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# NOTES

  

## COMPULSORY VOTING IN AMERICA

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### I. INTRODUCTION

*“This . . . is dedicated . . . to the American voter. In the future, may there be more of them . . . .”*

—Ruy A. Teixeira<sup>1</sup>

Persistently low voter turnout in the United States continues to disappoint lovers of democracy. When scarcely half of the population of eligible voters turns out for a presidential election once every four years—to say nothing of midterm congressional elections or local elections—it becomes difficult to defend American democracy as truly representative.<sup>2</sup> Instead, the will of the active voters, who constitute a stark minority of the eligible voting population, ultimately determines the electoral outcome. This regrettable situation is not the essence of a participatory democracy.

Although low turnout might easily be blamed on an American electoral lethargy, it could also be understood as a failure of the American electoral structure to motivate voter turnout. Accepting that premise as fact, it becomes possible to treat declining voter turnout as an opportunity

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1. See *Dedication to RUY A. TEIXEIRA, WHY AMERICANS DON'T VOTE* (1987).

2. See FED. ELECTION COMM'N, VOTER REGISTRATION AND TURNOUT IN PRESIDENTIAL ELECTIONS BY YEAR: 1960–1992, at <http://www.fec.gov/pages/tonote.htm> (last visited Jan. 8, 2002) [hereinafter VOTER REGISTRATION AND TURNOUT IN PRESIDENTIAL ELECTIONS BY YEAR].

to reconsider what has until now been a staple of American democracy: voluntary voting.

Voter turnout has been inching downward at an inconsistent clip since 1960, when 62.77% of all eligible voters in America went to the polls.<sup>3</sup> In the forty-two years since, only 1992 (beating 1988's turnout of 50.15%<sup>4</sup> by 5.08%<sup>5</sup>) can be distinguished as a significant improvement from the preceding election. The impression gleaned from the majority of elections since 1960 is therefore straightforward: Voter turnout in America is, and will probably remain, low. Under few circumstances currently imaginable could any political prognosticator suggest a turnout of even 60%, or three in five eligible voters.

The most recent presidential contest between then-Governor George Bush and then-Vice President Al Gore stands as evidence of this unfortunate truth. In November 2000, 105,586,274 voters went to the polls out of a potential voting age population of 205,815,000.<sup>6</sup> That amounts to an abysmal 51.3%.<sup>7</sup> Though notable as a 2.2% increase over turnout in 1996,<sup>8</sup> the 2000 general election nevertheless marked the third consecutive Presidential election in which the executive branch and both houses of Congress were carried by "mandates" comprising less than 25% of the eligible voter population.<sup>9</sup> In short, says Director of the Committee for the Study of the American Electorate ("CSAE") Curtis Gans, "[n]othing in this turnout picture indicates that we have turned the corner on declining voter turnout."<sup>10</sup>

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3. See FED. ELECTION COMM'N, VOTER TURNOUT IN THE 1960 PRESIDENTIAL ELECTION BY STATE, at <http://www.fec.gov/pages/rat60.htm> (last visited Feb. 6, 2003).

4. FED. ELECTION COMM'N, VOTER TURNOUT IN THE 1988 PRESIDENTIAL ELECTION BY STATE, at <http://www.fec.gov/pages/rat88.htm> (last visited Feb. 6, 2003).

5. See FED. ELECTION COMM'N, VOTER TURNOUT IN THE 1992 PRESIDENTIAL ELECTION BY STATE, at <http://www.fec.gov/pages/rat92.htm> (last visited Feb. 5, 2003).

6. FED. ELECTION COMM'N, VOTER REGISTRATION AND TURNOUT 2000, at <http://www.fec.gov/pages/2000turnout/reg&to00.htm> (last visited Jan. 8, 2002) [hereinafter VOTER REGISTRATION AND TURNOUT 2000]. The potential voting population is calculated by the U.S. Census Bureau and includes all persons over the age of eighteen whether or not they are eligible to vote. *Id.* Ineligibility to vote among those persons over eighteen years of age may arise if that person is an illegal alien, is under sentence for a felony conviction, or if that person has been declared incompetent by a court. See VOTER REGISTRATION AND TURNOUT IN PRESIDENTIAL ELECTIONS BY YEAR, *supra* note 2.

7. VOTER REGISTRATION AND TURNOUT 2000, *supra* note 6.

8. *Voter Turnout Rose in 2000, but No Lasting Impact Is Seen*, N.Y. TIMES, Aug. 30, 2001, at A12 [hereinafter *Voter Turnout Rose in 2000*].

9. Press Release, Committee for the Study of the American Electorate, Battleground State Mobilization Efforts Propel Voter Turnout Slightly Upward in Historic but Disturbing Election, Final Post Election Report (Feb. 9, 1999), at <http://www.gspm.org/csae/cgens6.html> [hereinafter Committee for the Study of the American Electorate].

10. *Voter Turnout Rose in 2000*, *supra* note 8.

What to do? This Note will argue that voting, which in modern history has been treated “more like a burden than a privilege,”<sup>11</sup> should be made mandatory without violating the First Amendment’s prohibition against compelled speech. America, with its enormous population of regular nonvoters, could benefit greatly from a system of compulsory voting. To quote one procompulsory voting member of Britain’s Parliament, “[d]emocracy is too important to leave to the minority.”<sup>12</sup>

Under a compulsory voting regime, failure to vote, like a failure to register for the Selective Service or to serve on a jury, would be treated as a violation of a legal duty. Reprimands for such a failure, though not severe, would be persuasive. For instance, nonvoting might result in an inability to receive federal student loans. Alternatively, a small (that is, \$50) fine comparable to a traffic infraction could be levied on nonvoters with an increasing scale to accommodate repeat nonvoters.

Importantly, under the system proposed in this essay, a final “none of the above” option would be included on the ballot after the traditional choices for office. Although technically abstention, selecting the “none of the above” choice would satisfy a citizen’s legal duty to vote. It may also serve to defeat a First Amendment compelled speech attack against compulsory voting.

If the experience of other industrialized democracies can be used as an example, a law or constitutional amendment mandating voting in the United States should propel voter turnout as a percentage of the eligible voter population to nearly 100%.<sup>13</sup> Such an astronomically high participation level would legitimize America’s democratically elected government and, ideally, encourage a knowledgeable electorate.<sup>14</sup> Over time, compulsory voting should also foster a social norm of voting in America. Violation of this norm, like violations of the norm of littering in public or of smoking cigarettes in front of children, would elicit social condemnation.

Part II of this Note will discuss proffered explanations for America’s consistently low voter turnout, and reject other proposed reforms as less effective than mandatory voting at dramatically increasing voter turnout.

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11. Tom Brazaitis, *Rescue Democracy From Apathy*, PLAIN DEALER, Sept. 2, 2001, at G2.

12. Nigel Morris & Andrew Grice, *Election 2001: Polling — Low Turn-Out Brings Calls for Compulsory Voting*, THE INDEPENDENT, June 9, 2001, at 6.

13. See *infra* Part III (using Australia, Belgium, and Italy to illustrate how instituting compulsory voting into a democratic system can significantly increase turnout).

14. Presumably, if Americans are required to vote, they will take the time to learn about issues that they might not learn about under a voluntary voting scheme.

Part III will consider the example of three industrialized democracies—Australia, Belgium, and Italy—who have achieved remarkable turnout rates with different compulsory voting schemes. Part IV will analyze a compulsory voting challenge based on the prohibition against compelled speech contained in the First Amendment to the U.S. Constitution. Part V will discuss potential challenges to compulsory voting based on political, not constitutional, grounds. Finally, Part VI will conclude that, while not entirely plausible politically, mandatory voting will guarantee an increase in citizen participation unequalled by any other proposed electoral reform scheme.

## II. TURNOUT: A NATIONAL CRISIS

Why was turnout so low in 2000, and why has it been consistently lower than nearly all other industrialized nations throughout modern history?<sup>15</sup> Is it something specific about the American electorate or the American political system that suppresses turnout? If so, would reform proposals other than mandatory voting, such as Internet voting, be more effective at increasing turnout?

Post election surveys and studies examining American voting habits have reached basic conclusions about the prototypical American nonvoter. In 2000, American nonvoters were most likely younger, less educated, poorer, and less connected to either of the two major political parties than their voting counterparts.<sup>16</sup> This is not to say, however, that a single cause is attributable to their lack of voting or that one solution (that is, increased Get Out The Vote efforts (“GOTV”), universal vote by mail, or Internet voting) would change their voting patterns.

Addressing all of the cited reasons for nonvoting would itself create a complicated web of problems. For instance, Internet voting, while appealing for its accuracy and efficiency (both of which are at a premium after the Florida 2000 debacle), nevertheless suffers for its perceived security shortcomings. Increased money and effort spent on GOTV might only motivate those already inclined to vote, leaving behind many of the

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15. See *DEMOCRACY: A WORLDWIDE SURVEY* 35 (Robert Wesson ed., 1987).

16. See MEDILL SCHOOL OF JOURNALISM, NW. UNIV., NO SHOWS: PASSING UP THE POLLS: REPORT HIGHLIGHTS, available at [http://www.yvoteonline.org/docs/noshows\\_2000/no\\_show\\_2000\\_report.pdf](http://www.yvoteonline.org/docs/noshows_2000/no_show_2000_report.pdf) (last visited Mar. 12, 2003) [hereinafter NO SHOWS] (positing that nonvoters report higher percentages than do voters in each of the following ways: 27% of nonvoters are between eighteen and twenty-nine, 16% of nonvoters have not finished their high school education, 35% of nonvoters have household incomes under \$30,000, and 40% of nonvoters identify themselves as political independents).

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most politically disconnected members of the public for whom no amount of persuasion is sufficient. For each solution to low voter turnout, potential shortcomings therefore must also be considered. Such shortcomings are, however, eliminated in one sweeping moment with the implementation of compulsory voting in the United States.

#### A. VOTER TURNOUT IN 2000

Low turnout in the 2000 general election cannot be blamed on the absence of a close presidential contest—the presence of which some political observers logically assume would increase turnout as would-be voters feel that their individual vote can make an important difference.<sup>17</sup> Certainly, no American could have predicted that the election for the highest office in the land would remain contested for over a month after the voters went to the polls in November, or that the final decisionmakers would be nine Supreme Court justices instead of the assembled consensus of the Electoral College. It is likewise doubtful that many foresaw a perfectly divided 50/50 Senate.

In 2000, says CSAE Director Gans, we had an election which was the second closest since 1888, in which the drumbeat of polls prior to the election continuously described how tight the race was, in which more money was spent than at any other time in history and in which control not only of the Presidency [but] both houses of Congress was at stake.<sup>18</sup>

Considering this persuasive body of evidence, the fact that nearly half of all eligible voters stayed at home<sup>19</sup> is compelling proof that a failure to vote is not entirely due to one's belief that their vote would not make a difference.<sup>20</sup> Instead, the 2000 election shows that voter turnout can remain relatively low despite a competitive contest in which the preferences of a small number of individual voters can (and did!) make the difference.

Similarly, low voter turnout probably cannot be blamed on the lack of an organized effort to get out the vote. It is often assumed that voter unwillingness can be cured by the deliberate and well-funded efforts of candidates, political parties, and nonprofit committees to “get out the vote.”

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17. See Editorial, *The Politics of Voter Turnout*, PITTSBURGH POST-GAZETTE, Aug. 5, 2001, at E1.

18. See Committee for the Study of the American Electorate, *supra* note 9.

19. See VOTER REGISTRATION AND TURNOUT 2000, *supra* note 6.

20. See NO SHOWS, *supra* note 16, at 10.

This assumption dates back to ancient Athens, where voters were corralled with a rope dyed red to the Pnyx where they would then place their vote for the Assembly.<sup>21</sup> Though the means are less drastic today, the problem of unmotivated voters sadly remains.

In the 2000 general election, organized GOTV efforts were most likely aimed at the thirty percent of nonvoters who cited work, illness, travel, inability to reach a polling place, or lack of time as the reason why they were kept from voting.<sup>22</sup> Notwithstanding a “massive” voter mobilization effort in the sixteen so-called “battleground” states, only two percentage points were added to total voter turnout.<sup>23</sup> While helpful, the 2000 GOTV efforts therefore proved inadequate to meet the significant problem of low turnout.<sup>24</sup> Even with the two percent gain in turnout, just over half of the eligible voter population actually went to the polls.<sup>25</sup>

Inconvenient voter registration procedures, which tend to suppress voter registration, are an oft-cited culprit for low voter turnout but are not entirely to blame.<sup>26</sup> Proof of this lies in the fact that affirmative and well-meaning measures undertaken in recent years to make voter registration more convenient and accessible have not had the hoped-for effect on voter turnout.<sup>27</sup> Even technological advancements utilizing the Internet to ease the burden of voter registration and new laws such as the “Motor Voter Act” have not dramatically improved the situation.<sup>28</sup>

Although sixty-four percent and fifty-seven percent of nonvoters responded that allowing for same-day registration and two- or three-day consecutive voting, respectively, would make voting more attractive for them, it is questionable whether or not even these reforms would make the

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21. See E.S. STAVELEY, GREEK AND ROMAN VOTING AND ELECTIONS 80 (1972).

22. See NO SHOWS, *supra* note 16, at tbl.7.

23. See Committee for the Study of the American Electorate, *supra* note 9.

24. See *id.*

25. See VOTER REGISTRATION AND TURNOUT 2000, *supra* note 6.

26. See Brazaitis, *supra* note 11. But see DEMOCRACY: A WORLDWIDE SURVEY, *supra* note 15, at 35–36 (citing the fact that the onus to register to vote rests with the voter, compared with the government in other Western democracies, as the most probable culprit for low turnout); Jason P.W. Halperin, Note, *A Winner at the Polls: A Proposal for Mandatory Voter Registration*, 3 N.Y.U. J. LEGIS. & PUB. POL’Y 69, 110–11 (1999–2000) (arguing that a scheme of mandatory voter registration would dramatically increase voter turnout).

27. See Brazaitis, *supra* note 11.

28. Although voters still cannot complete registration forms on the Internet, it is now possible to request forms from websites such as <http://www.fec.gov> or to print them from the Internet in Portable Document Format (“PDF”). See FED. ELECTION COMM’N, THE NATIONAL MAIL VOTER REGISTRATION FORM, at <http://www.fec.gov/votregis/vr.htm> (last visited Feb. 18, 2002).

needed difference.<sup>29</sup> Instead, it is possible that those respondents merely answered in a way pleasing to both the questioner and their own sense of civic duty, not in a way that portrayed their true voting intentions.

The lack of improvement in turnout in 2000 might be due to the fact that in the most recent general election 58% of all nonvoters responded that they *chose* not to vote, while only 40% were prevented from voting by a procedural barrier (that is, failure to register).<sup>30</sup> Paradoxically, 72% of respondents to an ABC poll answered that they were “certain” to vote and an additional 11% were “probably going to vote.”<sup>31</sup>

The difference between the percentage of respondents certain to or likely to vote and actual voting behavior in 2000 suggests that nonvoting was not a decision based on apathy or disenchantment. Instead, it seems that for many Americans on election day something else simply “got in the way.” This explanation, although admittedly nonscientific, might go further than most to discover why so many Americans intend to vote and why so few actually do.

The statement of one seemingly-typical Washington state resident illustrates this blunt conclusion: “My job and the traffic and the kids swamp out national politics.”<sup>32</sup> This view—no doubt echoed by many Americans—leads to the conclusion that procedural reforms will not succeed at turning out certain nonvoters. There is no legislating away an urgent trip to the market or traffic on the freeway, and no way to make voting more convenient to a father of a young child. A new approach is needed whereby voting in federal elections becomes a not-to-be-missed priority.

## B. APATHY?

Low voter turnout might reasonably be blamed on “apathy,” which is perhaps the single most cited factor in response to the question: Why don’t Americans vote? Although the term applies particularly well to younger

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29. See NO SHOWS, *supra* note 16, at 5.

30. See *id.*

31. ABC NEWS, PUBLIC OPINION SURVEY OCTOBER 28–31 (2000) (public opinion poll on file with author). In addition, eighty-seven percent of Americans also see voting as a “very important obligation.” PENN, SCHOEN & BERLAND, BLUEPRINT: IDEAS FOR A NEW CENTURY (1999) (public opinion poll on file with author) [hereinafter PENN, SCHOEN & BERLAND].

32. Dan Balz & Ceci Connolly, *Voters Feeling Remote from Politics*, WASH. POST, July 10, 1997, at A1.

Americans<sup>33</sup> who have been shown to both register and vote in lower numbers than middle-aged and older Americans,<sup>34</sup> it remains a fairly accurate determinant across the demographic spectrum. Curing apathy, however, remains an elusive goal.

According to a Shorenstein Center National survey conducted shortly before the 2000 general election, “71% of Americans agree with the statement “[p]olitics in America is generally pretty disgusting,” while 87% concur with the statement “most politicians are willing to say whatever it takes to get themselves elected.”<sup>35</sup> Tellingly, only 27% of respondents think that Americans possess a spirit of “citizenship and participation” as compared to the 62% who see Americans as cynical and apathetic.<sup>36</sup> Considering this strong evidence, an apathetic response to politics and elections is hardly surprising.

At best, curing voter apathy is a Herculean task; at worst, it is impossible. There is no “silver bullet” remedy to the problem of American disgust with politics. Some fear that government has grown too large or that political leaders are corrupt.<sup>37</sup> Others find politics boring, feel that their voice doesn’t make a difference, or believe that the outcome of the election has little relevance to the future of the nation.<sup>38</sup> Finally, a strong percentage of nonvoters feel that “voting in elections has little to do with the way that real decisions are made in our country.”<sup>39</sup>

In considering the number of problems connected to the notion of “apathy,” it quickly becomes apparent that the solutions would be both many and hard to accomplish. Decreasing the size of government, eliminating the role of money in politics, and ensuring that voters personally connect with their representatives would be just the beginning.

Why is curing political apathy so difficult? One plausible explanation is based on the fact that addressing the complaints of one voter might create

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33. See Press Release, Joan Shorenstein Center on the Press, Politics, and Public Policy, Election Apathy Pervasive Among Young Adults (May 12, 2000), at <http://www.vanishingvoter.org/releases/05-12-00.shtml>.

34. See FED. ELECTION COMM’N, VOTER REGISTRATION AND TURNOUT IN FEDERAL ELECTIONS BY AGE 1972–1996, at <http://www.fec.gov/pages/agedemog.htm> (last visited Jan. 8, 2002).

35. Press Release, Joan Shorenstein Center on the Press, Politics, and Public Policy, Americans “Disgusted” with Politics (Mar. 13, 2000), at <http://www.vanishingvoter.org/releases/03-13-00.shtml>.

36. See PENN, SCHOEN & BERLAND, *supra* note 31.

37. See *id.*

38. Press Release, Joan Shorenstein Center on the Press, Politics, and Public Policy, Weekly Poll Results, Conducted November 10–14, 1999, at <http://www.vanishingvoter.org/questions/q11-14-99.shtml> (last visited Feb. 18, 2002).

39. See NO SHOWS, *supra* note 16, at 15.

a new set of complaints by another. For instance, some Americans might argue that America has committed itself to too many foreign conflicts without paying adequate attention to domestic issues like homelessness, while others might view the same situation in the opposite light: In the process of solving domestic issues like homelessness, America has turned too far inward to the point of isolationism. And even when consensus is found on an issue like campaign finance reform, in America's bitterly divided two-party system of government<sup>40</sup> it nevertheless remains difficult to achieve significant results.<sup>41</sup>

### C. WHY COMPULSORY VOTING?

To date, no proposed or enacted electoral reform has met the daunting challenge of convincing tens of millions of nonvoters that they ought to participate in their democracy. And, for many of the reasons cited above, it is doubtful that any reform presently contemplated could successfully increase America's voter turnout to an average of ninety percent. This is arguably the case because no reform measure has been willing to take the revolutionary step that is at the heart of this essay: compulsory voting for all eligible Americans.

Though admittedly vulnerable on many fronts,<sup>42</sup> compulsory voting has the unmistakable appeal of guaranteeing high voter turnout, which in turn legitimizes a democracy in a way that partial turnout never will. Even small penalties for nonvoting have proven sufficient to increase turnout in nations like Australia.<sup>43</sup> Over time, an electoral system that incorporates compulsory voting also instills a social norm of voting in a society.<sup>44</sup> Through this norm, voting should gradually become a regular part of civic participation, like paying taxes. Avoidance or failure to satisfy the norm would illicit social condemnation.

As Part III illustrates, the increase in turnout in other industrialized nations that employ compulsory voting as compared with the present depressed picture in America is both dramatic and lasting.

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40. This statement is particularly true when different political parties control the House of Representatives and the Senate.

41. See, e.g., Ellen S. Miller, *A Reform That Lobbyists Could Love*, AM. PROSPECT, Sept. 10, 2001, at 8 (arguing that the actual effect of Shays-Meehan and McCain-Feingold will do little to "eliminate[] the scourges that [are] associate[d] with soft money").

42. See *infra* Part IV.

43. See *infra* Part III.A.

44. See *infra* Part III.C.

### III. A COMPARATIVE APPROACH TO STIMULATING VOTER TURNOUT

Twenty-four nations employ an electoral model that incorporates some element of compulsory voting,<sup>45</sup> while others such as Canada,<sup>46</sup> Britain,<sup>47</sup> and New Zealand<sup>48</sup> have considered it. Also known as mandatory or obligatory voting, compulsory voting does exactly what its name suggests: It “make[s] the exercise of the franchise a legal duty rather than merely a norm of good citizenship.”<sup>49</sup> This Part will examine the experiences of Australia, Italy, and Belgium with mandatory voting and conclude that it is an unusually effective remedy for low voter turnout.

A logical preliminary question asks: Just how do nations *require* their citizens to vote? The answer is that although generally enacted by statute, many nations have opted to make voting a constitutionally mandated duty.<sup>50</sup> Fiji’s constitution, for example, declares that “[e]very person registered as a voter whose right to registration has not ceased must . . . vote in every election.”<sup>51</sup> Article 118 of Paraguay’s constitution begins: “Suffrage is a right, a duty, and a public function of a voter.”<sup>52</sup> Among Western democracies, Belgium’s constitution advises that “voting is compulsory and secret,”<sup>53</sup> while in Italy “[t]he exercise thereof shall be a civic duty.”<sup>54</sup>

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45. RICHARD ROSE, *VOTER TURNOUT FROM 1945 TO 1997: A GLOBAL REPORT ON POLITICAL PARTICIPATION* 32 [hereinafter *GLOBAL REPORT*].

46. See Sean B. Pasternak, *Canada’s Election Chief Mulls Mandatory Voting*, *Paper Reports*, BLOOMBERG NEWS, Dec. 19, 2000, at A1.

47. See Michael Kallenbach, *MP Calls for Compulsory Voting Elections*, DAILY TELEGRAPH, Nov. 28, 2001, at 20. A proposal by Labour MP Gareth Thomas in 2001 included both a “none of the above” option “enabling electors to register their abstention if they did not support any candidate” as well as a small fine for voting violations. *Id.* Voter registration is already mandated in the United Kingdom. See Sian Clare, *Compulsory Voting Call*, PRESS ASS’N, Nov. 27, 2001.

48. See *Compulsory Voting Would Improve Turnout*, N.Z. PRESS ASS’N, Oct. 14, 2001.

49. INTERNATIONAL ENCYCLOPEDIA OF ELECTIONS 44 (Richard Rose ed., 2000) [hereinafter *ENCYCLOPEDIA*].

50. See *id.*

51. FIGI CONST. (Constitution Amendment Act 1997) ch. 6, pt. 2, 56, reprinted in C.G. POWLES, *Republic of the Fiji Islands*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 41 (Gisbert H. Flanz ed., 1998).

52. PARAGUAY CONST. ch. X, art. 118, reprinted in PETER B. HELLER, *Paraguay*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 20 (Albert P. Blaustein & Gisbert H. Flanz eds., 1993).

53. BELGIUM CONST. tit. III, ch. 1, § 1, art. 62, reprinted in GISBERT H. FLANZ, *Belgium*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 12 (Gisbert H. Flanz ed., 2002).

54. ITALY CONST. pt. I, tit. IV, art. 48, reprinted in GISBERT H. FLANZ & KARIN HERMANNSKA, *Italy*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 10 (Gisbert H. Flanz ed., 2002).

What follows is a selection from three industrialized democracies regarding their experiences with compulsory voting. Though different in a number of ways, these nations—Australia, Belgium, and Italy—share a dramatic improvement in citizen political participation following the introduction of compulsory voting.

#### A. AUSTRALIA

Australia has employed a system of compulsory voting in federal elections since 1924.<sup>55</sup> Today, it is generally considered a part of “the settled policy of the country,” and is unlikely to change.<sup>56</sup> Voting is now a part of Australia’s social ethos.<sup>57</sup> Although Queensland first introduced the concept in 1915, followed by New South Wales in 1921, it was not until 1924 that the Commonwealth itself passed legislation mandating voting at federal elections.<sup>58</sup> Recent history strongly suggests that compulsory voting has been a tremendous success in Australia. During the period between 1945 and 1997, Australia boasted a turnout amounting to 84.4% of the eligible voting age population. By contrast, during the same period, the United States could speak of a paltry 48.3% average.<sup>59</sup>

Three separate aspects of compulsion are at work in the current Australian electoral model: compulsory enrollment, compulsory voting, and compulsory preferences.<sup>60</sup> Compulsory enrollment is akin to mandatory voter registration in the United States. Roughly 12.1 million Australians are enrolled to vote.<sup>61</sup> The high correlation between voter registration and voter turnout in the United States has led some to the conclusion that mandatory registration alone might go far to solve the problem of low voter turnout.<sup>62</sup> That Australia employs a three-part system of compulsion, however, suggests that mandatory registration alone may be insufficient to dramatically increase turnout.

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55. See ENCYCLOPEDIA, *supra* note 49, at 45.

56. GEOFFREY SAWER, AUSTRALIAN GOVERNMENT TODAY 73 (1977).

57. See Don Aitkin & Michael Kahan, *Australia: Class Politics in the New World*, in ELECTORAL BEHAVIOR: A COMPARATIVE HANDBOOK 445–49 (Richard Rose ed., 1974) [hereinafter *Class Politics*].

58. See W.G. McMINN, A CONSTITUTIONAL HISTORY OF AUSTRALIA 143 (1979).

59. See GLOBAL REPORT, *supra* note 45, at 20–21.

60. See BILL BRUGGER & DEAN JAENSCH, AUSTRALIAN POLITICS: THEORY AND PRACTICE 202 (1985).

61. See Andrea Hopkins, *In Australia, You Must Vote or Else Risk Being Fined*, WASH. POST, Nov. 4, 2001, at A22.

62. See Halperin, *supra* note 26, at 121 (arguing that “[s]ince registered voters vote in very high numbers, a mandatory voter registration law would increase voter turnout dramatically”).

Compulsory preferences recognize an aspect of Australia's electoral model that differs markedly from its American counterpart. In Australia—and indeed many other democracies—voters *rank* their preferred candidates in order from one, or the most preferred choice, down to their least preferred candidate.<sup>63</sup> Under Australian electoral law, every candidate on the ballot must have a marked preference. This preferencing has the effect of increasing representation for third-party candidates and diversifying the legislature's composition.

The keystone to Australia's electoral laws is compulsory voting itself, by which enrolled voters face penalties for nonvoting. The administration of Australia's compulsory voting system is surprisingly simple.<sup>64</sup> Voting in Australia occurs on a Saturday between 8:00 a.m. and 8:00 p.m.<sup>65</sup> When a voter reports to the polling place, their name is simply crossed off by a polling clerk.<sup>66</sup> If an enrolled voter's name has not been crossed off, a divisional returning officer mails a "please explain" letter seeking justification for their failure to vote.<sup>67</sup> In the most recent federal election where over twelve million Australians turned out to the polls,<sup>68</sup> roughly 500,000 such letters were distributed.<sup>69</sup> In practice, all explanations except "I forgot" or "I was busy" are accepted.<sup>70</sup> Those nonvoters who cannot achieve the low bar of a "valid and sufficient reason" for their failure to vote are ordered to pay a small fine.<sup>71</sup>

The most obvious success of Australian compulsory voting has been a dramatic increase in voter turnout. When voting was optional in Australia, "sixty to seventy per cent of electors voted on average, and polls of about fifty-five per cent were frequent."<sup>72</sup> Specifically, in the general election

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63. See J.D.B. MILLER & BRIAN JINKS, *AUSTRALIAN GOVERNMENT AND POLITICS* 89 (4th ed. 1971).

64. See, e.g., Aitkin & Kahan, *supra* note 57, at 447 (citing a 1967 survey that found that less than one percent of voters would fail to vote if the election were held tomorrow).

65. *Id.*

66. *See id.*

67. *See id.*

68. See Richard Noonan, *500,000 Australians Face Fines for Not Voting, Paper Says*, BLOOMBERG NEWS, Feb. 17, 2002.

69. Rex Jory, Opinion, *Democracy Demands Voluntary Voting*, ADVERTISER, Feb. 19, 2002, at 18. In the November federal election, 426,906 Australians failed to vote and another 600,000 did not record a formal vote after having their names removed from the rolls. *See id.*

70. *See* Aitkin & Kahan, *supra* note 57, at 447.

71. *See* Noonan, *supra* note 68. In the 1998 federal election, fines were levied on 40,000 nonvoters and an additional 6246 went to court for their failure to vote. *See* Jory, *supra* note 69, at 18. Initial fines in 2002 were A\$20 (US\$10), and subsequent fines for those brought into court were A\$50, plus court costs. *See* Noonan, *supra* note 68.

72. MCMINN, *supra* note 58, at 144.

immediately preceding the 1924 legislation adopting compulsory voting at the federal level, fifty-nine percent of the electorate turned out to vote.<sup>73</sup> Since the implementation of mandatory voting, however, the average turnout has been over ninety percent.<sup>74</sup> The remaining population of nonvoters is composed of deliberate nonvoters, those who forgot about the election, or fictional voters that exist only as mistakes on the voting rolls.<sup>75</sup>

Two other successes can be attributed to Australia's compulsory voting scheme. The first is that compulsory voting reduces the need for lavish campaign expenditures to "get out the vote."<sup>76</sup> With fewer places and reasons to spend money, the role of money may diminish in the electoral process generally. Compulsory voting relieves parties of their political obligation to get out the vote, allowing them instead to focus their efforts on the much more important task of convincing voters to vote *for them*.<sup>77</sup>

The second success of compulsory voting in Australia is that the government, whether or not politically popular, can indisputably claim to be popularly elected. That is to say, every Australian government since the implementation of compulsory voting has accurately reflected the preferences of nearly all eligible Australian voters. American government is sorely in need of this sort of legitimacy.

Although successful at maintaining a high level of voter turnout, the decades-old system of compulsory voting in Australia is not without its critics. Some suggest that it leads to a phenomenon known as "donkey-voting" whereby voters complete their ballots quickly and without thought as to what, or whom, has received their vote.<sup>78</sup> Australian compulsory voting has also fallen under fire for encouraging people to uncritically accept the advice of the "how-to-vote" cards (akin to an American slate card) distributed by political parties that list each organization's preferred choices for particular offices.<sup>79</sup> Because Australia, like the United States, strictly maintains the secrecy of cast ballots, empirical verification of these criticisms is impossible.<sup>80</sup>

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73. See SAWER, *supra* note 56, at 73.

74. *Id.*

75. See Aitkin & Kahan, *supra* note 57, at 447.

76. See BRUGGER & JAENSCH, *supra* note 60, at 203.

77. *See id.*

78. See MCMINN, *supra* note 58, at 143.

79. *See id.*

80. See BRUGGER & JAENSCH, *supra* note 60, at 202.

There are also theoretical arguments against Australian compulsory voting. The most obvious of these is that the “duty to vote denies the right to vote.”<sup>81</sup> In other words, compulsory voting violates the ethic of personal volition which is said to be at the heart of a democratic government. According to one brash critic, “[i]t is absurd to argue we have a true democracy in Australia when we force—at threat of fine or even prison—people to vote at national and state elections.”<sup>82</sup> Other criticisms are more pragmatic and pessimistic, namely, that Australia’s system of compulsory voting results in a government chosen by “the scum and dregs of political life.”<sup>83</sup> This fear that uninformed and uninterested voters will determine who governs can easily be rebutted, however, by a voting structure that permits the selection of a “none of the above” option on the ballot and through simple voter education.

### B. BELGIUM

Belgium’s system of compulsory voting has been a political fixture since 1893,<sup>84</sup> when it was included in a revision of Article 48 of the Belgian constitution.<sup>85</sup> Prior to the new Article 48, electoral absenteeism had been running high: 26% in 1870, 30% in 1884, and 16% in the “tremendously significant” 1892 election contest.<sup>86</sup> After the franchise became mandatory in 1893, however, absentee levels were reduced by at least half.<sup>87</sup>

In Belgium, like other countries employing a system of compulsory voting, the duty to vote is not resented but revered. Writes one native Belgian, “Voting is mandatory in Belgium because it is considered one’s responsibility to society. Every Belgian citizen over [eighteen] years old has both the right and the duty to vote because the country is a democracy—government of the people, for the people and by the people, all the people.”<sup>88</sup> Clearly, voting has transcended mere social obligation.

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81. *Id.*

82. Jory, *supra* note 69, at 18.

83. See BRUGGER & JAENSCH, *supra* note 60, at 143.

84. See Alan Wertheimer, *In Defense of Compulsory Voting*, in PARTICIPATION IN POLITICS 276, 278 (J. Roland Pennock & John W. Chapman eds., 1975).

85. THOMAS HARRISON REED, GOVERNMENT AND POLITICS OF BELGIUM 30 (David P. Barrows & Thomas H. Reed eds., 1924).

86. *Id.* at 56.

87. See GLOBAL REPORT, *supra* note 45, at 56–57.

88. J.F. Godet-Calogeras, Letter to the Editor, *Mandatory Voting Isn’t Sinister*, PLAIN DEALER, Jan. 2, 1998, at 6B.

Penalties for nonvoting in Belgium, like those in Australia, are nominal. As established by the “Code Électoral,” first-time offenders appearing before a justice of the peace may be subject to fines of one to three francs for unexcused voting absences.<sup>89</sup> The fine for a second missed election in a six-year period rises to twenty-five francs.<sup>90</sup> Third time offenders in a ten-year period have their names posted on the city hall façade.<sup>91</sup> Those appearing for their fourth offense in fifteen years can expect a ten-year deprivation of their voting rights and an inability to receive any “appointment, promotion or distinction from any public authority.”<sup>92</sup>

Overall, compulsory voting in Belgium has been successful at increasing the percentage of the Belgian population who vote as a percentage of the overall voting age population.<sup>93</sup> Whereas absenteeism prior to the 1893 adoption of mandatory voting had run as high as 30%,<sup>94</sup> election data from the past fifty years reveals an enviable average absentee rate under 15%.<sup>95</sup> Turnout as a percentage of registered voters is even more impressive: In the 1999 parliamentary election, 90.5% of registered voters cast their ballots.<sup>96</sup>

### C. ITALY

Among industrial democracies, it is arguably in Italy where voting has become most engrained as a social norm. Interestingly, voting is no longer compulsory in Italy.<sup>97</sup> Although it used to be the case that Italy, like Australia and Belgium, duty-bound its citizens to participate in elections, such is no longer true today.<sup>98</sup> Italy therefore stands as an example of how compulsory voting can create a social norm of voting that persists even after the legal compulsion has ended. Evidence of Italy’s strong ethic for

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89. See REED, *supra* note 85, at 56. Note that the fine levels reported here were as originally prescribed in 1893. See *id.*

90. *Id.*

91. *Id.* at 57.

92. *Id.*

93. See GLOBAL REPORT, *supra* note 45, at 56–57.

94. See REED, *supra* note 85, at 56.

95. See GLOBAL REPORT, *supra* note 45, at 56–57.

96. FED. ELECTION COMM’N, INTERNATIONAL VOTER TURNOUT, at <http://www.fec.gov/votregis/InternatTO.htm> (last visited Jan. 8, 2002).

97. See ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 93 (1993).

98. See *id.*

civic participation is stark: Voter turnout since 1945 has averaged 92.5%, among the highest of any democracy in the world.<sup>99</sup>

Several explanations have been offered to account for Italy's remarkably high turnout, nearly all of which relate to a pervasive national ethic of civic participation. One suggestion is that politics in Italy is a national pastime: "Every day, in some palpable way, millions of Italians are arrayed on one side or another of many, many public issues."<sup>100</sup> Election day itself is said to have a certain "holiday atmosphere" about it.<sup>101</sup>

A second theory suggests that voting is a tie that binds all of Italy together.<sup>102</sup> According to one student of Italian politics, "[f]or most Italian citizens, to vote is as natural as it is to get up in the morning and go to school or work."<sup>103</sup> This is the case despite the fact that the "duty" to vote in Italy is actually defined as a "civic duty" rather than a mandatory requirement of all eligible citizens.<sup>104</sup> Those failing to fulfill this civic duty without a sufficient excuse have notations recorded on their official state record.<sup>105</sup>

Perhaps the most satisfying explanation of Italy's high turnout relates to the social norm of voting that developed when voting was a legal duty and remains strong today despite the absence of that duty. In short, this explanation posits that "people vote to comply with the norm [of voting], which is stronger and better internalized where the law backs it up."<sup>106</sup> This norm is often enforced through informal social pressures applied by family and friends, much like the norm not to drink alcohol and operate an automobile is enforced in America.<sup>107</sup> Compliance with the norm begets "social approval" while a violation of it warrants "ostracism."<sup>108</sup>

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99. See GLOBAL REPORT, *supra* note 45, at 20.

100. JOSEPH LAPALOMBARA, DEMOCRACY, ITALIAN STYLE 135 (1987).

101. See Samuel H. Barnes, *Italy: Religion and Class in Electoral Behavior*, in ELECTORAL BEHAVIOR: A COMPARATIVE HANDBOOK 171, 175 (Richard Rose ed., 1974) [hereinafter *Religion and Class*].

102. See LAPALOMBARA, *supra* note 100, at 135-36 (according to the author, not even pasta itself holds this sacred position).

103. *Id.* at 136.

104. See *Religion and Class*, *supra* note 101, at 175.

105. See SAMUEL H. BARNES, REPRESENTATION IN ITALY: INSTITUTIONALIZED TRADITION AND ELECTORAL CHOICE 34 (1977).

106. See ENCYCLOPEDIA, *supra* note 49, at 45.

107. See *id.* The norm against drunk driving in America serves as a good analogy to the norm against nonvoting in Italy. Though there are laws and penalties associated with drunk driving, the most immediate pressure often comes from one's social circle in the form of verbal cues (that is, "have a cup of coffee") or physical acts (that is, taking the driver's keys).

108. *Id.*

#### IV. A FIRST AMENDMENT CHALLENGE TO COMPULSORY VOTING

Domestic critics of compulsory voting will almost surely bring a challenge based upon the First Amendment to the United States Constitution. Specifically, opponents will assert that compulsory voting violates the constitutional “right to refrain from speaking” famously set forth in *West Virginia State Board of Education v. Barnette*.<sup>109</sup> There remain, however, two interesting points for discussion. The first is whether strengthening our democracy through compulsory voting might be a sufficiently persuasive purpose for the government to allow for (what some would quickly call) a First Amendment violation. The second asks whether the presence of a “none of the above” option on compulsory voting ballots in the United States might successfully negate arguments that such a voting scheme is impermissible under the First Amendment as compelled speech.

##### A. PRELIMINARY SHOWINGS NECESSARY FOR FIRST AMENDMENT VIOLATION

In order to mount a First Amendment challenge, opponents of compulsory voting must make two preliminary showings: that the government has acted, and that the burdened expression was indeed speech protected by the United States Constitution. The arguments below strongly suggest that, whether enacted via statute or constitutional amendment, the government will have indeed “acted” with compulsory voting and, further, that voting is a valid nonverbal subject of First Amendment protection.

##### 1. The Power to Alter the Manner of Federal Elections

As to the first question—whether the government has acted—an obvious inquiry arises as to the power under which Congress might lawfully enact legislation changing federal voting procedures. If the government lacks the power to act in this arena, then the issue of whether or not they did in fact “act” is moot.

Article I, Section 4, Clause 1 of the United States Constitution provides one valid avenue for procedural voting changes as to members of the House of Representatives and the Senate.<sup>110</sup> The Necessary and Proper

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109. See *W. Va. State Bd. Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring).

110. 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

Clause provides for another such opportunity.<sup>111</sup> Both Article I, Section 4, Clause 1 and the Necessary and Proper Clause were cited by the U.S. Senate Committee on Rules and Administration in defense of Congress' power to enact the 1993 National Voter Registration ("Motor Voter") Act.<sup>112</sup>

Two cases interpreting congressional power to alter the manner of federal elections are relevant to the question of whether Congress has the power to install compulsory voting. The first is *United States v. Classic*.<sup>113</sup> Effectively shutting the door on arguments that states have exclusive authority to determine the manner of voting, *Classic* noted that a state's general power to determine how federal elections are conducted extends only to the point that Congress has legislated otherwise.<sup>114</sup> *Classic* therefore stands for the proposition that federal legislation mandating compulsory voting would supercede contradictory state legislation, were it to exist.

The second case discussing Congress' power to change federal election procedures is *Oregon v. Mitchell*.<sup>115</sup> In *Mitchell*, Justice Stewart relied heavily on the Necessary and Proper Clause to support the power of Congress to determine the manner of federal elections.<sup>116</sup> Writes Stewart: "Congress brings to the protection and facilitation of the exercise of privileges of United States citizenship all of its power under the Necessary and Proper Clause."<sup>117</sup>

An alternative route toward compulsory voting in America is, of course, a constitutional amendment. Though procedurally difficult to enact,<sup>118</sup> a constitutional amendment has the unique potential to decisively

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Congress may at any time by law make or alter such Regulations, except as to the Places of chusing [sic] Senators.").

111. See U.S. CONST. art. I, § 8, cl. 1, 18.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence [sic] and general Welfare of the United States . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department of Officer thereof.

*Id.*

112. See S. REP. NO. 103-6, at 3-4 (1993).

113. 313 U.S. 299 (1941).

114. See *id.* at 315.

115. 400 U.S. 112 (1970).

116. See *id.* at 286.

117. *Id.*

118. Under Article V of the U.S. Constitution, constitutional amendments first require a two-thirds vote by both houses of Congress or the legislative will of two-thirds of the states, then ratification by three-fourths of the states to complete. See U.S. CONST. art V.

establish compulsory voting in federal elections. The Fourteenth, Nineteenth, and Twenty-Sixth Amendments to the U.S. Constitution are all instances where the federal government has changed U.S. voting procedures via constitutional amendment.<sup>119</sup>

## 2. Voting as “Speech”

Although the act of voting for a specified candidate is technically nonverbal conduct, because it is communicative it probably receives First Amendment protection. Voting for a candidate—not selection of the “none of the above” option as discussed below—is similar to other nonverbal acts, such as the wearing of a black armband to signify disagreement with the Vietnam war, that have received First Amendment protection from the Supreme Court in the past.<sup>120</sup> Theoretically, choosing a candidate for federal office is no different than making the verbal declaration: “I, Joe Voter, most prefer Jane Candidate for President of the United States.”

The expressive properties of the “none of the above” option, however, are subject to debate. As previously mentioned, the mandatory voting scheme proposed in this paper incorporates a “none of the above” option on each ballot.<sup>121</sup> Selection of that option satisfies the duty to vote.

Under *Spence v. Washington*,<sup>122</sup> the “none of the above” option is probably not communicative because it fails to convey a particularized message.<sup>123</sup> *Spence* stands for the proposition that nonverbal conduct falls within the ambit of First Amendment protection when (1) there is “[a]n intent to convey a particularized message” and (2) “in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”<sup>124</sup>

Choosing the “none of the above” option probably does not convey a “particularized message” under *Spence*. One can easily imagine an argument suggesting that the “none of the above” vote is an endorsement or

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119. See U.S. CONST. amend. XIV, § 2 (“[W]hen the right to vote . . . is denied to any of the male inhabitants of such State, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens twenty-one years of age in such State.”); U.S. CONST. amend. XIX, § 1 (prohibiting discrimination regarding the right to vote on the basis of sex.); U.S. CONST. amend. XXVI, § 1 (prohibiting the denial of the right to vote to citizens who are under eighteen years old).

120. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that expression of antiwar sentiment through the use of a black armband is protected speech).

121. See *supra* Part I.

122. 418 U.S. 405 (1974).

123. See *id.* at 410–11.

124. *Id.*

criticism of a certain political position. Most obviously, it might evince dissatisfaction with the choices for office, the belief that one vote “does not make a difference,” or a stand against the two-party dominance in American politics. But selection of the “none of the above” option may also stand for the proposition that marijuana ought to be decriminalized, that to reduce dependence on foreign oil America should begin exploratory drilling in the Arctic National Wildlife Refuge, that more national parks ought to receive funding, that Mumia should be set free, that the death penalty should be reconsidered, and on and on. In other words, since no one clear meaning can be ascribed to the “none of the above” option, it is not communicative under *Spence* and therefore not a valid subject of constitutional protection.

There is academic support for the argument that the “none of the above” option might provide a valid defense against a free speech violation. Under the heading “The Nonexpressiveness of Compelled Speech,” Abner Greene of Fordham University School of Law argues that compelled speech that does not communicate the speaker’s “internal mental state” is not an expression and therefore might not violate the First Amendment.<sup>125</sup>

Although Greene’s argument related to the forced recitation of the pledge of allegiance by public school students, it can be modified to fit the present situation. Under his reasoning, so long as the voter is not made to vote for a candidate based on that voter’s own preferences, compulsory voting might not run afoul of the First Amendment because the “none of the above” option is not an expression. Clearly, selecting the “none of the above” option is not like a vote for a candidate based on a voter’s internal mental state.

However, ignoring Greene’s reasoning, this paper will proceed on the assumption that the preliminary showings required for a violation of the First Amendment are met with the scheme of mandatory voting proposed above. The question therefore remains: Would compulsory voting violate the First Amendment as impermissible compelled speech?

## B. COMPELLED SPEECH

*West Virginia State Board of Education v. Barnette*<sup>126</sup> is widely held to be the classic statement of the belief that the First Amendment

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125. See Abner S. Greene, *The Pledge of Allegiance Problem*, 64 *FORDHAM L. REV.* 451, 473 (1995).

126. 319 U.S. 624 (1943).

encompasses both the right to speak *and* the right not to speak, or the right to resist compelled expression.<sup>127</sup> This 1943 case found that public school students cannot be forced to participate in the pledge of allegiance.<sup>128</sup> Although *Barnette* was brought and won by Jehovah's Witnesses, its application has never been limited to factual contexts where the plaintiff's religious beliefs disallowed certain speech.<sup>129</sup>

Several later cases support the fundamental *Barnette* holding that the government may not compel speech. For instance, in *Wooley v. Maynard* the Supreme Court held that the state of New Hampshire could not require all of its citizens to use license plates that bore (what the plaintiff felt was) an objectionable message.<sup>130</sup> In *Abood v. Detroit Board of Education*, the court prevented a labor union from "spending a part of their required service fees to contribute to political candidates and to express political views unrelated to [the union's] duties as exclusive bargaining representative."<sup>131</sup> In *Pacific Gas & Electric Co. v. Public Utilities Commission*, the Court held that the state's decision to "require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagree[d]" was improper.<sup>132</sup> And in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, the Court held that organizers of Boston's St. Patrick's Day Parade could not be forced to include gay and lesbian groups.<sup>133</sup>

Importantly, in all of the above cases the subject of governmental compulsion was specific and allowed for no opportunity to opt out. The *Barnette* school children could not choose to stay silent during the pledge of allegiance, the New Hampshire driver in *Wooley* could not select a license plate that omitted the phrase "Live Free or Die," and the utility company in *Pacific Gas & Electric Co.* could not exclude the third-party mailer from its billing envelopes. Were those options allowed, it is questionable whether the Court would have decided that the state was unconstitutionally compelling speech.

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127. See ERWIN CHEREMINSKY, CONSTITUTIONAL LAW 953 (2001).

128. See *W. Va. State Bd. Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

129. A literal reading of Exodus, Chapter 20, verses 4 and 5 prohibits saluting "images," among them the flag of the United States. See *id.* at 629.

130. See *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (regarding the objectionable message on the license plate read "Live Free or Die").

131. *Abood v. Detroit Bd. Educ.*, 431 U.S. 209, 234 (1977).

132. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 4, 21 (1986).

133. See *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 580–81 (1995).

## C. THE “NONE OF THE ABOVE” OPTION

A properly structured scheme of compulsory voting might be able to avoid the pitfalls that defeated the compelled speech measures in *Barnette* and its progeny.<sup>134</sup> Specifically, a “none of the above” option by which voters could choose and fulfill their statutory or constitutional duty arguably removes the suspect government compulsion. By removing the necessity to endorse a particular viewpoint or candidate (or even set of candidates), the “none of the above” option potentially undermines the argument that compulsory voting is compelled speech. In the scheme suggested in this essay, it is the voters’ *attendance*, rather than their act of voting, that would be compelled.

With the “none of the above” option, voters would not be compelled to actually cast a vote in favor of or against any candidate according to their own beliefs. Instead, once they had recorded their attendance at the polling place, their legal duty could theoretically be satisfied by marking “none of the above” for each of their ballot choices. Assuming that no clear meaning is attached to the “none of the above” vote,<sup>135</sup> that option would truly be exercising the right not to speak. In that circumstance, the only harm the voter would have suffered is twenty or thirty minutes of their day once every other year.

It is not difficult to change the facts—and results—of the cases cited in support of a right not to speak to accommodate the “none of the above” concept. In *Barnette*, for instance, a “none of the above” analogy would allow for public school students to opt out of the pledge of allegiance. Similarly, in *Wooley* it would provide the option not to display a license plate bearing the phrase “Live Free or Die.” Were such options presented in those cases, it is questionable whether the courts would have ruled as they did.

Several cases upholding compelled speech are useful in this analysis. For instance, in *PruneYard Shopping Center v. Robins*, the United States Supreme Court ruled that a private shopping center owner *could* be forced to allow “speech and petitioning, reasonably exercised” on his property even if that was against his will.<sup>136</sup> In that case, the Court noted that since “no specific message [was] dictated by the State . . . [t]here . . . [would be]

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134. See, e.g., *W. Va. State Bd. Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

135. See *supra* Part IV.A.2 (suggesting that no clear meaning can be attached to a “none of the above” option because such votes might evince a broad range of intentions by the voter).

136. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 78, 88 (1980) (quoting the California Supreme Court).

no danger of governmental discrimination for or against a particular message.”<sup>137</sup>

The “none of the above” option fits squarely into the *PruneYard* reasoning because it is essentially permission to choose not to vote for a candidate if the range of choices available is unsatisfactory. Under the compulsory voting scheme discussed in this paper, the state would not be compelling any single choice or message but rather presenting as a valid option none of the listed choices.

*Red Lion Broadcasting Co. v. FCC* and *Turner Broadcasting System, Inc. v. FCC* are two additional examples of United States Supreme Court decisions upholding compelled speech. Relying heavily on the fact that there are a scarcity of broadcast spectrums and that the government controls the distribution of those spectrums, the *Red Lion* Court upheld the FCC’s “fairness doctrine” whereby broadcasters had to allow parties claiming to have been attacked on television or radio free-reply time.<sup>138</sup> In *Turner*, the Supreme Court found that the so-called “must-carry” provision by which cable television systems were required to devote some channels to local broadcast stations was consistent with the First Amendment.<sup>139</sup>

Interestingly, in *Turner* the Court appeared to apply an intermediate First Amendment scrutiny analysis in holding for FCC. That is, the Court asked (1) whether the must-carry provision served an important governmental interest and (2) whether the provision substantially burdened more speech than was necessary to further those governmental interests.<sup>140</sup> Both questions were answered in the affirmative, and the must-carry provision was deemed consistent with the First Amendment.

Taken together, *Red Lion*, *PruneYard*, and *Turner Broadcasting* might suggest that there is not a categorical rule prohibiting governmentally compelled voting. First, no specific message (that is, “I vote for Joe Candidate”) is compelled under this system. Voters have a choice among a field of several candidates, and may choose “none of the above.” Second, the governmental interest of legitimate democratically elected governments that accurately represent the collective will of a majority of Americans is surely important.<sup>141</sup> This interest is only strengthened by the national crisis of low voter turnout. And finally, although less drastic alternatives to

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137. *See id.* at 87.

138. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380 (1969).

139. *See Turner Broad. Sys. v. FCC*, 520 U.S. 180, 185 (1997).

140. *Id.*

141. *See supra* Part II.

compulsory voting might be available, there is no less restrictive alternative that can guarantee ninety percent turnout.

## V. POLITICAL CHALLENGES TO COMPULSORY VOTING

In addition to the First Amendment argument outlined in Part IV, persuasive nonconstitutional or political challenges to compulsory voting must also be considered. Two fears in particular could sway public opinion away from compulsory voting. First is the concern that compelling voting is no different from compelling a charitable donation: Those who want to donate should, while those who don't care to should not be forced to. Second is the fear, likely possessed by many dedicated voters, that the weight of their vote will be diminished or diluted by the will of someone whom they consider less able to make an informed vote choice.

Given the widespread appeal of these two fears, it is reasonable to suggest that compulsory voting will never see a First Amendment challenge because American lawmakers will never enact it.

### A. LIBERTARIANISM AND COMPULSORY VOTING

Issues of constitutionality aside, there remains a nearly common sense belief that compulsory voting simply will not happen in the United States. According to noted election law scholar Richard Hasen, “[e]nactment of a compulsory voting law in the United States . . . even if proven effective as a means of increasing turnout in other states, is unlikely to occur because of a widely held libertarian belief against government interference in the decision to vote.”<sup>142</sup>

Hasen attributes this libertarian ideological opposition to two sources. The first stems from the fact that voluntary voting has been a staple of American democracy since its inception over two hundred years ago.<sup>143</sup> That argument holds that voting has been, and therefore should continue to be, an option for citizens to exercise or refuse to exercise. Hasen also wonders whether removing the voluntariness that has been a part of our democracy since the 18th century might be perceived as a “failure of the [American] democratic experiment.”<sup>144</sup>

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142. Richard L. Hasen, *Voting Without Law?*, 144 U. P.A. L. REV. 2135, 2138 (1996).

143. *See id.* at 2177.

144. *See id.* There is, of course, a counter-argument suggesting that the American democratic experiment has *already* failed and is in dire need of drastic overhaul.

The second reason offered by Hasen to explain American libertarian opposition to compulsory voting “may be found in the ‘political culture’ of American society” or, more specifically, its “individualism.”<sup>145</sup> However, even Hasen stumbles when trying to square this second explanation with the case of Australia.<sup>146</sup> Australia, “a society no less renowned for its commitment to rugged individualism,” has thrived under a compulsory voting scheme for years.<sup>147</sup>

#### B. THE UNINFORMED VOTER PROBLEM

Many well-educated voters who take civic participation seriously resent the possibility in a compulsory voting system that their collective influence might be flooded out by a wave of new voters who, they presume, would make uninformed vote choices. This argument fails, however, because under the compulsory voting system proposed in this paper voters are allowed to make a “none of the above” choice on their ballots. The existence of this option means that truly uninformed voters will be able to satisfy their duty to vote simply by appearing at the polling place. Such voters will not be compelled to make an actual vote choice.

#### C. INSTITUTIONAL RESISTANCE TO FRANCHISE EXPANSION

Assuming that a scheme of compulsory voting in the United States clears the considerable constitutional and political hurdles described above, there nevertheless remains a reality of political partisanship with which to contend. Institutional resistance by established political parties in the United States might prevent compulsory voting legislation from being enacted into law.

It is axiomatic that the Republican and Democratic parties generally vote in ways that are most beneficial to their own attempts to seize or maintain power. It is also true that if compulsory voting were enacted, the total composition of the voting population in America would undergo dramatic changes.<sup>148</sup> Racial and economic minority groups, which to date have been underrepresented in federal elections, would quickly become an important, if not decisive, voting bloc.

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145. *See id.*

146. *See id.*

147. *See supra* Part III.A.

148. *See generally* NO SHOWS, *supra* note 16 (discussing the differences in demographics, attitudes toward voting, and political beliefs between voters and nonvoters in the 2000 election).

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The implications of this shift for the established political parties could be severe. “To the extent that one or some parties might disproportionately benefit from better mobilization of less-well-off segments of the citizenry,” writes one commentator, their “vested interests might get in the way of reform efforts and participation-promotion schemes.”<sup>149</sup> In other words, the self-interest of the two major political parties could prevent compulsory voting legislation from ever reaching the president’s desk.

## VI. CONCLUSION

There is no doubt that compulsory voting, coupled with a modest nonvoting penalty, would increase voter turnout in America from its current depressed level. This increase promises to be both dramatic and lasting (assuming the development of a social norm of voting, as in Italy). There is also little disagreement that increased political participation legitimizes government and is generally healthy for a democracy. What remains open for discussion is whether compulsory voting with a “none of the above” option violates the First Amendment as compelled speech. Although this Note has argued that such a scheme would not violate the First Amendment, the likelihood of such a system ever existing in America remains slim. Despite the successes of democracies such as Belgium and Australia, it is all but certain that it would face defeat at the hands of the very political factions whose dominance and legitimacy it threatens.

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149. See *ENCYCLOPEDIA*, *supra* note 49, at 46.