

A WINNER AT THE POLLS: A PROPOSAL FOR MANDATORY VOTER REGISTRATION

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INTRODUCTION

A few days before the November 4, 1997 elections in Texas, David Wolf voted by absentee ballot.¹ This event ordinarily would not have raised any eyebrows, except for one thing: David Wolf was an American astronaut who cast his ballot from the Mir space station.² The Johnson Space Center in Houston sent the ballot up to the Russian space station electronically with an encrypted code.³ After Wolf filled out his ballot and beamed it back down, the Space Center delivered the ballot to the Harris County Registrar of Voters.⁴ When he cast his vote, Wolf was 235 miles from Earth.⁵ Considering this event, an observer might have thought that the United States had reached new heights in voter participation, but the truth is much more mundane.

As we prepare to begin a new millennium, the United States finds itself standing tall as the only remaining world superpower. Democracy has spread to corners of the globe where it would have been thought unimaginable only twenty years ago. Yet, in the United States, our government by the people has become less and less so. While the role of big money in politics has reached striking levels, another national problem poses as serious a threat to our collective future: the drastic drop-off in voter participation. In the 1996 presidential election, voter turnout (the percentage of the voting-age population (VAP) that actually voted) sank to 49 percent.⁶ This marked the lowest voter turnout in a presidential election since 1924 (also 49 percent).⁷ Out of 196.5 million people in the voting-age population, only

1. See Telephone Interview with Rob Navias, NASA spokesman at the Johnson Space Center (Jan. 8, 1999) (explaining that Texas Legislature passed law, which Governor George W. Bush signed in summer of 1997, allowing astronauts who are Texas residents to cast absentee ballots from space; and that Astronaut Wolf was first person to vote under this law).

2. See *id.*

3. See *id.*

4. See *id.*

5. See *id.*

6. See *National Voter Turnout in Federal Elections: 1960 – 1996*, FEDERAL ELECTION COMMISSION (last modified Aug. 18, 1999) <<http://www.fec.gov/pages/htmlto5.htm>> [hereinafter *National Voter Turnout*].

7. See *Voter Registration: Hearings on S. 352 and S. 472 Before the Senate Comm. on Post Office and Civil Serv.*, 93d Cong. 30 (1973) [hereinafter *Voter Registration Hearings*] (reporting voter turnout in U.S. presidential elections from 1824-1972). In addition, although turnout had been declining after World War I, 1924 could well have been something of an aberration, since it was the first year that women voted in a presidential election on a widespread basis after the ratification of the Nineteenth Amendment in 1920. See U.S.C.A. CONST. amend. XIX (1987) (historical notes) (recording date of ratification of Nineteenth Amendment).

96.4 million voted.⁸ Thus, more than 100 million people who could have gone to the polls did not. This downward trend continued in November 1998, when only 36 percent of the electorate voted.⁹ Turnout in a mid-term election had not been so meager since 1942.¹⁰

What has gone so wrong that less than half of the electorate participates in the most fundamental process of our democracy? As Raymond Wolfinger and Steven Rosenstone said in their landmark study "*Who Votes?*," "Elections are at the core of the American political system. . . . [F]or most Americans, voting is the only form of political participation."¹¹ Perhaps many ordinary voters, fed up with the notion that the amount of one's campaign donation determines one's influence, have simply decided to tune out politics. Perhaps they find that they are too often unexcited by the choice of candidates. Perhaps they feel that their votes do not matter.

While all of these theories are legitimate, this paper will argue that the single most important reason for the drastic decline in voter turnout during the twentieth century stems from the burdensome and outdated voter registration laws most states implemented at the turn of the century. If the statistics about voters and elections show any one thing clearly, it is that voter registration laws are the principal reason why so few people vote. There might be a tendency for a casual observer to think that those who do not register are simply apathetic and uninterested in politics, and thus choose not to register. The statistics, however, strongly dispute this notion. As will be discussed below, voter studies consistently show that even new voters, *once registered, vote at very high rates*. Professor Robert Erikson summed this up

8. As the Federal Election Commission (FEC) notes, VAP is not the same thing as the total number of eligible voters. See *A Few Words About Voting Age Population (VAP)*, FEDERAL ELECTION COMMISSION (last modified Aug. 18, 1999) <<http://www.fec.gov/pages/vapwords.htm>>. Provided by the Census Bureau's *Current Population Reports*, the VAP "refers to the total number of persons in the United States who are 18 years of age or older regardless of citizenship, military status, felony conviction, or mental state." *Id.* Thus, the VAP will always be greater than the number of eligible voters (all but four states prohibit incarcerated felons from voting). See *id.* In essence, then, in most elections, actual turnout as a percentage of eligible voters is slightly higher than the numbers reported. Nevertheless, because organizations like the Census Bureau and the FEC have always used VAP in these calculations (since it is impossible to calculate the actual number of eligible voters), these figures provide the most accurate available barometer of voter turnout and, more importantly, of trends in voter turnout. For purposes of simplicity in this study, I will use the terms VAP and eligible voters interchangeably.

9. See Telephone Interview with the Committee for the Study of the American Electorate (Jan. 6, 1999); see also *Low Voter Turnout Means Lower Hurdles*, *BALLOT ACCESS NEWS*, Dec. 8, 1998, at 1.

10. See *The Voice of the Voters*, *BOSTON SUNDAY GLOBE*, Nov. 8, 1998, at D6.

11. RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, *WHO VOTES?* 1 (1980).

neatly with the title of his article: “*Why Do People Vote? Because They Are Registered.*”¹²

The following will help illustrate: The Census Bureau reported that in the 1996 election, 127.7 million people were registered to vote, and that 105 million of these people voted.¹³ Thus, 82 percent of the registered voters went to the polls, compared with 49 percent of the entire electorate.¹⁴ This statistic is especially dramatic in light of the fact that 1996 was a low voter turnout year. In 1980 and 1984, 89 and 88 percent of registered voters voted, respectively.¹⁵ Over the past twenty years, *registered* voters have turned out at a rate of 80 to 90 percent.¹⁶ In 1996, the Census Bureau reported that 66 million people who could have voted were not registered to vote.¹⁷ If all of these citizens had been registered, and if 80 percent of them had voted as would be expected, an additional 53 million Americans would have participated in the 1996 presidential election.

Anachronistic and obstructionist, voter registration laws cry out for change to anyone who seriously wants to reform our system of electoral politics. Currently, too many people are disenfranchised by politics, particularly the less educated, the poor and minorities; voter registration laws present disproportionate barriers to entry for these segments of society.

Part I of this paper will examine the history of voter registration laws and how they were enacted in order to stem the immigrant vote in the North and, along with poll taxes and literacy tests, to suppress the black vote in the South.

Part II will focus on the last forty years, and will analyze why turnout has plummeted fourteen points from 63 percent in 1960 to 49 percent in 1996¹⁸—despite important federal intervention such as the

12. See Robert S. Erikson, *Why Do People Vote? Because They Are Registered*, 9 AM. POL. Q. 259 (1981) (discussing how voting is stimulated by act of registration).

13. See *Voting and Registration in the Election of November 1996 (Detailed tables)*, U.S. CENSUS BUREAU (last modified Nov. 8, 1999) <<http://www.census.gov/prod/population/www/socdemo/voting.html>> [hereinafter *Voting and Registration (Detailed tables)*].

14. See *id.*

15. See FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE* 260 (1988).

16. See *Voting and Registration (Historical Time Series Tables)*, U.S. CENSUS BUREAU (last modified Nov. 8, 1999) <<http://www.census.gov/population/www/socdemo/voting.html>> (showing statistics for turnout of registered voters of 88.6 percent in 1980, 87.8 percent in 1984, 86.2 percent in 1988, and 90.0 percent in 1992); but see *National Voter Turnout*, *supra* note 6 (showing statistics of 76.5 percent for 1980, 74.7 percent for 1984, 72.5 percent for 1988, and 78.0 percent for 1992).

17. See *Voting and Registration (Detailed tables)*, *supra* note 13.

18. See *National Voter Turnout*, *supra* note 6.

Voting Rights Act of 1965, its amendments, the National Voter Registration Act of 1993 (the “motor voter” law), and several crucial Supreme Court decisions. The analysis then moves to an international comparison to underscore how far American voter participation lags behind the rates in other industrialized democracies. The last section of Part II will survey alternative proposals to address the turnout problem, including compulsory voting, mail-in voting, and same-day voter registration. At first glance, all three of these measures would reduce the institutional barriers to voting, and same-day registration is particularly promising. But, none would achieve the reform triple-play of being constitutional, of significantly increasing voter participation, and of fundamentally strengthening a citizen’s right to vote.

Finally, Part III will argue that the best way to boost voter turnout dramatically—and to do so in a constitutionally acceptable manner—is not to reform the existing voter registration laws, but to jettison them altogether in favor of a system of mandatory voter registration for federal elections. By implementing such a system, while allowing those who do not wish to participate to opt out, the country will instantly bestow the franchise on millions of Americans, so that voter turnout will increase dramatically. Part III will also demonstrate why mandatory voter registration would survive any constitutional challenges, and will describe how such a system should be implemented.

By making registration the government’s responsibility—rather than the individual voter’s—as every other industrialized democracy already does, we will go a long way towards revitalizing the American electorate and restoring a great measure of confidence in our political system.

I

THE HISTORY OF VOTER REGISTRATION LAWS

A. *Turnout in the Nineteenth Century*

In order to appreciate the dramatic effect that the turn-of-the-century voter registration laws had on the decline in turnout, we must first look at voter participation in the nineteenth century. The earliest days of the republic were marked by extremely low voter turnout. “All American presidents from the first (Washington) through the fifth (Monroe) were elected with only 4 to 6 percent of the *eligible* electorate participating.”¹⁹ Most commentators believe this was the case for two main reasons. First, voting was a very costly, time-consuming

19. RUY A. TEIXEIRA, WHY AMERICANS DON’T VOTE: TURNOUT DECLINE IN THE UNITED STATES 1960-1984, at 8 (1987).

endeavor—transportation was primitive, it was hard to find one’s polling site, and obtaining a newspaper for basic information was difficult.²⁰ Second, political parties spent no time trying to build up a party base, but simply focused on appealing to those citizens who were already politically attuned.²¹ “The costs were so high and the reasons for voting so un compelling that most individuals could not attain sufficient motivation to vote.”²²

During Andrew Jackson’s presidency, significant changes occurred. With improved transportation, a more smoothly running electoral system, much more widely disseminated political news, and the advent of active political parties—led by the Jacksonian Democrats, who eagerly sought the support of the masses—turnout shot up from 27 percent in 1824 to 58 percent in 1828.²³ By 1840, turnout had reached 80 percent.²⁴ Turnout would remain at these high levels for the rest of the nineteenth century. In the fifteen presidential elections from 1840 to 1896, voter turnout averaged 77 percent, topping 75 percent ten times.²⁵ Moreover, during this period, turnout in mid-term elections, which is usually significantly lower than turnout in presidential elections, averaged 67 percent.²⁶ Needless to say, by today’s standards, this amounted to a remarkable level of voter participation.

B. A Case Study: The Dawn of Voter Registration Laws in New Jersey

An analysis of how voter registration laws developed in one of the thirteen original colonies should provide insight into the changes that occurred in voter participation throughout the Union. New Jersey’s political journey toward passage of these laws, laid out in a thorough study by Richard P. McCormick, provides a particularly vivid and representative portrait.²⁷

As with the rest of the country, New Jersey’s turnout increased dramatically during the Jacksonian era, from 31 percent in 1824 to 73

20. *See id.* at 9.

21. *See id.*

22. *Id.*

23. *See id.*

24. *See id.* *See also Voter Registration Hearings, supra* note 7, at 30 (reporting voter turnout in U.S. presidential elections from 1824-1972). *See infra* Table 1 for turnout in presidential elections from 1828 to 1996.

25. *See Voter Registration Hearings, supra* note 7, at 30.

26. *See PIVEN & CLOWARD, supra* note 15, at 30.

27. *See* RICHARD P. MCCORMICK, *THE HISTORY OF VOTING IN NEW JERSEY: A STUDY OF THE DEVELOPMENT OF ELECTION MACHINERY 1664-1911*, at 27 (1953).

percent in 1828.²⁸ In the 1840 presidential election, 86 percent of the adult white males voted.²⁹ McCormick explains that from 1839 to 1876, an era of rapid immigration, urbanization, and population growth, a dominant theme in New Jersey politics, became the purity of elections.³⁰ “Voting was no longer to be a small-town affair where most individuals were known to their neighbors. It now involved masses of persons whose individual identities were little regarded. Accordingly, opportunities for confusion and fraud were multiplied.”³¹

After Governor William Pennington declared in his 1838 address to the legislature that voting by ineligible people had become far too common, the legislature passed a comprehensive election law the following year, which required any voter challenged by the election officials to prove his citizenship by showing his naturalization papers.³² During the debate over the bill, some legislators began championing a voter registration system for the first time.³³ Although the bill emerged from the Assembly committee with voter registration provisions, the full Assembly eliminated the provisions because of widespread agreement (among both Whigs and Democrats) that “the proposal would introduce a new principle into elections and would lead to confusion.”³⁴ Five years later, at a state constitutional convention, a voter registration proposal drew little attention, although most

28. *See id.* at 121.

29. *See id.*

30. *See id.* at 122-23.

31. *Id.*

32. *See id.* at 126. The law was New Jersey Session Law, 63rd, Act of March 12, 1839. *See id.* at 125 n.3. There is a good deal of debate about how much fraud occurred in nineteenth century elections. On one side, in the 1970s, conservative scholars like Kevin Phillips and Paul Blackman criticized the “current reformers” in the Senate, Gale McGee (D-Wyo.) and Edward Kennedy (D-Mass.) for overemphasizing the supposedly “halcyon days of civic participation to which America ought to aspire.” KEVIN P. PHILLIPS & PAUL H. BLACKMAN, *ELECTORAL REFORM AND VOTER PARTICIPATION – FEDERAL REGISTRATION: A FALSE REMEDY FOR VOTER APATHY* 51 (1975). Offering very little evidence and admitting that it would be “impossible to estimate” how much fraud actually took place, they nevertheless insist that fraud was pervasive. *See id.* at 50-51. Attacking this position, progressive Professors Piven and Cloward note that while some level of fraud probably existed, the vast majority of the data on nineteenth century fraud comes from the unsupported claims of those advocating more restrictive elections laws. *See PIVEN & CLOWARD, supra* note 15, at 99. These claims, of course, must be assessed with an understanding of the political motivation of those making them. Furthermore, Professors Piven and Cloward rightly note that fraud also *reduced* turnout since it often took the form of “intimidating or of deterring voting, or of stealing ballots.” *See id.* at 99-100.

33. *See generally* McCORMICK, *supra* note 27, at 127.

34. *Id.*

delegates thought the legislature had the power to pass such a law without a clear constitutional mandate.³⁵

It was not until after the Civil War that the first voter registration law was enacted. Faced with a huge influx of immigrants and a population spike, the Republicans took control of both houses of the legislature in 1866 and then took aim at what they deemed to be the Democratic Party's reliance on illegal votes, particularly those from the cities.³⁶ The Republicans forced through a law creating a voter registration system that would be administered by bipartisan election boards:

The boards of registry met in their respective districts three weeks before the November election to prepare a register of voters. Only those who appeared personally before the board and proved their qualifications were enrolled on the register The name and address of each voter were recorded in alphabetical order. The full list was then posted in a public place. On the Thursday before the general election, the board again convened, this time for the purpose of revising or adding to the register. Again, however, no names were added unless the voter appeared in person, and any voter could challenge the claims of any person to be enrolled. At the election, no person was permitted to vote unless his name was on the register.³⁷

The law marked a dramatic shift in the state's approach to elections. For the first time, the state placed the responsibility on the individual voter to make sure he was registered. Whereas before a voter would have to prove his citizenship only if challenged at the polls, under the new law, every voter would have to receive pre-clearance in order to exercise his right to vote. Furthermore, a qualified citizen could now be shut out if he walked into the polling site on election day; never before had the law allowed such a result. Only those citizens who had taken the advance step of registering at some date prior to the election could vote. In sum, the registration law signified a fundamental shift of responsibility from the government to the citizen.

Arguing that the registry laws made voting "troublesome, inconvenient, and expensive," the Democratic press charged that the laws were being instituted to keep from "the polls the poor working man,

35. *See id.* at 133. Another election-related action at the convention revolved around whether to continue the state's two-day election period. *See id.* at 134. Ultimately, a majority of the delegates opted for only one day. *See id.* As one delegate remarked, "The night of the first day of elections is always a scene of much evil." *Id.*

36. *See id.* at 147.

37. *Id.* at 148.

who could not afford to take time off from his job to register.”³⁸ When the Democrats returned to power in 1868, they overrode the Republican Governor’s veto and abolished registration.³⁹ But in 1871, the Republicans took control again and reinstated registration, confining it solely to the seven cities in the state with populations of more than twenty thousand people.⁴⁰

Although the new law arguably drew a logical distinction, its creation of two separate rules depending on the area of the state raised significant fairness concerns. Voters in big cities would have to register before election day, but not voters in small towns and rural areas. On the one hand, the policy made sense because, in the more sparsely populated areas, county officials would know who in the neighborhood was entitled to vote. But, the subtle result of this law (and similar ones passed in many other states)⁴¹ was that it would now be *more difficult to vote* for an urban dweller than for a person living in the small towns and rural areas.

In 1876, the New Jersey legislature expanded registration to cover all cities with more than ten thousand people, and also made an important alteration by allowing any legal voter in the district to submit names for enrollment by affidavit.⁴² This amendment temporarily eliminated the in-person registration requirement, while increasing the possibility “that false registrations could be easily foisted upon the board.”⁴³ According to McCormick, this early wave of rather lax registration laws probably had little effect on reducing fraud or voter turnout, which was about 85 to 90 percent in the presidential elections from 1840 to 1876.⁴⁴ Most importantly, though, these new laws “in-

38. *Id.* at 149. This contention would be echoed in debates that would take place 100 to 125 years later in political battles over proposals for postcard registration in the 1970s and for the National Voter Registration Act in 1993. *See infra* notes 134-36 and accompanying text.

39. *See id.*

40. *See id.*

41. As late as 1946, New York State still required voters to re-register before every general election. *See* JOHN B. JOHNSON & IRVING J. LEWIS, *THE COUNCIL OF STATE GOV'TS, REGISTRATION FOR VOTING IN THE UNITED STATES* 72-73 (rev. 1946). But this provision only applied to citizens living in cities and towns with populations of more than five thousand people. *See id.* In other areas, the local government could decide how to run its own system. *See id.*

42. *See* MCCORMICK, *supra* note 27, at 149.

43. *Id.*

44. *See id.* at 156. Note that these turnout numbers should probably be discounted to some degree to account for fraud. McCormick reports, for example, that in one tight race for the Assembly in 1887, Boss “Bob” Davis handed out the regular election ballots with tissue ballots stuffed inside them so each Democratic Committee member got two votes. *See id.* at 172. Stories like this eventually led to the adoption of the Australian ballot, where there was one single, official ballot, printed at government

troduced a new element in the election process that in time was to be refined and improved to the point where it was to constitute a real safeguard.”⁴⁵

With concern about ballot procedures sweeping the state, the legislature enacted a reform law in 1890 that implemented some changes to the state’s registration process.⁴⁶ It mandated that new bipartisan boards in each district would conduct a house-to-house canvass of their district and list the names and the residences of each voter.⁴⁷ Three weeks before the election, each district board would meet to add names of voters who had personally appeared before them, or who were shown to have voted in the last election, or who were declared qualified by another qualified voter’s affidavit.⁴⁸ In addition, on the Tuesday before the election, the board took personal registrations.⁴⁹

The final stage of electoral reform, which led to New Jersey’s modern-day registration laws, occurred when Governor Woodrow Wilson took office in 1911 and pushed hard for change.⁵⁰ Widespread reports of fraud (many of which were voiced by reformers with an agenda), plus stories of vote-buying, helped generate the political support for revamping the election laws.⁵¹ On April 11, 1911, the legislature passed a law creating a complete primary system, a secret ballot, and vastly strengthened registration procedures.⁵² McCormick describes the new provisions as “exceedingly clumsy and complicated,”

expense and available only at the polls, on which all the candidates were listed. *See id.* at 174. It also allowed voters to cast their vote by marking the ballot in secrecy, free from intimidation. *See id.* First introduced in Australia in 1856, this type of ballot procedure debuted in Massachusetts in 1888. *See id.* By 1892, thirty-two states used the Australian ballot or some variation of it. *See id.* New Jersey did not switch over until 1911. *See id.* at 209 & n.74.

45. *Id.* at 150.

46. *See id.* at 174-76.

47. *See id.* at 177.

48. *See id.*

49. *See id.* It is crucial to note that in this registration scheme, a voter could still register within a week of the election. Without doubt, one of the most effective methods by which states made registration more difficult throughout the twentieth century was by passing laws with long registration closing dates (in some cases, a voter could not register within one year before the election). The Supreme Court struck down these long timeframes in *Dunn v. Blumstein*, 405 U.S. 330 (1972), saying a thirty-day cutoff was acceptable. The next year, though, in *Marston v. Lewis*, 410 U.S. 679 (1973) and *Burns v. Fortson*, 410 U.S. 686 (1973), the Court said fifty-day cutoffs were acceptable for administrative reasons. For obvious reasons, most notably that the vast majority of voters do not really begin to focus on an election until the last month of the campaign, these long cut-off periods served to slice off a large chunk of the electorate, particularly those less politically attuned.

50. *See* McCORMICK, *supra* note 27, at 207.

51. *See id.* at 206.

52. *See id.* at 209.

particularly since different procedures were (once again) required for municipalities with more or less than five thousand people.⁵³ In the larger districts, the election board members placed on the register all those who had voted in the preceding general election or those whose names were presented by affidavit.⁵⁴ The process to add a new potential voter's name to the registry, however, was much more difficult. A potential voter had to: (1) register for a general election *in person* on the second or fourth Tuesday of September, or on the Tuesday two weeks before the election; (2) answer twelve questions about his name, address, age, place of birth, and employment; and (3) sign the registry book.⁵⁵ When the lists were printed, the local police had to verify the authenticity of the names and addresses.⁵⁶

Meanwhile, in areas with fewer than five thousand people, election boards compiled a registry by conducting a house-to-house canvass.⁵⁷ This accommodation perpetuated the disparity between cities, where the onus was squarely on the would-be voter, and the less populated regions, where the government would shoulder a significant portion of the responsibility for getting voters registered. Finally, the new law required that on election day, before any voter could vote, "he had to establish the fact that he was registered and sign the poll book."⁵⁸

New Jersey's progression of stricter and stricter registration laws ultimately led to a substantial drop in voter turnout and reflected the general trend in the North and West at the turn of the century.⁵⁹ While voter registration laws were also implemented in the South, there were other techniques of suppressing voter participation, with the goal being very clear: to prevent blacks from voting.

C. *The Song of the South: Poll Taxes, Literacy Tests, and Grandfather Clauses*

When the Thirteenth, Fourteenth, and Fifteenth Amendments were ratified after the Civil War, whites in the deep South realized that they had to develop new methods by which they could constitutionally suppress the black vote. White political leaders made little effort to hide their intentions.

53. *See id.* at 210.

54. *See id.*

55. *See id.*

56. *See id.*

57. *See id.*

58. *Id.* at 212.

59. *See infra* Table I for statistics on voter turnout at the turn of the century.

In 1890, a Mississippi constitutional convention began considering election law changes.⁶⁰ As William Mabry notes, the key question at the convention would be “[h]ow was a suffrage clause to be framed which would effectively disfranchise the majority of Negroes and, at the same time, not violate the Fifteenth Amendment or disqualify large numbers of whites from voting?”⁶¹ In the end, the delegates decided it was worth sacrificing the least educated and poorest white voters for the sake of wiping out the bulk of the black electorate and preserving white supremacy.⁶² Ratified on November 1, 1890, the new state constitution established: (1) the Australian ballot; (2) a \$2 poll tax; and (3) a system whereby, besides registering, a potential voter would now have to satisfy an “understanding clause.”⁶³ The clause mandated that potential voters would have “to read any section of the state constitution; or to be able to understand the same when read to him, or give a reasonable interpretation thereof.”⁶⁴ As Mabry notes, “registration officials were given wide discretionary powers” to assess a person’s ability to read or understand a section of the constitution.⁶⁵ The new constitution was never submitted to the people for their approval, but was simply promulgated by the convention.⁶⁶ The white politicians had achieved their main objective, the disfranchisement of black voters. In the election of 1890, held three days after the constitution was ratified, only 30 percent of the black citizens voted.⁶⁷

Eight years later, Louisiana held its own constitutional convention.⁶⁸ The convention’s suffrage committee surveyed the state’s registered voters and discovered the following: out of the 74,000 white registered voters, 68,000, or 92 percent, could write their name, while out of the 13,000 black registered voters, only 7,500, or 58 percent, could do so.⁶⁹ As their neighbors at the Mississippi convention had

60. See William Alexander Mabry, *Disfranchisement of the Negro in Mississippi*, 4 J. S. HIST. 318, 324 (1938).

61. *Id.* at 325.

62. See *id.* at 325-30. Mabry also notes that the lone black delegate supported the proposed changes. His position drew “widespread attention and many favorable comments.” *Id.* at 329.

63. See *id.* at 326-33. See *supra* note 44 for an explanation of the Australian ballot.

64. *Id.* at 327.

65. *Id.* at 333.

66. See *id.* at 332.

67. See *id.*

68. See WILLIAM ALEXANDER MABRY, *Louisiana Politics and the “Grandfather Clause,”* in STUDIES IN THE DISFRANCHISEMENT OF THE NEGRO IN THE SOUTH 290, 299 (1938).

69. See *id.* at 299.

done, the delegates in Louisiana spoke freely of their objectives. The convention chairman said the following in his keynote address:

In the first place, my fellow citizens, we are all aware that this convention has been called by the people of the state of Louisiana principally to deal with one question . . . to eliminate from the electorate the mass of corrupt and illiterate voters who have during the last quarter of a century degraded our politics.⁷⁰

There can be no doubt as to who were these “corrupt and illiterate voters” who had entered the electorate since the Civil War. The convention decided to implement a poll tax and a literacy test.⁷¹ However, the delegates added one crucial safety net for poor whites. Any male person who was entitled to vote before January 1, 1867, or the son or grandson of such a person, could vote without having to pay the poll tax or pass the literacy test.⁷² Judge Thomas T. Semmes, the chairman of the convention’s judiciary committee, described the purpose of the grandfather clause as making certain that “no white man in this state who has heretofore exercised the right of suffrage shall be deprived of it, whether or not he can read or write, or whether he possesses the property qualification.”⁷³

It should be noted that non-Southern states also used some of these vote-suppressing devices, though, in the North, they were usually directed at immigrants rather than blacks. For instance, in 1921, when xenophobia swept America during the first Red Scare, the voters of New York State approved a constitutional amendment “requiring that all voters be able to read and write English.”⁷⁴ The Board of Regents administered the literacy test, which applied only to voters who became eligible after January 1, 1922.⁷⁵

D. The Net Result: Turnout Plummetts

As new legal obstacles such as voter registration laws, poll taxes, and literacy tests took effect, they combined to drive down turnout across the country. From 1888 to 1924, voting rates fell from 64 to 19 percent in the South, from 86 to 57 percent in the North and West, and

70. *Id.* (quoting statement made by chairman E.B. Kruttschnitt of Orleans at Louisiana Constitutional Convention of 1898).

71. *See id.* at 308.

72. *See id.*

73. *Id.* at 309.

74. REGENTS EXAMINATION AND SCHOLARSHIP CENTER, STATE EDUC. DEP’T, LITERACY TESTING AND THE ISSUANCE OF CERTIFICATES OF LITERACY 4 (1964).

75. *See id.*

from 79 percent to 49 percent nationally.⁷⁶ In 1867, 55 percent of eligible whites were registered to vote in Mississippi, compared with 67 percent of blacks.⁷⁷ By 1892, 57 percent of whites were registered, compared with 6 percent of blacks.⁷⁸

Professors Piven and Cloward make two important observations about the decline in turnout. First, they point out that the trends in the North and West cannot be dismissed as occurring because of the low turnout of women who were granted the vote by the Nineteenth Amendment in 1920.⁷⁹ After all, turnout in the non-South dropped from 86 percent in 1896 to 68 percent in 1912, eight years before the Nineteenth Amendment was ratified.⁸⁰ Second, Professors Piven and Cloward identify the crucial presidential election of 1896, in which William McKinley defeated William Jennings Bryan, as a turning point.⁸¹ The political realignment that emerged after this race was “near total domination of the Republican party by business in the North and of the Democratic party by planter interests in the South.”⁸² The fact that both regions became one-party locks for a generation led to less party competition and thus reduced turnout.⁸³ However, while this is a partial explanation, Professors Piven and Cloward persuasively contend that the main outcome of the 1896 election was to spur the Republicans in the North (as was seen above with New Jersey) to enact tough registration laws:

Business leaders and professionals were unnerved by the hordes of immigrants concentrating in burgeoning city slums, confounded by the strength of the new city political bosses made audacious by their grip on immigrant and working-class voters, shaken by the waves of strikes and riots that began in the 1870s, and then finally jolted by the series of insurgent electoral challenges that culminated in 1896.

. . . .

Logically enough, the big cities were marked from the beginning as the target of these increasingly restrictive registration requirements.⁸⁴

76. See PIVEN & CLOWARD, *supra* note 15, at viii; see also *Voter Registration Hearings*, *supra* note 7, at 30.

77. See BURT NEUBORNE & ARTHUR EISENBERG, *THE RIGHTS OF CANDIDATES AND VOTERS: THE BASIC ACLU GUIDE FOR VOTERS AND CANDIDATES* 21 (1976).

78. See *id.*

79. See PIVEN & CLOWARD, *supra* note 15, at 55.

80. See *id.* at 54.

81. See *id.* at 53.

82. *Id.* at 53-54.

83. See *id.* at 54.

84. *Id.* at 71, 90.

Professor Richard L. McCormick summed up this approach when he observed, “Under the banner of ‘reform,’ [the elite] enacted registration requirements, ballot laws, and other measures to restrict suffrage”⁸⁵

Between 1876 and 1912, almost half the northern states had implemented voter registration laws.⁸⁶ By 1929, all but three states (Arkansas, Indiana, and Texas) had enacted them, and these states soon followed suit.⁸⁷ An entire chunk of the nation’s electorate had been left behind. This portrait of the American electoral system would stay roughly the same until the 1960s.

II

THE LAST 40 YEARS: WORSENING TURNOUT DESPITE FEDERAL INTERVENTION AND FAVORABLE SUPREME COURT RULINGS; CONSIDERATION OF OTHER OPTIONS

A. *Consistently Low Voter Participation Leads to Reform Efforts*

Although the Supreme Court put an end to state-sponsored segregation in public schools in 1954 in a landmark civil rights victory,⁸⁸ voting in the South remained largely a whites-only affair.⁸⁹ In some areas, the number of blacks who were registered to vote was frighteningly low. Before the federal government asserted itself in 1965, only 2.1 percent of the eligible voting-age blacks were registered to vote in Dallas County, Alabama, which had a majority of black citizens.⁹⁰ It had been nearly 100 years since the Fifteenth Amendment had been ratified, guaranteeing blacks the right to vote. But, in an entire section of the country, the right to vote existed only on paper.

85. Richard L. McCormick, *The Party Period and Public Policy: An Exploratory Hypothesis*, J. AM. HIST., Sept. 1979, at 279, 295.

86. See PIVEN & CLOWARD, *supra* note 15, at 88.

87. See *id.* (examining JOSEPH P. HARRIS, REGISTRATION OF VOTERS IN THE UNITED STATES 70 (1929)).

88. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (holding that segregation of children in public schools solely on basis of race deprives children of minority groups of equal educational opportunities and is therefore unconstitutional).

89. However, general turnout in the South was lower than in the North; from 1920 to 1960, turnout was 65 percent in the non-South, but only 29 percent in the eleven states of the deep South. See Walter Dean Burnham, *The Changing Shape of the American Political Universe*, AM. POL. SCI. REV., Mar. 1965, at 7, 11. The eleven states of the deep South are: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. See HAROLD W. STANLEY, VOTER MOBILIZATION AND THE POLITICS OF RACE: THE SOUTH AND UNIVERSAL SUFFRAGE, 1952-1984, at 97 tbl.15 (1987).

90. See John Lewis, *Black Voter Registration in the South*, in ISSUES OF ELECTORAL REFORM 75, 77 (Richard J. Carlson ed., 1974).

Civil rights leaders and other reformers realized that a federal enforcement mechanism was needed.⁹¹ Their lobbying efforts helped result in a landmark piece of legislation, the Voting Rights Act of 1965 (VRA or the “1965 Act”).⁹² The VRA had both general provisions, applicable to the entire nation, and specific ones, which covered those areas with such low voting rates that they triggered special attention.⁹³ In a nutshell, the general provisions of the VRA, as amended:⁹⁴

- (1) prohibit voting qualifications or procedures that deny or restrict a person’s right to vote based on race;⁹⁵
- (2) make it a crime for any public official to refuse to allow an eligible person to vote;⁹⁶
- (3) make it a crime for any person to try to threaten or intimidate a person to prevent her from voting or to prevent her from helping another to vote;⁹⁷
- (4) abolish duration residency requirements as a prerequisite for voting for president or vice president;⁹⁸
- (5) establish uniform absentee ballot provisions, and mandate that states allow voters to register up to thirty days before a presidential election (thus eliminating overly long registration closing dates);⁹⁹

91. President Kennedy had also emphasized the importance of electoral reform when he established the President’s Commission on Registration and Voting Participation. *See* Exec. Order No. 11,100, 28 Fed. Reg. 3,149 (1963).

92. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994)).

93. *See id.*

94. The VRA was amended and extended in 1970, 1975, and 1982. *See* Bernard Grofman, *Voting Rights in a Multi-Ethnic World*, 13 CHICANO-LATINO L. REV. 15, 15 (1993). The most important provision of the 1982 amendment was the new language that made explicit that discriminatory purpose was not needed to trigger the VRA; rather, discriminatory effects of electoral systems would suffice. *See id.* at 15-16. In 1992, the minority group provisions were extended through 2007. *See* Voting Rights Language Assistance Act of 1992, 42 U.S.C. § 1971 (1994).

95. *See* § 2, 79 Stat. at 437.

96. *See* §§ 11(a), 12(a), 79 Stat. at 442.

97. *See* §§ 11(b), 12(a), 79 Stat. at 442.

98. *See* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 202(b), 84 Stat. 314, 316. Before this section was enacted, a number of states had laws saying that a person had to live in the state for one year in order to be eligible to vote in an election in that state. The Supreme Court struck down these duration residency requirements in 1972 in *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972).

99. *See* § 202(d), 84 Stat. at 316.

(6) provide for enhanced enforcement by private parties and the United States Attorney General, allowing them to file suit to enforce the Fourteenth and Fifteenth Amendments;¹⁰⁰

(7) grant courts the power to appoint federal examiners and observers to monitor election and registration procedures,¹⁰¹ as well as the power to require any jurisdiction in the United States to have proposed election law reforms pre-cleared;¹⁰² and

(8) prohibit the use of tests or devices in voting (thus eliminating literacy tests).¹⁰³

In addition, the VRA contained specific provisions for jurisdictions with less than a 50 percent turnout in presidential elections in 1964, 1968, or 1972.¹⁰⁴ In these jurisdictions—which included the entire states of Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, and most of North Carolina—state officials would have to obtain pre-clearance from the United States Attorney General for any proposed changes in voting procedures.¹⁰⁵ The states carried the burden of showing that changes would not be discriminatory.¹⁰⁶

The VRA immediately drove up registration rates in the South. From 1964 to 1968, the percentage of voting-age blacks who were registered rose: from 23 to 57 percent in Alabama, from 49 to 70 percent in Arkansas, from 7 to 59 percent in Mississippi, from 58 to 83 percent in Texas, and from 46 to 58 percent in Virginia.¹⁰⁷ Across the eleven deep South states, black voter registration rose from 43 to 62

100. See Voting Rights Act of 1965, Pub. L. No. 89-110, § 3(c), 79 Stat. 437-38 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994)).

101. See § 3(a), 79 Stat. at 437.

102. See § 3(c), 79 Stat. at 437-38.

103. See § 4(a), 79 Stat. at 438.

104. See, e.g., § 4(b)(2), 79 Stat. at 438.

105. See generally UNITED STATES COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS 4 (1981) (assessing progress in voting, in areas covered by special provisions of Voting Rights Act of 1964) [hereinafter UNFULFILLED GOALS]. Some commentators, like Professor Burt Neuborne, point out that since turnout in the 1996 presidential election did not reach 50 percent, the whole country, as a jurisdiction, could arguably now be covered by the pre-clearance provisions. See Burt Neuborne, *Making the Law Safe for Democracy*, 97 MICH. L. REV. 1578, 1584 n.31 (reviewing SAMUEL ISSACHAROFF ET. AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (1998)).

106. When the VRA took effect in 1965, stories of racial discrimination in voting and registering abounded. For example, some jurisdictions “required blacks, who attempted to register, to be accompanied by two persons already registered; since no blacks were already registered, whites had to be found, and none made themselves available.” See UNFULFILLED GOALS, *supra* note 105, at 5.

107. See STANLEY, *supra* note 89, at 97.

percent in this four-year period.¹⁰⁸ In the period immediately after the 1965 Act, the success stories were astonishing. Commentators agree that, among other things, the VRA's provision authorizing the use of federal examiners had a powerful impact.¹⁰⁹ Overall, five years after the law was enacted, registration of blacks in the covered areas had increased from 29 to 52 percent, leading one observer to hail the progress as "dramatic."¹¹⁰

Those seeking fairer voting procedures also attained victories outside the legislative arena. Reformers won a number of key court battles, beginning with the case *Baker v. Carr*¹¹¹ in 1962, when Tennessee voters challenged the apportionment of the state assembly under the Equal Protection Clause.¹¹² The plaintiffs claimed that the new system had diluted their voting power in an arbitrary and capricious way.¹¹³ The Court rejected the defendant's argument that this was a "political question" in which the Court should not intervene and stated, "The question here is the consistency of state action with the Federal Constitution."¹¹⁴ Most importantly, Justice Brennan's opinion in *Baker* ushered in a new philosophy of the Court—a willingness to enter the realm of supervising and reviewing state political systems.¹¹⁵ Two years later, in *Reynolds v. Sims*¹¹⁶ and five companion cases, the Court struck down the legislative apportionment in one or both houses in six states.¹¹⁷ Taking direct aim at decades old apportionment laws that gave white areas greater weighted voting power, Chief Justice Earl Warren made the Court's position on this issue very clear:

[Since] the right of suffrage is a fundamental matter in a free and democratic society [and] is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized

108. See James E. Alt, *The Impact of Voting Rights Act on Black and White Voter Registration in the South*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990, at 351, 374 (Chandler Davidson & Bernard Grofman eds., 1994).

109. See *id.* at 368-69; see also PENN KIMBALL, *THE DISCONNECTED* 263 (1972).

110. See Richard Claude, *The Federal Voting Rights Act*, in ISSUES OF ELECTORAL REFORM 49, 56 (Richard J. Carlson ed., 1974).

111. 369 U.S. 186 (1962).

112. See *id.* at 237 (holding that challenge of state's apportionment of seats in legislature, which effectively eliminated certain citizens' right to vote, was justiciable under Equal Protection Clause).

113. See *id.* at 192.

114. *Id.* at 226.

115. See *id.* at 218-36.

116. 377 U.S. 533 (1964).

117. See *id.* at 566-67 (holding that reapportionment of both houses of Alabama Legislature violated constitutionally protected rights of Alabama citizens).

We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us To the extent that a citizen's right to vote is debased, he is that much less a citizen [T]he weight of a citizen's vote cannot be made to depend on where he lives.¹¹⁸

Over the next eight years, the Court would issue a handful of decisions on equal protection grounds, building on the foundation it laid in *Baker and Reynolds*. The Court struck down (1) a state voter qualification law, for the first time, by overturning a law preventing a soldier stationed in Texas from voting;¹¹⁹ (2) Louisiana's literacy test requirement;¹²⁰ (3) poll taxes for all state and local elections;¹²¹ and (4) state residency laws that established calendar waiting periods before a voter could register.¹²²

Considering the events of the 1960s and 1970s—the VRA and its amendments, the string of Court cases, the ratification of the Twenty-fourth Amendment abolishing the poll tax and the Twenty-sixth Amendment lowering the voting age to eighteen, one would think that these decades were a period of expanded and strengthened American suffrage. These events seemed to herald a new era of active voter participation, in which newly enfranchised young voters would eagerly join in the political process, while those who had long been denied their fundamental voting right would use it passionately.

The numbers, however, told a different story. After the initial push of the VRA led to greatly increased registration among blacks, the number of blacks who were registered in the South hit a plateau.

118. *Id.* See also *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“[Voting] is regarded as a fundamental political right, because [it is] preservative of all rights.”).

119. See *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (holding that denial of vote to bona fide resident merely because he is service member violates Equal Protection Clause of Fourteenth Amendment).

120. See *Louisiana v. United States*, 380 U.S. 145, 153 (1965) (holding Louisiana's literacy test for voter registration both unconstitutional on its face and in conflict with Fifteenth Amendment and 42 U.S.C. § 1971).

121. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding that Virginia's poll tax was unconstitutional and inconsistent with Equal Protection Clause because it required payment of fee). The Twenty-fourth Amendment, ratified on January 23, 1964, abolished the poll tax for federal elections. See U.S.C.A. amend. XXIV (1987) (historical notes).

122. See *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (holding that Tennessee's residence requirements impermissibly impact constitutionally protected rights and do not adequately further state interests).

While the percentage of blacks registered in the eleven deep South states jumped from 43.1 to 62 percent from 1964 to 1968, it dropped back down to 60.8 by 1986.¹²³ Ironically, the 1996 registration figures showed modest progress in the South, where 65 percent of blacks were registered compared with 67 percent of whites, but disappointing results in the Northeast, where only 57 percent of blacks were registered compared with 67 percent of whites.¹²⁴

Perhaps even more disappointing to voting rights advocates than the mixed results on registration over the past thirty-five years has been the clear downward spiral in voter turnout. On the one hand, it may be argued that the turnout drop in presidential elections from 61 percent in 1968 to 55 percent in 1972 and 54 percent in 1976 was due to the ratification of the Twenty-sixth Amendment.¹²⁵ Expanding the electorate to 11 million eighteen- to twenty-year-olds bestowed the franchise on a group that not only had never voted before, but, as Census Bureau surveys indicate, is the least likely age group to vote.¹²⁶ Under similar circumstances, voter turnout dropped after women were granted the vote; but, by 1936, three elections after women first voted on a widespread basis, turnout climbed back up to 61 percent, where it had stood before.¹²⁷ However, since voter participation stayed at or below 55 percent from 1972 to 1992, and dropped to 49 percent in 1996, expanding the franchise to eighteen- to twenty-year-olds does not provide a sufficient explanation. Other factors must be affecting turnout.¹²⁸

Faced with dropping turnout rates, Congress considered a number of bills aimed at improving voter registration in the 1970s. None would garner sufficient support to be enacted into law. In March, 1972, the Senate began debating Senate Bill 2574, a bill that the Senate Post Office and Civil Service Committee had reported to the floor.¹²⁹ The bill, called the National Voter Registration Act would have established a bipartisan National Voter Registration Administra-

123. See Alt, *supra* note 108, at 374.

124. See LYNNE M. CASPER & LORETTA E. BASS, U.S. DEP'T OF COMMERCE, *VOTING REGISTRATION IN THE ELECTION OF NOVEMBER 1996*, at 1 (1998).

125. See *Voter Turnout in the 1968 Presidential Election by State*, FEDERAL ELECTION COMMISSION (last modified Aug. 18, 1999) <<http://www.fec.gov/pages/rat68.htm>>; *Voter Turnout in the 1972 Presidential Election by State*, FEDERAL ELECTION COMMISSION (last modified Aug. 18, 1999) <<http://www.fec.gov/pages/rat72.htm>>.

126. See CONGRESSIONAL QUARTERLY, INC., *GUIDE TO U.S. ELECTIONS* 320-21 (1985). See also *Voting and Registration (Detailed tables)*, *supra* note 13.

127. See *Voter Registration Hearings*, *supra* note 7, at 30.

128. These factors are considered in Part II.B.

129. See *Congressional Quarterly Almanac* 28, at 337 (1972).

tion to be operated out of the Bureau of the Census.¹³⁰ Postcards would be sent to every household before each federal election, and each eligible voter would complete, sign, and return the card to state election officials, who would add the names of any eligible, unregistered voter to the list of registered voters.¹³¹ Respecting state's rights, Senate Bill 2574 would have continued to have state officials control registration procedures for state elections, but states would be given financial inducements to adopt the federal system.¹³² The federal government would cover 15 percent of the cost of a state's conversion to a postcard-registration system.¹³³

Supporters argued that Senate Bill 2574 would greatly increase voter registration and thus voter turnout. Noting that 47 million people had not voted in 1968, Senator Gale McGee (D-Wyo.), Chairman of the Post Office and Civil Service Committee said: "There are still many who cannot get to town regardless of when the office is open. The aged, the infirm, the rural resident, the housewife without transportation . . . make up the preponderance of those who do not register and vote."¹³⁴ Opponents, like Senator James Allen (D-Ala.), countered by asking, "Why should we spend millions of dollars to hand the franchise, this priceless gift . . . to a disinterested person on a silver platter?"¹³⁵ Senator Sam Ervin (D-N.C.) raised concerns about voter fraud, and fiercely denounced the proposal: "This is a highly dangerous bill. In the hands of an unscrupulous organization, it would virtually permit the stealing of the Presidency of the United States."¹³⁶ On March 15, Senator Allen, knowing that six announced supporters of the bill were absent, moved to table (and thus to kill) Senate Bill 2574.¹³⁷ By a vote of 46 to 42, the motion to table passed, with 35 Republicans joining 11 (of the 14) southern Democrats.¹³⁸

The following year, the Senate took up a slightly modified postcard registration bill, Senate Bill 352.¹³⁹ This bill would also have created a Voter Registration Administration in the Census Bureau, but citizens who wished to register had to return the postcards to local

130. *See id.*

131. *See id.*

132. *See id.*

133. *See id.* Senate Bill 2574 also contained a provision reducing the residency requirement to no more than thirty days. *See id.*

134. *Id.* at 338.

135. *Id.*

136. *Id.*

137. These six absent supporters included presidential hopefuls Hubert Humphrey and Edmund Muskie. *See id.* at 337.

138. *See id.*

139. *See* Congressional Quarterly Almanac 29, at 726 (1973).

officials no later than thirty days before a federal election.¹⁴⁰ Once again, the bill contained incentives for states to adopt the federal system by having the federal government offer to pay 30 percent of the costs of processing the postcards.¹⁴¹ But the bill's supporters had now added three anti-fraud provisions: (1) multiple voting or registering more than once with the intent to vote more than once in a federal election would be a federal crime (the criminal penalties included a maximum fine of \$10,000 and five years in prison for fraud); (2) a statement of the penalties for fraudulent action would be displayed on the postcard form; and (3) where such criminal activities occur, local officials would have to notify the Voter Registration Administration.¹⁴²

As with the previous session's bill, supporters contended that a postcard system would greatly enhance voter registration and that uniform registration laws were desirable. Senator McGee sought to assuage the opposition's fears of trampling on state sovereignty by reassuring them that the federal government would not usurp the states' control over voter registration.¹⁴³ He also noted that 80 to 90 percent of registered voters usually vote.¹⁴⁴ Opponents once again argued that fraud would be prevalent under such a system, and that registration was and should be left to the states. President Nixon said he would veto the bill if it passed both houses.¹⁴⁵

On May 9, 1973, Senate Bill 352 passed the Senate, 57 to 37.¹⁴⁶ Amid a spirit of bipartisanship, the three anti-fraud amendments had been accepted and paved the way for the bill's passage. One former opponent of the bill, Senator William Brock (R-Tenn.) switched his vote, saying, "We've got to take our case to the people; the Republican party can stand on its own merits."¹⁴⁷

However, in 1974, the House refused to take up the postcard registration bill, killing it for the Ninety-third Congress.¹⁴⁸ The vote

140. *See id.*

141. *See id.*

142. *See* Claude, *supra* note 110, at 62.

143. *See* Congressional Quarterly Almanac 29, at 726 (1973). One of the speakers at the Senate hearings was then New York City Board of Elections President (later mayor), David Dinkins, who referred to non-registration as "an acknowledged national scandal," and suggested that the bill be amended to cover primaries also. *Id.* at 727.

144. *See id.* at 726.

145. *See id.* at 727.

146. *See* Claude, *supra* note 110, at 62.

147. *Id.*

148. *See* Congressional Quarterly Almanac 30, at 656 (1974).

was 204 to 197 against.¹⁴⁹ Labor leaders, who strongly supported the bill, were furious with the House Democratic leadership, which had not aggressively pushed its members to support the bill.¹⁵⁰

At the time, members of Congress must have viewed postcard registration as a radical break with the standard method of registering voters. Only three states (California, Kentucky, and Texas) had tried some form of postcard registration.¹⁵¹ By 1988, more than twenty states allowed voters to register by mail.¹⁵²

President Jimmy Carter launched the final reform effort of this period. In his 1977 message to Congress, he proposed major changes in election laws. The centerpiece of the proposal was an election day (or “same-day”) registration system, whereby qualified citizens could go to their polling places on the day of the federal election and, after proving their eligibility, they could register and vote.¹⁵³ States would be encouraged to adopt a similar system for state and local elections.¹⁵⁴ President Carter explained the rationale behind the election day registration system:

[W]e have in recent years witnessed a disturbing trend toward lower and lower levels of voting by our citizens. I am deeply concerned that our country ranks behind at least twenty other democracies in its level of voter participation.

. . . [M]illions of Americans are prevented or discouraged from voting in every election by antiquated and overly restrictive voter registration laws.¹⁵⁵

After an initially favorable reception in both houses, the same-day registration proposal was blocked in both houses by coalitions of Republicans and southern Democrats.¹⁵⁶ A number of local Democratic election board officials also testified against the bill.¹⁵⁷

Significant election reform finally occurred in 1993, when President Bill Clinton signed the National Voter Registration Act of 1993 (NVRA, “motor voter law,” or the “Act”) into law.¹⁵⁸ The Act had

149. *See id.*

150. *See id.* at 660.

151. *See* CITIZENS’ COMMISSION ON CIVIL RIGHTS, BARRIERS TO REGISTRATION AND VOTING: AN AGENDA FOR REFORM 149 (1988).

152. *See id.*

153. *See* Congressional Quarterly Almanac 33, at 17-E (1977).

154. *See id.*

155. *Id.* In 1976, four states allowed election day registration, including Minnesota, the home state of newly elected Vice President Walter Mondale, who was the Carter Administration’s chief architect of this proposal. *See id.* at 800.

156. *See id.* at 799-800.

157. *See id.* at 799.

158. 42 U.S.C. § 1973gg (1994).

passed Congress a year earlier, but President George Bush had vetoed it.¹⁵⁹ The NVRA made a number of substantial changes, which include the following highlights:

(1) The Federal Election Commission (FEC) must develop a national mail-in voter registration form. The states must accept and use this mail-in registration form. (States may also design and use their own forms that meet the Act's criteria.)¹⁶⁰

(2) The FEC must produce biennial reports to Congress on the National Voter Registration Act's impact on the states, including recommendations for improvements in federal and state procedures.¹⁶¹

(3) States must designate a chief state election official responsible for overseeing all state obligations under the Act.¹⁶²

(4) If the voter registration form is postmarked or accepted at designated agencies no later than the lesser of thirty days before the federal election or the period provided by state law, the state must register the applicant, if he or she is qualified.¹⁶³ In addition, states must tell voters if their applications have been accepted, rejected, or are incomplete.¹⁶⁴

(5) Voters' names may not be removed from the registration rolls if they do not vote. They may only be removed at the voter's request, or as provided by state law by reason of criminal conviction or mental incapacity.¹⁶⁵

(6) Applications for, or renewals of, drivers' licenses will also serve as a voter registration application if the citizen signs the voter registration application. Moreover, states must offer voter registration services in a number of state agencies, including those that provide public assistance, in unemployment compensation offices, and in public schools or public libraries.¹⁶⁶

159. See Helen Dewar, *Veto of 'Motor Voter' Bill Sustained, Bush Wins 31st Straight as Move to Override Falls 5 Votes Short*, WASH. POST, Sept. 23, 1992, at A14.

160. See *The National Mail Voter Registration Form*, FEDERAL ELECTION COMMISSION (last modified Aug. 18, 1999) <<http://www.fec.gov/voregis/vr.htm>> ("The National Mail Voter Registration Form is the one document that allows you to register to vote from anywhere in the United States.").

161. See 42 U.S.C. § 1973gg-7(a)(3) (1994).

162. See *id.* § 1973gg-8.

163. See *id.* § 1973gg-6(a)(1).

164. See *id.* § 1973gg-6(a)(2).

165. See *id.* § 1973gg-6(d)(1)-(2).

166. See generally Human Serve Campaign for Universal Voter Registration, *State-By-State Report on the Impact of the National Voter Registration Act*, INSTITUTE FOR GLOBAL COMMUNICATIONS (last modified Apr. 5, 1997) <<http://www.igc.org/human>

Six states were exempted from the NVRA: Idaho, Minnesota, New Hampshire, Wisconsin, and Wyoming, which allow election day registration, and North Dakota, which is the only state with no voter registration law.¹⁶⁷

For the most part, the NVRA has worked. Needless to say, since the law only took effect in January 1995, a more thorough report card will not be available for several years. But progress is already apparent. In March 1998, the FEC reported that 26 million new voters had registered in 1995 and 1996.¹⁶⁸ Of the 41 million total NVRA transactions (which included 15 million change of address transactions), approximately 14 million took place at DMV offices, 12 million by mail, and 5 million at state agencies or state designated sites.¹⁶⁹ In addition, nearly 9 million names were deleted from the registration lists under the law's new list-verification procedures.¹⁷⁰ Overall, from 1992 to 1996, the percentage of registered voters in the country rose from 70.6 to 72.8 percent.¹⁷¹ This marks the highest national voter registration rate since reliable records were first available in 1960.¹⁷²

Moreover, the NVRA was upheld by the Ninth Circuit.¹⁷³ The Supreme Court denied certiorari,¹⁷⁴ and thus let stand the Ninth Circuit decision that had affirmed a district court opinion ordering California Governor Pete Wilson (who had challenged the Act's constitutionality) to implement its voter registration provisions. The Ninth Circuit held that the NVRA was a wholly legitimate exercise of Congress's power under Article I, Section 4 of the Constitution to alter state laws pertaining to the times, places, and manner of electing representatives and senators.¹⁷⁵

serve/quarter4.html> (articulating various states' implementation of National Voter Registration Act).

167. *See id.* Maine is the only other state with election day registration. *See id.*

168. *See id.*

169. *See* OFFICE OF ELECTION ADMINISTRATION, FED. ELECTION COMM'N, IMPLEMENTING THE NATIONAL VOTER REGISTRATION ACT app. C at 12 (1988).

170. *See id.*

171. *See id.* app. B at 11.

172. *See Executive Summary of the Federal Election Commission's Report to the Congress on the Impact of the National Voter Registration Act of 1993 on the Administration of Federal Elections*, FEDERAL ELECTION COMMISSION (June 1997) <<http://www.fec.gov/votregis/nvrasum.htm>>.

173. *See* *Voting Rights Coalition v. Wilson*, 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996).

174. *See* *Wilson v. Voting Rights Coalition*, 516 U.S. 1093 (1996).

175. *See* *Voting Rights Coalition*, 60 F.3d at 1413.

B. *Why Has Turnout Not Increased?*

In light of the significant progress during the past four decades in terms of expanding and strengthening the suffrage, one question remains: Why hasn't voter turnout increased?

Many political scientists agree that the principal reason for the United States' increasingly embarrassing voting rates is the continued reliance on our unique voter registration laws. Professors Piven and Cloward explain:

American registration procedures are Byzantine compared with those that prevail in other democracies. The major difference is that governments elsewhere assume an affirmative obligation to register citizens. People are certified as automatically eligible to vote when they come of age and obtain identity cards, or government-sponsored canvassers go from door to door before each election to enlist voters.¹⁷⁶

Wolfinger and Rosenstone offer a similar assessment:

Registration raises the costs of voting. Citizens must first perform a separate task that lacks the immediate gratification characterizing other forms of political expression (such as voting). Registration is usually more difficult than voting, often involving more obscure information and a longer journey at a less convenient time, to complete a more complicated procedure. Moreover, it must usually be done before interest in the campaign has reached its peak.¹⁷⁷

In analyzing their data, Wolfinger and Rosenstone reach two crucial conclusions: (1) where obstacles to voting are greater, turnout will be lower; and (2) variations in the difficulty of registering have the greatest adverse effect on those with the least education, because they are the least able to cope with bureaucratic problems.¹⁷⁸

Many political analysts have posited answers to the time-worn question of why so many Americans do not vote. The reasons offered are well-known. Some say that the choices from which voters must choose are not that attractive.¹⁷⁹ Others say that voters do not feel as if their vote matters as much since politicians cater to wealthy donors and powerful lobbyists, so that the average citizen's voice is not as

176. See PIVEN & CLOWARD, *supra* note 15, at 17. This paper's next section will focus on a comparative analysis of voting systems in other democracies.

177. WOLFINGER & ROSENSTONE, *supra* note 11, at 61.

178. See *id.* at 62.

179. See, e.g., Michael Moore, *Monster Truck Presidents*, THE NATION, Sept. 9/16, 1996, at 30 (arguing that "[t]he reason the majority of Americans don't vote is that they're tired of having to choose between Tweedledum and Tweedledumber").

important.¹⁸⁰ Still others claim that citizens engage in a cost-benefit analysis to determine if voting is a rational thing for them to do.¹⁸¹

But, the crucial point is this: All of these theories are as applicable to most other industrialized democracies that have higher voting ratios as they are to the United States. The undeniable inference is that there must be some other factor that will explain America's abysmal voter turnout.¹⁸² That factor is the nation's voter registration laws.

It is not simply that Americans are less interested in politics than our global contemporaries by an average of 30 percentage points.¹⁸³ It is not the case that after 160 years, we have proven de Tocqueville a fool because he came to this country to find "the image of democracy itself."¹⁸⁴ It is not—as the political scientists Phillips and Blackman would have us believe—that American voter turnout is low because of "boredom" and "inertia."¹⁸⁵

On the contrary, a closer examination of voting patterns shows that when registration barriers are eliminated, American voters compare well with those in other countries. As the Census Bureau itself concluded after reviewing the connection between registration and voting between 1964 and 1980, "one clear-cut finding of the data is that once people register, they overwhelmingly go to the polls" in presidential elections.¹⁸⁶ For example, the United States ranked 23rd out of 24 in an international survey of voter turnout in the major national elections between 1980 and 1983 (the United States had a 53 percent turnout in the 1980 election).¹⁸⁷ But, the United States placed 11th out of 24 when the voter turnout was calculated as a percentage of registered voters.¹⁸⁸ The survey shows that in the 1980 presidential election, 87 percent of registered voters voted.¹⁸⁹

180. See, e.g., John Nichols, *Apathy Inc.*, THE PROGRESSIVE, Oct. 1998, at 30, 32 (suggesting that Democrats' move to right and consequent reliance "on the same Wall Street donor base as the Republicans" has made people's votes seem less meaningful).

181. See, e.g., Matthew S. Scott, *Empowerment Means More than Voting*, BLACK ENTER., Nov. 1996, at 107 (arguing that voting particular way in election will not constitute effective vote on issues about which author and readers care).

182. See *infra* Table 2 for a chart on international voter turnout.

183. See *infra* Table 2 for a chart on international voter turnout.

184. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 17 (The Modern Library 1981) (1835).

185. See PHILLIPS & BLACKMAN, *supra* note 32, at 2.

186. PIVEN & CLOWARD, *supra* note 15, at 260 (citing Bureau of the Census (February 1984)).

187. See *id.* at 5.

188. See *id.* at 19.

189. See *id.*

Despite the evidence, some commentators insist that voting registration laws are not the reason why American turnout is low. In a section of their book called "The Ethnic Factor," Phillips and Blackman argue that ethnic backgrounds provide the best explanation for America's low turnout: "The least 'melted' elements of America's melting pot—blacks and those of Hispanic heritage, plus some American Indians—vote the least, whether located in urban or rural environments, North or South, East or West. . . . America's blacks turn out at a much lower rate than America's whites."¹⁹⁰ Not only do Phillips and Blackman make dubious judgments about which Americans are most assimilated, but they also fail to do the next level of analysis. On the one hand, it is true that, in the 1980 presidential race, 61 percent of the white voting-age population (VAP) voted, 51 percent of the black VAP voted, and only 30 percent of the Hispanic VAP voted.¹⁹¹ This is a significant difference. But, an examination of voter turnout as a percentage of *registered voters* tells a different story: In 1980, 89 percent of registered whites voted, 84 percent of registered blacks voted, and 81 percent of registered Hispanics voted.¹⁹² In 1984, these numbers were 88, 84, and 81 percent respectively.¹⁹³ In 1996, they were 83, 80, and 75 percent.¹⁹⁴

The facts lead us to a different conclusion than the one Phillips and Blackman drew: Minorities will participate at nearly the same level as whites once they are registered. Voter registration laws are preventing large blocs of voters (minorities and Hispanics, in particular) from being more active participants in our democracy. The numbers demonstrate that if minorities are registered, they will vote. This applies to all voting blocs in the United States: Registered voters turn out at an average of 80 to 90 percent.¹⁹⁵ Even in the 1996 election, when turnout of eligible voters sunk to 49 percent, turnout of all registered voters was 82 percent.¹⁹⁶

In sum, for most of the last four decades, although the VRA and Supreme Court decisions bolstered the right to vote, little progress was made in terms of stripping away voter registration barriers. The first significant reform was the National Voter Registration Act of 1993; however, it is still too early to gauge how much the Act will increase

190. PHILLIPS & BLACKMAN, *supra* note 32, at 44-45.

191. See CITIZENS' COMMISSION ON CIVIL RIGHTS, BARRIERS TO REGISTRATION AND VOTING: AN AGENDA FOR REFORM 9 (1988).

192. See *id.*

193. See *id.* at 10.

194. See *Voting and Registration (Detailed tables)*, *supra* note 13.

195. See *supra* note 16 and accompanying text.

196. See *Voting and Registration (Detailed tables)*, *supra* note 13.

turnout. The NVRA was a good first step, but not a particularly bold one. The fundamentally unique trait of America's election system—in which the individual voter bears the responsibility of getting herself registered—remains largely the same. The NVRA is probably most important not for the changes it will actually bring about, but for the symbolic statement Congress made. If we view the NVRA as an acknowledgment by the federal government that it ought to take a greater role in registering its citizens to vote, there is good reason to think the NVRA could lay the groundwork for deeper and more meaningful reform, which could ultimately lead to much higher rates of voter turnout.

C. *America's Voter Participation Rates: An International Scandal*

In order to understand fully the dampening effect that registration laws have on voter turnout in the United States, this section will now examine voting systems in other democratic countries. The average turnout in other industrialized democracies is 80 percent.¹⁹⁷ If 80 percent of eligible American voters had gone to the polls in the 1996 presidential election, 61 million more people would have voted.

And yet, as was mentioned above, Americans are not less politically attuned than their global counterparts. As G. Bingham Powell, Jr. noted, "Seen in comparative perspective, American voter turnout presents an interesting paradox. Americans seem to be more politically aware and involved than citizens in any other democracy, yet the levels of voter turnout in the United States are consistently far below the democratic average."¹⁹⁸ There appears to be some agreement that the reason for this paradox is that, in almost every industrialized democracy, the government takes much or all of the responsibility for registering its citizens. "The idea of government-initiated registration is startling to Americans but standard practice in virtually every other western democracy."¹⁹⁹ Of the twenty democracies in Powell's well-known study, only France and the United States leave the decision about whether to register to vote up to the citizen's initiative.²⁰⁰

The most striking difference in the comparative analysis is the percentage of voters who are registered in each country. In Powell's

197. See G. Bingham Powell, Jr., *American Voter Turnout in Comparative Perspective*, AM. POL. SCI. REV., Mar. 1986, at 17.

198. *Id.*

199. Richard M. Scammon & Jeanne Richman, *Election Reform in the United States*, in ISSUES IN ELECTORAL REFORM 153, 158 (Richard J. Carlson ed., 1974).

200. In France, however, citizens must register within their community and get ID cards, making the registration process much easier. See Powell, *supra* note 197, at 21.

survey, 18 of the 20 democracies had registration rates of more than 90 percent in the 1970s.²⁰¹ In fact, 13 of 20 were greater than 95 percent, with 7 at 100 percent.²⁰² Only Switzerland had a registration rate under 90 percent, and it stood at 85.²⁰³ On the other hand, the average United States registration rate for the presidential elections of 1972, 1976, and 1980 was 61 percent.²⁰⁴

Under the umbrella of a government-sponsored system of registration, there are three basic models used in the industrialized democracies:²⁰⁵

(1) *Door-to-door registration*: Used in Canada, this process registers voters through a door-to-door census (as Phillips and Blackman note, the system is much like the taking of the American census).²⁰⁶ If the voter is not home after two separate visits, a notice is left at the home so the voter may call and have herself registered.²⁰⁷ In addition, even once the final register is prepared, eligible voters who were left off the rolls may still vote if a registered voter vouches for them on the day of the election.²⁰⁸ England also uses a door-to-door registration procedure but combines it with postcard registration.²⁰⁹

(2) *Administrative census*: Sweden and Finland follow this process, whereby county boards maintain lists of all residents in an area, which are then put together to create master lists of voters.²¹⁰

201. See *id.* app. at 1.

202. See *id.*

203. See *id.*

204. See *id.* It should be noted that unlike Powell, who relied on the Katosh and Traugott study for his U.S. turnout figures, the FEC reports this three-election registration average as 69 percent. See *Voter Registration and Turnout in Presidential Elections by Year: 1960-1992*, FEDERAL ELECTION COMMISSION (last modified Aug. 18, 1999) <<http://www.fec.gov/pages/tonote.htm>>.

205. See generally PHILLIPS & BLACKMAN, *supra* note 32, at 24-34 (discussing door-to-door registration, administrative census, and compulsory registration and voting as applied in several countries).

206. See *id.* at 26. Note that the pre-election canvass was replaced in 1991 by "an automated, permanent register of Canadian electors." *National Register of Electors*, ELECTIONS CANADA ON-LINE (visited Nov. 17, 1999) <http://www.elections.ca/register/national_e.html>. However, the old Canadian system described by Phillips and Blackman is still a useful example of government efforts to take responsibility for getting voters registered.

207. See PHILLIPS & BLACKMAN, *supra* note 32, at 26.

208. Cf. *National Register of Electors*, ELECTIONS CANADA ON-LINE (visited Nov. 17, 1999) <http://www.elections.ca/register/national_e.html#privacy> (describing procedure by which eligible Canadians who refuse to have their names placed on the register may nevertheless vote on election day).

209. See PHILLIPS & BLACKMAN, *supra* note 32, at 28.

210. See *id.* at 30.

(3) *Compulsory registration and voting*: Employed in Australia, “the citizen is required by law to apply to the local registrar within three weeks of the time he becomes eligible to vote and thereafter to keep registrars informed of address changes. The punishment is a small, rarely imposed fine.”²¹¹ Belgium and Italy also have compulsory voting laws.²¹²

The overriding theme is that the United States is the aberration from the almost universal rule of modernized democracies that government should register its citizens to vote.

Clearly, there are other important distinctions between the electoral systems used by the United States and most other democracies. For example, the United States has single-member districts rather than proportional representation, which is the dominant regime in most democracies. Under proportional representation, a voter selects her party preference for the national parliament. For example, if party X wins 55 percent of the vote nationally, party Y wins 40 percent nationally, and party Z wins 5 percent (assuming a one hundred-person parliament) party X would send 55 members to parliament, party Y would send 40, and party Z would send 5. If, however, the vote were 55 to 40 to 5 in every senatorial district in the United States in a congressional election, all 100 Senate seats would go to party X. Thus, some commentators argue that winner-take-all elections, like those in the United States, deter voters who would otherwise come out to support minority parties (a voter might ask herself: Why should I waste a vote on a candidate who has no chance?).²¹³ Other voters might be deterred because, in the United States today, many districts at both the federal and state level are unwinnable for one party. To illustrate, why should a Republican in New York’s Sixteenth Congressional District in the Bronx, where registration is 77 to 6 Democratic,²¹⁴ or a Democrat in upstate New York’s Twenty-second Congressional Dis-

211. *Id.* at 33. See also Commonwealth Electoral Act, 1918, ch. 42 (Austl.). Although, technically, the citizen takes the first step in Australia by registering, the law makes this a mandatory procedure, so it can hardly be said to be a voluntary choice left up to the individual voter.

212. See PHILLIPS & BLACKMAN, *supra* note 32, at 33 n.7.

213. See Arend Lijphart, *Unequal Participation: Democracy’s Unresolved Dilemma*, Presidential Address, *American Political Science Association*, 1996, AM. POL. SCI. REV., Mar. 1997, at 1, 7 (observing that proportional representation stimulates voter participation by giving effect to minority voters).

214. See STATE BOARD OF ELECTIONS, STATE OF NEW YORK, *16th Congressional District, in 1997 ENROLLMENT FIGURES (1997)* (reporting that among New York 16th Congressional District’s 295,019 registered voters, 229,157, or 77.7 percent, are registered Democrats, whereas 18,436, or 6.2 percent, are registered Republicans).

trict, where registration is 46 to 24 Republican,²¹⁵ bother voting if there are no competitive statewide races? In a proportional representation system, the potential voter's vote would carry more weight since she could still influence the shape of the national parliament or the statewide governing body.

These arguments certainly have merit.²¹⁶ Nevertheless, they only go a short distance in explaining the low turnout in the United States because these are arguments about diminishing the incentives for *those who are already registered to vote*. What these theories do not explain is why such a sharply lower percentage of voters is registered in America. As we have seen, the best explanation for that rests on the role the federal government plays in registering its citizens.

D. A Survey of Other Possible Reforms and Their Shortcomings

Before considering a system of mandatory voter registration in Part III, this paper will assess the utility of other potential reforms, specifically compulsory voting, mail-in voting, or election day registration. First, though, there are a number of smaller-scale changes that ought to be implemented as valuable tools to make voting and registration easier.²¹⁷ While the NVRA represented a substantial leap forward in terms of making things more convenient for the voter, particularly with its requirements that all states accept registration by mail and the greatly increased use of state agencies to provide voter registration forms and assistance,²¹⁸ more can be done along these lines:

- (1) *Making election day a national holiday or, alternatively, moving voting to weekends*: Without doubt, one of the biggest turnout drains among those who are already registered stems

215. See STATE BOARD OF ELECTIONS, STATE OF NEW YORK, *22nd Congressional District, in 1997 ENROLLMENT FIGURES* (1997) (reporting that among New York 22nd Congressional District's 372,000 registered voters, 172,537, or 46.4 percent, are registered Republicans, whereas 87,687, or 23.6 percent, are registered Democrats).

216. This Note does not endorse a system of proportional representation. That debate will be had another day.

217. These steps can be taken as interim measures until the political will and public support develops for a system of mandatory voter registration. Professors Piven and Cloward argue that the more we take small steps to increase registration and thus turnout, the greater the public support should become for universal voter registration. See PIVEN & CLOWARD, *supra* note 15, at 210.

218. After all, it was not too long ago that "voter registration for persons living in Sunflower County, Mississippi, involve[d] a round trip journey of one hundred miles to the county courthouse at Indianola, because registration [was] not allowed at precinct polling places or other locations." See Chandler Davidson, *Minority Vote Dilution: An Overview*, in *MINORITY VOTE DILUTION* 20 n.6 (Chandler Davidson ed., 1984).

from the simple logistical fact that a good number of people cannot take the time off from a normal working day to vote.²¹⁹ In addition, it can be hard to make time after work either because of other engagements or because voting lines are usually busiest after the evening commute. Numerous industrialized democracies have made their election days a national holiday or hold elections on weekends.²²⁰ In the United States, only fifteen states make election day a state holiday, and what this means varies in each state.²²¹ In most of these states, state employees do not work and most government offices are closed;²²² only some states close schools.²²³ A national holiday is needed—unless weekend voting is implemented—because this is the only way to ensure that private sector employees get off from work.²²⁴

(2) *Aggressively promoting registration in all state agencies:* The results of the NVRA's first two years show that many new voters are being registered in state agencies, with the vast majority of these transactions occurring in the states' Department of Motor Vehicles (DMV) sites.²²⁵ Some experts, though, are concerned that state offices that cater more to the disadvantaged are

219. See PHILLIPS & BLACKMAN, *supra* note 32, at 27 (noting importance of choosing right day for holding elections so that "almost nobody can blame work for not voting").

220. See, e.g., *id.* at 30-31 (describing Finnish and Swedish weekend election systems).

221. See DEL. CODE ANN. tit. 1, § 501 (1993); HAW. REV. STAT. § 8-1 (1993); 10 ILL. COMP. STAT. ANN. 5/17-25 (West 1993); IND. CODE § 1-1-9-1 (1976); LA. REV. STAT. ANN. § 1:55 (West Supp. 1999); MD. CODE ANN. art. 1, § 27 (1998); MONT. CODE ANN. § 1-1-216 (1997); N.J. STAT. ANN. § 36:1-1 (West 1999); N.Y. CIV. SERV. LAW app. § 21.1 (McKinney Supp. 1999); OHIO REV. CODE ANN. § 5.20 (West 1994); R.I. GEN. LAWS § 25-1-1 (1998); S.C. CODE ANN. § 5.20 (Law. Co-op. 1998); TEX. GOV'T CODE ANN. § 662.003 (West 1994); W. VA. CODE § 2-2-1 (1999); WIS. STAT. ANN. § 6.76 (West 1996).

222. See *supra* note 221.

223. See *supra* note 221.

224. See generally *supra* note 221. Most of these 15 states do not allow private-sector employees to take any time off. There are some exceptions. West Virginia and Wisconsin, for example, allow private-sector employees to have three hours off from work to vote. See W. VA. CODE § 3-1-42 (1999); WIS. STAT. ANN. § 6.76 (West 1996). On this point, in his bid for the Democratic nomination for president in 2000, former New Jersey Senator Bill Bradley called for a requirement that employers give their employees at least two hours off on election day. See Katharine Q. Seelye, *Bradley Proposes Revamping Federal Campaign Finance System*, N.Y. TIMES, July 23, 1999, at A19.

225. See OFFICE OF ELECTION ADMINISTRATION, FED. ELECTION COMM'N, IMPLEMENTING THE NATIONAL VOTER REGISTRATION ACT: A REPORT TO STATE AND LOCAL ELECTION OFFICIALS ON PROBLEMS AND SOLUTIONS DISCOVERED 1995-1996, at 1-2, 1-3 (1998).

not implementing the registration provisions of the NVRA as effectively. Jo-Anne Chasnow, Executive Director of Human Serve, a non-partisan voter registration reform organization, noted that the NVRA was being implemented “much better in DMV” sites and raised two concerns about welfare offices: (1) whether voter registration is being promoted and displayed prominently, as the NVRA requires; and (2) with the new federal welfare legislation of 1996 and similar state laws that seek to divert people away from welfare, whether the most disadvantaged members of society will be reached as effectively.²²⁶ Since DMV registration has been shown to register disproportionately middle- and upper-class citizens (the very poor often cannot afford cars),²²⁷ states and the FEC must remain hyper-vigilant to ensure that voter registration is being encouraged as forcefully as possible at public assistance and unemployment agencies as well. (3) *Implementing postcard registration*: Although postcard registration proposals failed in Congress in the 1970s, the passage of the NVRA in 1993 might signal a new congressional willingness to entertain measures that would increase voter registration.²²⁸ One of the most notable omissions from the NVRA is a provision requiring the FEC or state boards of elections to mail out voter registration forms to all eligible voters prior to each federal election. The advantage of postcard registration is that it would make registration much more convenient to potential voters, which was one of the principal rationales behind the NVRA. Unfortunately, unlike the first two proposals in this section, this one will cost a substantial amount of money. To have any hope of passing such a law, Congress would have to provide financial incentives (or reimbursements) to states that participate.

Now this paper turns to other possible large-scale reforms of the nation’s registration system: compulsory voting, mail-in voting, and election day registration. There is no doubt that requiring citizens to register and to vote would increase voter turnout substantially. Australia and Belgium, which always stand at the top of the international

226. See Telephone Interview with Jo-Anne Chasnow, Executive Director of Human Serve (Jan. 11, 1999).

227. See, e.g., PIVEN & CLOWARD, *supra* note 15, at 222 (explaining how motor voter programs fail to address electorate’s upward class skew).

228. *But see* Kevin K. Green, Note, *A Vote Properly Cast? The Constitutionality of the National Voter Registration Act of 1993*, 22 NOTRE DAME J. LEGIS. 45, 46 n.11 (1996) (noting that NVRA was passed by Democratic House and Senate essentially on party lines with virtually all Republicans opposing it).

voter turnout charts,²²⁹ are two good examples. An Australian-type system of compulsory voting presents several distinct advantages: (1) it will lead to high and relatively equal voter turnout; (2) an increase in voting may stimulate stronger participation and interest in other political activities; (3) it may help to reduce the role of money in politics—“When almost everybody votes, no large campaign funds are needed to goad voters to the polls;” and (4) it may reduce negative advertisements, whose main objective is to try to reduce turnout among the opposition.²³⁰

However, the Supreme Court would most likely strike down a compulsory voting system as unconstitutional—and rightly so. There is a strong argument to be made that voting is a form of speech. “[A]bstention involves a form of political expression protected under the First Amendment.”²³¹ The freedom to speak includes the freedom not to speak. Any other reading of the Constitution would fly in the face of the nation’s bedrock values of individual liberty and freedom. Thus, forcing someone to vote is tantamount to forcing that person to speak or to express their opinion, and such a requirement would not be constitutional. Even if we did not rely on First Amendment grounds, we could still turn to the Fifth and Fourteenth Amendments to argue that no person should be deprived of liberty without due process of law. Forcing someone to vote would amount to an unconstitutional deprivation of liberty. Finally, a third constitutional pillar is the Fifteenth Amendment. By granting the people the right to vote, the Fifteenth Amendment could be read to say that the right to vote includes the right not to vote.

Compulsory voting advocates, like Professor Lijphart, counter that voting is not pure speech and thus compulsory voting would probably be constitutional.²³² Even if such a law were to be struck down, Professor Lijphart suggests a constitutional amendment could rectify that problem.²³³ But, to think that a constitutional amendment creating a system of compulsory voting might someday pass both houses of Congress by a two-thirds vote and be approved by thirty-eight states is a political miscalculation of the highest order. Moreover, Professor Lijphart contends that compulsory voting is “a very minor restriction” on individual freedom, because in these systems, a voter is not re-

229. See *infra* Table 2.

230. See Lijphart, *supra* note 213, at 10.

231. Jeffrey A. Bloomberg, Note, *Protecting the Right Not to Vote from Voter Purge Statutes*, 64 *FORDHAM L. REV.* 1015, 1016-17 (1995).

232. See Lijphart, *supra* note 213, at 11.

233. See *id.*

quired to fill out a valid ballot, but need only show up at the polls.²³⁴ This charade would still be unacceptable to most Americans. Most of us would demand the ability to stay far away from the polling booth on election day if we so chose. As one commentator who asked citizens for their opinions on forced voting observed, “Most Americans . . . bristle at the thought of such a law.”²³⁵ Compulsory registration and voting may work well in Australia, but it does not comport with our basic values, and it would be unconstitutional.

Mail-in voting is another proposal offered by some as a significant electoral reform. Certainly, if voters can send their ballots in by mail, the added convenience would lead to a greater turnout of registered voters.²³⁶ This, presumably, was an important reason why Oregon’s State Measure Number 60, which requires the state to send out ballots to all voters and to allow voting by mail, passed with 69 percent of the vote in November 1998, making Oregon the first state in the nation to do away with polling sites.²³⁷

Although mail-in voting (or even hypothetical on-line voting, which would be more difficult to police because of the security risk posed by Internet hackers) would help boost turnout, it does not address the root problem, for mail-in voting will only raise turnout among *those voters who are already registered*. As we have seen, voters who are already registered vote at 80 to 90 percent.²³⁸ What this proposal would fail to do is to reach the 66 million eligible voters who were not even registered to vote in the 1996 election.²³⁹ Quite simply, mail-in voting would not even begin to approach the core of this nation’s non-voting problem.

234. *See id.*

235. Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2174 (1996).

236. Other arguments in favor of mail-in voting include cost efficiency, since it is estimated that elections conducted in this manner cost one-third to one-half less than ones with polling sites, and that mail-in voting eliminates the problems of elderly or disabled people getting to the polls. Opponents charge that we should not make voting “too easy” for fear of encouraging “uninformed” people to vote, and that the mailed-out ballots will be used fraudulently. *See* Priscilla L. Southwell & Justin Burchett, *Vote-By-Mail in the State of Oregon*, 34 WILLAMETTE L. REV. 345, 347 (1998).

237. *See* Election Division, *Oregon Voter Registration*, OREGON SECRETARY OF STATE (last modified Oct. 11, 1999) <<http://www.sos.state.or.us/elections/other.info/vreg.htm>>. The new law is now being challenged in court. *See* Telephone Interview with Brian Hancock, Election Research Specialist, FEC (Jan. 8, 1999).

238. *See supra* note 16 and accompanying text.

239. The same argument can be made against weekend voting or making election day a holiday, which is why these ideas are offered as only partial solutions.

The last alternative considered in this section is election day registration. This system allows an unregistered voter to show up on election day and, after showing identification sufficient to satisfy state procedures, to register and then vote. Of the three big-ticket proposals examined in this section—compulsory voting, mail-in voting, and election day registration—this last one offers the best hope of satisfying constitutional concerns and of actually getting many more eligible voters registered.

Six states now have election day registration laws. Maine, Minnesota, and Wisconsin have had them since the 1970s, and Idaho, New Hampshire, and Wyoming have adopted them since 1993, essentially to earn exemptions from the NVRA.²⁴⁰ North Dakota is the only state that does not require any type of voter registration.²⁴¹

More than any other contest, the 1998 Minnesota gubernatorial election demonstrated clearly how an election day registration law can boost voter turnout. On November 3, 1998, Jesse Ventura, a former professional wrestler nicknamed “The Body,” stunned the nation by winning the race for governor of Minnesota. Ventura captured 37 percent of the vote, besting two formidable political veterans, Republican Norm Coleman (34 percent), and Democratic-Farmer-Labor candidate Hubert Humphrey III (28 percent). Jesse Ventura’s candidacy galvanized the Minnesota electorate. On election day, about 332,000 new voters registered, or about 16 percent of the total vote that day.²⁴² Exit polls showed that “virtually all of [these] voters said that they had voted for Ventura.”²⁴³ Undoubtedly, Ventura could not have won the race if Minnesota did not have an election day registration law.²⁴⁴ Although voter turnout nationally was only 36 percent, in Minnesota, 61 percent of all eligible voters voted.²⁴⁵ By a large margin, Minnesota had the highest turnout in the country.

240. See Telephone Interview with Joe Mansky, Minnesota State Election Director (Jan. 6, 1999).

241. See Human Serve Campaign for Universal Voter Registration, *State-By-State Report on the Impact of the National Voter Registration Act*, INSTITUTE FOR GLOBAL COMMUNICATIONS (last modified Apr. 5, 1997) <<http://www.igc.org/humanserve/quarter4.html>>.

242. See Telephone Interview with Joe Mansky, *supra* note 240.

243. Bob von Sternberg, *Exit Polling Shows Ventura Fueled Surprising Turnout*, STAR TRIB. (Minneapolis), Nov. 4, 1998, at A1. Exit polls showed that one in eight voters said he or she would not have voted if Ventura had not been on the ballot. See *id.* Of this 12.5 percent bloc of the electorate, the vast majority registered on election day and pulled for Ventura. See *id.*

244. Some would argue that this is why election day registration laws should not be enacted. This argument is examined in Part III.

245. See *id.*

This fact, taken alone, is not that surprising. States with election day registration laws have traditionally led the nation in participation. In both 1992 and 1996, Maine and Minnesota had the first and second highest turnouts in the nation.²⁴⁶ In 1996, all six states with election day registration ranked in the top 11 states in turnout.²⁴⁷ In 1992, when only Maine, Minnesota, and Wisconsin had these laws in place, they ranked first, second, and fourth, with 72.0, 71.6 and 69.0 percent turnout, while national turnout stood at 55.1 percent.²⁴⁸

Ventura's victory offers an important lesson. Most political analysts know that few voters pay attention to a campaign before Labor Day,²⁴⁹ typically the last weekend of the summer, which is the main reason why turnout in primary elections is always so much lower than in the general elections.²⁵⁰ Furthermore, elections often do not really heat up until the last three or four weeks of the race. But, since so many state registration laws and the NVRA cut off registration at thirty days before an election,²⁵¹ many would-be registrants find themselves unable to vote on election day. As the turnout results from states with election day registration show, many more citizens would vote if they could register on election day.²⁵²

States that allow election day registration address concerns about fraud by requiring every would-be registrant to present a current driver's license or execute an affidavit,²⁵³ and some states even separate challenged same-day ballots from the rest, counting the same-day ballots only after they have been verified.²⁵⁴ There is no reason to think that same-day registration can only work in sparsely populated

246. See *National Voter Turnout*, *supra* note 6.

247. See *Voter Registration and Turnout – 1996*, FEDERAL ELECTION COMMISSION (last visited Nov. 19, 1999) <<http://www.fec.gov/pages/96to.htm>>.

248. See *National Voter Turnout*, *supra* note 6.

249. See, e.g., John W. Mashek, *Campaign Kickoff, Has Reagan Dropped the Ball?*, U.S. NEWS & WORLD REP., Sept. 8, 1980, at 20 (referring to “the traditional Labor Day start of the election season”).

250. Compare RHODES COOK & ALICE V. MCGILLIVRAY, U.S. PRIMARY ELECTIONS 1995-1996, at 2-5 (1997) (showing total primary vote of 23,091,792 in 1996 in states where both parties held primaries), with *Voter Registration and Turnout – 1996*, FEDERAL ELECTION COMMISSION (last visited Nov. 19, 1999) <<http://www.fec.gov/pages/96to.htm>> (showing total general election vote of 86,418,605 in those same states in 1996).

251. See 42 U.S.C. § 1973gg-6(a)(1) (1994).

252. In Maine, Minnesota, and Wisconsin, registration has been reported to increase by up to 20 percent on election day. See NATIONAL CENTER FOR POLICY ALTERNATIVES, VOTER REGISTRATION AND THE STATES: EFFECTIVE POLICY APPROACHES TO INCREASING PARTICIPATION 7 (1986).

253. See *id.* at 7, 15.

254. See *id.* at 7.

areas. After all, if moderately-sized Minnesota and Wisconsin²⁵⁵ can successfully administer election day registration, surely the biggest cities and states could do the same.²⁵⁶

In the end, same-day registration represents a proven, effective proposal to raise voter participation. A national law requiring each state to allow same-day registration for federal elections would survive constitutional challenge, just as the NVRA did.²⁵⁷

While same-day registration signifies an important milestone on the path to ultimate reform, it still suffers from several shortcomings. First, while same-day registration leads to notable increases in turnout, data shows that it will not lead to a monumental boost in turnout that would make our turnout rates competitive with most other western democracies. Even with these laws in place during the 1996 presidential election, voter turnout in Maine, Minnesota, and Wisconsin was 72 percent, 64 percent, and 57 percent.²⁵⁸ Some political experts have estimated that same-day registration increases voter participation by an average of 10 percent.²⁵⁹ While this would qualify as substantial progress, it falls short of the fundamental expansion of turnout that a mandatory voter registration system would produce. Second, same-day registration can be difficult to administer logistically. In some Minnesota precincts in the 1998 gubernatorial election, overwhelmed election officials ran out of ballots. Turnout in one precinct, Todd County, was so high that officials had to rush over photocopied ballots.²⁶⁰ Third, although some of these problems could be ameliorated with adequate preparation, there would be no way to avoid the long election day lines for those who are registering on election day. And, until election day becomes a national holiday or workers are given several hours off to vote, these long lines will serve as a deterrent to

255. Thirty-one states have fewer electoral college votes than Minnesota (ten) and Wisconsin (eleven). See *Distribution of Electoral Votes*, FEDERAL ELECTION COMMISSION (last modified Feb. 18, 1997) <<http://www.fec.gov/pages/elevote.htm>>.

256. Inspired by the voter turnout in Minnesota in 1998 and disconcerted with California's 1998 turnout, which had fallen to 41 percent, two California state legislators, Assemblyman Bob Hertzberg and State Senator Kevin Murray, both Democrats, introduced legislation in May 1999 that would bring a same-day registration system to California. See *Voter Registration at the Last Minute*, N.Y. TIMES, May 30, 1999, at 18. To date, their proposal has met with a tepid reception among their fellow legislators. See *id.*

257. On the campaign trail, presidential candidate Bill Bradley has called for a national same-day registration system. See Katharine Q. Seelye, *Bradley Proposes Revamping Federal Campaign Finance System*, N.Y. TIMES, July 23, 1999, at A19.

258. See *National Voter Turnout*, *supra* note 6.

259. See *Voter Registration at the Last Minute*, *supra* note 256.

260. See *Bustling Polling Places Run Short on Ballots*, STAR TRIB. (Minneapolis), Nov. 4, 1998, at 5B.

would-be registrants. Finally, same-day registration still places the onus of registering on the individual citizen, rather than the government. As Penn Kimball said, "There seems to be a limit . . . to what one can accomplish by methods that ultimately rely on initiative by the individual."²⁶¹

III

MANDATORY VOTER REGISTRATION

As has been demonstrated, onerous voter registration laws drastically depress voter turnout. In order to restore faith in our system of government, reform must be enacted that will push voter participation far higher than the current crisis level. This final section focuses on two key issues: first, whether the best way to achieve reform is through litigation or legislation; and second, the form and implementation structure a mandatory voter registration proposal should take. Part III will also consider the policy and political considerations surrounding the proposal.

A. *Is Litigation the Answer?*

One way to topple arcane voter registration laws is through favorable court rulings. The best case to be made would argue that a state that requires citizens to register before an election and then denies them "the fundamental right to cast a ballot on election day" if they do not, violates the Equal Protection Clause of the Fourteenth Amendment.²⁶² Thus, "the class of persons harmed by the registration requirement consists of those who on election day would like to cast a ballot and are otherwise eligible but are blocked from doing so for not having registered."²⁶³

In 1886, the Supreme Court established in *Yick Wo v. Hopkins* that the right to vote was "a fundamental political right."²⁶⁴ As we saw in Part II, this position has been reaffirmed several times since then, most notably in the rash of voting rights cases in the 1960s and early 1970s.²⁶⁵ For cases involving fundamental rights, the Court will apply the strict scrutiny test, whereby a law will only be upheld when

261. KIMBALL, *supra* note 109, at 290.

262. Deborah S. James, Note, *Voter Registration: A Restriction on the Fundamental Right to Vote*, 96 YALE L.J. 1615, 1615 (1987).

263. *Id.* at 1620.

264. 118 U.S. 356, 370 (1886).

265. See *supra* notes 111-22 and accompanying text.

a state demonstrates a compelling state interest that cannot be advanced by any less drastic means.²⁶⁶

After noting how the Court has applied enhanced scrutiny to laws that restrict the right to vote,²⁶⁷ Deborah James articulates how an equal protection argument might be framed for the plaintiffs:

Voting is more aligned with free speech and travel as an unconditional right, requiring a lower threshold of injury before applying strict scrutiny. The state's only potentially valid compelling interest in support of the voter registration requirement, fraud prevention, aims to prevent unqualified votes from being counted, not to prevent qualified voters from voting. Every individual who meets the age, residency, citizenship and competency requirements, and who is blocked from voting by the registration requirement, has lost a fundamental right for the sake of a collateral matter, fraud prevention.²⁶⁸

James continues by noting that although many states emphasize their concerns about fraud, most take few steps to prevent fraudulent voting from the time of the registration closing date (usually about thirty days before an election) to election day.²⁶⁹ While rightly conceding that fraud prevention is a compelling state interest, James points out that two basic fraud-prevention devices are utilized laxly. First, no state checks its registration records against other states' registration records on a regular basis to see if any voter has registered in more than one place.²⁷⁰ Second, many states do not send out non-forwardable postcards to all voters (with automatic return to the state board of elections) to see if registrants have provided false addresses.²⁷¹ Of those that use this procedure, the follow-up process is often not very aggressive; some states still allow registrants whose postcards have been returned to the board of elections to vote without a further check despite

266. See *Dunn v. Blumstein*, 405 U.S. 330, 340-41 (1972). But see Mark Thomas Quinlivan, *One Person, One Vote Revisited: The Impending Necessity of Judicial Intervention in the Realm of Voter Registration*, 137 U. PA. L. REV. 2361, 2391 (1989) (arguing that, according to *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), some voting restrictions do not require strict scrutiny analysis). Thus, the crucial first step in a lawsuit designed to void voter registration laws would be to argue that the laws burden the fundamental right to vote.

267. See James, *supra* note 262, at 1623-24 (citing *Dunn*, 405 U.S. at 332-33, which struck down duration residency requirement, and *Anderson*, 460 U.S. at 789, which invalidated Ohio ballot access law as placing unconstitutional burden on voting and association rights of supporters of independent candidate).

268. *Id.* at 1625.

269. See *id.* at 1634-35.

270. See *id.* at 1634.

271. See *id.*

the possibility that false addresses were provided.²⁷² The conclusion is clear:

The fact that many states do not use registration as a verification tool to the degree theoretically possible supports the thesis that these states do not perceive fraud through registration to be a major problem. Systematic election fraud is more likely to be conducted by election officials than by private individuals, and at the voting rather than registration stage.²⁷³

James concludes her Note by arguing that election day registration offers a less restrictive means to satisfy the state's compelling interest in fraud prevention since fraud checks could be performed effectively on election day (as has been shown in those states with election day registration).²⁷⁴ This would, then, no longer burden the fundamental rights of those eligible voters who want to vote on election day but find themselves unable simply because they failed to register to vote at some earlier date.

Having assumed that the Court would inject itself into this political morass,²⁷⁵ James presents a reasonable case for striking down most states' current voter registration laws.²⁷⁶ The problem is that litigation, if successful, would only result in election day registration which, as explained in Part II, would represent substantial progress but would not signify the momentous reform whereby our government would accept responsibility for registering its citizens to vote, as most other democracies do.²⁷⁷

B. *A Federal Mandatory Voter Registration Law with an Opt-Out Clause*

As we have seen, the United States is unique in having a system of personal voter registration. For more than a century, the basic assumption in this country has been that "voting is a privilege to be earned by individual initiative rather than a right to be aggressively disseminated by government, itself."²⁷⁸ It was not always like this.

272. See *id.* at 1634-35.

273. *Id.* at 1635 (citing *Hearings on S. 1199, S. 2445, S. 2457 & S. 2754 Before the Senate Post Office and Civil Serv. Comm.*, 92d Cong. 78, 196 (1971)).

274. See *id.* at 1636-40.

275. See Quinlivan, *supra* note 266, at 2377-84 for a compelling argument that the Court would, in fact, be willing to step into the "political thicket" of voter registration, much as it entered the apportionment debate in *Baker v. Carr*, 369 U.S. 186 (1962).

276. Whether five members of the Court, as now constituted, would accept her argument is a subject for speculation.

277. See *supra* Part II.

278. KIMBALL, *supra* note 109, at 296.

For most of the nineteenth century, there were no registration laws. Indeed, even when there were registration systems during this period, most laws placed the responsibility of compiling the list of eligible voters on the government.²⁷⁹ In order to boost voter participation to 80 percent or higher, the registration responsibility must be shifted back to the government.

The best way to attain this lofty goal is for Congress to enact a law prescribing mandatory voter registration. In essence, as soon as a citizen turned eighteen years of age, she would automatically be registered to vote by a newly created federal office called the Office of Voter Registration (OVR). The OVR would send each citizen an official voter registration card with the person's name and Social Security number on the card. The voter would present this card and a photo identification (possibly a driver's license) every time she votes. If the voter forgot to bring one of these two cards on election day, she would have to sign an affidavit swearing that she is not voting under false pretenses.

There should be stiff criminal penalties for false voting. A voter would be subject to federal prosecution for fraud, with a conviction yielding a maximum fine of \$10,000 and up to five years in prison. These penalties mirror those contained in Senate Bill 352,²⁸⁰ the 1973 postcard registration bill that passed the Senate but died in the House. This bill had two other important anti-fraud provisions which would also be incorporated in the OVR bill. First, to make certain every voter knows about these criminal penalties, when the OVR mails each new voter her voter registration card, a letter would be included, specifically laying out the penalties for fraudulent voting practices. The penalties would also have to be posted visibly at every polling site for a federal election. Second, when such criminal activities occur, local officials must notify the OVR. These anti-fraud provisions would go a long way toward mitigating the concerns of those who would claim that this bill would lead to increased opportunities for corruption. Moreover, these provisions make the penalties for fraudulent voting behavior much harsher than those currently existing in most states.

Some thought must be given to the bureaucratic structure of the OVR. On the one hand, the OVR should not be a separate federal

279. In New York, the first registration law, passed in 1859, had authorized precinct officers to prepare lists. See PIVEN & CLOWARD, *supra* note 15, at 92. "American registration systems were . . . initially based on the presumption that registering people was a state responsibility; only later were they changed to shift to the citizen the obligation of getting one's name on the register." *Id.* at 93 n.82.

280. See *supra* notes 139-42 and accompanying text.

agency. Creating a new agency would be the most costly method of setting up the OVR. Furthermore, now that “the era of big government is over,” according to Democratic President Bill Clinton, it would be politically difficult to justify creating a new federal agency.²⁸¹

On the other hand, placing the OVR under the aegis of the Census Bureau or the Social Security Administration, as was suggested in the roughly seven proposals for national voter registration in the 1970s,²⁸² could lead to long-term political problems for the new agency. As the recent debate over sampling (which allows for some estimation of population figures as opposed to the traditional practice of actual enumeration of citizens) has demonstrated, the census and the Census Bureau are political hot potatoes.²⁸³ Housing the OVR there might not only make the OVR somewhat vulnerable to the political agenda of each administration, but might also create an unnecessary obstacle for supporters trying to forge a coalition to pass the bill. Although there is some logic to placing the OVR and the Census Bureau in the same agency since the Census Bureau’s population-tracking data (as well as the Social Security register) would be of use to the OVR in creating and updating the initial voter list, there is no reason why the two agencies must be under the same roof in order to share information.²⁸⁴ Like the Census Bureau, the Social Security Administration, whose future is already engulfed in a raging debate,²⁸⁵ might be an inappropriate home for the OVR. Americans are justifiably so fond of the Social Security program that there might be some reluctance to link it with a quasi-political office like the OVR.

The most logical venue for the OVR would be the Federal Election Commission (FEC). The FEC has a reputation for non-partisan fairness, and is widely seen as an equal-opportunity watchdog that

281. See STATE OF THE UNION MESSAGE, MESSAGE FROM THE PRESIDENT, H.R. REP. NO. 104-168, at 11 (1996), *microformed on* CIS No. 96-H9200-4 (Congressional Info. Serv.).

282. See PHILLIPS & BLACKMAN, *supra* note 32, at 56-57.

283. See, e.g., Department of Commerce v. Glavin, 525 U.S. 316, 779 (1999) (holding that Census Bureau may not use sampling to calculate proper apportionment of representatives to Congress); Joan Biskupic & Barbara Vobejda, *High Court Rejects Sampling in Census, Ruling Has Political, Economic Impacts*, WASH. POST, Jan. 26, 1999, at A1; Christina Duff, *Panel Rules Against Sampling for Census, Decision a Blow to Clinton: Democrats Plan Appeal To the Supreme Court*, WALL ST. J., Aug. 25, 1998, at A2.

284. For example, whatever information the OVR might need from door-to-door canvasses could be gleaned from the Census Bureau’s decennial count of the population.

285. See, e.g., Eric Pianin, *In Social Security Debate, Politics Is Key Player*, WASH. POST, Oct. 31, 1999, at A4.

fines Democrats and Republicans in an evenhanded way.²⁸⁶ Since it already oversees the financing of all congressional campaigns and federal candidate reporting requirements, among other things, the FEC could adjust rather smoothly to running a new national administration.

Creating the OVR would enable the nation to do away with two other historic drains on voter turnout: residency requirements and long closing dates. Since the OVR would mandate that an eligible voter is registered permanently, unless she wants to have her name taken off the rolls, there would be no reason to have laws stating that individuals must live in a given place for a certain amount of time before they are eligible to vote in that district. In addition, as we have seen, most states and the NVRA establish thirty-day closing dates before elections. In contrast, the OVR bill would essentially have no closing date for registration since voters would already be registered. For administrative reasons, there would most likely have to be a one-week cutoff before election day, by which time the OVR would have to be notified if a voter moves.²⁸⁷ This provision would be necessary so that the OVR would have sufficient time to provide state election officials with a list of voters who are registered in each congressional district.²⁸⁸ If a voter forgets to notify the OVR that she has moved, or if she moves during this one-week period, the voter would be allowed to vote in her new congressional district after, once again, signing an affidavit at the polling site. The voter would affirm that this is the only district in which she will vote in this election. Consequently, this OVR bill incorporates an election day, mover-notification plank, allowing for a last-second surge of interested voters.

For all of the above logistical reasons, the OVR should be run out of a federal office. Quite simply, the responsibility for supervising a

286. The FEC is designed to foster this sort of reputation, as it can take no action without bipartisan support, regardless of who controls the White House or Capitol Hill. See, e.g., Ruth Marcus, *Dismissal of Suit Against GOPAC Won't Be Appealed*, WASH. POST, Mar. 27, 1996, at A13 (noting 3-2 vote in favor of appealing dismissal of suit against Republican political action committee nonetheless counted as tie because no Republican voted in favor); Charles R. Babcock, *FEC Divides Over Clinton Election Fund*, WASH. POST, Dec. 16, 1994, at A38 (noting auditor's recommendations against Democratic campaign fund rejected as result of 3-3 tie vote along party lines).

287. The most efficient way for the OVR to learn if a voter moves is probably to encourage every voter to dial a 1-800 number at the OVR, where an automated message system could take note of the voter's change of address. An instruction to this effect, with the 1-800 number, should be printed on the back of each voter registration card as well as on the letter accompanying the card.

288. This idea was originally suggested by former Rep. Abner Mikva (D-Ill.), who included this provision in his national voter registration proposal in 1971. See H.R. 10442, 92d Cong. (1971); PHILLIPS & BLACKMAN, *supra* note 32, at 57, 68.

system of national voter registration for federal elections should be borne by federal, rather than state, government. Moreover, the lessons from the NVRA of 1993 support this view. For example, in February 1998, five years after the motor voter law was enacted, the Mississippi legislature finally passed a law implementing the NVRA provisions.²⁸⁹ Calling the bill “an unwarranted Federal intrusion into our state’s election laws,”²⁹⁰ Republican Governor Kirk Fordice vetoed it, and the legislature never tried to override.²⁹¹ Only when a panel of three federal judges ordered Mississippi to comply in October 1998, did the state law conform to the NVRA.²⁹² If the states run the mandatory registration program, with its list preparation and maintenance responsibilities, there will inevitably be wide disparities in how well the system is implemented across state lines. To avoid these problems, the OVR must be centralized.

Finally, another crucial provision of the OVR bill must be that a voter can opt out at her choosing. We saw that the problem with compulsory voting was that the right to speak includes the right not to speak, and the right to vote includes the right not to vote.²⁹³ Moreover, the right to associate includes the right not to associate. The same concerns would apply if the government forced people to register. There may be citizens who are anarchists, who do not believe in a democratic form of government, or there may be citizens who do not want to vote out of principle. Whatever the case, the OVR bill would allow citizens to remove themselves from the rolls easily.²⁹⁴ This opt-out clause should satisfy any concerns about invasion of privacy.²⁹⁵

289. See Kevin Sack, *Mississippi Legislature Accepts Bill to Ease Voter Registration*, N.Y. TIMES, Feb. 20, 1998, at A12.

290. *Id.*

291. See *Mississippi Is Told To Open Elections*, N.Y. TIMES, Oct. 8, 1998, at A22.

292. See *id.*

293. See *supra* notes 231-35 and accompanying text.

294. For example, the self-removal process could be achieved through a phone call to the 1-800 number. See *supra* note 287 for a discussion of how a 1-800 number could be used to implement the legislation.

295. Another possible invasion of privacy issue that might be raised is the use of Social Security numbers as an identifying tool for voters. Since Social Security numbers are so frequently used (when a person applies for a driver’s license, bank account, credit card, health insurance, et cetera), and since a number of different governmental agencies have access to them (Social Security Administration, Selective Service System, et cetera), this would most likely not be a serious concern. However, hard-line invasion of privacy defenders would say that in many of these day-to-day instances, a citizen is not required to provide her Social Security number. The level of concern might best be gauged during congressional hearings on the bill. Any serious contention over this issue could perhaps be solved by an amendment that allowed for an alternative method of identification for this presumably very small bloc of voters.

C. Possible Legal Challenges and Responses

The attacks on the proposed bill will focus on federalism issues: Does Congress have the power to set up the OVR and instruct the states as to how voters can qualify for federal elections? The answer is yes.

Opponents of the OVR proposal may echo the arguments of Mississippi Governor Kirk Fordice that registration laws should be left to the states.²⁹⁶ For example, an analogy may be drawn to *New York v. United States*,²⁹⁷ where the Court struck down a federal radioactive waste disposal law that it characterized as a congressional attempt to commandeer state instrumentalities.²⁹⁸ Next, opponents of the OVR bill will point to *Printz v. United States*,²⁹⁹ which invalidated key provisions of the Brady Bill handgun control law. Noting that the *Printz* Court held that Congress overstepped its constitutional bounds by directing local law enforcement officers to conduct background checks on gun buyers,³⁰⁰ opponents will say that the same reasoning precludes the OVR's direction of state election regulators.

These arguments fail when applied to the OVR bill. Unlike the waste disposal law and Brady Bill examples, Congress is granted explicit constitutional authority to make or alter federal election laws by Article I, Section 4:

The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.³⁰¹

Noting that the Supreme Court has traditionally read the grant of power to Congress in Article I, Section 4 expansively,³⁰² the Ninth Circuit said, "Congress may conscript state agencies to carry out voter registration for the election of Representatives and Senators."³⁰³

296. See Sack, *supra* note 289, at A12.

297. 505 U.S. 144 (1992).

298. See *id.* at 188.

299. 521 U.S. 898 (1997).

300. See *id.* at 933.

301. U.S. CONST. art. I, § 4, cl. 1.

302. See *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (upholding Congress's power to provide "a complete code for congressional elections," including areas such as registration, protection of voters, fraud prevention, and vote counting). See also *Burroughs v. United States*, 290 U.S. 534, 545 (1934) (extending this congressional power to pass appropriate legislation safeguarding presidential elections from improper use of money).

303. *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995). See *supra* notes 173-74 and accompanying text.

Thus, any federalism or Tenth Amendment objections to the portion of the bill regarding federal elections are eliminated.

Even though Congress clearly has the power to set up its own registration system for federal elections, it is unlikely that this power would extend to state elections. In fact, such a provision, if included in the OVR bill, would most likely render it unconstitutional. First, there is no explicit constitutional authority for Congress to regulate state elections. Second, because this authority is lacking, a strong argument could be made that Congress does not have the power to regulate state elections because the Tenth Amendment would reserve this power to the states.³⁰⁴ Thus, the current Court would almost certainly strike down such a provision.³⁰⁵

The question then becomes: How could the OVR bill encourage states to adopt the federal system of registration for state elections? To some extent, there is good reason to think that the states might fall in line and use the new federal system on their own. As Kimball noted, when the Twenty-sixth Amendment was passed by Congress, giving eighteen-year-olds the vote, "The confusion and expense of running elections with two separate electorates had been sufficient to persuade otherwise reluctant state legislators to support the Constitutional amendment lowering the voting age to eighteen in state as well as national elections."³⁰⁶ Similarly, Phillips and Blackman observed that the "record-breaking speed" with which the Twenty-sixth Amendment was ratified highlighted "how much state officials fear the administrative difficulties they would face if state voting requirements differed from those for federal elections."³⁰⁷ If Congress were to pass the OVR bill, the expense and "administrative difficulties" of running two different polling booths at each site and having to turn away many eligible federal voters from voting in the state elections would be a nightmare. The bottom line would be that the states would most likely adopt the federal registration system.

304. See U.S. CONST. amend. X.

305. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court held that Congress did not have the power to regulate state elections, explaining that while Congress had the power to lower the voting age to eighteen for federal elections, it could not do so for state elections. The Twenty-sixth Amendment overturned this decision by the Court. See U.S. CONST. amend. XXVI. But as Phillips and Blackman note, the "division of opinion" in *Oregon* was significant. See PHILLIPS & BLACKMAN, *supra* note 32, at 13. Only Justice Black believed Congress could regulate federal elections, but not state elections. See *id.* at 12-13. Four Justices thought Congress could regulate both, and four thought that voting-age requirements were state matters. See *id.*

306. KIMBALL, *supra* note 109, at 308.

307. PHILLIPS & BLACKMAN, *supra* note 32, at 12-13.

Nevertheless, Congress should encourage the states to adopt the federal system for state elections. As was shown by several states' reactions to the NVRA of 1993, there will be significant variation in implementation if Congress does not actively provide incentives. And, of course, "incentives" means federal money. Four of the seven 1970s proposals for a national program of voter registration included inducements for state adoption or compliance.³⁰⁸ Senator Kennedy's bill (Senate Bill 2457) would have granted the states up to 50 percent of the cost for facilitating registration up to 10¢ per voter, while Senator Inouye's and Representative Udall's bills (Senate Bill 1199; House Bill 6088) would have given states \$100,000 per congressional district for each district where 90 percent of the eligible voters were registered.³⁰⁹ "The federal grants-in-aid technique offers the most clearly constitutional way to achieve uniformity in state voter-registration laws without offending state sensitivities about their rights and privileges."³¹⁰ In sum, the OVR bill should have a provision calling for financial incentives for states that adopt the new registration system.

D. Policy Arguments and Political Obstacles

Two major policy claims may be presented in opposition to the OVR bill. First, opponents may claim that by establishing a system of universal registration, many more opportunities for fraud will crop up. The specter of fraud has been raised by losing candidates in several recent elections. For example, when Representative Robert Dornan lost his re-election race in California in 1996, he raised the fraud banner.³¹¹ Similar charges were made when Senator Mary Landrieu first won her seat in Louisiana by a margin of 6,000 votes.³¹² In both cases, the claims of fraud were not substantiated.³¹³ And, as recently as December 1998, New York State Attorney General Dennis Vacco refused to concede defeat in his re-election race until almost six weeks after the November election.³¹⁴ At one point, his supporters claimed that 1,000 votes were cast by dead voters in Manhattan,³¹⁵ an area that

308. *See id.* at 56-57.

309. *See id.*

310. *Id.* at 59.

311. *See* John Victor Berry, Comment, *Take the Money and Run: Lame-Ducks "Quack" and Pass Voter Identification Provisions*, 74 U. DET. MERCY L. REV. 291, 291 n.2 (1997).

312. *See id.* at 291 n.3.

313. *See id.* at 291.

314. *See Mr. Vacco Confronts Reality*, N.Y. TIMES, Dec. 15, 1998, at A26.

315. *See* Josh Barbanell, *The Dead Stayed Home on Election Day, Voter Data Indicate*, N.Y. TIMES, Dec. 3, 1998, at B1.

had voted overwhelmingly for his opponent.³¹⁶ A survey by The New York Times, however, totally discredited Vacco's claim, finding "not one phantom vote from beyond the grave."³¹⁷ Not only is fraud much harder to pull off in today's computerized era than in the nineteenth century (when it was, to some degree, a legitimate concern), but the harsh federal, anti-fraud penalties included in the OVR proposal would have an even stronger deterrent effect than most current anti-corruption provisions.

The second principal policy argument that might be used to attack the bill is more disturbing. It is likely that some may oppose a mandatory voter registration law because it would make it much easier for "uninformed" voters to vote. "Look what happened in Minnesota in 1998 when the registration rules were more voter-friendly—Jesse Ventura was elected governor," some people may warn. This argument is disturbing because it reeks of rank elitism and reveals a total disregard for the bedrock values of democracy. Consider the words of one who would oppose increasing voter participation:

Somehow the delusion has taken hold that a commitment to self-rule means coaxing apathetic numbskulls into voting . . . [.] By now, we have so degraded the franchise that the vote of an illiterate, unemployed, unstable high school drop-out couch potato is deemed no less valuable than that of the president of Columbia [University].³¹⁸

The arrogance of those who would tell us who is "informed" enough to vote is mind-boggling. Where in the Fifteenth Amendment grant of the right to vote is the parenthetical that says "but this right to vote only applies to those who would cast an informed vote"? Now that the United States no longer has poll taxes and literacy tests, should states adopt current-events tests to weed out those voters who are not informed enough? The notion is simply outrageous.

The truth is that, in Jesse Ventura's case, he energized hundreds of thousands of voters, who said that in the past they never felt like they had a reason to vote.³¹⁹ Ventura's mix of liberal social positions

316. See Election Results, *1998 General Election Results (Attorney General)*, NEW YORK STATE BOARD OF ELECTIONS (Dec. 15, 1998) <<http://www.elections.state.ny.us/elections/election.htm>> (showing that, in Nov. 3, 1998 election, Elliot Spitzer received 264,830 votes in New York City and Dennis C. Vacco received 49,486 votes).

317. Barbanel, *supra* note 315, at B1.

318. See Berry, *supra* note 311, at 296 (citing Phil Keisling, *What if We Held an Election and Nobody Came?*, WASH. MONTHLY, Mar. 1996, at 41 (quoting Jeff Jacoby, *Elections by Mail? Here's a No Vote*, BOSTON GLOBE, Feb. 1, 1996, at 9) (alteration in original)).

319. See Kenneth Nuckols, *Why We Voted for Jesse, Race came down to honesty, trustworthiness*, STAR TRIB. (Minneapolis), Nov. 7, 1998, at 19A.

and conservative fiscal views was well-received by the Minnesota electorate, who appreciated his straight-talking honesty and his lack of affiliation with any special interest groups.³²⁰ After the election, the Minneapolis Star-Tribune invited readers to write in and explain why they voted for Ventura. As Rick Pierce, a mechanical engineer from Savage, Minnesota, wrote:

The political experts are now trying to figure out why we voted for Jesse.

They think it is a fluke. They think it is because he is a celebrity and that we were stupid to take him seriously. . . . [T]here is more to it. How about the fact that he is a *normal* person and a straight shooter? Someone who opposes taxes and intrusive government? . . . Someone who is not for sale? . . .

. . . A guy who is willing to stick with principles rather than change direction with the wind.

. . . .

. . . He will have the guts to call it like he sees it, and not worry about the next election.³²¹

Not only do these sound like very good reasons, but even if they did not, no system could possibly judge whether a person has cast an informed vote.

Finally, make no mistake: Politically, the OVR bill will be very hard to pass. The proposal will scare both Democrats and Republicans. The political system as it now stands has worked for them. They have been elected and re-elected under the current system. By injecting a wildcard into the mix, the OVR will threaten incumbents. Since the Civil War, Republicans have strongly favored tighter registration laws,³²² so their opposition to the OVR is predictable. However, Democratic incumbents will also be threatened. Professors Piven and Cloward have noted that, although one might think that Democrats would support the OVR bill overwhelmingly (since those who are unregistered are generally less educated, poorer, and minorities—traditional Democratic supporters), many entrenched Democrats might feel threatened by the bill. These incumbent Democrats may fear it could lead to competitive primaries with more blacks and Hispanics.³²³ As political scientist David Mayhew wrote: “In a good many ways the interesting division in congressional politics is not between Democrats and Republicans, but between politicians in and out

320. See Rick Pierce, *Why We Voted for Jesse, Wasted vote is for one you don't want*, STAR TRIB. (Minneapolis), Nov. 7, 1998, at 19A.

321. *Id.*

322. See *supra* note 37 and accompanying text.

323. See PIVEN & CLOWARD, *supra* note 15, at 214.

of office [This creates] the appearance of a cross-party conspiracy among incumbents to keep their jobs.”³²⁴ In explaining why his election day registration bill failed in 1977, President Carter said:

The conservatives, Democrats and Republicans, almost to a person opposed this legislation. I was taken aback that many of the liberal and moderate members of the Congress also opposed any increase in voter registration The key [source of resistance] was “incumbency.” Incumbent members of the Congress don’t want to see additional unpredictable voters registered The more senior and more influential members of the Congress have very safe districts. To have a 25 or 30 percent increase of unpredictable new voters is something they don’t relish I would suggest to you that this is the single most important obstacle to increasing participation on election day.³²⁵

Politicians’ concerns might be eased, to some degree, if they knew that most political scientists thought that a large increase in registration would not significantly benefit either Democrats or Republicans.³²⁶ Most polls show that the political views of non-voters mirror those of voters.³²⁷ In addition, one set of researchers found “strong evidence that motor voter programs disproportionately register citizens who indicate no preference for either major party.”³²⁸ Moreover, according to information gathered by the National Republican Congressional Committee, motor voter programs, which one might have expected to help Democrats,³²⁹ have in fact helped the Republicans most of all.³³⁰

Despite the evidence that neither party should fear the OVR, there is no question that the bill would face an enormous uphill battle. For all the debate about legal issues and policy considerations, the fate of the OVR bill would inevitably hinge on politics. Without a doubt, the best way to persuade representatives and senators to pass the bill would be to take this case directly to the people. The message of increased convenience to voters and increased popular participation

324. DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 105 (1974).

325. PIVEN & CLOWARD, *supra* note 15, at 215.

326. See Quinlivan, *supra* note 266, at 2387.

327. See DANIEL HAYS LOWENSTEIN, ELECTION LAW: CASES AND MATERIALS 57 (1995).

328. Stephen Knack & James White, *Did States’ Motor Voter Programs Help the Democrats?*, 26 AM. POL. Q. 344, 361 (1998).

329. See Michael Walzer, *The Hard Questions*, THE NEW REPUBLIC, Jan. 6 & 13, 1997, at 23 (describing classical view that increase in participation would shift political power to left).

330. See K.C. Swanson, *Rules Eased, Voter Rolls and Swelling*, 28 NAT’L J. 2231, 2231 (1996).

would resonate with the public and generate the kind of public support that reformers would need to have a legitimate shot at enacting the OVR in this poll-driven age.

CONCLUSION

Sometimes we get so engrossed in trying to change the details of the system that we forget we can change the system altogether.³³¹

— Arkansas Governor Bill Clinton, 1988

In 1896, turnout of all eligible voters in the presidential election was 79 percent.³³² By 1996, it had plummeted to 49 percent.³³³ More than one of every two eligible voters failed to vote. A century of rigid voter registration laws, poll taxes, and literacy tests have driven down turnout to the point where the United States lags well behind the 80 percent average of other industrialized democracies. Today, the United States is the only industrialized democracy that does not accept the responsibility of registering its voters.

The appalling turnout rate of recent years may be viewed as something of a national crisis. With money playing such an important role in political campaigns and voter participation at historic lows,³³⁴ the public's faith in its government has been seriously shaken. Nevertheless, we have reason to stay hopeful. As Penn Kimball said, "The genius of the American political system has been its ability to reconstitute itself periodically to pass through times of national crisis."³³⁵

The American political system is now faced with one of those times of crisis. As the nation looks out toward the horizon of the twenty-first century, we should seize the moment and revitalize our government. There is no better way to do so than to enact a federal mandatory voter registration law. Since registered voters vote in very high numbers, a mandatory voter registration law would increase voter turnout dramatically. By increasing the number of citizens who participate in the political process, we could greatly restore the public's faith in that sacred notion of government of the people, by the people, and for the people.

331. Bill Clinton, *State Initiatives to Increase Voter Participation*, in *VOTING RIGHTS IN AMERICA* 150 (Karen McGill Arrington & William L. Taylor eds., 1992). Then-Governor Clinton's article was based on a speech sponsored by the Leadership Conference Education Fund at the 1988 conference on the bicentennial celebration of the U.S. Constitution.

332. See *Voter Registration Hearings*, *supra* note 7, at 30 (testimony of Edward M. Kennedy, U.S. Senator from Massachusetts).

333. See *id.*

334. See *supra* note 180 and accompanying text.

335. KIMBALL, *supra* note 109, at 317.

IV
TABLES

TABLE 1
VOTER TURNOUT IN PRESIDENTIAL ELECTIONS; 1828-1996
[In percent]

Election:	Turnout	Turnout
1828	58	1916
1832	55	1920
1836	58	1924
1840	80	1928
1844	79	1932
1848	73	1936
1852	70	1940
1856	79	1944
1860	81	1948
1864	74	1952
1868	78	1956
1872	71	1960
1876	82	1964
1880	79	1968
1884	78	1972
1888	79	1976
1892	75	1980
1896	79	1984
1900	73	1988
1904	65	1992
1908	65	1996
1912	59	

Sources: See *Voter Registration: Hearings on S. 352 and S. 472 Before the Senate Comm. on Post Office and Civil Serv.*, 93d Cong. 30 (1973); *National Voter Turnout in Federal Elections: 1960 - 1996*, FEDERAL ELECTION COMMISSION (last modified Aug. 18, 1999) <<http://www.fec.gov/pages/htmlto5.htm>> (for presidential elections from 1960 to 1996).

TABLE 2
 AVERAGE INTERNATIONAL VOTER TURNOUT IN THE 1980s
 [In national elections; in percent]

Belgium	94
Austria	92
Australia	90
New Zealand	89
Sweden	88
West Germany	87
Denmark	86
Italy	84
Netherlands	84
Norway	83
Israel	79
Greece	78
Finland	74
United Kingdom	74
Ireland	73
Canada	72
France	70
Japan	68
United States	53
Switzerland	49

Source: DANIEL HAYS LOWENSTEIN, *ELECTION LAW: CASES AND MATERIALS* 42 (1995) (citing RUY A. TEIXEIRA, *THE DISAPPEARING AMERICAN VOTER* 8 (1992)).