
GET OUT THE VOTE (OR ELSE): TESTING THE CONSTITUTIONALITY OF COMPULSORY VOTING

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INTRODUCTION

The Preamble to the United States Constitution envisions a nation governed by “We the People.”¹ The United States has never been governed by the people, however. Instead, the United States is and always has been run by the voters. Voters are wealthier, more educated, older, and whiter than “the People.”² These differences have consequences. Since voters hold the key to lawmakers’ job security, representatives are often more responsive to voters’ interests than nonvoters’ interests.³

The reason voters differ so much from the population⁴ as a whole is that voter turnout is consistently low in the United States. In federal midterm elections since the passage of the Voting Rights Act in 1965, voters have only constituted an average of 41.4% of the population.⁵ Even in presidential elections, in which voters usually do make up a majority of the population, the majority is usually bare.⁶ Consequently, the winners of those elections

1. U.S. CONST. pmb.

2. See, e.g., Arend Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1, 2–3 (1997) (wealth); Norman Nie & D. Sunshine Hillygus, *Education and Democratic Citizenship*, in MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY 30, 30 (Diane Ravitch & Joseph P. Viteritti eds., 2001) (education); JAN E. LEIGHLEY & JONATHAN NAGLER, WHO VOTES NOW?: DEMOGRAPHICS, ISSUES, INEQUALITY, AND TURNOUT IN THE UNITED STATES 32 (2014) (age); BERNARD L. FRAGA, THE TURNOUT GAP: RACE, ETHNICITY, AND POLITICAL INEQUALITY IN A DIVERSIFYING AMERICA 11–12 (2018) (race).

3. See John D. Griffin & Brian Newman, *Are Voters Better Represented?*, 67 J. POL. 1206, 1216 (2005).

4. I use “population” to refer to the voting-eligible population (that is, not including children, noncitizens, disenfranchised felons, and so forth).

5. See Michael P. McDonald, *National General Election VEP Turnout Rates, 1789-Present*, U.S. ELECTIONS PROJECT [hereinafter *Turnout Rates, 1789-Present*], <http://www.electproject.org/national-1789-present> [https://perma.cc/96P4-Z3WM]. Only 36.7% of the population chose the 114th Congress in 2014. See Michael P. McDonald, *2014 November General Election Turnout Rates*, U.S. ELECTIONS PROJECT, <http://www.electproject.org/2014g> [https://perma.cc/9UTQ-5FVA].

6. See *Turnout Rates, 1789-Present*, *supra* note 5.

are chosen by nowhere near a majority of the population. For example, President Donald Trump was elected by roughly 27% of the population in 2016.⁷ Even President Joe Biden, who won the largest number of votes for a presidential candidate in United States history, was elected by roughly 34% of the population in 2020.⁸ These low voter turnout figures set the United States apart from most of the developed world.⁹

Of course, low levels of voter turnout do not delegitimize elections in the United States. Other major democracies also do not achieve full voter turnout.¹⁰ Electoral legitimacy would be impossible to realize if it depended on full voter turnout in every election. However, many argue that low voter turnout in the United States is a serious problem.¹¹ To the extent a country values majoritarianism,¹² its elections arguably serve that purpose better

7. Donald Trump received 62,985,106 votes in the 2016 election. See *Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 9, 2017, 9:00 AM), <https://www.nytimes.com/elections/2016/results/president> [<https://perma.cc/S4H6-5V6B>]. The voting-eligible population in 2016 was 230,931,921. See Michael P. McDonald, *2016 November General Election Turnout Rates*, U.S. ELECTIONS PROJECT, <http://www.electproject.org/2016g> [<https://perma.cc/ZM6E-AMHS>]. Therefore, the number of people who voted for Trump in 2016 was approximately 27% of the voting eligible population.

8. Joe Biden received 81,284,666 votes in the 2020 election. See *Presidential Election Results: Biden Wins*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-president.html> [<https://perma.cc/5PG4-KP37>]. The voting-eligible population in 2020 was 239,247,182. See Michael P. McDonald, *2020 November General Election Turnout Rates*, U.S. ELECTIONS PROJECT, <http://www.electproject.org/2020g> [<https://perma.cc/3MS6-GSN9>]. Therefore, the number of people who voted for Biden in 2020 was approximately 34% of the voting eligible population.

9. See Drew DeSilver, *U.S. Trails Most Developed Countries in Voter Turnout*, PEW RSCH. CTR. (May 21, 2018), <https://www.pewresearch.org/fact-tank/2018/05/21/u-s-voter-turnout-trails-most-developed-countries> [<https://perma.cc/PRJ8-JKQ5>]. It is worth noting that the 2020 general election saw increased levels of voter turnout in the United States. See McDonald, *supra* note 8 (showing voter turnout equaling 66.7% of the voting-eligible population). This is a welcome development. However, it is unclear whether the 2020 general election represents the beginning of a new trend of increased voter participation in the United States, or whether the extraordinary circumstances of 2020, including the COVID-19 pandemic and the increased availability of mail-in voting, created a temporary spike in voter turnout that will fade in future elections. Regardless, even 66.7% voter turnout, while relatively high for the United States, is far lower than that of many other developed nations. See DeSilver, *supra*.

10. See DeSilver, *supra* note 9.

11. See Ryan J. Silver, Note, *Fixing United States Elections: Increasing Voter Turnout and Ensuring Representative Democracy*, 10 DREXEL L. REV. 239, 247–49 (2017) (describing low voter turnout as a “democratic crisis”). *But see* George Will, Opinion, *Low Voter Turnout Not a Major Problem*, TOPEKA CAP.-J. (Dec. 22, 2012, 3:26 PM), <https://www.cjonline.com/article/20121222/OPINION/312229910> [<https://perma.cc/E48Y-KJMT>] (arguing that voter turnout is low for the benign reasons that (1) Americans are “mostly comfortable,” (2) elections do not threaten important constitutional rights, (3) the Electoral College makes most states uncompetitive in presidential elections, and (4) gerrymandering makes many Congressional and state legislative races uncompetitive).

12. By “majoritarianism,” I mean the sense that a republican government should reflect the will of the majority. Whether the United States actually values majoritarianism has reemerged as a source of debate in the last few years. See Jesse Wegman, Opinion, *Joe Biden Won the Most Votes. It Doesn't Matter.*, N.Y. TIMES (Dec. 13, 2020), <https://www.nytimes.com/2020/12/13/opinion/electoral-college-trump-election.html> [<https://perma.cc/8XA8-5SCF>] (arguing that the United States values majoritarianism and that the Electoral College represents an irrational deviation from that ideal); *cf.* Mike Lee, *Of Course We're Not a Democracy*, MIKE LEE, U.S. SENATOR FOR UTAH (Oct. 20, 2020),

when the gap between its voters and its population is minimized. One day, Congress may agree with this argument. Therefore, this Note imagines a world in which Congress takes a decisive step to fix low voter turnout: compel every eligible American adult to vote.¹³

Congress is unlikely to pass such a transformative piece of legislation in the near future. However, it might enact compulsory voting someday. Far from being a fringe or radical idea, it has been implemented by several democracies,¹⁴ and it has been successful where actually enforced.¹⁵ Indeed, commentators often cite compulsory voting as a solution to the United States' low voter turnout problem.¹⁶ Compulsory voting legislation has even been recently proposed at the statewide level in California.¹⁷

But if Congress decided to pass compulsory voting legislation, it would face a substantial and unanswered question: would it be constitutional? This Note intends to answer that question by analyzing how compulsory voting would fare in various constitutional challenges.¹⁸ Part I explores how compulsory voting might be structured in the United States if Congress based its legislation on Australia's. Part II addresses the most likely constitutional challenges to compulsory voting. The structural argument addressed in Section II.A concerns whether Congress has the constitutional power to pass compulsory voting if it conflicted with state legislation. I conclude that it does because the Elections Clause gives Congress the power to supersede

<https://www.lee.senate.gov/2020/10/of-course-we-re-not-a-democracy> [<https://perma.cc/MLN7-L68Q>] (arguing that majoritarianism is not the goal of the American political system). This debate tends to center on the wisdom (or lack thereof) of the unique mechanisms of the Electoral College, the Senate, and partisan redistricting of legislative seats, which are explicitly antimajoritarian institutions. That is not the focus of this Note, and therefore I will assume that the United States values majoritarianism broadly and in contexts other than in those institutions.

13. This Note does not address compulsory voting that could be passed by state legislatures for statewide elections. However, a state could attempt such a system. *See* U.S. CONST. art. I, § 4, cl. 1; *see also infra* note 17 and accompanying text.

14. Laura Santhanam, *22 Countries Where Voting Is Mandatory*, PBS NEWSHOUR (Nov. 3, 2014, 3:01 PM), <https://www.pbs.org/newshour/politics/22-countries-voting-mandatory> [<https://perma.cc/Z5Q6-P9L5>].

15. In Australia, where compulsory voting is enforced, *see infra* Part I, turnout increased from 64.2% in 1924 to an average of 94.6% in the nine elections following implementation of compulsory voting, SARAH BIRCH, *FULL PARTICIPATION: A COMPARATIVE STUDY OF COMPULSORY VOTING* 80 (2008). In Guatemala, by contrast, where compulsory voting is not enforced, compulsory voting only increased voter turnout by 5.2% after its adoption. *See id.* at 81.

16. *See, e.g.,* Eric Lund, Comment, *Compulsory Voting: A Possible Cure for Partisanship and Apathy in U.S. Politics*, 31 WIS. INT'L L.J. 90, 116 (2013); Note, *The Case for Compulsory Voting in the United States*, 121 HARV. L. REV. 591, 592–93 (2007); Dambisa Moyo, Opinion, *Make Voting Mandatory in the U.S.*, N.Y. TIMES (Oct. 15, 2019), <https://www.nytimes.com/2019/10/15/opinion/united-states-voting-mandatory.html> [<https://perma.cc/K42Z-W37P>].

17. *See* Assemb. B. 2070, 2019–20 Leg., Reg. Sess. (Cal. 2020).

18. This Note is not a policy paper and will not explore the many nonlegal issues surrounding the potential implementation of compulsory voting. Therefore, any conclusions in this Note about the legal feasibility of compulsory voting are not policy endorsements of the program.

state election regulations, even when states have not acted. The rights-based arguments addressed in Section II.B concern whether compulsory voting would violate the right not to speak or a potential right not to vote. I conclude that while the voting is expressive conduct, compulsory voting would not violate the First Amendment by compelling it. I also conclude that there is likely no such thing as a right not to vote. However, if there is a right not to vote, the interests served by compulsory voting would outweigh the light burden upon it. Finally, Section II.C argues that compulsory voting legislation could be legally justified as a tax.

I. COMPULSORY VOTING LEGISLATION AND THE AUSTRALIAN MODEL

If Congress were to draft compulsory voting legislation, it might look to Australia as a model. It would be wise to do so for several reasons. First, there are significant structural and cultural parallels between Australia and the United States. Second, Australia's compulsory voting has been very successful in increasing and maintaining high voter turnout. Therefore, structuring compulsory voting legislation to mirror Australia's would give Congress a starting place and could help sell the legislation to the American public.

Compulsory voting would be controversial in the United States. Public polling on the issue suggests Americans would not favor it.¹⁹ This is consistent with Americans' general opposition to behavioral mandates, such as the shared responsibility payment²⁰ of the Affordable Care Act (ACA).²¹ However, emphasizing that compulsory voting has been implemented in a country similar to the United States in political structure and culture could create public support for it. Consider the following dynamics: Australia is

19. See, e.g., Dalia Sussman, *Poll: Americans Oppose Compulsory Voting*, ABC NEWS (Jan. 6, 2006, 3:30 PM), <https://abcnews.go.com/Politics/story?id=120577&page=1> [<https://perma.cc/FS32-URSA>].

20. Otherwise known as the "individual mandate." See *infra* note 21.

21. See THE HENRY J. KAISER FAM. FOUND., KAISER PUBLIC OPINION: DATA NOTE 1 (2012), <https://www.kff.org/wp-content/uploads/2013/01/8296.pdf> (showing total public support for the individual mandate at 32%, nineteen percentage points lower than the next least popular portion of the ACA). Further comparisons between the individual mandate of the ACA and compulsory voting are explored in Section II.C. The unpopularity of behavioral mandates has appeared to dissipate somewhat during the COVID-19 pandemic, as polls suggest that Americans largely back initiatives such as mask-wearing and vaccination mandates. See, e.g., Ed Silverman, *STAT-Harris Poll: Most Americans Would Support Biden Issuing a Mask Mandate*, STAT (Dec. 21, 2020), <https://www.statnews.com/pharmalot/2020/12/21/biden-trump-covid19-coronavirus-pandemic-mask-vaccine> [<https://perma.cc/8T6G-BNBY>]; *Majority Back Vaccine, Mask Mandates*, MONMOUTH UNIV. (Sept. 15, 2021), https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_091521 [<https://perma.cc/VJJ6-4KSL>]. However, I believe it is more likely that the public health risks of the COVID-19 pandemic resulted in an exception to public perceptions of behavioral mandates, rather than the start of a new trend.

popular among Americans;²² individualism is a core cultural value in Australia, just as it is in the United States;²³ and Australia's government shares a similar structure to the United States' government, including three branches of government federalist principles, and legislative bicameralism.²⁴ Therefore, by using Australia as a model for compulsory voting legislation, Congress could emphasize that a country similar in its structure and values to the United States has adopted compulsory voting. This may ease the public's concern about the program.

Australian compulsory voting has also been effective. Since its introduction in 1924, turnout in federal elections has never fallen below 90%.²⁵ Australians have also had comparatively high confidence in their democratic process relative to other countries.²⁶ Even as Australians' confidence in politicians and political parties has declined in recent years, their support for the electoral process itself and the Australian Electoral Commission (AEC)—the body responsible for enforcing compulsory voting—remains high.²⁷ Compulsory voting has also not led to voter fraud. An investigation by the Joint Standing Committee on Electoral Matters for the Australian Parliament found one case of voter fraud per 200,000 enrollments on average, or a 0.0005% occurrence.²⁸ Finally, and perhaps most importantly, compulsory voting is and has been very popular among Australians.²⁹

Therefore, Australia's model could offer political assistance in

22. Gallup regularly polls Americans' views of foreign countries. In February 2019, 88% of Americans said they had either a "very favorable" or "mostly favorable" view of Australia. *Country Ratings*, GALLUP, <https://news.gallup.com/poll/1624/perceptions-foreign-countries.aspx> [<https://perma.cc/RD7G-J6ZF>].

23. See GEERT HOFSTEDE, *CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES* 157 (abr. ed. 1984).

24. See *Infosheet 20: The Australian System of Government*, PARLIAMENT OF AUSTRALIA, https://www.aph.gov.au/%20About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_20_-_The_Australian_system_of_government [<https://perma.cc/8BRK-8678>].

25. See TIM EVANS, *AUSTRALIAN ELECTORAL COMM'N, COMPULSORY VOTING IN AUSTRALIA* 7 (2006).

26. See Pippa Norris, *Confidence in Australian Democracy*, in *ELECTIONS: FULL, FREE & FAIR* 202, 209 fig.13.2 (Marian Sawyer ed., 2001). Although not all of Australians' confidence in their elections can be attributed to compulsory voting, it likely contributes to some degree given that compulsory voting is a central tenet of the country's electoral structure.

27. JEFFREY KARP, ALESSANDRO NAI, FERRAN MARTINEZ I COMA, MAX GRÖMPING & PIPPA NORRIS, *THE ELECTORAL INTEGRITY PROJECT, THE AUSTRALIAN VOTER EXPERIENCE: TRUST AND CONFIDENCE IN THE 2016 FEDERAL ELECTION* 16–17 (2017).

28. JOINT STANDING COMM. ON ELECTORAL MATTERS, *THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, USER FRIENDLY, NOT ABUSER FRIENDLY: REPORT OF THE INQUIRY INTO THE INTEGRITY OF THE ELECTORAL ROLL* § 2.14 (2001).

29. See Lisa Hill, *Public Acceptance of Compulsory Voting: Explaining the Australian Case*, 46 *REPRESENTATION* 425, 427 (2010) (showing public support for compulsory voting in Australia sustaining levels over 70% across four decades).

Congress's attempt to pass compulsory voting. The countries' many parallels and Australia's remarkable success with the program illustrate how.

It is thus worth exploring how compulsory voting in Australia works. Section 245 of the Commonwealth Electoral Act 1918 provides the framework. At each election, the Electoral Commissioner compiles a list of those from the registered voters list who ostensibly did not vote.³⁰ Within three months of the election, local election officials send a notice to each apparent nonvoter in the nonvoter's jurisdiction with the following notices: (1) the individual appears to have not voted; (2) it is against the law to not vote; and (3) the individual can either (a) claim to have voted, (b) claim a valid and sufficient reason for not voting, or (c) pay a \$20 penalty.³¹ A religious belief that it is immoral to vote is a valid and sufficient reason not to vote.³² If the individual is unable to respond to the notice, someone else with personal knowledge of the facts of the individual's failure to vote may respond on the individual's behalf.³³ A local election official is not required to send such notice to a nonvoter if the official is convinced that the person: (1) is dead, (2) was absent from Australia on polling day, (3) was ineligible to vote at the time of the election, or (4) had a valid and sufficient reason for not voting.³⁴

No criminal proceedings can be brought if the individual responds that the individual voted or had a valid and sufficient reason for not doing so.³⁵ However, if the local election official is not satisfied by the individual's response, the local official sends a notice that the \$20 penalty must be paid if the individual wishes to avoid criminal proceedings.³⁶

An individual is subject to criminal proceedings by the Electoral Commissioner if the individual fails to comply with the above provisions or makes a knowingly false or misleading statement in the process.³⁷ Violations of the compulsory voting law are strict liability offenses, which in Australia refer to offenses for which no "fault elements" (mens rea) need to be proven, although mistake of fact can be presented as a defense.³⁸ If convicted of the offense, an individual is assigned one penalty unit, which equals a maximum,

30. *Commonwealth Electoral Act 1918* (Cth) pt XVI s 245 para 2 (Austl.).

31. *Id.* paras 3, 5. A second notice of penalty is sent if the individual does not respond with (i), (ii), or (iii). *Id.* para 6.

32. *Id.* para 14.

33. *Id.* para 11.

34. *Id.* para 4.

35. *Id.* paras 8, 15. Alternatively, the individual can make the \$20 payment at this stage. *Id.* para 8(b).

36. *Id.* para 9.

37. *Id.* paras 15, 15C, 16.

38. *Id.* para 15A; *Criminal Code Act 1995* (Cth) ch 2 pt 2.2 div 6 s 6.1 para 1 (Austl.).

but not mandatory, fine of \$210.³⁹ Proceedings can be avoided if the individual can show evidence that there is a “reasonable possibility” that the individual has a valid and sufficient reason for not voting.⁴⁰

Thus, Australian compulsory voting includes substantial due process in which an individual can challenge the underlying presumption that the individual did not vote or present a reason for not doing so.

An American compulsory voting scheme could look similar to section 245 of the Commonwealth Electoral Act 1918. This would mean that the compulsory voting legislation could include: (1) a \$20 penalty for not voting (the “Non-Participation Payment”),⁴¹ (2) an opportunity to present a valid and sufficient reason for not voting, and (3) an opportunity to assert that the individual did vote. However, there should be two significant but simple differences. The first difference is that the United States legislation should require local election officials to send a list of nonvoters without valid or sufficient justifications to the Internal Revenue Service (IRS). The IRS could then add the Non-Participation Payment to the nonvoter’s tax liability.⁴² Because American elections are administered at the state and local level, it does not have a federal body similar to the AEC.⁴³ Therefore, the IRS, a federal agency with the infrastructure to impose and collect payments on Americans, would be a wise choice to fill the role of the AEC. Further, this change would help to preserve compulsory voting’s constitutionality.⁴⁴ The second difference is that states should be required to provide a “none of the above” option for congressional candidates and for President and Vice President on all ballots.⁴⁵

This Note also assumes that compulsory voting legislation would apply only to federal elections for Congress, President, and Vice President. If federal compulsory voting applied to state or local elections, it would likely be unconstitutional because state and local elections are not subject to federal

39. *Commonwealth Electoral Act 1918* (Cth) pt XVI s 245 para 15 (Austl.); *Crimes Act 1914* (Cth) pt IA s 4AA para 1 (Austl.).

40. *Commonwealth Electoral Act 1918* (Cth) pt XVI s 245 para 15B (Austl.); *Criminal Code Act 1995* (Cth) ch 2 pt 2.6 div 13 s 13.3 para 6 (Austl.).

41. In U.S. dollars. I use the \$20 figure only because that is the amount of the penalty in Australia’s legislation, not because I believe it is necessarily the optimal penalty amount. In deciding the optimal penalty amount, Congress would have to balance the interest in encouraging voting against the interest in not excessively penalizing nonvoters.

42. Tax penalties could be increased with successive failures to vote or respond.

43. The United States does have the Federal Election Commission (FEC). However, the FEC is a very different body than the AEC. The FEC is a regulatory agency designed to enforce federal campaign finance law, but does not administer elections. See 52 U.S.C. § 30106(b). The AEC, by contrast, actually administers the commonwealth’s elections. See *Commonwealth Electoral Act 1918* (Cth) pt II div 2 s 7 (Austl.).

44. See *infra* Section II.C.4.

45. See *infra* Section II.B.1.iii.d.

jurisdiction.⁴⁶

II. ARGUMENT

A. CONGRESS HAS THE POWER TO ENACT COMPULSORY VOTING

Compulsory voting raises an important question of power: in an electoral system administered by states and local jurisdictions, is it an overreach of congressional power to impose federal compulsory voting?

The Constitution divides control over federal elections between states and the federal government. Article I, Section 4, Clause 1 of the Constitution (the “Elections Clause”) declares that states proscribe “[t]he Times, Places, and Manner of holding [e]lections for Senators and Representatives,” but “Congress may at any time by Law make or alter” states’ regulations.⁴⁷

Given Congress’s ability to “make or alter” states’ election regulations, the Elections Clause grants Congress significant power. The Supreme Court has described Congress’s power to regulate elections as “paramount” relative to states’ power to do so.⁴⁸ The Court has also said that Congress has the power to provide “a complete code for congressional elections.”⁴⁹ Therefore, if election regulations promulgated by Congress interfere with those of the states, Congress’s regulations “necessarily supersede[] them.”⁵⁰ Thus, states may only create regulations concerning the times, places, and manner of holding federal elections to the extent those regulations do not contravene Congress’s will.⁵¹

The Court has continuously recognized Congress’s affirmative power under the Elections Clause. It has held, for example, that Congress (1) can regulate primary elections to the extent the elections involve the selection of candidates for federal election,⁵² (2) has the “exclusive authority” to secure fair representation in the House of Representatives,⁵³ (3) can force states to allow eighteen-year-olds to vote in federal elections,⁵⁴ (4) can regulate the

46. See *Ex parte Siebold*, 100 U.S. 371, 393 (1880) (stating that state regulations concerning state or local elections would not be subject to federal jurisdiction).

47. U.S. CONST. art. I, § 4, cl. 1.

48. *Ex parte Siebold*, 100 U.S. at 383–84.

49. *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

50. *Ex parte Siebold*, 100 U.S. at 384.

51. *Foster v. Love*, 522 U.S. 67, 69 (1997) (citations omitted) (noting the Elections Clause “invests the [s]tates with responsibility for the mechanics of congressional elections, . . . but only so far as Congress declines to pre-empt state legislative choices”).

52. *United States v. Classic*, 313 U.S. 299, 320 (1941).

53. *Colegrove v. Green*, 328 U.S. 549, 554 (1946).

54. *Oregon v. Mitchell*, 400 U.S. 112, 130 (1970).

recount process,⁵⁵ and (5) has the power to set a date on which states must hold federal elections.⁵⁶ The fact that a state and federal election may occur on the same date does not abrogate Congress's supremacy over electoral regulations.⁵⁷

Further, the principle under the Commerce Clause that the federal government cannot commandeer state actors to implement a federal regulatory program⁵⁸ does not apply to the Elections Clause. Every circuit to consider the issue has held as such. The issue arose in challenges to the National Voter Registration Act of 1993 (NVRA). Similar to how compulsory voting might operate, the NVRA mandates states to follow federal registration procedures.⁵⁹ In *Association of Community Organizations for Reform Now v. Miller*, the Sixth Circuit upheld the NVRA because the Elections Clause explicitly allows Congress to conscript state actors for a federal purpose.⁶⁰ Similar challenges against the NVRA were brought in other circuits, where the courts shared or followed the Sixth Circuit's holding and reasoning in *Miller*.⁶¹ Therefore, an argument against compulsory voting on anticommandeering principles would fail, since the Elections Clause plainly permits federal commandeering of federal elections.

Finally, even though the Elections Clause refers only to elections for Senators and Representatives, the Court has also held that Congress has the sole authority to regulate elections for the President and Vice President.⁶² This authority does not derive from the Elections Clause, but rather from the nature of the offices of President and Vice President, which undoubtedly perform federal functions and therefore should be regulated by Congress.⁶³

The analysis would end there, except that the Court recently defined Congress's Elections Clause power more precisely in *Arizona v. Inter Tribal Council of Arizona, Inc.* That case involved a conflict between an Arizona

55. *Roudebush v. Hartke*, 405 U.S. 15, 24–25 (1972).

56. *Foster*, 522 U.S. at 74.

57. *See Ex parte Siebold*, 100 U.S. 371, 393 (1880); *United States v. Bowman*, 636 F.2d 1003, 1010 (5th Cir. 1981) (citing *Ex parte Siebold*).

58. *See New York v. United States*, 505 U.S. 144, 176 (1992) (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

59. 52 U.S.C. § 20503 (emphasis added) (“[N]otwithstanding any other Federal or State law . . . each State shall establish procedures to register to vote in elections for Federal office . . .”).

60. *See Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997).

61. *See Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791, 794–95 (7th Cir. 1995); *Voting Rts. Coal. v. Wilson*, 60 F.3d 1411, 1413–15 (9th Cir. 1995).

62. *Burroughs v. United States*, 290 U.S. 534, 547–48 (1934). Congress could probably only make voting in presidential elections compulsory to the extent state legislatures continue to allow presidential electors to be chosen by statewide popular election. *See* U.S. CONST. art. II, § 1, cl. 2; *Bush v. Gore*, 531 U.S. 98, 104 (2000).

63. *Burroughs*, 290 U.S. at 545.

regulation that required voting registration applicants to document their citizenship and a federal regulation that only required applicants to attest to their citizenship.⁶⁴ In ruling that the federal regulation preempted the application of the Arizona regulation, Justice Scalia, writing for the majority, declined to apply the Supremacy Clause preemption principle,⁶⁵ which presumes Congress does not intend to preempt state law.⁶⁶ Scalia did not apply this principle because the Elections Clause expressly gives Congress the ability to preempt state laws.⁶⁷ He wrote that “the [s]tates’ role in regulating congressional elections . . . has always existed subject to the express qualification that it ‘terminates according to federal law.’”⁶⁸ But Scalia also noted that Congress “*necessarily* displaces some element of a pre-existing legal regime erected by the States” when it acts under the Elections Clause.⁶⁹ He further said that the power granted by the Elections Clause to Congress is “none other than the power to pre-empt.”⁷⁰

Some commentators have noted that *Inter Tribal* represents a thorough reaffirmation of federal power under the Elections Clause. Graham August Toney Floyd describes the holding as reiterating prior precedent,⁷¹ and Robert A. Kengle states that “the Court [in *Inter Tribal*] reaffirmed the ‘paramount’ authority of Congress over the regulation of congressional elections.”⁷² Samuel Issacharoff goes further, describing *Inter Tribal* as giving “the most expansive account to date of federal power under the Elections Clause.”⁷³

However, Franita Tolson reads the decision differently and criticizes the Court for reading congressional power under the Elections Clause too narrowly.⁷⁴ Tolson argues that the Court in *Inter Tribal* erroneously reasoned that “the Elections Clause is an area of concurrent state and federal power in

64. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 6–7 (2013).

65. *Id.* at 13–14.

66. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In this context, “pre-empt” means to replace, not to prevent.

67. *Inter Tribal*, 570 U.S. at 13–14.

68. *Id.* at 15 (quoting *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 347 (2001)).

69. *Id.* at 14 (emphasis in original). Scalia further elaborates: “*all* action under the Elections Clause displaces some element of a pre-existing state regulatory regime, because the text of the Clause confers the power to do exactly (and only) that.” *Id.* at 14 n.6.

70. *Id.* at 14.

71. Graham August Toney Floyd, Note, *Federalism, Elections, Preemption, and Supremacy: The Aftermath of Inter Tribal Council*, 33 *MISS. COLL. L. REV.* 235, 251 (2014).

72. Robert A. Kengle, *To Accept or To Reject: Arizona v. Inter Tribal Council of Arizona, the Elections Clause, and the National Voter Registration Act of 1993*, 57 *HOW. L.J.* 759, 802 (2014).

73. Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 *HARV. L. REV.* 95, 111 (2013).

74. Franita Tolson, *Election Law “Federalism” and the Limits of the Antidiscrimination Framework*, 59 *WM. & MARY L. REV.* 2211, 2219 (2018) (“Congress also can act in complete disregard of state sovereignty in exercising [its] authority [under the Elections Clause].”).

which each government exercises power of the same kind and type.”⁷⁵ Tolson argues that this contradicts the key Elections Clause principle that Congress can legislate for elections “in complete disregard of state law.”⁷⁶ Tolson’s concern is that the Court may have redefined Congress’s Elections Clause power to require states to act first before Congress can act to preempt them.

To the extent the Court in *Inter Tribal* suggests that the Elections Clause requires states to act before Congress does, this rule would not pose an issue for compulsory voting. If congressional action must “displace[] some element of a pre-existing legal regime erected by the [s]tates,”⁷⁷ then states’ “legal regime” necessarily includes actions states have not yet taken.⁷⁸ In other words, state action includes what states *could* do and is not limited to what any individual state has already passed.

To illustrate, consider a scenario where Congress passed a federal voter ID law that required proof of photographic identification to vote. This would conflict with and preempt Kentucky’s voter ID law, which allows voters to be identified by certain forms of nonphotographic ID.⁷⁹ This would be a straightforward instance of federal law “displac[ing]” a part of Kentucky’s “pre-existing legal regime,” as articulated in *Inter Tribal*.⁸⁰ However, this federal voter ID law would not explicitly conflict with any existing provision of Illinois’s voter ID law, which does not have a documentation provision.⁸¹ But the Court would likely not invalidate the federal voter ID law on the sole basis that it did not contradict a specific, written provision in the Illinois election code. It would likely find instead that since Illinois *could* have passed a documentation law, the federal ID law preempts Illinois’s decision not to do so.

75. *Id.* at 2281. Tolson also takes issue with the dicta in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, in which Justice Ginsburg wrote that the Elections Clause was not designed “to restrict the way [s]tates enact legislation.” *Id.* at 2242; *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 814–15 (2015).

76. Tolson, *supra* note 74, at 2270; see also Conner Johnston, Comment, *Proportional Voting Through the Elections Clause: Protecting Voting Rights Post-Shelby County*, 62 UCLA L. REV. 236, 264–66 (2015) (arguing that the Elections Clause should be used to make state legislatures adopt proportional voting systems).

77. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 14 (2013).

78. If the Elections Clause grants Congress the power to regulate what states have the legal power to do, even if they have not done so, Congress’s power is in practice almost unlimited. Few examples would arise in which Congress would pass an election law that did not reflect some underlying hypothetical power of the states. However, framing the power in this way is consistent with Scalia’s language in *Inter Tribal*, and therefore the point is an important one to emphasize.

79. KY. REV. STAT. ANN. § 117.227 (West 2020). These forms of ID include personal acquaintance of the election officer, credit card, or Social Security card.

80. See *Inter Tribal*, 570 U.S. at 14.

81. See 10 ILL. COMP. STAT. 5/3 (2021). In other words, the Illinois election code does not explicitly state that no documentation is required; rather, it is silent on that issue.

The same logic would apply to compulsory voting. Compulsory voting is and has been within the purview of states to implement.⁸² States have declined to do so, and federal compulsory voting would preempt those decisions not to act. Therefore, to the extent Tolson's concerns about the Court's opinion in *Inter Tribal* bear fruit and the Court were to explicitly hold that Congress only has the power to preempt state election regulations under the Elections Clause, that would not preclude Congress from enacting compulsory voting legislation.

In sum, the Elections Clause represents a significant grant of power to Congress in shaping the "Times, Places, and Manner" of holding congressional elections. This power is stronger than any states' actions or nonactions concerning federal elections.

B. COMPULSORY VOTING WOULD NOT IMPERMISSIBLY INFRINGE ON CONSTITUTIONAL RIGHTS

1. The First Amendment and the Right Not to Speak

The right to speak under the First Amendment is a bedrock of our democratic system.⁸³ The Court has many times invalidated governments' attempts to restrict citizens' ability to speak.⁸⁴ However, the Court has stated just as clearly that governments may not compel speech, recognizing an individual's right *not* to speak.⁸⁵ The first case to recognize this right was *West Virginia v. Barnette*.⁸⁶ There, the Court held that a state requirement that students recite the Pledge of Allegiance upon penalty of expulsion violated the Constitution.⁸⁷ As *Wooley v. Maynard* later elaborated, "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"⁸⁸

82. Compulsory voting is not a secret. Twenty-two countries have adopted compulsory voting. Santhanam, *supra* note 14. Some of the most famous examples adopted their compulsory voting laws a long time ago. Belgium adopted their program in 1893. A. Nerinx, *Compulsory Voting in Belgium*, 18 ANNALS AM. ACAD. POL. & SOC. SCI. 87, 87 (1901). Australia adopted its compulsory voting laws in 1924. EVANS, *supra* note 25. Georgia even included compulsory voting in its Constitution of 1777, although that constitution was ultimately not adopted. Albert B. Saye, *The Elective Franchise in Georgia*, 2 GA. REV. 434, 434 (1948).

83. U.S. CONST. amend. I; see *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

84. See, e.g., *Cohen v. California*, 403 U.S. 15, 24, 26 (1971); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969); *Texas v. Johnson*, 491 U.S. 397, 420 (1989); *Reno v. ACLU*, 521 U.S. 844, 874, 885 (1997).

85. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); Anna M. Taruschio, Note, *The First Amendment, the Right Not to Speak, and the Problem of Government Access Statutes*, 27 FORDHAM URB. L.J. 1001, 1001 (2000) (describing Supreme Court's view of the negative free speech right as "the right not to speak").

86. *Barnette*, 319 U.S. 624.

87. *Id.* at 642.

88. *Wooley*, 430 U.S. at 714.

Harper & Row, Publishers, Inc. v. Nation Enterprises further added, “There is necessarily . . . [a] freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.”⁸⁹

Therefore, if voting is a form of speech, compulsory voting may infringe upon the First Amendment by compelling it—in other words, by restricting the right not to speak. For the reasons below, however, I conclude that compulsory voting would not be an unconstitutional burden on the right not to speak, even though voting is expressive conduct protected by the First Amendment.⁹⁰

i. Voting Is Expressive Conduct

Voting is best described as conduct because it does not involve the written or spoken word.⁹¹ Under a First Amendment speech analysis, the degree to which Congress can regulate conduct depends in large part on whether that conduct is expressive. To determine whether conduct is expressive, the Court outlined a test in *Spence v. Washington*.⁹² This test looks to whether “[a]n intent [by the speaker] to convey a particularized message was present, and . . . [whether] the likelihood was great that the message would be understood by those who viewed it.”⁹³ If the conduct is expressive, the Court asks whether the government’s regulation is related to the suppression of free expression.⁹⁴ If the government’s regulation is not so related, a relatively lenient test outlined in *United States v. O’Brien* is applied.⁹⁵ The *O’Brien* test holds that the government regulation is justified if it (1) is within the constitutional power of the government, (2) furthers an important or substantial government interest, (3) the interest is unrelated to the suppression of free expression, and (4) the restriction is no more extensive than necessary.⁹⁶ If the government’s regulation *is* related to the suppression of free expression, however, then a “more demanding” standard is applied.⁹⁷

89. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (quoting *Est. of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (N.Y. 1968)).

90. *See infra* Section II.B.1.

91. *See Texas v. Johnson*, 491 U.S. 397, 406 (1989) (contrasting “expressive conduct” with “written or spoken word”). Of course, a ballot literally contains written words, and in some cases, voting can involve writing in a name. But a ballot is easily distinguishable from the types of “written word” in books, pamphlets, and so forth.

92. *Spence v. Washington*, 418 U.S. 405 (1974).

93. *Id.* at 410–11.

94. *Texas*, 491 U.S. at 403 (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968); *Spence*, 418 U.S. at 414 n.8).

95. *O’Brien*, 391 U.S. 367.

96. *Id.*

97. *Texas*, 491 U.S. at 403 (citing *Spence*, 418 U.S. at 411).

Voting satisfies the first prong of the *Spence* test because it intends to convey a message of political preference. Many commentators have argued as such.⁹⁸ For example, Armand Derfner and J. Gerald Herbert argue that “voting . . . plainly express[es] a point of view and represent[s] a decision to sign on to a particular idea in the marketplace of ideas or support a particular candidate who best represents the voters’ political beliefs.”⁹⁹ Adam Winkler asserts that “through voting, the individual expresses, among other things, support for a candidate for political office . . . [and] communicates her political views, judgments, and ideals.”¹⁰⁰

However, the Court has not definitively recognized the expressive aspect of voting.¹⁰¹ Indeed, at times it has seemed to downplay voting’s expressive aspect. For example, in *Storer v. Brown*, Justice White wrote that the primary process in California “functions to winnow out and finally reject all but the chosen candidates,” and that the general election ballot was “not a forum” for intraparty battles.¹⁰² Later, in *Timmons v. Twin Cities Area New Party*, the Court stated that “[b]allots serve primarily to elect candidates, not as forums for political expression.”¹⁰³ However, the Court did not clearly hold that *voting*, as opposed to the primary process or the ballot itself, is not expressive in either of these cases. Moreover, to the extent these opinions implied that voting does not intend to convey a message, that conclusion should be rejected. To see how, consider the Court’s jurisprudence on petitions and how it relates to voting.

The Court has held that the circulation of a petition is expressive.¹⁰⁴ In *Meyer v. Grant*, the Court struck down a law that prohibited paying a person to circulate a ballot-initiative petition.¹⁰⁵ Justice Stevens emphasized that the circulation of a petition for an initiative involves “the expression of a desire for political change.”¹⁰⁶ The prohibition on the payment of additional actors to circulate the petition overburdened the protected speech.¹⁰⁷ *Buckley v. American Constitutional Law Foundation*, decided ten years later, applied

98. See, e.g., Armand Derfner & J. Gerald Herbert, *Voting Is Speech*, 34 YALE L. & POL’Y REV. 471, 485–86 (2016); Michele Logan, Note, *The Right to Write-In: Voting Rights and the First Amendment*, 44 HASTINGS L.J. 727, 743–44 (1993).

99. See Derfner & Herbert, *supra* note 98, at 487.

100. Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 334–35 (1993).

101. The Court has not definitively held that voting is a form of speech. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) (“We do not stop to canvass the relation between voting and political expression.”).

102. *Storer v. Brown*, 415 U.S. 724, 735 (1974).

103. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997).

104. See *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988); *Buckley v. Am. Const. L. Found.*, 525 U.S. 182, 186 (1999) (citing *Meyer*, 486 U.S. at 422).

105. *Meyer*, 486 U.S. at 415–16.

106. *Id.* at 421.

107. See *id.* at 422–23, 428.

the principles in *Meyer* to strike down different restrictions on petition circulation in Colorado.¹⁰⁸ Finally, and more recently, the Court reaffirmed the constitutional protections afforded to petitioning in *Doe v. Reed*, in which the Court held that the signing of a petition itself is a form of expression.¹⁰⁹

Scholars have argued that the Court's application of First Amendment protections to petitioning should apply to voting as well. For example, Derfner and Herbert argue that *Meyer* and *Reed* indicate that voting should be treated like petitioning because "[v]oting and petition-signing plainly express a point of view."¹¹⁰ Robert Colton agrees that *Reed* provides strong evidence that voting and petitioning should be treated similarly.¹¹¹ He notes that five of the Justices in the case believed that signing the referendum petition qualified as political expression, and thus, "it would follow that those Justices also believe physically casting a vote on the referendum after the successful petition is also a political expression."¹¹² Given this, "voting for a candidate on Election Day . . . would be entitled to protection under the First Amendment."¹¹³

This comparison between voting and petitioning is apt. The Court applies First Amendment protections to petitioning because petitioning intends to convey a message, namely that the signor or distributor supports the initiative or purpose of the petition. Voting similarly intends to convey that the voter supports the candidate or issue on the ballot.¹¹⁴ Indeed, Justice Stevens' description in *Meyer* of petitions as expressing "a desire for political change" could just as easily apply to voting. Moreover, the fact that voting performs a legal function does not make it nonexpressive.¹¹⁵ Chief

108. *Buckley*, 525 U.S. at 186–87.

109. *Doe v. Reed*, 561 U.S. 186, 194–95 (2010). Notably, while the holding in *Meyer* appeared at least in part to be based upon the actual person-to-person conversations that occur while convincing a person to sign a petition, *Reed* asserts that the signature itself alone is expressive, since it expresses at minimum that the political issue in question should be considered by the electorate. *Id.* at 195. The Court ultimately upheld the disclosure statute in question in the case but recognized that the public disclosure of the signatures constituted a burden on First Amendment rights. *Id.* at 196, 202.

110. Derfner & Herbert, *supra* note 98, at 486–87.

111. Robert Colton, Note, *Back to the Drawing Board: Revisiting the Supreme Court's Stance on Partisan Gerrymandering*, 86 *FORDHAM L. REV.* 1303, 1321–22 (2017).

112. *Id.* at 1321 (emphasis omitted).

113. *Id.* at 1322.

114. Chesa Boudin argues that voting is even *more* expressive than petition signatures. Chesa Boudin, Note, *Publius and the Petition: Doe v. Reed & the History of Anonymous Speech*, 120 *YALE L.J.* 2140, 2178 (2011). He notes that while "[a] vote expresses a political opinion on an issue," a petition signature may have a more muddled message. *Id.*

115. The Court in *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117 (2011), nearly seemed to hold the opposite. In that case, a Nevada statute barred a state legislator from voting upon an issue on which he had a conflict of interest. *Id.* at 119. The legislator alleged that the statute violated his First Amendment right to freedom of speech, but the Court disagreed. *Id.* at 126–27. It referred to his vote as a "governmental mechanic[]." *Id.* at 127. However, this case says little, if anything, about a citizen's vote. The Court based its decision on the fact that the legislator had "no personal right" to his vote. *Id.* at 126.

Justice Roberts in *Reed* explicitly rejected the idea that the “legal consequence” of the petition at issue lessened its First Amendment protections.¹¹⁶ He stated that it did not make sense for the legal effect of an activity to “somehow deprive[] that activity of its expressive component.”¹¹⁷ The same logic applies to voting.

Therefore, voting satisfies the first prong of the *Spence* test because it intends to convey a preference for a political change, candidate, or issue, much in the same way as distributing or signing a petition does. Since the Court has recognized the expressive aspect of petitions, there is no reason not to do so for voting.

One might counter, however, that voting fails the second prong of the *Spence* test, which asks if the expressive conduct’s message is likely to be understood by the viewer.¹¹⁸ In this case, the “viewer” is the general public that sees the election results. Voting in the United States is largely anonymous,¹¹⁹ so it could be argued that the public is not likely to understand the voter’s message if it does not know the voter’s identity. This argument fails, however, because anonymity does not itself lessen First Amendment protections. The Court has made it clear that anonymous speech is protected by the First Amendment.¹²⁰ *McIntyre v. Ohio Elections Comm’n* is a helpful parallel demonstrating how these protections should apply to anonymous voting.¹²¹ In *McIntyre*, Margaret McIntyre distributed unsigned leaflets

Thus, it would be difficult to extend the Court’s logic in *Carrigan* to citizens’ votes because citizens clearly have a right to vote. *See infra* text accompanying notes 170–72.

116. *Doe v. Reed*, 561 U.S. 186, 195 (2010).

117. *Id.*

118. *See Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

119. *See Burson v. Freeman*, 504 U.S. 191, 206 (1992) (stating that “an examination of the history of election regulation in this country reveals” that “all 50 States, together with numerous other Western democracies,” have adopted the secret ballot). *See also* CAL. ELEC. CODE § 2300(a)(4) (Deering 2020); ME. REV. STAT. ANN. tit. 21-A, § 671(8) (2019); N.J. STAT. ANN. § 19:53A-6(c) (West 1973); KY. REV. STAT. ANN. § 118.025 (West 2020) for examples of state statutes providing that voting be performed anonymously. This anonymity is often considered an important part of voting. *See, e.g., O’Neal v. Simpson*, 350 So. 2d 998, 1005 (Miss. 1977) (“One of the primary purposes of laws regulating elections is to secure to a voter the right to cast his vote in secret.”); *Common Council of Detroit v. Rush*, 46 N.W. 951, 953 (Mich. 1890) (“The secrecy of the ballot is the great safeguard to the purity of elections. The vote by ballot implies secrecy. This secrecy should not be confined to the time of depositing the ballot.”). However, while voting is often anonymous, it is not inherently so. There is no constitutional requirement that votes be cast in secret. Instead, secret ballots in the United States emerged in the late nineteenth century as a state-law innovation. *See* ELDON COBB EVANS, A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES 27 (1917). Previously, voting was largely done in public spaces, with significant exposure. *See* Jill Lepore, *Rock, Paper, Scissors: How We Used to Vote*, NEW YORKER (Oct. 6, 2008), <https://www.newyorker.com/magazine/2008/10/13/rock-paper-scissors> [<https://perma.cc/W9XG-8EXC>]. Moreover, of course, any person can (and often does) simply inform others of their vote.

120. *See, e.g., Talley v. California*, 362 U.S. 60, 65 (1960); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341 (1995) (“[A]nonymity . . . is not ordinarily a sufficient reason to exclude [speech] from the protections of the First Amendment.”).

121. *McIntyre*, 514 U.S. 334.

expressing her opposition to a local school tax levy, which was to be decided upon by referendum.¹²² The state of Ohio imposed a fine on McIntyre pursuant to a state law which barred such anonymous leafletting.¹²³ The Court struck down the law as an unconstitutional burden on expression.¹²⁴ There is not a compelling reason to distinguish between expression through anonymous leafletting and anonymous voting. To illustrate, assume McIntyre eventually voted “no” on the tax levy referendum. Both her leaflet and her vote anonymously expressed opposition to the tax levy. If the Court believed that Ohio’s law restricting McIntyre’s anonymous leaflets “involve[d] a limitation on political expression,”¹²⁵ it would follow that restrictions on voting similarly limit political expression because, as discussed *supra*, voting also intends to convey a political message.

Given that anonymity poses no constitutional issue, voting satisfies the second *Spence* prong. Voting conveys a message that is likely to be understood by the public. For example, any member of the public who sees that one million people voted for Candidate A will understand that each of those one million people preferred Candidate A to Candidate B. Even in uncontested elections, if those one million people vote for Candidate A over no alternative, the message is clear that each of those one million people felt that Candidate A was worthy of their expressive support. These messages are unambiguous. Therefore, because voting’s message is likely to be understood by the viewing public, it satisfies the second prong of the *Spence* test. Therefore, because voting satisfies both prongs of the *Spence* test, it is expressive conduct and warrants First Amendment protections.

ii. Compulsory Voting Is Not Related to the Suppression of Free Expression

Because voting is expressive conduct, the First Amendment right to speak applies. And because the right to speak applies to voting, the First Amendment right *not* to speak applies to not voting.¹²⁶ Therefore, the next question is whether compulsory voting legislation would unconstitutionally burden this right not to speak by compelling expressive conduct.

The Court applies one of two standards to government restrictions on the right to speak, which it would similarly apply to restrictions on the right not to speak. If the restriction is related to the suppression of free expression,

122. *Id.* at 337.

123. *Id.* at 338.

124. *Id.* at 357.

125. *Id.* at 346.

126. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (quoting *Est. of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (N.Y. 1968)).

then a stringent standard is applied.¹²⁷ If the restriction is not related to the suppression of free expression, then the more lenient *O'Brien* test, outlined *supra*, is applied. Whether a restriction is related to the suppression of free expression is premised on whether the restriction is content-based or content-neutral.¹²⁸ In other words, if the restriction is content-based, it is related to the suppression of free expression. If it is content-neutral, it is not.

Content-neutrality is determined on the face of the law.¹²⁹ If the law facially “limit[s] communication because of the message it conveys,” it is content-based.¹³⁰ If the law facially “limit[s] expression without regard to the content or communicative impact of the message conveyed,” it is content-neutral.¹³¹ Determining whether a restriction is content-based or content-neutral can be an inexact and difficult science.¹³² Even so, compulsory voting legislation would clearly be content-neutral. Compulsory voting prohibits the failure to vote regardless of the message communicated by the nonvoter. The law punishes equally the nonvoter who refuses to vote to communicate anger and the nonvoter who refuses to vote to communicate apathy. In other words, enforcement of the law does not require the “examin[ation of] the content of the message that is conveyed to determine whether the views expressed” violate the law.¹³³

Because compulsory voting legislation would be content-neutral, the less-restrictive *O'Brien* test would apply to determine whether the legislation is constitutionally appropriate.

iii. Compulsory Voting Satisfies the *O'Brien* Test

The *O'Brien* test states that a content-neutral government restriction on expression is justified if it (1) is within the constitutional power of the government, (2) furthers an important or substantial government interest, (3) the interest is unrelated to the suppression of free expression, and (4) the restriction is no more extensive than necessary.¹³⁴

127. *Texas v. Johnson*, 491 U.S. 397, 403 (1989) (citing *Spence v. Washington*, 418 U.S. 405, 411 (1974)).

128. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015).

129. *See McCullen v. Coakley*, 573 U.S. 464, 479 (2014).

130. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 (1987).

131. *Id.* at 48.

132. *Norton v. City of Springfield*, 768 F.3d 713, 717 (7th Cir. 2014) (noting “that it is difficult to be confident about how the line between subject-matter (usually allowed) and content-based (usually forbidden) distinctions is drawn”).

133. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984).

134. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

a. Congress Has the Constitutional Power to Enact Compulsory Voting

As a threshold matter, the first prong is easily satisfied. Congress would clearly have the constitutional power to pass compulsory voting due to its power under the Elections Clause to preempt federal election regulations set by the states,¹³⁵ as discussed in Section II.A.

b. Compulsory Voting Furthers Congress's Important Interest in Promoting Confidence in the Electoral Process

To satisfy the second prong of the *O'Brien* test, the government restriction must further an important or substantial interest. Congress has an important interest in promoting public confidence in the electoral process.¹³⁶ The Court has explained that “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.”¹³⁷ The Court has upheld a wide variety of regulations that serve to protect this interest, including general voter eligibility rules such as reasonable age, residency, and citizenship requirements.¹³⁸

Notably, courts have also upheld states' voter ID requirements based on the interest of increasing public confidence in the electoral process.¹³⁹ This is despite the fact that there is scant evidence of in-person voter fraud in the United States.¹⁴⁰ Nonetheless, voter ID laws claim to promote confidence in the electoral system because they are *perceived* to combat voter fraud.¹⁴¹ This signals courts' openness to accepting the notion that promoting confidence in the electoral system includes encouraging mere perceptions of increased legitimacy and that this interest is substantial and important.

Compulsory voting would further the important government interest in increasing public confidence in elections by mitigating the influence of foreign interference in our elections. Voter turnout is a tool that foreign

135. U.S. CONST. art. I, § 4, cl. 1.

136. See, e.g., *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (citing *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)); *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973) (citations omitted); *Doe v. Reed*, 561 U.S. 186, 197 (2010).

137. *Purcell*, 549 U.S. at 4.

138. See, e.g., *Carrington v. Rash*, 380 U.S. 89, 91 (1965); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 625 (1969).

139. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008); *Lee v. Va. Bd. of Elections*, 843 F.3d 592, 606–07 (4th Cir. 2016).

140. See Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES (Apr. 12, 2007), <https://www.nytimes.com/2007/04/12/washington/12fraud.html> [<https://perma.cc/P868-ZF49>]; JUSTIN LEVITT, BRENNAN CTR. FOR JUST., *THE TRUTH ABOUT VOTER FRAUD* 23 (2007).

141. Andrew N. DeLaney, Note, *Appearance Matters: Why the State Has an Interest in Preventing the Appearance of Voting Fraud*, 83 N.Y.U. L. REV. 847, 874 (2008); see Justin McCarthy, *Four in Five Americans Support Voter ID Laws, Early Voting*, GALLUP (Aug. 22, 2016), <https://news.gallup.com/poll/194741/four-five-americans-support-voter-laws-early-voting.aspx> [<https://perma.cc/J498-ALGG>].

actors can use to attempt to influence modern elections. The 2016 presidential election provides a pertinent example. Members of the United States intelligence community and the Justice Department concluded that actors tied to the Russian government interfered in that election.¹⁴² While there were many facets to the Russians' efforts, central to the plan of the Internet Research Agency, LLC (IRA)¹⁴³ was to deploy information and disinformation in order to motivate people to vote for President Trump and discourage people from voting for his opponent, Hillary Clinton.¹⁴⁴

This informational campaign was designed to “sow[] discord”¹⁴⁵ and influence voter turnout. Internal IRA documents demonstrated that the effort was designed to influence the election largely through criticisms of Clinton.¹⁴⁶ This was often done through advertisement purchases, social media posts, and political organizing focused on attacking Clinton and supporting Trump.¹⁴⁷ IRA was likely less interested in changing individual voters' minds and more interested in encouraging voter turnout on the part of potential Trump supporters and discouraging voter turnout on the part of potential Clinton supporters. They attempted this through posts meant to stimulate Trump supporters' passions and depress Clinton supporters' intention to vote.¹⁴⁸

142. See Eric Lipton, David E. Sanger & Scott Shane, *The Perfect Weapon: How Russian Cyberpower Invaded the U.S.*, N.Y. TIMES (Dec. 13, 2016), https://www.nytimes.com/2016/12/13/us/politics/russia-hack-election-dnc.html?_r=0 [<https://perma.cc/G3AJ-EQP8>].

143. IRA is a Russian organization which has been described by the United States intelligence community as a “troll farm,” an organization whose purpose is to cause discord online and sway public opinion through provocative content production. See OFF. OF THE DIR. OF NAT'L INTEL., ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS 4 (2017); Mike Snider, *Robert Mueller Investigation: What Is a Russian Troll Farm?*, USA TODAY (Feb. 16, 2018, 6:13 PM), <https://www.usatoday.com/story/tech/news/2018/02/16/robert-mueller-investigation-what-russian-troll-farm/346159002> [<https://perma.cc/4GRL-N35P>].

144. See ROBERT S. MUELLER, III, U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 14 (2019).

145. *Id.*

146. *Id.* at 22–23. There was an additional, less-specific effort to make the American political scene appear chaotic and divisive. Many posts concerned contentious issues, such as police brutality and the Confederacy. *Id.* at 24–25, 29 (evidence of IRA-created black social justice account called “Don't Shoot Us” and IRA-organized “confederate rally”).

147. *Id.* at 25, 27, 29.

148. Consider two of the social media posts IRA promulgated. One was a Facebook post from a group called “Army of Jesus” and featured an image of Jesus Christ arm-wrestling Satan. The caption to the picture reads: “Satan: If I win, Clinton wins! Jesus: Not if I Can Help It! Press ‘Like’ to Help Jesus Win!” This post targeted “[p]eople age 18 to 65+ interested in Christianity, Jesus, God, Ron Paul and media personalities such as Laura Ingraham, Rush Limbaugh, Bill O'Reilly and Mike Savage, among other topics.” *The Social Media Ads Russia Wanted Americans to See*, POLITICO (May 10, 2018, 11:49 AM), <https://www.politico.com/story/2017/11/01/social-media-ads-russia-wanted-americans-to-see-244423> [<https://perma.cc/GXY6-884U>]. Another Facebook post was from a group called “Born Liberal” and featured a caption misquoting Senator Bernie Sanders, Clinton's primary opponent for the Democratic Party nomination, in which he states that her relationship to her charitable foundation was a “problem.” This post targeted “[p]eople ages 18 to 65+ interested in Bernie Sanders.” *Id.* These posts are clearly

This was of concern because the 2016 presidential election was close. In Pennsylvania, Trump bested Clinton by a margin of 44,292 votes.¹⁴⁹ In Wisconsin, he did so by a margin of 22,748 votes.¹⁵⁰ In Michigan, he did so by a margin of 10,704 votes.¹⁵¹ If a sum of people equal to the capacity of Rose Bowl Stadium¹⁵² across those three states had voted for Clinton instead of staying home in 2016, Trump would not have won. Registered voters who did not vote in the 2016 election were on the whole less Republican-leaning, and the lack of turnout from that group may have contributed to Clinton's loss.¹⁵³ Studies also show that negative political advertisements might depress intent to vote.¹⁵⁴

To be clear: it is very unlikely that IRA's social media campaign actually swayed the results of the 2016 presidential election. Election results have innumerable causes, and it is misleading to label any one phenomenon as determinative. Indeed, IRA's posts were particularly unlikely to be a primary motivator in a substantial number of voters' decisions to vote. Several other factors in that election likely had a much stronger effect on the result.¹⁵⁵ But the facts that (1) a foreign influence campaign intended to depress turnout on behalf of one candidate, (2) that candidate lost the election narrowly, and (3) that depressed turnout for that candidate may have been a contributing factor to the loss could lead to a widespread perception that foreign influence affected the outcome. Indeed, in March 2017, 41% of Americans believed that the Russians influenced the outcome of the 2016

targeted to encourage conservatives to vote for Trump and to discourage liberals from voting for Clinton, not to sell swing voters on the merits of Trump over Clinton.

149. See *2016 Presidential Election*, PENN. DEP'T OF STATE (Dec. 30, 2020, 3:06 PM), <https://www.electionreturns.pa.gov/General/SummaryResults?ElectionID=54&ElectionType=G&IsActive=0> [<https://perma.cc/4ZC2-C6MM>].

150. See *2016 Fall General Election Results*, WIS. ELECTIONS COMM'N (Nov. 8, 2016, 6:00 PM), <https://elections.wi.gov/elections-voting/results/2016/fall-general> [<https://perma.cc/J4K7-HM3B>].

151. See *2016 Michigan Election Results*, MICH. ELECTIONS: JOCELYN BENSON, SEC'Y OF STATE (Nov. 28, 2016, 3:32 PM), https://mielections.us/election/results/2016GEN_CENR.html [<https://perma.cc/PVX7-GMTQ>].

152. Rose Bowl Stadium currently has a capacity of 89,702. ROSE BOWL STADIUM WITH LEARFIELD IMG COLL., ROSE BOWL STADIUM GUIDE 1, 26 (2020), <https://digital.learfieldimgcollege.com/2020-rose-bowl-guide.html> [<https://perma.cc/7JF4-678Y>].

153. Harry Enten, *Registered Voters Who Stayed Home Probably Cost Clinton the Election*, FIVETHIRTYEIGHT (Jan. 5, 2017, 6:30 AM), <https://fivethirtyeight.com/features/registered-voters-who-stayed-home-probably-cost-clinton-the-election> [<https://perma.cc/7T4B-WKN3>].

154. See Stephen Ansolabehere, Shanto Iyengar, Adam Simon & Nicholas Valentino, *Does Attack Advertising Demobilize the Electorate?*, 88 AM. POL. SCI. REV. 829, 833 (1994).

155. For example, some have argued that James Comey informing Congress shortly before the election that the FBI had re-opened an investigation into Clinton had a more decisive effect. See Nate Silver, *The Comey Letter Probably Cost Clinton The Election*, FIVETHIRTYEIGHT (May 3, 2017), <https://fivethirtyeight.com/features/the-comey-letter-probably-cost-clinton-the-election> [<https://perma.cc/ZC4Y-XENJ>].

election.¹⁵⁶ Perhaps most importantly, the 2016 election demonstrated that future close federal elections could be influenced by a more sophisticated voter turnout influence campaign by foreign actors.¹⁵⁷ Regardless, as made clear by the Court's jurisprudence on voter ID laws, it is not *evidence* of illegitimacy that makes promoting confidence in the electoral process a compelling interest, but rather the *appearance* of illegitimacy that matters to the Court. Therefore, that the public might perceive that voter turnout can be manipulated by foreign actors to influence elections is a concern. Congress has a substantial interest in combatting that perception.

Compulsory voting would effectively combat this perception and increase confidence in the electoral process. If everyone must vote regardless of their political passions, foreign actors cannot use those passions as a tool to manipulate voter turnout. Voter turnout becomes an issue of compliance with the law, not of enthusiasm or disillusionment. Therefore, the perception that a foreign actor could substantially influence voter turnout would be eliminated. This solution would not solve every problem with the perception of foreign interference in elections. But in the same way that voter ID laws do not intend to solve every perceived problem with voter fraud,¹⁵⁸ compulsory voting would not intend to eliminate all perceptions of foreign election interference.

Thus, by making voting compulsory, Congress would maximize voter turnout and minimize the extent to which it fluctuates based on political messaging. Therefore, compulsory voting would further its important interest in promoting confidence in the electoral process by reducing the effect that a foreign influence campaign could have on turnout.

c. The Interest in Promoting Confidence in the Electoral Process Is Not Related to the Suppression of Free Expression

The next prong of the *O'Brien* test is that the government interest must be unrelated to the suppression of free expression. Here, it is manifestly clear that Congress's interest in promoting confidence in the electoral process is unrelated to the suppression of free expression. Therefore, compulsory voting satisfies the third prong of the *O'Brien* test.

156. Jon Reid, *Growing Number of Americans Believe Russia Influenced 2016 Election*, MORNING CONSULT (Mar. 8, 2017, 7:00 AM), <https://morningconsult.com/2017/03/08/growing-number-americans-believe-russia-influenced-2016-election> [<https://perma.cc/QZT9-KZTX>].

157. In fact, the 2020 presidential election was even closer than 2016. See James M. Lindsay, *The 2020 Election by the Numbers*, COUNCIL ON FOREIGN RELS. (Dec. 15, 2020, 7:00 AM), <https://www.cfr.org/blog/2020-election-numbers> [<https://perma.cc/4H9B-KVJZ>] (“[The 2020 election] was even closer than 2016. If Trump picked up the right mix of 42,921 votes in Arizona (10,457), Georgia (11,779), and Wisconsin (20,682), the Electoral College would have been tied at 269 all.”).

158. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 225–26 (2008) (Souter, J., dissenting) (listing types of voter fraud not addressed by voter ID law).

d. Compulsory Voting Is No More Extensive than Necessary

The final requirement of the *O'Brien* test is that the government restriction on the right to speak (or right not to speak, in this case) must be no more extensive than necessary. Compulsory voting would satisfy this requirement. Other legislative options would either be more restrictive on the right not to speak or ineffectual. For example, Congress could attempt to mitigate the perception of foreign influence on voter turnout by restricting or banning political advertisements or posts on social media platforms. However, this effort would likely be more problematic under the First Amendment than a requirement to vote would be. Moreover, it is not clear that speech regulation on social media platforms would be effective in addressing the issue of foreign influence on turnout,¹⁵⁹ whereas compulsory voting would largely eliminate voter turnout as a tool to influence an election. As another example, Congress could take measures to attempt to encourage voter turnout, such as providing financial incentives to vote.¹⁶⁰ This would probably not burden any constitutional right but would be ineffectual in promoting confidence in the electoral process. The success of compulsory voting relies on the principle that people will likely vote in order to comply with the law regardless of the messages they are exposed to. A program that increases average voter turnout in the United States to marginally higher levels would be commendable but would likely not achieve maximum turnout. Evidence shows that people often do not claim financial incentives that they are entitled to, such as the Earned Income Tax Credit (EITC).¹⁶¹ A financial incentive to vote would likely be in the form of a tax credit or rebate and would be subject to similar issues. Therefore, without maximum voter turnout, the perception that voter turnout could be subject to foreign influence would remain. By contrast, compulsory voting would likely achieve maximum turnout based on the results seen in Australia and elsewhere.¹⁶²

Moreover, compulsory voting would impose only a light burden on voters' right not to speak. This demonstrates that compulsory voting would be no more extensive than necessary. First, the burden on voters' right not to speak is light because many states provide a write-in option on their ballots

159. See Shannon C. McGregor, Opinion, *Why Twitter's Ban on Political Ads Isn't as Good as It Sounds*, GUARDIAN (Nov. 4, 2019, 6:00 AM), <https://www.theguardian.com/commentisfree/2019/nov/04/twitters-political-ads-ban> [<https://perma.cc/9BMT-228J>].

160. See Costas Panagopoulos, *Extrinsic Rewards, Intrinsic Motivation and Voting*, 75 J. POL. 266, 277 (2012) (discussing results of experiment in which voters were given financial incentive to vote).

161. Katherin Ross Phillips, *The Earned Income Tax Credit: Knowledge Is Money*, 116 POL. SCI. Q. 413, 418 (2001). This is often due to a lack of knowledge about the program. *Id.* at 418–23. This suggests that many voters may not take advantage of a financial incentive to vote.

162. See *supra* text accompanying note 26.

which allow a voter to choose from outside the list of candidates provided.¹⁶³ Second, even though many states do not allow write-in options on their ballots,¹⁶⁴ compulsory voting legislation could easily contain a provision allowing an individual to provide a legitimate reason for why they did not cast a vote, as is the case in Australia.¹⁶⁵ Thus, individuals with religious or other valid objections to participating in the electoral process would likely be exempt from doing so.¹⁶⁶ Finally, a “none of the above” provision could be required on states’ ballots to allow voters to abstain from expressing a preference. The Elections Clause would likely give Congress the ability to preempt any state regulations to the contrary on this matter.¹⁶⁷ This alone would ease the burden on the right not to speak to a minimum, since it would not require voting to include an expression of preference for any specific candidate or issue.

e. Summary

Compulsory voting is within the constitutional purview of Congress due to the authority to override state election regulations. Compulsory voting would further the important interest in promoting confidence in the electoral process by minimizing the influence of foreign actors on voter turnout. The interest in promoting confidence in the electoral process is wholly unrelated to the suppression of free expression. Finally, compulsory voting would be no more restrictive than necessary on the right not to speak because alternative approaches would be unavailing and the restriction itself is minimal. Therefore, compulsory voting would be upheld by the courts under the *O’Brien* test for content-neutral restrictions on First Amendment speech rights.

163. See, e.g., OR. REV. STAT. § 254.500 (2019); 17 R.I. GEN. LAWS § 17-20-23(e) (2020).

164. See, e.g., GA. CODE ANN. § 21-2-494 (2021) (instructing superintendent to only certify write-in votes for candidates who have given proper advance notice of their intent to be a write-in candidate); S.D. CODIFIED LAWS § 12-20-21.2 (2021) (write-in votes will not be counted).

165. See *supra* text accompanying notes 35, 40.

166. It is worth noting that in Australia, it is not difficult to escape the penalty. See Tacey Rychter, *How Compulsory Voting Works: Australians Explain*, N.Y. TIMES (Nov. 4, 2018), <https://www.nytimes.com/2018/10/22/world/australia/compulsory-voting.html> [<https://perma.cc/3N6X-VSGB>] (giving example of Australian voter who successfully appealed fine for not voting because he “missed the local ads”).

167. See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 7–8 (2013) (noting that U.S. CONST. art. I, § 4, cl. 1 gives Congress power to override state regulations on time, place, and manner of holding elections); see also discussion *supra* Section II.A.

2. The Fourteenth Amendment and the Right Not to Vote

i. There Is No Right Not to Vote

Perhaps the most famous of the fundamental rights outside the text of the Constitution is the right to vote.¹⁶⁸ The Supreme Court recognized it as a fundamental right under the Equal Protection Clause of the Fourteenth Amendment in *Reynolds v. Sims*, *Wesberry v. Sanders*, and *Harper v. Virginia Board of Elections*.¹⁶⁹ The scope and application of this right has been a source of significant legal controversy ever since, but its existence is no longer in question.¹⁷⁰ But is there a corresponding right *not* to vote inherent in the right to vote? For the reasons described below, I argue that there is not.

No binding jurisprudence has answered this question. However, the right not to vote has been mentioned to a small degree in two federal district courts.¹⁷¹ But these mentions were both offered without explanation and were not followed upon appeal.¹⁷² In the state context, only the Michigan Supreme Court has held that there is a right not to vote.¹⁷³ The Eastern District of Pennsylvania later went out of its way to reject the Michigan Supreme Court's reasoning,¹⁷⁴ and the Michigan Supreme Court has more recently criticized its own decision.¹⁷⁵ Regardless, the Michigan Supreme Court would be free to hold that there is a right not to vote according to Michigan's state constitution without such holding affecting the analysis under the United States Constitution.¹⁷⁶ Therefore, no binding case law

168. See *Minor v. Happersett*, 88 U.S. 162, 170–71 (1875).

169. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 667–68 (1966); *Reynolds v. Sims*, 377 U.S. 533, 554, 568 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964).

170. Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) (citations omitted) (“[F]or reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure.”).

171. See *Hoffman v. Maryland*, 736 F. Supp. 83, 85 (D. Md. 1990), *aff'd*, 928 F.2d 646, 649 (4th Cir. 1991) (“[T]he right to vote includes the right not to vote.”); *Beare v. Smith*, 321 F. Supp. 1100, 1103 (S.D. Tex. 1971) (“Parenthetically, it must be said that there is also a right not to vote.”), *aff'd sub nom.* *Beare v. Briscoe*, 498 F.2d 244, 248 (5th Cir. 1974). Neither of these courts went very far in recognizing these new rights. In *Hoffman*, the court went on to apply rational basis to this right not to vote. *Hoffman*, 736 F. Supp. at 85. In *Beare*, the court offered no explanation as to why it stated there was a right not to vote. *Beare*, 321 F. Supp. at 1103.

172. *Hoffman v. Maryland*, 928 F.2d 646, 648 (4th Cir. 1991) (“We need not and do not decide the correctness of the comparison because, even if there is a right not to vote of constitutional significance, it is not infringed upon by Maryland’s purge statute.”); *Beare*, 498 F.2d at 244–48.

173. *Mich. State UAW Cmty. Action Program Council v. Sec’y of State*, 198 N.W.2d 385, 387–88, 390 (1972).

174. *Williams v. Osser*, 350 F. Supp. 646, 652 (E.D. Pa. 1972).

175. *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 461–62 (2007).

176. See William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

answers whether there is a right not to vote under the Fourteenth Amendment.¹⁷⁷

I argue that there is not a right not to vote. First, the existence of a right does not necessarily carry with it a right to waive it.¹⁷⁸ Seth Kreimer posits that certain rights do not necessarily protect individual choice by limiting government overreach, but instead reflect the structure of a decent society.¹⁷⁹ In other words, certain rights cannot be waived, even if an individual desires not to exercise that right.¹⁸⁰ As an illustration of this point, imagine a voluntary contract between two individuals in which one agrees to be the property of the other. No court would sanction such an agreement, no matter the motivations, intentions, or voluntariness of the now-enslaved individual. The Thirteenth Amendment right to be free from enslavement is not waivable or contingent on the desire to be free.¹⁸¹ It operates on the principle that slavery is an inhumane institution, and one's right to be free of it cannot be waived. A similar rationale applies to the Eighth Amendment. Individuals could not waive their Eighth Amendment rights in order to request or voluntarily accept cruel and unusual punishment from the government.¹⁸²

However, there are clearly some rights that can be waived. For example, the Court would likely find that a mandatory gun ownership law passed by Congress would infringe on a right *not* to bear arms under the Second Amendment. In contrast to the right to be free of enslavement, the Second Amendment is not based on the premise that a decent society is one where all are armed. Rather, it is rooted in the notion that owning a gun or not owning a gun is a decision within an individual's purview to choose.¹⁸³ The government's ability to restrain that choice is therefore limited. If the

177. One possible indication that the Court believes there is no right not to vote comes from the Court's "one person, one vote" jurisprudence. Specifically, the Court has held that voters cannot waive their right to equal representation in their state legislature by majority vote. *Lucas v. Forty-Fourth Gen. Assembly of Co.*, 377 U.S. 713, 736–37 (1964). In *Lucas*, Chief Justice Warren stated that "an individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate." *Id.* at 736. *Lucas* does not map perfectly onto the current issue, given that there is a distinction between a majority waiving a right and an individual waiving a right. However, *Lucas* is notable in that it suggests the Court is sympathetic to the idea that voting rights are inalienable and not contingent on a desire to retain it.

178. *Faretta v. California*, 422 U.S. 806, 847 (1975) ("The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." (quoting *Singer v. United States*, 380 U.S. 24, 34–35 (1965))); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1387–89 (1984).

179. See Kreimer, *supra* note 178, at 1387.

180. *Id.* at 1387–88.

181. See *United States v. King*, 840 F.2d 1276, 1283 (6th Cir. 1988), *cert. denied sub nom. Lewis v. United States*, 488 U.S. 894 (1988).

182. See Kreimer, *supra* note 178, at 1387.

183. See *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (internal quotation marks and citations omitted) ("[I]ndividual self-defense is the central component of the Second Amendment right.").

underlying premise of a right is the freedom to choose, then it follows that the right can be voluntarily waived. This principle is reinforced by the previous discussion of the right not to speak.¹⁸⁴ The government is restrained from overreaching in restricting the decision not to speak because the First Amendment protects “individual freedom of mind.”¹⁸⁵

Therefore, the issue is whether the right to vote under the Fourteenth Amendment is akin to the rights under the Eighth and Thirteenth Amendments, in which the principles pertain to the definition of a decent society, or to the rights under the First and Second Amendments, in which the principles pertain to individual freedom of choice. I argue that the right to vote is more similar to the Eighth and Thirteenth Amendments.

The right to vote under the Fourteenth Amendment is fundamentally about democratic participation, not about individual choice. Phrased differently, the right to vote protects the idea that a decent society lets its people participate in democracy. To see how, it is important to emphasize that voting has both a functional and an expressive aspect. While the First Amendment protects the expressive aspect,¹⁸⁶ the right to vote under the Fourteenth Amendment protects the functional aspect.¹⁸⁷ The functional aspect of the right to vote, which refers to the legal effect of casting a vote, is defined by democratic participation, not expression.¹⁸⁸ To see how, consider the Court’s one person, one vote jurisprudence.¹⁸⁹ The very essence of that doctrine is based on whether a voter has “an equal opportunity to *participate* in [an] election.”¹⁹⁰ This principle of participation explicitly rejects Justice Frankfurter’s conception of the right to vote. His dissent in *Baker v. Carr* argued that the right to vote is not violated if individuals “go to the polls” and “cast their ballots,”¹⁹¹ indicating that the right to vote is satisfied so long as individuals are able to express themselves. The Court has instead taken the position that the principle of the right to vote is effective participation in democracy, not individual expression.

184. See *supra* Section II.B.

185. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citation omitted).

186. See *supra* Section II.B.1.i.

187. See *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (collecting cases). In other words, the right to vote protects a person’s legal ability to cast a vote and have it count, separate from any expression which comes with that action.

188. See Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709–12 (1993). Karlan states that voting is a continuum of three conceptions of voting: (1) as participation, (2) as aggregation (the ability to combine votes with others in order to elect candidates of choice, and (3) as governance (the ability to use votes to effect governmental outcomes). *Id.* at 1709–20.

189. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Hadley v. Junior Coll. Dist.*, 397 U.S. 50 (1970).

190. *Hadley*, 397 U.S. at 56 (emphasis added).

191. See *Baker*, 369 U.S. at 299 (Frankfurter, J., dissenting).

Therefore, a right not to vote would counteract the principles underlying the right to vote because it would discourage effective participation in democracy. Without a right not to vote, compulsory voting cannot infringe on the right to vote. Compulsory voting does not make one vote count less than another. It does not restrict access to the ballot. Indeed, it encourages participation in democracy, the very core of the right to vote.

Nonetheless, some commentators have suggested there is a right not to vote. Jeffrey Blomberg argues that the right not to vote extends from the notion that voting includes a series of decisions.¹⁹² Thus, the decision not to vote is a decision made at the “choosing stage” within the process of voting.¹⁹³ In other words, Blomberg argues that the decision not to vote is as legitimate of an exercise of the right to vote as the decision to vote. Anthony Ciccone agrees, stating that “[t]he logical inverse of the right to vote, is a right not to vote.”¹⁹⁴ Furthermore, Caitlin Wise argues that the NVRA was passed for the purpose of protecting the First Amendment “right to not vote.”¹⁹⁵

Their arguments rest on the idea of voting under the Fourteenth Amendment as primarily an exercise of freedom of expression, not of civic participation.¹⁹⁶ Indeed, courts do sometimes write of the right to vote in the language of freedom of expression.¹⁹⁷ This language suggests that the right to vote is valuable not only because it bestows the ability to affirmatively exercise the right, but also because it bestows the ability to refuse to do so. Perhaps it was Rush who phrased this argument most succinctly: “If you choose not to decide, you still have made a choice.”¹⁹⁸

However, their argument confuses the expressive aspect of voting with

192. Jeffrey A. Blomberg, Note, *Protecting the Right Not to Vote from Voter Purge Statutes*, 64 *FORDHAM L. REV.* 1015, 1020–21 (1995).

193. *Id.* at 1021.

194. Anthony Ciccone, *The Constitutional Right to Vote Is Not a Duty*, 23 *HAMLIN J. PUB. L. & POL’Y* 325, 347–48 (2002). Ciccone’s argument cites to Blomberg’s article often for support.

195. Caitlin Wise, Note, *Black and White Make Gray: Common Cause v. Kemp, What’s the Trigger for Purging Voters?*, 69 *MERCER L. REV.* 947, 953–54 (2018). I do not find support for her contention that the NVRA was passed with a First Amendment right not to vote in mind. To support this contention, she cites 52 U.S.C. § 20501(b), which lists the following four purposes for the passage of the NVRA: (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; (2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office; (3) to protect the integrity of the electoral process; and (4) to ensure that accurate and current voter registration rolls are maintained. None of these appear to support the idea of a constitutional right not to vote.

196. See Blomberg, *supra* note 192, at 1019.

197. See *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (describing the importance of elections as giving people “voice”); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (describing the “right to vote freely” as the “essence of a democratic society”).

198. RUSH, *Freewill*, on *PERMANENT WAVES* (Mercury Records 1980).

its functional aspect. Not voting likely does have constitutional value because it is expressive, but this value derives from the right not to speak under the First Amendment,¹⁹⁹ not from the right to vote. This constitutional protection is discussed at length in Section II.B.1.i. The right to vote under the Fourteenth Amendment, by contrast, solely protects the ability to participate in democracy, not the ability to sit on its sidelines.

In sum, because the right to vote does not include a right to waive it, there is unlikely a right not to vote under the Fourteenth Amendment.

ii. The Government's Interest in Increased Voter Turnout Outweighs Any Burden on a Right Not to Vote

If the Court nonetheless disagreed with my conclusion and found a right not to vote under the Fourteenth Amendment, compulsory voting would naturally impose some burden on the exercise of that right. In order to determine the constitutionality of compulsory voting, the Court would therefore have to determine the standard of review to subject it to.

A potential right not to vote would exist under the right to vote and be analyzed under the same framework. Two principal tests guide this analysis. The first is found under *Harper v. Virginia Board of Elections*.²⁰⁰ The Court in *Harper* noted that restrictions on the right to vote must be “closely scrutinized and carefully confined,”²⁰¹ an articulation of strict scrutiny. Later decisions continued this strict scrutiny test for voting right restrictions.²⁰² However, in 2008, the Court took a different approach in *Crawford v. Marion County*.²⁰³ There, the Court limited the scope of *Harper* to those restrictions which have a discriminatory effect and “are unrelated to voter qualifications.”²⁰⁴ Justice Stevens, writing for the majority, stated that “evenhanded restrictions that protect the integrity and reliability of the electoral process itself are not invidious and satisfy the standard set forth in *Harper*.”²⁰⁵ Thus, instead of subjecting every restriction on the right to vote to strict scrutiny, “evenhanded restrictions” that relate to the “integrity and reliability” of the electoral process are subject to a different, less rigorous test. That test is articulated as follows: “a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed

199. See *supra* Section II.B.1.i.

200. *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

201. *Id.* at 670.

202. See, e.g., *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 633 (1969); *Hussey v. City of Portland*, 64 F.3d 1260, 1265 (9th Cir. 1995).

203. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

204. See *id.* at 189; see also *Brakebill v. Jaeger*, 932 F.3d 671, 678 (8th Cir. 2019).

205. *Crawford*, 553 U.S. at 189–90 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788, 788 n.9 (1983)) (internal quotation marks omitted).

by its rule, and then make the hard judgment that our adversary system demands.”²⁰⁶ Stevens described this as a “balancing [test].”²⁰⁷ Although the *Crawford* opinion did not overrule *Harper*, courts have since used the balancing test more frequently than strict scrutiny when analyzing voting restrictions.²⁰⁸

Compulsory voting would likely be subject to the balancing test of *Crawford* instead of the strict scrutiny test of *Harper*. Compulsory voting would be “evenhanded” in that it would apply to all qualified voting-age citizens.²⁰⁹ It would also pertain to the integrity of the electoral process because it would be related to overall voter turnout and increase confidence in the electoral process.²¹⁰

Once applied, compulsory voting would likely satisfy the *Crawford* balancing test. When an election regulation is “reasonable” and “nondiscriminatory,” the government’s justifications are usually sufficient.²¹¹ Here, the government could cite its compelling interest in promoting confidence in the electoral system, as discussed above,²¹² or even its interest in increased voter turnout. Courts have indicated that increasing voter turnout is a legitimate government interest²¹³ that pertains to the “integrity of the electoral process.”²¹⁴ Moreover, compulsory voting legislation could include several provisions that minimize the burden on the right not to vote, including write-in voting, exempting voters with valid reasons not to vote, and a “none of the above” option.²¹⁵ Therefore, Congress’s interest in promoting voter turnout would satisfy the *Crawford* balancing test and would be a permissible restriction on the right not to vote, if such a right were found to exist.²¹⁶

206. *Id.* at 190 (internal quotation marks omitted).

207. *Id.*

208. *See, e.g.,* Van Allen v. Cuomo, 621 F.3d 244, 248 (2d Cir. 2010); Democratic Nat’l Comm. v. Reagan, 904 F.3d 686, 724 (9th Cir. 2018).

209. In this context, “evenhanded” most likely means “neutral” and “nondiscriminatory.” *See* Ohio Democratic Party v. Husted, 834 F.3d 620, 626 (6th Cir. 2016) (describing the *Crawford* test as implicating “neutral, nondiscriminatory regulation[s]”).

210. *See supra* Section II.B.1.iii.b.

211. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

212. *See supra* Section II.B.1.iii.b.

213. *See, e.g.,* Cal. Democratic Party v. Jones, 530 U.S. 567, 600 (2000) (Stevens, J., dissenting) (“I would rank as ‘substantial, indeed compelling’ . . . California’s interest in fostering democratic government by . . . increasing voter turnout.”); *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018) (citations omitted); *Tedards v. Ducey*, 398 F. Supp. 3d 529, 539 (D. Ariz. 2019) (citing *Valenti v. Rockefeller*, 292 F. Supp. 851, 854 (W.D.N.Y. 1968), *aff’d* 393 U.S. 405 (1969)).

214. *See* Van Allen v. Cuomo, 621 F.3d 244, 248–49 (2d Cir. 2010).

215. *See supra* Section II.B.1.iii.d.

216. *Short*, 893 F.3d at 680 (finding that California’s interest in voter turnout outweighed slight burden on voters).

C. THE NON-PARTICIPATION PAYMENT WOULD BE A CONSTITUTIONAL TAX

Congress may also defend compulsory voting as a permissible use of its power to tax. Compulsory voting's operative function would be the \$20 Non-Participation Payment imposed on those who do not vote without a valid or sufficient justification.²¹⁷ The Non-Participation Payment would be a constitutional tax. This argument should feel familiar to observers of the Court: it was the one used by the government in *National Federation of Independent Business v. Sebelius* to defend the constitutionality of shared responsibility payment of the Affordable Care Act (ACA).²¹⁸

There are four provisions in the Constitution which relate to Congress's power to tax. The first, Article I, Section 8, Clause 1, provides Congress with its basic taxation powers. The provision states that Congress has the ability "[t]o lay and collect Taxes, Duties, Imposts and Excises" in order "to pay the Debts and provide for the common Defence and general Welfare of the United States."²¹⁹ It also includes a requirement that "all Duties, Imposts and Excises . . . be uniform throughout the United States."²²⁰ The second, Article I, Section 9, Clause 4, limits Congress's power to tax by providing that no "[c]apitation" or "direct tax" may be imposed except "in [p]roportion to the Census."²²¹ The third, Article I, Section 9, Clause 5, further limits Congress's power to tax by providing that no tax can be imposed on articles exported from the States.²²² The fourth, the Sixteenth Amendment, grants Congress the power to tax incomes from any source without proportionality to the Census.²²³ Article I, Section 9, Clause 5 and the Sixteenth Amendment are irrelevant to the analysis of the Non-Participation Payment.²²⁴

The Non-Participation Payment could be a legal tax, even if it is not

217. See *supra* text accompanying note 41.

218. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 561 (2012). The shared responsibility payment required individuals who did not maintain minimum health insurance coverage for the previous tax year to make a payment to the IRS. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, § 1501(b) (2010).

219. U.S. CONST. art. I, § 8, cl. 1.

220. *Id.*

221. U.S. CONST. art. I, § 9, cl. 4.

222. *Id.* cl. 5.

223. U.S. CONST. amend. XVI.

224. Article 1, Section 9, Clause 5 does not apply because voting does not involve state exports. The Sixteenth Amendment would apply if Congress tied the Non-Participation Payment to taxable income. This would exempt it from the Apportionment Requirement. See *infra* text accompanying note 257. The Non-Participation Payment would not be an income tax, however, because it taxes non-voting, not income. See 26 U.S.C. § 61. It would also be a flat tax not subject to marginal income rates. In other words, a person who has \$0 in income would not be exempt from the Non-Participation Payment if they did not vote. Therefore, it is not an income tax, even if the Non-Participation Payment is collected via IRS Form 1040.

called a “tax” in the legislation. The Non-Participation Payment would be included in Article I, Section 8, Clause 1’s broad definition of “taxes” because it would be due and recoverable by law.²²⁵ Congress’s taxing power includes “every conceivable power of taxation”²²⁶ and includes all types of levies.²²⁷

The central question is whether the Non-Participation Payment has unconstitutional characteristics. There are five requirements that determine whether a federal tax is constitutional: (1) the General Welfare Requirement; (2) the Uniformity Requirement; (3) the Apportionment Requirement; (4) the Revenue Requirement; and (5) the Individual Rights Requirement.²²⁸ I focus only on the first four requirements in this Section because the Individual Rights Requirement, which holds that taxes cannot impermissibly infringe on individual constitutional rights,²²⁹ is the focus of Section II.B above, and I conclude that the Non-Participation Payment does not violate any individual constitutional right.

1. The General Welfare Requirement

The General Welfare Requirement is derived directly from the language of Article I, Section 8, Clause 1.²³⁰ It is a very low bar to clear, as any plausible, inoffensive reason for the tax can be for the general welfare.²³¹ Specifically, “unless the choice is clearly wrong, a display of arbitrary power, [and] not an exercise of judgment,” the courts must defer to Congress as to what constitutes the general welfare.²³² The Supreme Court has continued to read this requirement very loosely. In *South Dakota v. Dole*, the Court reiterated that the judiciary “should defer substantially to the [discretion] of Congress” on matters of general welfare.²³³ In *Buckley v. Valeo*, the Court noted that the General Welfare Requirement is actually an

225. *Pac. Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433, 445 (1869) (“Duties are . . . things due and recoverable by law. The term . . . is hardly less comprehensive than ‘taxes.’”).

226. *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 12 (1916).

227. Evgeny Magidenko, Note, *Classifying Federal Taxes for Constitutional Purposes*, 45 U. BALT. L. REV. 57, 58 (2015).

228. Rebecca L. McCullough, Note, *What Is All the Fuss About?: The United States Congress May Impose a Tax (It’s Called the “Individual Mandate”)*, 22 S. CAL. INTERDISC. L.J. 729, 747–53 (2013).

229. See, e.g., *Dep’t of Revenue of Mont. v. Ranch*, 511 U.S. 767, 784 (1994) (striking down tax because it infringed on Fifth Amendment protection against double jeopardy); *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 591–93 (1983) (striking down tax because it infringed on First Amendment rights); cf. *United States v. Cox*, 906 F.3d 1170, 1187 (10th Cir. 2018) (rejecting appellants’ argument that tax on firearms violated Second Amendment rights).

230. U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes . . . [to] provide for the common Defence and general Welfare of the United States.”).

231. McCullough, *supra* note 228, at 748–49.

232. *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

233. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

“expansive” grant of power that does not limit Congress’s ability to tax.²³⁴

Therefore, the General Welfare Requirement is not difficult for Congress to clear and the Non-Participation Payment could easily satisfy it. The goal of increasing voter turnout alone, already noted as a legitimate government interest,²³⁵ would suffice.

2. The Uniformity Requirement

The Uniformity Requirement requires that a tax must be applied with uniformity.²³⁶ This is a “geographic uniformity,”²³⁷ meaning that the tax must apply with equal force and effect wherever it is imposed²³⁸ and cannot prefer one class of persons over another.²³⁹ Although a valid constitutional requirement, the Uniformity Requirement is not a “regular topic in constitutional conversation[s].”²⁴⁰

The Uniformity Requirement is not difficult to satisfy. *United States v. Ptasynski* demonstrates how.²⁴¹ *Ptasynski* concerned a tax on crude oil which exempted certain areas of Alaska from the tax.²⁴² This was an explicit geographical classification. Nonetheless, the Court held that the tax did not violate the Uniformity Requirement because Congress has wide latitude to make classifications of taxation subjects if the classifications relate to the purpose of the tax.²⁴³ The Court held that Congress reasonably found that certain areas of Alaska merited favorable treatment because of the disproportionately high cost of extracting oil from those areas.²⁴⁴ *Ptasynski* did suggest an outer limit to the deference of the Uniformity Requirement, however. The Court suggested that evidence of “undue preference” for members of one class at the expense of another could potentially cause a tax to fail the Uniformity Requirement.²⁴⁵

234. *Buckley v. Valeo*, 424 U.S. 1, 90 (1976).

235. *See supra* text accompanying note 213.

236. U.S. CONST. art. I, § 8, cl. 1 (“[A]ll Duties, Imposts and Excises shall be uniform throughout the United States.”).

237. *Knowlton v. Moore*, 178 U.S. 41, 106 (1900).

238. *Edye v. Robertson* (Head Money Cases), 112 U.S. 580, 594 (1884).

239. *See United States v. Singer*, 82 U.S. (15 Wall.) 111, 121 (1872) (reasoning that a tax on distillers was uniform because “[t]he law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike”); *see also Apache Bend Apartments, Ltd. v. United States*, 964 F.2d 1556, 1561–62 (5th Cir. 1992).

240. Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of “Incomes,”* 33 ARIZ. STATE L.J. 1057, 1065 (2001).

241. *United States v. Ptasynski*, 462 U.S. 74 (1983).

242. *Id.* at 77–79.

243. *Id.* at 85–86.

244. *Id.*

245. *See id.* at 86.

The Non-Participation Payment would be uniform in the sense mandated by the Uniformity Requirement. That is, it would apply to all eligible voters who do not vote, it would not be more or less onerous based on an individual's classification, and it would apply with equal force and effect wherever it is imposed.

The remaining issue would be whether the Non-Participation Payment creates an "undue preference" for one class at the expense of another. A state such as Hawaii, which has some of the lowest turnout rates in the United States,²⁴⁶ could hypothetically present this challenge. Hawaii could argue that the Non-Participation Payment gives preference to states such as Minnesota, which typically has very high turnout rates.²⁴⁷ Hawaii could argue that more of its citizens will be burdened by the Non-Participation Payment than Minnesota's, thereby exposing Congress's "undue preference" for Minnesota.

This argument fails on several counts, however. First, the Court in *Ptasynski* held that there was no geographic discrimination in that case, even though a geographic classification was explicitly written into the law, because it was justified. The Non-Participation Payment would have no such facial geographic considerations and would be treated even more favorably by the Court than the law in *Ptasynski*.²⁴⁸ Second, in a pre-implementation facial challenge to the law, Hawaii could not prove that its citizens would be more affected by the Non-Participation Payment, since compulsory voting intends to achieve maximum turnout across the country. Therefore, turnout rates from before the implementation of compulsory voting would not be determinative. Finally, even if Hawaii brought an as-applied challenge if evidence showed the Non-Participation Payment disproportionately affected the state, this effect would not reflect an "undue preference" for high-turnout states like Minnesota. Any benefit that Minnesota receives would be due to the actions of its citizens or its state government in facilitating voting, not from any preference by Congress. Therefore, it is likely that the Non-Participation Payment would satisfy the Uniformity Requirement.

246. See John D. Sutter, Opinion, *8 Reasons Hawaii Doesn't Vote*, CNN (Oct. 21, 2021, 11:40 AM), <https://www.cnn.com/2012/10/21/opinion/why-hawaii-doesnt-vote/index.html> [<https://perma.cc/RD62-PXAA>].

247. See Tim Pugmire, *It's Official: Minnesota 2018 Voter Turnout Tops the Nation*, MPR NEWS (Nov. 28, 2018, 3:01 PM), <https://www.mprnews.org/story/2018/11/27/minnesota-2018-voter-turnout-tops-the-nation> [<https://perma.cc/4GVL-JM4E>].

248. The lack of explicit geographic considerations alone would likely be sufficient to satisfy the uniformity requirement on its own. See *Ptasynski*, 462 U.S. at 86 ("Had Congress described this class of oil in nongeographic terms, there would be no question as to the Act's constitutionality.").

3. The Apportionment Requirement

The Apportionment Requirement mandates that direct taxes be apportioned among the states by population.²⁴⁹ In other words, where a direct tax is imposed, a state must be liable for the proportion of the overall tax revenue relative to its proportion of the national population. The Apportionment Requirement applies only to taxes not subject to the Uniformity Requirement.²⁵⁰ That is, the Uniformity Requirement applies only to indirect taxes and the Apportionment Requirement applies only to direct taxes.

Therefore, the issue is whether the Apportionment Requirement applies to the Non-Participation Payment at all. If the Apportionment Requirement applies, the Non-Participation Payment would be invalid. As envisioned in this Note, the Non-Participation Payment would apply a flat tax of \$20 to any individual who fails to vote,²⁵¹ and thus any variation in voter turnout rates across states would cause the Non-Participation Payment to fail to comply with the Apportionment Requirement. Compliance with the Apportionment Requirement would mean that the penalty rate would have to be more severe for nonvoters in states with fewer nonvoters. This would lead to an illogical result where states with better voter turnout would be punished with higher penalty rates. Congress would not write the legislation in this manner.

However, the Apportionment Requirement would not apply to the Non-Participation Payment. First, the Apportionment Requirement has become nearly moot as a matter of constitutional law.²⁵² It has been described by Calvin Johnson as having “no constitutional weight.”²⁵³ This is because apportionment is unrealistic in most scenarios²⁵⁴ and absurd in others.²⁵⁵ Johnson illustrates the illogical inequity of the Apportionment Requirement in the example of a carriage tax. He notes in his example that if New York

249. U.S. CONST. art. I, § 9, cl. 3 (“No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”).

250. Jensen, *supra* note 240, at 1067.

251. See *supra* text accompanying note 41.

252. Jensen, *supra* note 240, at 1066 (describing the perception that the apportionment requirement “seems to have disappeared from the constitutional radar” as “pretty close to the truth”). However, it is worth noting that Jensen believes the apportionment requirement has legitimate purposes and has been “misunderstood or ignored.” *Id.* at 1066, 1078–79.

253. Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL OF RTS. J. 1, 1 (1998).

254. See Calvin H. Johnson, *A Wealth Tax Is Constitutional*, A.B.A. TAX TIMES, Aug. 2019, at 1, 6 (describing that excises and duties are not considered direct taxes because it would be almost impossible to impose them in accordance with the Apportionment Requirement and also with the Uniformity Requirement of U.S. CONST. art. I, § 8, cl. 1.).

255. See Johnson, *supra* note 253, at 5–6.

and Virginia had equal populations, but New York had ten times more carriages to tax than Virginia, each taxable carriage in Virginia would be subject to ten times the rate of a carriage in New York, for no other reason than that Virginia had fewer carriages.²⁵⁶

Moreover, Johnson notes that the Apportionment Requirement has been effectively repealed by three events: (1) the adoption of the Constitution, which ended the requisition system of the Articles of Confederation and gave Congress the power to tax without going through the states; (2) the repeal of slavery, which was the original intent and purpose of the inclusion of the Apportionment Requirement; and (3) the adoption of the Sixteenth Amendment, which allowed for the imposition of income taxes without the Apportionment Requirement.²⁵⁷ Because of the Apportionment Requirement's difficulties, courts generally do not apply it. To avoid it, they usually construe "income" broadly to fit the tax under the Sixteenth Amendment or find an exemption from the Apportionment Requirement for "excises," and then construe "excise" broadly to include the tax.²⁵⁸ Thus, the practical rule is likely that the Apportionment Requirement does not include any tax which would lead to an unreasonable outcome if apportionment applied.²⁵⁹ Because the Apportionment Requirement would be unrealistic if applied to the Non-Participation Payment, discussed *supra*, it likely would not apply.

Second, to the extent there is an enforceable Apportionment Requirement, courts have held that it would apply only to three types of "direct taxes": (1) capitations; (2) taxes on real property; or (3) taxes on personal property.²⁶⁰ In this case, the Non-Participation Payment obviously does not involve taxes on property, real or personal. Therefore, only the first type of direct tax, capitations, is potentially relevant. A capitation is tax imposed "without regard to property, profession, or any other external

256. *Id.*

257. *Id.* at 25–28. The argument that the Apportionment Requirement was effectively repealed by the abolishment of slavery is a view shared by other scholars. *See, e.g.,* Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 58 (1999). However, Jensen vigorously opposes the notion that the Apportionment Requirement had its purposes inextricably tied to slavery. *See* Jensen, *supra* note 240, at 1074.

258. Johnson, *supra* note 253, at 79.

259. *See id.*; *see also* *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 174 (1796) ("The rule of apportionment is only to be adopted in such cases where it can reasonably apply."); *Scholey v. Rew*, 90 U.S. 331, 343 (1875) ("If all taxes that political economists regard as direct taxes should be held to fall within those words in the Constitution, Congress would be deprived of the practical power to impose such taxes.").

260. *See Delaware Cnty. v. Fed. Hous. Fin. Agency*, 747 F.3d 215, 221 (3d Cir. 2014) (citing *Murphy v. IRS*, 493 F.3d 170, 181 (D.C. Cir. 2007)); *see also* *Springer v. United States*, 102 U.S. 586, 598 (1881).

circumstance” of the taxpayer.²⁶¹ Here, the Non-Participation Payment is clearly not a capitation, because it is imposed with regard to the external circumstance of whether an individual has voted.

Therefore, the Apportionment Requirement would not apply to the Non-Participation Payment.

4. The Revenue Requirement

The Revenue Requirement mandates that taxes have the purpose of raising “some revenue.”²⁶² This requirement can be divided into two elements. The first is that the tax must actually raise some revenue. *Sonzinsky v. United States* demonstrates that the amount of revenue raised does not have to be substantial to be constitutional.²⁶³ At issue in *Sonzinsky* was a tax that only raised \$5,400 in 1934, and \$4,400 in 1935.²⁶⁴ The Court found those amounts sufficient to uphold the tax as a constitutional exercise of Congress’s power to tax.²⁶⁵

The second element of the Revenue Requirement is that the tax must be imposed affirmatively for the nominal purpose of raising revenue,²⁶⁶ rather than for the purpose of imposing a penalty.²⁶⁷ To determine whether a law is a tax or a penalty, a court must look beyond the label toward the “operation of the provision.”²⁶⁸ Therefore, the fact that the Non-Participation Payment might be referred to by the legislation as a “penalty” is unimportant so long as it actually functions as a tax.²⁶⁹ The distinction between a tax and a penalty is that the former provides pecuniary support for the government,²⁷⁰ and the

261. *Hylton*, 3 U.S. at 175; *Capitation Tax*, BALLENTINE’S LAW DICTIONARY (3d ed. 1969).

262. See *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937) (upholding a tax because it was “productive of some revenue”); *United States v. Kahriger*, 345 U.S. 22, 28 (1953), *overruled on other grounds by* *Marchetti v. United States*, 390 U.S. 39, 54 (1968).

263. *Sonzinsky*, 300 U.S. at 514.

264. See *id.* at 514 n.1. These values would translate to roughly \$106,457.32 and \$84,191.74 in today’s dollars. See *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm [<https://perma.cc/W4NL-LNS2>]. These figures are still very small for a federal tax.

265. *Sonzinsky*, 300 U.S. at 514.

266. I state that the purpose of raising revenue is “nominal” because a tax does not need to be for the actual purpose of raising revenue in order to be constitutional. See *infra* text accompanying note 283.

267. *Dep’t of Revenue of Mont. v. Ranch*, 511 U.S. 767, 779–80 (1994) (“Whereas fines, penalties, and forfeitures are readily characterized as sanctions, taxes are typically different because they are usually motivated by revenue-raising, rather than punitive, purposes. Yet at some point, an exaction labeled as a tax approaches punishment.”).

268. *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 220 (1996).

269. The Court was similarly unconcerned with the fact that the “shared responsibility payment” of the ACA was also called a penalty. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 564 (2012) (noting that the fact that the Affordable Care Act labels the shared responsibility payment as a “penalty” does not mean that it falls outside Congress’s taxation powers).

270. *New Jersey v. Anderson*, 203 U.S. 483, 492 (1906).

latter punishes unlawful conduct or omissions.²⁷¹

The Court grappled with this distinction between a tax and a penalty in the *Lochner*-era case of the *Child Labor Tax Case*.²⁷² Although the practical effect of the holding in the *Child Labor Tax Case* was overruled by the Fair Labor Standards Act of 1938,²⁷³ its analysis of how a tax may be a penalty in disguise is still pertinent. It was this case that Chief Justice John Roberts relied upon in *Sebelius* to determine whether the shared responsibility payment of the ACA was a tax or a penalty.²⁷⁴

In the *Child Labor Tax Case*, the Court considered a law imposing a financial burden on companies that did not comply with certain child labor regulations. The Court invalidated the law for three reasons: (1) the tax was a “heavy exaction,” which required an employer to forfeit one-tenth of its net income, regardless of whether it “employ[ed] five hundred children for a year, or . . . only one for a day”; (2) the tax had a scienter requirement, something traditionally associated with penalties; and (3) an employer was subject to the tax by the Department of Labor, an agency not regularly associated with tax collection.²⁷⁵

According to this framework, the Non-Participation Payment would not be a penalty. Chief Justice Roberts’ analysis in *Sebelius* gives insight into why that is the case. He held that the shared responsibility payment, which in 2016 would have been no less than \$695,²⁷⁶ was not “prohibitory.”²⁷⁷ In that light, it is unlikely that \$20 would be prohibitory. Moreover, Chief Justice Roberts noted that the absence of a “scienter” requirement indicates a tax more than a penalty because “Congress often wishes to punish only those who intentionally break the law.”²⁷⁸ Because the shared responsibility payment had no scienter requirement, the law did not suggest that failing to

271. See *Reorganized CF&I Fabricators of Utah*, 518 U.S. at 224; *United States v. La Franca*, 282 U.S. 568, 572 (1931).

272. *Child Labor Tax Case*, 259 U.S. 20, 36–37 (1922).

273. See Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060.

274. See *Sebelius*, 567 U.S. at 565–66.

275. *Child Labor Tax Case*, 259 U.S. at 36–37; see also *Sebelius*, 567 U.S. at 565–66 (analyzing *Child Labor Tax Case* according to this three-part framework).

276. *Sebelius*, 567 U.S. at 539 (emphasis added) (“In 2016, for example, the penalty will be 2.5 percent of an individual’s household income, but *no less than \$695* and no more than the average yearly premium for insurance that covers 60 percent of the cost of 10 specified services (e.g., prescription drugs and hospitalization).”); see also Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1501(b), 10106(b), 124 Stat. 119, 245, 909 (2010); Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, sec. 1002(a), §§ 1501(b), 10106(b), 124 Stat. 1029, 1032 (adjusting “applicable dollar amount” from \$750 to \$695). In 2017, Congress again adjusted the shared responsibility payment to \$0. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092. However, this change occurred several years after the *Sebelius* decision.

277. *Sebelius*, 567 U.S. at 566.

278. *Id.*

obtain health insurance was intentional unlawful action. Similarly, Congress would not require a scienter requirement to apply the Non-Participation Payment because it would not be necessary or efficient to increase turnout.

For the third *Child Labor Tax Case* factor, I propose that Congress could direct the IRS to collect the Non-Participation Payment.²⁷⁹ This could involve a process similar to that of Australia's, wherein state and local officials would send a list of alleged nonvoters to the IRS, who would subsequently inform the alleged nonvoters of their failure to vote and allow them to contest the determination. If the nonvoter fails to contest the determination, the IRS would add \$20 to the nonvoter's tax liability. Given that the United States does not have a federal electoral body comparable to the AEC, a collection system through the IRS would make the most sense because the IRS already has the institutional ability to collect payments from Americans.²⁸⁰ This structure would satisfy the third factor of the *Child Labor Tax Case* that suggests payments collected by the IRS are more likely to be taxes. However, even if the Non-Participation Payment was not collected by the IRS, that fact alone would not make it an unconstitutional penalty. Nothing in the *Child Labor Tax Case* nor *Sebelius* suggests that all three factors must be met, and the first two factors weigh heavily in favor of the Non-Participation Payment satisfying the Revenue Requirement.

Moreover, even if the revenue-raising effect of a tax is clearly incidental to its intent to regulate individual behavior, it is still constitutional. The Court has made clear that taxes that obviously have the actual purpose of regulating behavior instead of raising revenue are not unconstitutional on that basis alone.²⁸¹ It is even permissible for Congress to use taxes to regulate behavior that it otherwise could not regulate.²⁸² Thus, an objection that the Non-Participation Payment is not for the purpose of raising revenue because it is designed to affect individual behavior would fail.

Therefore, because the Non-Participation Payment would raise some form of revenue and does not demonstrate the signs of a penalty as laid out in the *Child Labor Tax Cases*, it satisfies the Revenue Requirement.

279. See *supra* text accompanying note 42.

280. See *supra* text accompanying note 43.

281. See, e.g., *United States v. Sanchez*, 340 U.S. 42, 44-45 (1950) (citing *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)); *South Carolina v. Baker*, 485 U.S. 505, 527 n.16 (1988); *Minor v. United States*, 396 U.S. 87, 98 n.13 (1969) (citations omitted).

282. *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 47 (1934) ("From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment."). Linda Sugin also suggests that the Roberts Court has become particularly favorable to the notion that Congress can regulate something through taxation that it otherwise cannot. See Linda Sugin, *The Great and Mighty Tax Law: How the Roberts Court Has Reduced Constitutional Scrutiny of Taxes and Tax Expenditures*, 78 BROOK. L. REV. 777, 833 (2013).

CONCLUSION

Time will tell whether tides will shift and a future Congress will address low voter turnout through compulsory voting. If that day comes, Congress's effort will be constitutional. First, compulsory voting is squarely within Congress's power under the Elections Clause. Second, compulsory voting would not unconstitutionally burden the right not to speak. Third, it would not unconstitutionally burden a right not to vote, because such a right does not exist. Even if it were to exist, compulsory voting would not unconstitutionally burden it. Finally, compulsory voting would be a legal exercise of Congress's power to tax.

