appealing to those voters. Compulsory voting would bring a new population into play, and would force political actors to make changes in their campaign methods in order to take these new voters into account — whether those changes involve their substantive policy positions or the means of communicating those positions.

Compulsory voting thus has the potential over time to alleviate some of the very causes of the current low levels of voter turnout. By triggering a shift in political discourse, compulsory voting would create a virtuous cycle that would alleviate the underlying causes of voter apathy. First, as already mentioned, compulsory voting will reduce the negative tone of campaigns that discourages some potential voters.<sup>42</sup> Second, compulsory voting can make politics less partisan and divisive, since currently the voting population is much more partisan than the electorate at large.<sup>43</sup> If the entire population votes, there will be a more balanced representation of the political spectrum. Finally, compulsory voting can lead to increased government relevance. By bringing in groups that are underrepresented among those who are currently likely to vote, compulsory voting will force politicians to shift their focus to different sets of issues. People who are brought into the democratic process will increasingly find that the government agenda addresses their interests, and this recognition could lead to a greater

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<sup>40</sup> STEPHEN ANSOLABEHRE & SHANTO IVENGAR, *GOING NEGATIVE* (1995).

<sup>41</sup> Negative campaign ads could still be effective under a compulsory voting regime by influencing voters' choices as to whom to vote for, even if not their choices regarding whether to vote.

<sup>42</sup> Although voter apathy is not the main reason for low voter turnout, *see infra* notes 115–16 and accompanying text, it is a substantial factor. According to the U.S. Census Bureau, more than 20% of nonvoters reported either a lack of interest or a dislike of the candidates or issues as their reason for not voting. *See* U.S. CENSUS BUREAU, *supra* note 27, at 15 tbl.F.

<sup>43</sup> *See* Keiko Ono, *Polarization in Congress and Voter Turnout: An Electoral Connection?* 15–16 (2003) (unpublished manuscript, on file with the Harvard Law School Library).

appreciation of the importance of democratic government. This may increase the utility people get from fulfilling their civic duty to vote, which would in turn lead more people to see their rational choice as voting, rather than staying at home on Election Day.<sup>44</sup>

### III. PHILOSOPHICAL AND LEGAL OBJECTIONS TO COMPULSORY VOTING

Despite the likely benefits of instituting a compulsory voting regime, there are numerous obstacles to doing so. Most of these reflect philosophical and legal conceptions (and some misconceptions) about the nature of American democracy and the nature of rights. This Part will address the four most important legal issues pertaining to compulsory voting in America: whether the right to vote implies an inverse right *not* to vote; whether compulsory voting is an undue burden on individual liberty; whether compulsory voting would violate the First Amendment by compelling speech; and whether Congress has the power to enact compulsory voting laws.<sup>45</sup>

#### A. *Is There a Right Not To Vote?*

One of the chief objections to any compulsory voting law is that it violates a purported right *not* to vote.<sup>46</sup> Many of our most closely

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<sup>44</sup> There is also some evidence that voting is habitual, and that those who vote early in their adult lives are likely to continue to do so. See FRANKLIN, *supra* note 6, at 60–61. This suggests that compulsory voting can have a dramatic, long-term effect on voter turnout if it is enforced strictly for several years, even if enforcement drops off once the law has entrenched the habit of voting. The role of habit also offers an explanation for the “stickiness” of the impact of compulsory voting on voter turnout even after the laws are repealed. See Matsler, *supra* note 12, at 967–68 (discussing explanations for the persistence of high voter turnout in Italy after its repeal of compulsory voting laws). But see *infra* note 118 (discussing evidence that the repeal of compulsory voting laws in Switzerland led to a decrease in voter turnout).

<sup>45</sup> American courts, including the Supreme Court, have almost never had to confront these legal issues because there has been no real attempt to institute compulsory voting in the United States. Georgia and Virginia had statutes imposing fines for not voting in the eighteenth century, but it appears that the statutes were never enforced, and thus never came under judicial scrutiny. Hasen, *supra* note 6, at 2174 n.154. North Dakota and Massachusetts both amended their constitutions around the turn of the twentieth century to allow for compulsory voting, but the state legislatures never enacted statutes to implement it. See Jackman, *supra* note 9, at 16,315. Perhaps the only case to address the constitutionality of compulsory voting directly was *Kansas City v. Whipple*, 38 S.W. 295 (Mo. 1896). In that case, the Supreme Court of Missouri held that a tax that was imposed on all citizens who did not vote violated the “free exercise of the right of suffrage.” *Id.* at 297 (emphasis omitted). The court did not, however, cite any particular constitutional provision that was violated by the tax. See John W. Dean, *Is It Time To Consider Mandatory Voting Laws?*, FINDLAW, Feb. 28, 2003, <http://writ.corporate.findlaw.com/dean/20030228.html> (discussing *Whipple*). The decision presumably reflects some of the concerns about compulsory voting that this section discusses.

<sup>46</sup> See, e.g., Anthony Ciccone, *The Constitutional Right To Vote is Not a Duty*, 23 HAMLIN J. PUB. L. & POL’Y 325, 347–53 (2002); Jeffrey A. Blomberg, Note, *Protecting The Right Not To Vote from Voter Purge Statutes*, 64 FORDHAM L. REV. 1015 (1995).



cherished rights reflect a choice<sup>47</sup> — to speak out, or not to speak out; to worship, or not to worship; and so on. This gives rise to the notion that a right to do something inherently includes the right not to do that thing. It is the individual's choice to exercise a right or not, and the state is simply supposed to stay out of it altogether. Thus, it seems almost axiomatic that an individual who possesses a right has the absolute power to waive that right (which is functionally equivalent to having an inverse right).

However, the very idea that a right, by definition, can be waived is false.<sup>48</sup> Numerous rights cannot be waived;<sup>49</sup> and, although many others can, this still does not imply the general existence of inverse rights. The Supreme Court observed this in *Singer v. United States*,<sup>50</sup> in which it upheld a federal rule that requires government consent in order for a criminal defendant to waive his right to a jury trial.<sup>51</sup> The Court declared that “[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right,”<sup>52</sup> and cited several examples of this principle in the context of a criminal defendant's Sixth Amendment rights: the right to a public trial, the right to be tried in the state and district where the crime was committed, and the right to confront the government's witnesses.<sup>53</sup>

The reason that a right does not imply its inverse is that there are competing interests at stake. An individual right may serve both a public and a private interest, and creating an absolute individual right of waiver would leave unprotected the public interest that the right serves.<sup>54</sup> The right to trial by jury is a protection of the individual

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<sup>47</sup> See Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1387 (1984) (“The case for recognition of waivers rests on the conviction that constitutional rights protect individual choice.”).

<sup>48</sup> *Id.* at 1387–88.

<sup>49</sup> See, e.g., 29 U.S.C. §§ 651–678 (2000) (right to workplace safety); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740 (1981) (right to a minimum wage); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51–52 (1974) (statutory right of equal employment opportunities); *Pate v. Robinson*, 383 U.S. 375, 384–86 (1966) (right of criminal defendant to be tried only when competent). The doctrine of unconstitutional conditions also places limits on an individual's ability to waive constitutional rights in exchange for government benefits. See, e.g., *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 269–70 (1974) (striking down durational residency requirement as impermissibly conditioning the discretionary benefit of free medical care on waiver of the right to interstate travel); *Perry v. Sindermann*, 408 U.S. 593, 597–98 (1972) (holding that government employees may not waive their right to free speech as a condition of employment); *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that a state cannot condition the availability of unemployment benefits on a beneficiary's waiving her right to the free exercise of religion).

<sup>50</sup> 380 U.S. 24 (1965).

<sup>51</sup> See *id.* at 24–26; see also FED. R. CRIM. P. 23(a).

<sup>52</sup> *Singer*, 380 U.S. at 34–35.

<sup>53</sup> *Id.* at 35.

<sup>54</sup> See Kreimer, *supra* note 47, at 1387.

from the power of the state,<sup>55</sup> but it also serves an important collective function by promoting the accuracy and legitimacy of criminal trials.<sup>56</sup> There is no inverse right to a bench trial because this would focus only on the individual interest and would ignore the collective interest. Similarly, the collective interest in having open trials prevents a defendant from turning his right to a public trial into the inverse right to a private trial.

Thus, if there is a strong enough collective interest at stake with voting, this should prevent the individual right to vote from becoming an inverse right not to vote. Voting is often viewed as an individual privilege, but it is also true that there are collective benefits from the participation of citizens in elections. Because all Americans benefit from having representative democracy as a form of government, all Americans benefit when others exercise the right to vote.<sup>57</sup> The individual act of voting is essential to the collective's ability to have democratic government, and as such should not be waivable.

### B. *Compulsion and Individual Liberty*

A powerful objection to compulsory voting, more philosophical than doctrinal, is that it is an interference with individual liberty.<sup>58</sup> The United States is not, however, a society of purely libertarian ideals. There are numerous instances when the government can legitimately compel individuals to fulfill some kind of duty, generally when there is a market imperfection that would result in too much shirking in the absence of compulsion. For example, because of the importance of having a criminal jury that represents a fair cross-section of the community,<sup>59</sup> the government may compel jury service.<sup>60</sup> Similarly, if paying income taxes were voluntary, many Americans would simply choose not to pay and become free riders instead. To overcome this

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<sup>55</sup> *Singer*, 380 U.S. at 31.

<sup>56</sup> See *Patton v. United States*, 281 U.S. 276, 312 (1930) (noting the importance of "the maintenance of the jury as a fact-finding body in criminal cases").

<sup>57</sup> This is not meant to suggest that every individual American benefits when every single other American votes. A conservative Republican may not benefit from the vote of a liberal Democrat. Rather, the external benefits of voting are collective, in that voting allows individuals to have democratic government, as opposed to some form of authoritarian government or anarchy. A large electorate also provides benefits of aggregated information. See *infra* notes 108–10 and accompanying text.

<sup>58</sup> See H.B. Mayo, *A Note on the Alleged Duty To Vote*, 21 J. POL. 319, 320, 323 (1959); see also Michael G. Colantuono, Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473, 1503 (1987).

<sup>59</sup> See *Duren v. Missouri*, 439 U.S. 357, 364–66 (1979).

<sup>60</sup> If the government relied on market forces to assemble juries, by raising the amount of monetary compensation for service, the resulting jury pools would not be a fair cross-section of the community. The jury would be socioeconomically skewed, because individuals with higher incomes would value their time more highly and thus would be less likely to serve.

problem, paying income taxes is required by law. Selective service is another example. The government has the power to require military service,<sup>61</sup> because in times of war relying on voluntary service may not be sufficient.<sup>62</sup> In all of these examples, it is obvious that compulsion is necessary to avoid some kind of market failure. Jury service, tax-paying, and military service during times of war would fall far below the socially optimal levels without some kind of government action. Voting neatly fits into the mold of these examples. Voting is subject to a market failure due to the existence of a serious collective action problem. If left to individual choice, the level of voting theoretically will be below the socially optimal level. Like jury service, taxes, and the draft, compulsory voting is a legitimate way to solve such a market failure.

### *C. Compulsory Voting and the First Amendment Prohibition of Compelled Speech*

Unlike some rights, the First Amendment right to free speech does imply an inverse right not to be compelled to speak. Sometimes remaining silent is a statement itself. The choice not to vote can be a political statement, subject to First Amendment protection,<sup>63</sup> and compulsory voting inhibits this statement. According to this argument, by forcing the nonvoting population into conformity with the set of choices that they get at the polls, we are silencing the more informative statement they make by not participating. Not only does this silencing raise First Amendment concerns, but it also raises doubts about how compulsory voting can make government more representative if certain voters feel better represented by staying out of the electoral process altogether.

The constitutional validity of this First Amendment argument is doubtful.<sup>64</sup> The expressive function of elections is secondary to their function in selecting government leaders.<sup>65</sup> The Supreme Court has “repeatedly upheld reasonable, politically neutral regulations that have

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<sup>61</sup> See *Selective Draft Law Cases*, 245 U.S. 366, 376–78 (1918).

<sup>62</sup> See Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Deletions*, 56 STAN. L. REV. 755, 827–30 (2004).

<sup>63</sup> See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (applying the First Amendment to a claim of infringement on the right to vote).

<sup>64</sup> See Hasen, *supra* note 6, at 2176 n.163; Matsler, *supra* note 12, at 975.

<sup>65</sup> In *Burdick v. Takushi*, 504 U.S. 428, the Supreme Court stated: [T]he function of the election process is “to winnow out and finally reject all but the chosen candidates,” not to provide a means of giving vent to “short-range political goals, pique, or personal quarrel[s].” Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently. *Id.* at 438 (alteration in original) (citations omitted) (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974)).

the effect of channeling expressive activity at the polls.”<sup>66</sup> The Court has specifically upheld limited burdens on the right to vote for the candidate of one’s choosing in declaring that a state’s prohibition of voting for write-in candidates was valid.<sup>67</sup>

A compulsory voting regime differs from a prohibition on write-in votes, however, because it does more than just limit choice — compulsory voting literally compels a choice of some kind. The Supreme Court recognized an individual right not to be compelled by the government to express an idea that one does not agree with in *West Virginia State Board of Education v. Barnette*.<sup>68</sup> Requiring someone to vote for a particular cause or candidate would clearly violate the First Amendment, but requiring someone to vote for the candidate of his or her choosing is viewpoint neutral.<sup>69</sup> A person is not being forced to express any particular viewpoint when a law requires him to cast a vote for someone of his own choosing — anyone really, given the opportunity to vote for a write-in candidate, which exists in most states.<sup>70</sup>

Viewpoint-neutral laws trigger an intermediate level of scrutiny.<sup>71</sup> Although there have been several formulations of the intermediate scrutiny test in the First Amendment context,<sup>72</sup> the key elements of the test are that the law must further a substantial government interest and that it must be narrowly tailored to serve that interest.<sup>73</sup> Compulsory voting laws serve the interest of improving and legitimizing democratic government, which this Note assumes would qualify as substantial. More complicated is the requirement of narrow tailoring.

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

<sup>67</sup> *Id.* at 441 (“[A] prohibition on write-in voting will be presumptively valid, since any burden on the right to vote for the candidate of one’s choice will be light and normally will be counterbalanced by the very state interests supporting the ballot access scheme.”); see also Hasen, *supra* note 6, at 2176 n.163.

<sup>68</sup> 319 U.S. 624, 641–42 (1943) (holding that a state could not require children in public schools to salute and pledge allegiance to the flag).

<sup>69</sup> See *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 682–83 (1998) (holding that a public broadcasting station’s decision to exclude a minor-party candidate from a televised debate was viewpoint neutral).

<sup>70</sup> See Nancy L. Rosenblum, *Primus Inter Pares: Political Parties and Civil Society*, 75 CHL-KENT L. REV. 493, 509 (2000).

<sup>71</sup> See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70–72 (1976) (opinion of Stevens, J.); Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 737–38 (1980) (describing the Court’s analysis of viewpoint-neutral laws as intermediate scrutiny); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 128 n.102 (1981) (using the term “relaxed” scrutiny).

<sup>72</sup> See Kimberly K. Smith, Comment, *Zoning Adult Entertainment: A Reassessment of Renton*, 79 CAL. L. REV. 119, 133–34 & n.93 (1991).

<sup>73</sup> See *City of Renton v. Playtime Theatres*, 475 U.S. 41, 50, 52 (1986); *United States v. O’Brien*, 391 U.S. 367, 377 (1968). For a discussion of how the precise formulations of the test in *Renton* and *O’Brien* differ, see Smith, *supra* note 72, at 134–36.

A compulsory voting regime could be narrowly tailored by allowing people to abstain (submitting a ballot without registering a vote), or perhaps to obtain a “conscientious objector” exemption from even submitting a ballot.<sup>74</sup> This exemption would satisfy the requirement of narrow tailoring because it would leave open the same opportunities for expression that exist under the current system of voluntary voting.<sup>75</sup> Such an exemption could be made available to anyone who fills out a simple form and is willing to sign a statement indicating that he or she chooses not to vote for political or religious reasons. This requirement would at least ensure that those who are not voting are doing so as a matter of political expression or religious belief and not because of the collective action problem inherent in voting.<sup>76</sup>

While any compulsory voting proposal would probably need to have a conscientious objector exemption in order to be politically palatable, the value of the statements individuals make by not voting is actually quite limited. If not voting is meant to be a statement of dissatisfaction with the candidates and their policies, then it is not a very effective one. First, the option of voting for a write-in candidate gives people choices beyond the candidates listed on the ballot. Second, even if a person does not particularly like any of the candidates, dissatisfaction is not the same as indifference. Many nonvoters presumably have *some* preference as to which candidate is elected even if none of the candidates is an ideal choice. If a potential voter is truly indifferent, then being forced to cast a vote for one or another candidate is no better or worse to that person than abstaining. There may be other political statements that people make by not voting, such as questioning the legitimacy of democratic government.<sup>77</sup> There are, of course, many other outlets through which these statements can be made. Nevertheless, including a conscientious objector exemption in a compulsory voting regime can effectively subdue concerns about curbing political expression while still remedying the collective action problem of voting.<sup>78</sup>

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<sup>74</sup> Hasen, *supra* note 6, at 2175–76; Lisa Hill, *Compulsory Voting: Residual Problems and Potential Solutions*, 37 AUSTL. J. POL. SCI. 437, 443–48 (2002).

<sup>75</sup> See Matsler, *supra* note 12, at 974–76 (reaching a similar conclusion).

<sup>76</sup> Another response to the First Amendment argument is that if mandating the act of voting in an election is unconstitutionally compelled speech, then jury duty would violate the First Amendment as well. Jurors are at some point required to cast their vote so that the jury may deliver its verdict. Jurors can avoid this only by maintaining in good faith that they are unable to reach a decision, or “hung.” The availability of a conscientious objector exemption would be a similar escape valve for compulsory voting.

<sup>77</sup> See Hill, *supra* note 74, at 444–45 (discussing some of the rationales that conscientious objectors in Australia have offered).

<sup>78</sup> See *id.* at 445–47.

*D. Congressional Power To Enact Compulsory Voting Laws*

Whether or not compulsory voting would violate the First Amendment or some implied right not to vote, the legal feasibility of compulsory voting depends in large part on the existence of congressional power to enact compulsory voting laws. This section addresses whether Congress *could* enact compulsory voting laws, but puts aside the question of whether Congress *would* do so.<sup>79</sup> There are several congressional powers that plausibly could serve as a basis for compulsory voting laws. Congress's power to regulate federal elections could serve as a basis for compulsory voting in federal elections, its power to enforce the Reconstruction Amendments could serve as a basis for compulsory voting in both federal and state elections, and the Republican Guarantee Clause could serve as a basis for Congress to compel voting in state elections. It is worth noting, moreover, that even if Congress cannot constitutionally enact compulsory voting laws, individual states have the authority to do so because of the powers vested in them by Article II, Section 1, as well as their residual powers under the Tenth Amendment.

1. *Congress's Powers To Regulate National Elections.* — Congress has fairly broad power to regulate congressional elections.<sup>80</sup> The extent of Congress's power to regulate presidential elections, however, is less clear.<sup>81</sup> As a purely textual matter, Congress's power to regulate presidential elections is much too limited to justify the enactment of national compulsory voting laws. Article II, Section 1 gives state legislatures the power to determine the method of selecting electors in the Electoral College.<sup>82</sup> Nothing in the Constitution requires state legislatures to even grant their citizens the right to vote for presidential electors.<sup>83</sup> Congress's power over presidential elections is limited to "determin[ing] the Time of chusing the Electors, and the Day on which they shall give their Votes."<sup>84</sup> Since Congress cannot compel state leg-

<sup>79</sup> The consensus is that Congress is unlikely to enact compulsory voting laws. See, e.g., MARTIN P. WATTENBERG, WHERE HAVE ALL THE VOTERS GONE? 165 (2002); Hasen, *supra* note 6, at 2173; Matsler, *supra* note 12, at 976.

<sup>80</sup> See U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." (emphasis added)).

<sup>81</sup> Stephanie Phillips, Comment, *The Risks of Computerized Election Fraud: When Will Congress Rectify a 38-Year-Old Problem?*, 57 ALA. L. REV. 1123, 1156–57 (2006).

<sup>82</sup> U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . .").

<sup>83</sup> See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.").

<sup>84</sup> U.S. CONST. art. II, § 1, cl. 4.

islatures to let *anyone* vote in presidential elections under its Article II powers, Congress seemingly cannot use these powers to compel *everyone* to vote.

Despite the text of Article II, the Supreme Court has read Congress's power to regulate presidential elections broadly in light of the Necessary and Proper Clause.<sup>85</sup> In *Buckley v. Valeo*,<sup>86</sup> the Court observed that it had "recognized broad congressional power to legislate in connection with the elections of the President and Vice President."<sup>87</sup> Nevertheless, the Court generally has sustained congressional regulation of presidential elections only when the regulations were aimed at preventing violence, fraud, or corruption.<sup>88</sup> Compulsory voting laws pose a different issue and would intrude more clearly on "exclusive state power"<sup>89</sup> to determine the manner of appointment of presidential electors.

Congress's Article II powers are thus not a clear source of authority for enacting compulsory voting laws in presidential elections, although Article I would allow Congress to compel voting in congressional elections. As a practical matter, it may not be important whether Congress has the power to directly compel voting in presidential elections since it may do so indirectly. This is because Americans vote for presidential electors at the same time that they vote for their congressional representatives on Election Day. If Congress forces people to show up at the polls for congressional elections, most people presumably would cast a vote for a presidential candidate while they were there.<sup>90</sup>

2. *Congress's Power To Enforce the Reconstruction Amendments.* — For presidential and state elections, a plausible candidate for congressional authority to compel voting is Congress's power to enforce the Reconstruction Amendments, and specifically the Fifteenth Amendment's guarantee that "[t]he right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude."<sup>91</sup>

<sup>85</sup> *Id.* art. I, § 8, cl. 18.

<sup>86</sup> 424 U.S. 1 (1976) (per curiam).

<sup>87</sup> *Id.* at 14 n.16 (citing *Burroughs v. United States*, 290 U.S. 534 (1934)); *see also id.* at 247 (Burger, C.J., concurring in part and dissenting in part) ("I do not question the power of Congress to regulate elections . . ."); *id.* at 257 (White, J., concurring in part and dissenting in part) ("It is accepted that Congress has power under the Constitution to regulate the election of federal officers, including the President and the Vice President.")

<sup>88</sup> *See, e.g., id.* at 23–28 (per curiam) (upholding limits on campaign contributions); *Burroughs*, 290 U.S. at 544 (upholding legislation that imposed reporting requirements on political committees).

<sup>89</sup> *Burroughs*, 290 U.S. at 545.

<sup>90</sup> They would also be likely to vote in state elections that occur on Election Day.

<sup>91</sup> U.S. CONST. amend. XV, § 1. Congress is given the power to enforce this guarantee "by appropriate legislation" in section 2 of the amendment. Congress could probably get as far by

In *City of Boerne v. Flores*,<sup>92</sup> the Supreme Court cut back substantially on Congress's formerly broad power to enforce the Reconstruction Amendments. Although the Court maintained that Congress has the power to impose prophylactic remedies, it held that Congress may do so only if there is "congruence and proportionality" between the injury to be remedied and the means adopted to do so.<sup>93</sup> There is no doubt that the current voting system in the United States results in the underrepresentation of racial minorities. But the Reconstruction Amendments prohibit only *intentional* discrimination.<sup>94</sup> It would be difficult to link all or even most of the underrepresentation of racial minorities among voters to intentional efforts to disenfranchise them on account of their race.<sup>95</sup> Without a concrete and well-documented problem of intentional discrimination by government officials against racial minorities in the voting context, it is unlikely that compulsory voting laws would meet *Boerne's* "congruence and proportionality" test.

3. *Congress's Power Under the Republican Guarantee Clause.* — Article IV, Section 4, Clause 1 states, "The United States shall guarantee to every State in this Union a Republican Form of Government."<sup>96</sup> Legal scholars have offered a varied set of interpretations of this clause, known as the Republican Guarantee Clause,<sup>97</sup> but there is some consensus that the clause guarantees majoritarian democratic government.<sup>98</sup>

The Republican Guarantee Clause is not, however, an open-ended invitation for Congress to structure state governments along whatever

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using its powers to enforce the Equal Protection Clause of the Fourteenth Amendment. See U.S. CONST. amend. XIV, § 5. However, the particular focus on voting in the Fifteenth Amendment makes it more apt than the Fourteenth as a source of authority for Congress to compel voting.

<sup>92</sup> 521 U.S. 507 (1997).

<sup>93</sup> *Id.* at 519–20.

<sup>94</sup> See *Washington v. Davis*, 426 U.S. 229, 239–42 (1976).

<sup>95</sup> This does not mean that intentional discriminatory conduct has no effect on the underrepresentation of racial minorities in the electorate. For instance, in the 2000 presidential election, there were widespread reports of efforts to intimidate black voters. See, e.g., DOUGLAS KELLNER, GRAND THEFT 2000: MEDIA SPECTACLE AND A STOLEN ELECTION 33, 106 (2001).

<sup>96</sup> U.S. CONST. art. IV, § 4, cl. 1.

<sup>97</sup> For a summary of the various interpretations, see Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 752–60 (1994); and Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 22 n.122 (1988).

<sup>98</sup> See, e.g., Amar, *supra* note 97, at 762; Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037, 1063 (2000); William T. Mayton, *Direct Democracy, Federalism and the Guarantee Clause*, 2 GREEN BAG 2d 269, 271 (1999); see also THE FEDERALIST NO. 39, at 237 (James Madison) (Clinton Rossiter ed., 1961) (defining republican government as "a government which derives all its powers directly or indirectly from the great body of the people").



lines it considers to be most consistent with democratic government. The original understanding of the clause was that it would “secure each of the states the autonomy necessary to maintain a republican form of government. The clause, therefore, serves as an essential constitutional limit on federal interference with state autonomy.”<sup>99</sup> Some Supreme Court opinions also reflect the view that the Republican Guarantee Clause protects states’ autonomy.<sup>100</sup>

In light of this understanding, the clause could only support congressional enactment of compulsory voting laws for state elections if current regimes of voluntary voting lie outside “the zone of popular sovereignty.”<sup>101</sup> It would be very difficult to meet this high bar, even in light of the concerns laid out in Part I of this Note, given that voluntary voting has been the norm in the United States since the very first elections. The clause is thus not a likely source for congressional authority to enact compulsory voting laws.<sup>102</sup>

#### IV. PRACTICAL AND POLITICAL PROBLEMS WITH COMPULSORY VOTING

##### A. *The Problem of Uninformed or Underinformed Voting*

If compulsory voting laws brought in a pool of uninformed or underinformed voters, then they could conceivably worsen political outcomes.<sup>103</sup> Underlying this concern is the assumption that many or most nonvoters are either disengaged from or unaware of political events. One response to the underinformed-voter objection is to observe that it actually raises larger questions about principles of “universal”<sup>104</sup> suffrage. If a concern with underinformed voters is the basis for opposition to compulsory voting, then this concern does not simply justify the status quo of voluntary voting. Rather, it suggests that only

<sup>99</sup> Merritt, *supra* note 97, at 22–23 (footnote omitted).

<sup>100</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 918–19 (1997); *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) (“[T]he authority of the people of the States to determine the qualifications of their most important government officials . . . is a power . . . guaranteed them by [the Republican Guarantee Clause].”).

<sup>101</sup> Mayton, *supra* note 98, at 271.

<sup>102</sup> Although the Supreme Court has found claims under the Republican Guarantee Clause to be nonjusticiable in the past, see *New York v. United States*, 505 U.S. 144, 184 (1992), the fact that opponents might be unable to bring a successful challenge to compulsory voting laws under the clause in federal court does not relieve Congress of its independent obligation to remain faithful to the Constitution, see U.S. CONST. art. VI, cl. 3.

<sup>103</sup> See Hasen, *supra* note 6, at 2174 (“Perhaps the strongest instrumental argument against compulsory voting is that it would lead to poorer decisionmaking by the electorate.”); see also *id.* at 2175.

<sup>104</sup> Since voting is limited to citizens, age eighteen and over, often with no prior felonies, it is not literally universal.

those who somehow demonstrate a certain minimum degree of awareness and understanding of political issues should be allowed to vote. If, instead, the United States is to remain committed to having near-universal suffrage, then the problem of an underinformed citizenry should be addressed head-on through educational or other measures, rather than held up as support for voluntary voting.<sup>105</sup>

The assumption that nonvoters are politically ignorant is also questionable. First, it is perfectly understandable for even the most politically informed citizens to refrain from voting due to the negligible probability that their vote will influence the outcome and to the non-negligible private costs they incur by voting.<sup>106</sup> Second, as an empirical matter, the assumption that most nonvoters are politically ignorant is inaccurate. For example, a study of the 1990 election for the U.S. Senate found that only 18% of nonvoters fit the stereotype of individuals who are “oblivious to the campaign and . . . better off staying away from the polls.”<sup>107</sup>

Even if current nonvoters are less informed than current voters, their votes might still improve electoral outcomes. This is simply an application of the Condorcet Jury Theorem<sup>108</sup> (CJT). Assuming that there is a “correct” outcome to an election,<sup>109</sup> then as long as the population of nonvoters will choose that correct outcome with an average probability greater than 50%,<sup>110</sup> their participation in the election will improve the expected outcome. The limited information each individual voter possesses is more than balanced by the sheer quantity of voters. This is one reason why democratic government is better than government by some benevolent group of philosopher kings. It also supports the notion that high voter turnout is a good thing, because a large electorate will do better than a small one.

The concern with underinformed voters also assumes that current nonvoters’ levels of political engagement and awareness are static. As noted in Part II, one of the potential benefits of compulsory voting is

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<sup>105</sup> See Hasen, *supra* note 6, at 2175 (“[T]he risk of poor decisionmaking is an unavoidable side effect of equalizing political capital among individuals.”).

<sup>106</sup> See *supra* p. 591.

<sup>107</sup> Lyn Ragsdale & Jerrold G. Rusk, *Who Are Nonvoters? Profiles from the 1990 Senate Elections*, 37 AM. J. POL. SCI. 721, 744 (1993).

<sup>108</sup> See MARQUIS DE CONDORCET, *Essay on the Application of Mathematics to the Theory of Decision-Making*, in CONDORCET: SELECTED WRITINGS 33 (Keith Michael Baker ed., 1976).

<sup>109</sup> If one disputes the existence of a correct outcome to an election, then the CJT does not apply. As Professors Eric Posner and Cass Sunstein have observed, the CJT clearly applies when factual questions are at stake, but not necessarily when moral questions are at stake. See Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 142–43 (2006). However, the answers to moral questions may often rely on the answers to underlying factual questions. See *id.*

<sup>110</sup> Further research would be necessary to determine whether nonvoters as a group would meet the 50% threshold.

that it can make government more relevant to the lives of current nonvoters and can thus increase their levels of political engagement.<sup>111</sup> Compulsory voting can also force political candidates to change the way that they communicate their messages and reach out to the electorate. Thus, over time, compulsory voting may cause current nonvoters to become more politically informed.

A compulsory voting regime will result in some degree of “random voting,” as is apparent from the experiences of other countries with compulsory voting.<sup>112</sup> This does not mean, however, that compulsory voting would simply introduce randomness into the electoral process and yield illegitimate outcomes. Rather, random voting would likely be unproblematic because truly random votes would cancel each other out.<sup>113</sup> It is true that if everyone who voted only because of compulsion voted randomly, then the benefits discussed in Part II would be unlikely to materialize. This outcome seems unrealistic, however. There are many Americans who have clear political preferences but do not vote.<sup>114</sup> According to U.S. Census Bureau data, uncertainty about whom to vote for is not a major reason people do not vote.<sup>115</sup> Instead, most people do not vote because of inconvenience, illness, transportation problems, registration problems, forgetfulness, or similar, nonpolitical reasons.<sup>116</sup> Randomness is thus unlikely to be a major problem with compulsory voting in the United States.

### B. Enforcement Costs

An assessment of the efficacy of compulsory voting requires an understanding of what it will cost to implement the system. One of the major costs would be enforcement of the compulsory voting laws.<sup>117</sup> While dollar estimates are beyond the scope of this Note, this section

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<sup>111</sup> See, e.g., Steven E. Finkel, *Reciprocal Effects of Participation and Political Efficacy: A Panel Analysis*, 29 AM. J. POL. SCI. 891, 907 (1985).

<sup>112</sup> Dean, *supra* note 45.

<sup>113</sup> *Id.* Listing candidates' names in random order on each ballot would help ensure that random voting has a negligible impact because some voters might simply vote for the first person listed.

<sup>114</sup> See, e.g., John T. Jost, *The End of the End of Ideology*, 61 AM. PSYCHOLOGIST 651, 656 (2006) (reporting that more than 75% of Americans could place themselves on a bipolar liberalism-conservatism scale).

<sup>115</sup> See U.S. CENSUS BUREAU, *supra* note 27, at 15 tbl.F.

<sup>116</sup> See *id.* The only commonly reported political reasons for not voting were a dislike of the candidates or issues and being “[n]ot interested,” which 9.9% and 10.7% of respondents respectively reported as their reason. Those respondents who reported not liking any of the candidates may still have known whom they would have voted for if they *had* to vote. As for those who reported being uninterested, even they might still be able to identify a preferred candidate or party despite their lack of interest.

<sup>117</sup> Other costs would include increased costs of printing and mailing voter registration acknowledgements, outfitting polling sites to handle increased traffic, and recruiting additional staff and volunteers to process the votes.

demonstrates that compulsory voting can be enforced at a relatively low cost when compared with enforcement of most criminal laws. This is because governments would not need to utilize the most costly elements of criminal law enforcement: investigation and prosecution.

There are several approaches that an enforcement regime might take. Some of these approaches have been taken by countries that currently have compulsory voting. Others can be gleaned from the ways in which the federal and state governments currently enforce other compelled civic duties such as registration for selective service.

Regardless of the enforcement scheme, simply putting a compulsory voting law on the books might have some positive impact on voter turnout, even if individuals were virtually never punished for not voting. For example, using panel data on voter turnout from Switzerland,<sup>118</sup> Professor Patricia Funk found that abolition of compulsory voter laws led to a decrease in voter turnout, even though the laws imposed a negligible amount of punishment on violators while the laws were in effect.<sup>119</sup> Legal scholars have documented this “expressive function of law”<sup>120</sup> in the United States in other contexts.<sup>121</sup>

One approach to enforcement of compulsory voting would be to emulate the Selective Service System’s (SSS) approach. Under federal law, it is a crime for almost any male citizen or alien between the ages of eighteen and twenty-six not to register with the SSS.<sup>122</sup> Although the SSS does refer a list of suspected violators to the Department of

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<sup>118</sup> Five of the twenty-six cantons in Switzerland had compulsory voting laws and particularly high awareness of those voting laws. Patricia Funk, *Is There an Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines*, 9 AM. L. & ECON. REV. 135, 138 (2007). Four of the five cantons subsequently abolished their compulsory voting laws, allowing Professor Funk to measure the effect of the abolition on voter turnout. *Id.*

<sup>119</sup> See *id.* at 138, 150. Violators of the compulsory voting laws could be forced to pay a “symbolic” fine, generally less than one U.S. dollar in value, *id.*, and when discounted by the likelihood of being fined, the expected punishment was negligible.

<sup>120</sup> See, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

<sup>121</sup> See, e.g., Alma Cohen & Liran Einav, *The Effects of Mandatory Seat Belt Laws on Driving Behavior and Traffic Fatalities*, 85 REV. ECON. & STAT. 828, 829 (2003) (documenting an increase in seatbelt usage from barely enforced laws); Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1590 (2000) (noting anecdotal evidence that pooper-scooper laws and no-smoking signs are effective even with minimal enforcement); Ray Fisman & Edward Miguel, *Cultures of Corruption: Evidence from Diplomatic Parking Tickets* (Nat’l Bureau of Econ. Research, Working Paper No. 12312, 2006), available at <http://www.nber.org/papers/w12312> (finding some compliance with parking regulations by diplomats who are immune from fines).

<sup>122</sup> Failure to register is a felony punishable by up to five years in prison and a fine of up to \$10,000. 50 U.S.C. app. § 462(a) (2000).

Justice for potential prosecution,<sup>123</sup> such prosecutions are rare.<sup>124</sup> Instead of using criminal law to enforce registration laws, the SSS has achieved an impressive compliance rate of 93% by tying important government benefits — such as driver's licenses, eligibility for student financial aid, job training, government employment, and citizenship for immigrants — to registration.<sup>125</sup> Compulsory voting laws similarly could achieve high rates of compliance by tying these and other government benefits to voting, thereby avoiding costly criminal prosecutions.

Other countries have been able to successfully enforce compulsory voting laws by tying the act of voting to valuable government benefits, along the lines of the SSS. Brazil issues a document called a *título eleitoral* to voters, who must present the document in order to interact with state agencies or even to get a job.<sup>126</sup> Peru also requires individuals to carry proof of having voted in order to obtain certain government benefits.<sup>127</sup> Both have achieved relatively high levels of voter turnout,<sup>128</sup> although it is unclear how much of this turnout is due to compulsory voting. The successes of these countries, along with the SSS's track record of compliance, illustrates that this approach can be effective at achieving high compliance without the high costs of criminal law enforcement.

Another approach to enforcing compulsory voting is to use administrative law. Australia uses this kind of enforcement regime for its compulsory voting laws.<sup>129</sup> Under this method, a federal agency would be charged with documenting which eligible voters fail to vote in any election. These nonvoters would be notified by mail of their failure to vote and assessed a small fine. The agency would also offer them a chance to provide a legitimate reason for their nonvote, such as illness, emergency, or conscientious objector status. If the agency ac-

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<sup>123</sup> See SELECTIVE SERV. SYS., ANNUAL REPORT TO THE CONGRESS OF THE UNITED STATES 7 (2006), available at <http://www.sss.gov/PDFs/AnRepFY06.pdf>.

<sup>124</sup> SELECTIVE SERV. SYS., STATES WITH DRIVER'S LICENSE LEGISLATION REPORT INCREASED SELECTIVE SERVICE REGISTRATION COMPLIANCE (2003), [http://www.sss.gov/current\\_story\\_archive/2003\\_june03/2003\\_feb04.html](http://www.sss.gov/current_story_archive/2003_june03/2003_feb04.html).

<sup>125</sup> SELECTIVE SERV. SYS., *supra* note 123, at 4.

<sup>126</sup> Timothy J. Power & J. Timmons Roberts, *Compulsory Voting, Invalid Ballots, and Abstention in Brazil*, 48 POL. RES. Q. 795, 800 n.9 (1995).

<sup>127</sup> Hill, *supra* note 74, at 443.

<sup>128</sup> In Brazil, around 80% of the voting-age population has voted in recent years. See Int'l Inst. for Democracy & Electoral Assistance, Country View: Brazil, [http://www.idea.int/vt/country\\_view.cfm?CountryCode=BR](http://www.idea.int/vt/country_view.cfm?CountryCode=BR) (last visited Nov. 10, 2007). In Peru, voter turnout has been lower than in Brazil, but has still been higher than in the United States. See Int'l Inst. for Democracy & Electoral Assistance, Country View: Peru, [http://www.idea.int/vt/country\\_view.cfm?CountryCode=PE](http://www.idea.int/vt/country_view.cfm?CountryCode=PE) (last visited Nov. 10, 2007).

<sup>129</sup> M. Mackerras & I. McAllister, *Compulsory Voting, Party Stability and Electoral Advantage in Australia*, 18 ELECTORAL STUD. 217, 223–24 (1999).

cepts the excuse, then the fine would be waived. Otherwise, failure to pay the fine would potentially lead to a judicial action and, ultimately, a prison sentence. Australia has achieved very high voter turnout using such a system. Since the Australian Electoral Commission takes less than 2% of nonvoters to court,<sup>130</sup> the costs of enforcement are relatively low.

Finally, there is the possibility of using rewards instead of punishments. There could be a tax break or a cash payout given to any eligible voter who votes (or qualifies as a conscientious objector).<sup>131</sup> Using rewards is likely to be more costly than punishments, however, because it would be difficult to identify those people who would not vote in the absence of payment, requiring the government to pay all voters.<sup>132</sup>

## V. CONCLUSION

Compulsory voting is certainly not a panacea for all of the deficiencies of the U.S. political system. It would, however, be an important initial step toward changing politics for the better. Compulsory voting has been successful in other countries and could have a dramatic impact on voter turnout in the United States. This in turn has the potential to lead to greater changes in American political culture, resulting in a more politically engaged citizenry.

Although there are several legal obstacles to compulsory voting, none of them appear to be substantial enough to bar compulsory voting laws. Congress has the power to compel voting, at least in congressional elections. The biggest obstacle to compulsory voting is the political reality that compulsory voting seems incompatible with many Americans' notions of individual liberty.<sup>133</sup> As with many other civic duties, however, voting is too important to be left to personal choice.

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<sup>130</sup> *Id.* at 224. After the 1993 Australian federal election, the Commission brought 0.9% of nonvoters to court. *Id.* After the 1996 election, the figure was 1.7%. *See id.* at 224 n.11.

<sup>131</sup> The law that the Missouri Supreme Court struck down in *Kansas City v. Whipple*, 38 S.W. 295 (Mo. 1896), for instance, imposed a \$2.50 poll tax on eligible voters, but then waived the tax for anyone who voted. *See id.* at 295; *see also supra* note 45.

<sup>132</sup> *See Hasen, supra* note 6, at 2172.

<sup>133</sup> *See id.* at 2177-78.