
NO MORE HALF MEASURES: THE CASE FOR COMPULSORY
VOTING IN UNITED STATES ELECTIONS

BRANDON MARC DRAPER*

*As the 2020 election approaches, demands for greater access to the ballot have been justifiably reignited. The most meaningful measure of effective voter access is turnout. In *Shelby County v. Holder*, the Supreme Court struck down the Voting Rights Act formula for determining which jurisdictions are “covered,” a status that required administrative preclearance prior to changes in apportionment schemes. Following that ruling, several previously covered states enacted laws that hindered ballot access and, as a result, voter turnout decreased. To combat the ruling in *Shelby*, as well as subsequent legislative actions by those states, several other states enacted laws that sought to improve access and turnout, namely through laws that created or expanded automatic voter registration, same-day voter registration, vote-by-mail, and early voting. Additionally, voting rights organizations have continued to lobby governments for greater access and urgently encouraged citizens to register to vote, vote, and run for office. Yet overall, even in states where voter access is relatively high and/or voting is strongly encouraged, voter turnout in these states, and in the United States as a whole, lags severely behind most developed countries.*

This Article contends that effectively increasing ballot access as a means of substantially increasing voter turnout requires drastic changes to our election systems. Such changes include making voting compulsory and replacing current majority rule and plurality

* Assistant County Attorney, Harris County Attorney’s Office; Adjunct Professor, University of Houston Law Center. BA, SUNY at Binghamton, JD, University of Maryland Francis King Carey School of Law. The author thanks Maxwell L. Stearns for helpful comments on an earlier draft. Tifenn Drouaud provided outstanding assistance with research and editing. He also thanks Samantha D. Dudley, Victoria A. Ford, and the editorial staff at the *Elon Law Review*.

rule/winner-take-all voting systems with a majority rule/ranked-choice system. These changes would greatly expand ballot access and likely lead to a rise in American voter turnout that could match the levels seen in most developed countries. Furthermore, the transition to compulsory voting would help guarantee the protections of the Fifteenth Amendment. Practically, however, implementation and enforcement of these changes face a variety of potentially fatal constitutional and administrative challenges. Such challenges include those made on First and Fourteenth Amendment grounds, as well as those caused by the current and expected future makeup of Congress and the Judiciary. Despite these legitimate concerns, these are changes that have been proven to deliver the greatest contemporary levels of ballot access and voter turnout, and that the United States should seek to enact in order to create meaningful ballot access to all eligible citizens.

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I. INTRODUCTION

The Supreme Court's decision in *Shelby County v. Holder* marked the end of the federal government's ability to use Section 4(b) of the Voting Rights Act of 1965 ("VRA") to protect American citizens from racial discrimination with respect to voting in "covered" jurisdictions, or jurisdictions with a history of such racial discrimination.¹ Prior to this ruling, the U.S. Department of Justice used Section 4(b)'s coverage formula to determine which jurisdictions are covered to enforce Section 5.² Section 5 requires any changes to a covered jurisdiction's voting laws to first be approved by "preclearance," either from the Attorney General of the United States or from a federal three-judge panel in the District of Columbia.³

The Supreme Court's decision in *Shelby* increased barriers to the ballot and ultimately suppressed voter turnout, which this Article contends is the most meaningful measure of effective voter access. However, even before the Supreme Court's decision in *Shelby*, voter turnout rates in the United States were well behind those of other developed countries.⁴ In this Article, using public choice tools and available legal and economic data, I seek to explain that the most effective way to markedly increase voter access and turnout is to

¹ 570 U.S. 529, 557 (2013).

² Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 438 (codified as amended at 52 U.S.C. § 10303 (2018)).

³ See Jenée Desmond-Harris, *Why Is Section 4 of the Voting Rights Act Such a Big Part of the Fight over Voting Rights?*, VOX (Feb. 14, 2016, 6:25 PM), <https://www.vox.com/2016/2/14/17619202/voting-rights-fight-explained-key-sections-rights-act> (discussing how Section 4(b) interacts with the other sections of the VRA).

⁴ See ABDURASHID SOLIJONOV, INT'L INST. DEMOCRACY & ELECTORAL ASSISTANCE, VOTER TURNOUT TRENDS AROUND THE WORLD, 47–48 (2016), <https://www.idea.int/sites/default/files/publications/voter-turnout-trends-around-the-world.pdf>; see also *Tbl. A-1. Reported Voting and Registration by Race, Hispanic Origin, Sex, and Age Groups: November 1964 to 2018*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/voting-historical-time-series.html> (last visited Nov. 22, 2020).

reform United States election systems to feature ranked choice voting with compulsory voting.

This Article proceeds as follows: In Part I, I briefly discuss the legal history of the VRA from *Katzenbach* to *Shelby*, in addition to measures that have been implemented by states, counties, and other jurisdictions to either suppress or enhance ballot access. Part II contrasts existing American voting methods with the proposed ranked choice voting ("RCV") with compulsory voting, while Part III applies the public choice framework to analyze the costs and benefits of switching from the current election systems to RCV with compulsory voting. In Part IV, I discuss how to logistically enact RCV with compulsory voting, as well as the processes and hurdles that the United States would likely face if it were to make this change. While such a drastic change to United States elections will be extremely difficult to implement and enforce, this Article contends it is the change needed to create meaningful ballot access for all eligible citizens.

II. THE EXPANSION OF VOTING RIGHTS PROTECTION AND THE PATH TO *SHELBY COUNTY V. HOLDER*

After the United States Civil War, the American government added three amendments—the Thirteenth Amendment,⁵ the Fourteenth Amendment,⁶ and the Fifteenth Amendment⁷—to the United States Constitution, commonly known as the "Reconstruction Amendments." The Reconstruction Amendments codified the abolition of slavery, equal protection of the law, and the right to vote for African Americans. Despite the passage of these amendments, African Americans still faced several legal obstacles in voting, primarily through Jim Crow laws, which permitted poll taxes and literacy tests.⁸ To counteract such laws, Congress passed the VRA,⁹ which included several measures for the federal government to either prevent a racially discriminatory voting law from being enacted, or allow it to be stricken down.

⁵ U.S. CONST. amend. XIII.

⁶ U.S. CONST. amend. XIV.

⁷ U.S. CONST. amend. XV.

⁸ Danyelle Solomon et al., *Systematic Inequality and American Democracy*, CTR. FOR AM. PROGRESS: RACE & ETHNICITY (Aug. 7, 2019, 7:00 AM), <https://www.americanprogress.org/issues/race/reports/2019/08/07/473003/systematic-inequality-american-democracy/>.

⁹ Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 438 (codified as amended at 52 U.S.C. § 10303 (2018)).

Specifically, Section 4(b) of the VRA established a formula¹⁰ to determine that the states of Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, as well as several jurisdictions within Arizona, Hawaii, Idaho, and North Carolina, were "covered" and subject to preclearance requirements of the VRA.¹¹ The State of South Carolina sued and the Supreme Court ruled upon the constitutionality of the VRA in *South Carolina v. Katzenbach*.¹² In *Katzenbach*, the Supreme Court held that "the portions of the [VRA, including Section 4(b)], are a valid means for carrying out the commands of the Fifteenth Amendment."¹³

Congress renewed the VRA several times after it was enacted: first in 1970 and again in 1975, 1982, and 2006.¹⁴ Fifty years later, in *Shelby County v. Holder*,¹⁵ the Supreme Court reversed its own decision, holding instead that the coverage formula found in Section 4(b) of the VRA was unconstitutional. In doing so, the Court crippled the Department of Justice's ability, under Section 5 of the VRA,¹⁶ to ensure that jurisdictions with a history of discrimination did not change their voting procedures in a way that could disadvantage minority voters.¹⁷ Speaking for the majority, Chief Justice Roberts

¹⁰ The original formula required a finding of "yes" to the following two questions: (1) On November 1, 1964, did the state or jurisdiction maintain a test or device that restricted the opportunity to register and vote?; and (2) According to the Director of the Census, did less than 50% of the vote-eligible population register to vote on November 1, 1964, or did less than 50% of the vote-eligible population vote in the presidential election of November 1964? Voting Rights Act of 1965 § 4(b).

¹¹ Voting Rights Act of 1965 § 4(a)(1)(D).

¹² 383 U.S. 301, 336 (1966).

¹³ *Id.* at 337.

¹⁴ *Shelby Cty. v. Holder*, 570 U.S. 529, 538–39 (2013).

¹⁵ Prior to reaching the Supreme Court, *Shelby County, Alabama*, filed suit in the Federal District Court for the District of Columbia, where it "sued the Attorney General in Federal District Court in Washington, D.C., seeking a declaratory judgment that sections 4(b) and 5 of the Voting Rights Act are facially unconstitutional, as well as a permanent injunction against their enforcement." *Id.* at 540–41. The District Court ruled against *Shelby County* and upheld those sections of the VRA. *Id.* at 541. *Shelby County* then appealed to the Court of Appeals for the D.C. Circuit, and the D.C. Circuit affirmed. *Id.* *Shelby County* then appealed to the Supreme Court, which granted certiorari. *Id.* at 542.

¹⁶ Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 439 (codified as amended at 52 U.S.C. § 10304 (2018)).

¹⁷ However, Chief Justice Roberts encouraged Congress to "draft another formula based on the current conditions [of racial discrimination]." *Shelby*, 570 U.S. at 557. Congress did exactly that when it passed the Voting Rights Advancement Act of 2019. See H.R. 4, 116th Cong. (2019). If passed into law, Representative Terri Sewell, who introduced the Act,

stated that such a ruling was appropriate, in part, because "things have changed dramatically"¹⁸ in the nearly fifty years since the Court decided *Katzenbach*.¹⁹ Chief Justice Roberts further stated that "[a]t the time, the coverage formula—the means of linking the exercise of the unprecedented authority with the problem that warranted it—made sense."²⁰ However, since the climate in which racial discrimination in voting had allegedly largely subsided,²¹ the Court ultimately found that the "current burdens" of the VRA on covered districts were no longer compatible with "current needs" to combat voter discrimination.²²

In her dissenting opinion, where she was joined by Justices Breyer, Sotomayor, and Kagen, Justice Ginsberg stated that the majority's decision "terminate[d] the remedy that proved to be best suited to block [the voting rights] discrimination [the VRA sought to eliminate]."²³ Justice Ginsburg looked to Congress' 2006 near-unanimous reauthorization of the VRA, during which it concluded that "[f]orty] years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly one-hundred years of disregard for the dictates of the [Fifteenth Amendment] and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution."²⁴ Justice Ginsburg further discussed the thoughtful

would seek to reevaluate the following states with a history of voter discrimination: Alabama, Georgia, Mississippi, Texas, Louisiana, Florida, South Carolina, North Carolina, Arkansas, Arizona, California, New York, and Virginia. See Ella Nilsen, *The House Has Passed a Bill to Restore Key Parts of the Voting Rights Act*, VOX (Dec. 6, 2019, 1:30 PM), <https://www.vox.com/2019/12/6/20998953/house-bill-voting-rights-advancement-act>.

¹⁸ *Shelby*, 570 U.S. at 547.

¹⁹ 383 U.S. at 336.

²⁰ *Shelby*, 570 U.S. at 530.

²¹ Chief Justice Roberts correctly observed that, mainly "because of the Voting Rights Act, "[v]oter turnout and registration rates" in covered jurisdictions "now approach parity. Blatantly discriminatory evasions of federal decrees are rare, and minority candidates hold office at unprecedented levels." *Id.* at 531 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009)).

²² *Id.* at 536.

²³ *Id.* at 559–60 (Ginsburg, J., dissenting); see also P.R. Lockhart, *How Shelby County v. Holder Upended Voting Rights in America*, VOX, <https://www.vox.com/policy-and-politics/2019/6/25/18701277/shelby-county-v-holder-anniversary-voting-rights-suppression-congress> (last updated June 25, 2019, 7:49 PM).

²⁴ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(7), 120 Stat. 577, 578 (2006). Congress voted to reauthorize the VRA with near-unanimity. See H.R. Rep. No. 109-478, at 2 (2006); see also Amy Davidson Sorkin, *The Court Rejects the Voting Rights Act—and History*, NEW YORKER (June 25, 2013), <https://www.newyorker.com/news/amy->

and deliberative process that led to the 2006 reauthorization.²⁵ Specifically, beginning in 2005, the 109th Congress' review entailed extensive hearings in the House, additional hearings in the Senate, and after the VRA authorization bills were brought to the House and Senate, both houses held further hearings that continued into July of 2006.²⁶ Most pointedly, Justice Ginsberg stated "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."²⁷ To this point, Justice Ginsberg noted that "between 1982 and 2006, DOJ objections blocked over 700 voting changes based on a determination that the changes were discriminatory."²⁸

Perhaps predictably, after the Court's ruling in *Shelby*, the rainstorm continued without the umbrella.²⁹ In the years since the Court's ruling in *Shelby*, several previously covered states, counties, and jurisdictions enacted laws and took other administrative actions likely to suppress voting among minorities, the poor, and the elderly, ultimately hindering ballot access.³⁰ These measures consisted of strict voter

davidson/the-court-rejects-the-voting-rights-act-and-history (explaining that the Act passed the House with 390-33 voting in favor, and the Senate with 98-0 voting in favor).

²⁵ See Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 738–43 (2014). Here, Hasen argued that the dissenters failed to discuss serious Republican opposition to the VRA's preclearance requirement, even though reauthorization was ultimately unified, to perhaps portray greater "moral force" and outrage at the majority's opinion. *Id.*

²⁶ See S. REP. NO. 109-295, at 2 (2006). After approximately eight months of hearings and debate, the 2006 Reauthorization was passed by both Houses of Congress and signed into law passed by President George W. Bush. See *Shelby*, 570 U.S. at 564 (Ginsburg, J., dissenting) (citing S. REP. NO. 109-295, at 2 (2006)).

²⁷ *Shelby*, 570 U.S. at 590 (Ginsburg, J., dissenting).

²⁸ *Id.* at 571 (citing H.R. REP. NO. 109-478, at 21 (2006)).

²⁹ Even worse, it is unclear if any new "coverage" formula would be deemed constitutional by the Supreme Court. See Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 121 (2014). It is clear, however, that enforcement of the VRA under Section 2 is significantly less effective than Section 5 at rooting out discrimination in voting. *Id.* at 112; see also Ellen D. Katz, *Section 2 After Section 5: Voting Rights and the Race to the Bottom*, 59 WM. & MARY L. REV. 1961 (2018); Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-CL. L. REV. 439 (2015).

³⁰ See *The Battle to Protect the Ballot: Voter Suppression Measures Passed Since 2013*, ACLU, <https://www.aclu.org/issues/voting-rights/fighting-voter-suppression/battle-protect-ballot-voter-suppression-measures> (last visited Nov. 23, 2020). From 2013 to 2014, Texas, Arizona, Montana, Kansas, Wisconsin, Iowa, Missouri, Arkansas, Mississippi, Alabama, Georgia, Florida, Ohio, North Carolina, and South Carolina all announced or passed voter suppression laws.

identification laws,³¹ greater restrictions on voter registration,³² increased limits on early voting,³³ the closure of polling places,³⁴ requiring

Id.; see also Vann R. Newkirk, II, *How Shelby County v. Holder Broke America*, ATLANTIC (July 10, 2018), <https://www.theatlantic.com/politics/archive/2018/07/how-shelby-county-broke-america/564707/> (explaining that “[v]oter-identification laws, which experts suggest will make voting harder especially for poor people, people of color, and elderly people, have advanced in several states, and some voting laws that make it easier to register and cast ballots have been destroyed”); WENDY R. WEISER & MAX FELDMAN, *THE STATE OF VOTING 2018* (2018), <https://www.brennancenter.org/our-work/research-reports/state-voting-2018> (illustrating that between 2011 and 2018, voters in twenty-three states faced voting restrictions that they had not as recently as 2010).

³¹In 2001, for example, the Texas State Legislature passed SB 14, a voter identification law that was later deemed a poll tax and found unconstitutional by the Southern District of Texas. See *Veasey v. Perry*, 71 F. Supp. 3d 627, 641–42 (S.D. Tex. 2014) *aff’d in part, rev’d in part*, 796 F.3d 487 (5th Cir. 2015). In 2017, Texas replaced SB 14 with SB 5, a slightly a less restrictive law that allowed voters who lacked identification to vote if they swore to have a “reasonable impediment” to obtaining proper identification, and also provided an alternative proof of identification. See *Texas NAACP v. Steen (Consolidated with Veasey v. Abbott)*, BRENNAN CTR. FOR JUST. (Sept. 21, 2018), <https://www.brennancenter.org/our-work/court-cases/texas-naacp-v-steen-consolidated-veasey-v-abbott>. Presently, “36 states have laws requesting or requiring voters to show some form of identification at the polls” *Voter Identification Requirements / Voter ID Laws*, NAT’L CONF. ST. LEGISLATURES (Aug. 25, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

³²To register individuals to vote in Texas, a person must be deputized as a Volunteer Deputy Registrar (“VDR”). VDR training takes place once per month, at most, and completion of such training only allows the VDR to register voters in the county in which such training was completed. Failure to comply with this law can lead to criminal prosecution. Practically, this law has the effect of banning voter registration drives. See, e.g., *Texas Volunteer Deputy Registrar Guide*, TEX. DEP’T ST. (Sept. 11, 2017), <https://www.sos.state.tx.us/elections/pamphlets/deputy.shtml>. As of 2016, Texas was ranked forty-fifth in the United States in voter registration and last in turnout. See Ari Berman, *Texas’s Voter Registration Laws Are Straight out of the Jim Crow Playbook*, NATION (Oct. 6, 2016), <https://www.thenation.com/article/archive/texas-voter-registration-laws-are-straight-out-of-the-jim-crow-playbook/>; see also Adam Serwer, *Something’s Happening in Texas*, ATLANTIC (Nov. 5, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/somethings-happening-in-texas/574873/> (detailing the inherent difficulty of voting in Texas).

³³Iowa reduced its early voting period from forty to twenty-nine days. See, e.g., Stephen Gruber-Miller & Brienne Pfannenstiel, *Voter ID Lawsuit: Civil Rights Group, ISU Student to Sue Iowa Secretary of State*, DES MOINES REG., <https://www.desmoinesregister.com/story/news/crime-and-courts/2018/05/30/iowa-voter-id-lawsuit-lulac-civil-rights-group-isu-student-sue-iowa-secretary-state-paul-pate/652649002/> (last updated May 31, 2018, 8:20 AM).

³⁴Between 2012 and 2018, counties across Texas closed 750 polling places. See Ari Berman, *Here’s Why Texans Had to Wait Six Hours to Vote*, MOTHER JONES (Mar. 4, 2020), <https://www.motherjones.com/politics/2020/03/texas-primary-lines/>. Across the country, 1,688 polling locations were closed. *Id.*; see also *Democracy Diverted: Polling Place Closures*

documentary proof of citizenship to vote,³⁵ "exact match" laws,³⁶ restrictions on student voting,³⁷ and higher rates of voters purged from voter rolls.³⁸ While proponents of many of these measures insist they are necessary to curb widespread voter or election fraud,³⁹ this position is largely unsupported by data.⁴⁰ Studies demonstrate that these

and the Right to Vote, LEADERSHIP CONF. ON CIV. & HUM. RTS., <https://civilrights.org/democracy-diverted> (last visited Nov. 23, 2020).

³⁵ In 2014, Alabama continued its plan to require potential voters to show proof of citizenship to vote. See Erik Eckholm, *After Ruling, Alabama Joins 2 States in Moving to Alter Voting Rights*, N.Y. TIMES (Mar. 21, 2014), https://www.nytimes.com/2014/03/22/us/after-ruling-alabama-joins-2-states-in-moving-to-alter-voting-rules.html?_r=0. This came after a federal judge ordered federal election authorities to assist Kansas and Arizona to provide proof of citizenship when registering to vote. See Fernanda Santos, *Two States Win Court Approval on Voter Rules*, N.Y. TIMES (Mar. 19, 2014), <https://www.nytimes.com/2014/03/20/us/judge-says-us-must-help-states-enforce-voter-id-laws.html>.

³⁶ In 2017, Georgia sought to enact an "exact match" law, which would have required a voter's name or signature on their absentee ballot to be an "exact match" to the name or signature on their other government documents. If the signatures did not match for any reason, including missing hyphens, accent marks, and middle initials, the vote did not count. H.B. 268, 154th Gen. Assemb., Reg. Sess. (Ga. 2017). In 2018, a federal court struck down this law as it raised "grave concerns for the Court about the differential treatment inflicted on a group of individuals who are predominantly minorities The election scheme here places a severe burden on these individuals." See Shannon Van Sant, *Judge Rules Against Georgia Election Law, Calling It a 'Severe Burden' for Voters*, NPR (Nov. 3, 2018, 6:33 PM), <https://www.npr.org/2018/11/03/663937578/judge-rules-against-georgia-election-law-calling-it-a-severe-burden-for-voters>.

³⁷ See, e.g., Michael Wines, *The Student Vote Is Surging. So Are Efforts to Suppress It*, N.Y. TIMES (Oct. 24, 2019), <https://www.nytimes.com/2019/10/24/us/voting-college-suppression.html>.

³⁸ While voter purges occurred throughout the United States, according to research from the Brennan Center, "2 million fewer voters would have been purged over those four years if jurisdictions previously subject to federal preclearance [pursuant to the VRA] had purged at the same rate as those jurisdictions not subject to that provision in 2013." JONATHAN BRATER ET AL., PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 1 (2018), <https://www.brennancenter.org/our-work/research-reports/purges-growing-threat-right-vote>.

³⁹ See, e.g., Hans A. von Spakovsky, *The Myth of Voter Suppression and the Enforcement Record of the Obama Administration*, 49 U. MEM. L. REV. 1147, 1150–53 (2019).

⁴⁰ See Jessica Huseman, *How the Case for Voter Fraud Was Tested – and Utterly Failed*, PROPUBLICA (June 19, 2018, 3:40 PM), <https://www.propublica.org/article/kris-kobach-voter-fraud-kansas-trial>; see also *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUST. (Jan. 31, 2017), https://www.brennancenter.org/sites/default/files/analysis/Briefing_Memo_Debunking_Voter_Fraud_Myth.pdf; Rebecca Shabad, *Barr Claims Voting by Mail Will Lead to Fraud, 'Counterfeiting.' Admits He Has Zero Evidence.*, NBC NEWS (June 26, 2020, 7:10 AM), <https://www.nbcnews.com/politics/2020-election/barr-claims-voting-mail-will-lead-fraud-counterfeiting-admits-he-n1232208>.

measures reduce voter turnout by 2–3%.⁴¹ Furthermore, these measures disproportionately suppress the vote among minorities.⁴²

On the other end of the spectrum, many states passed laws that enhanced access to the ballot, and ultimately increased voter turnout.⁴³ Although such laws are ultimately "half measures," as their passage alone does not meaningfully increase ballot access and turnout,⁴⁴ they are nevertheless important actions aimed toward reaching this goal and boosting turnout among Democrats and Republicans at virtually equal levels.⁴⁵ I will now briefly discuss and define some of the most popular and effective measures to increase ballot access and turnout.

*Automatic Voter Registration ("AVR")*⁴⁶ requires the appropriate state agency to automatically register all eligible citizens to vote upon

⁴¹ WEISER & FELDMAN, *supra* note 30, at 6–8. However, with respect to voter ID laws, research suggests that efforts to reduce voter turnout with such laws are effectively cancelled out by efforts to increase turnout by local political campaigns. See Jacob R. Neiheisel & Rich Horner, *Voter Identification Requirements and Aggregate Turnout in the U.S.: How Campaigns Offset the Costs of Turning Out When Voting Is Made More Difficult*, 18 ELECTION L.J.: RULES, POL., & POL'Y 227, 234 (2019); see also Mark Hoekstra & Vijetha Koppa, *Strict Voter Identification Laws, Turnout, and Election Outcomes* 8–9, 14 (Nat'l Bureau of Econ. Research, Working Paper No. 26206, 2019), <https://www.nber.org/papers/w26206> (finding that, because 0.10% and 0.31% of total votes are cast without ID, the enactment of a voter ID law would have a minimal effect on turnout).

⁴² See Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, BRENNAN CTR. FOR JUST. (Jan. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/new-voter-suppression>.

⁴³ See *Voting Laws Roundup 2014*, BRENNAN CTR. FOR JUST. (Dec. 18, 2014), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2014>. In 2014, legislators throughout the United States introduced and supported at least 340 bills to enhance voter access to registration and voting, and twelve states plus the District of Columbia passed such bills. *Id.*

⁴⁴ A meaningful increase is an increase to the levels of ballot access and voter turnout as those seen in countries that use compulsory voting. See Chris Iovenko, *These Countries Make Voting Mandatory. Could It Work in the United States?*, HUFFPOST (June 1, 2020, 5:45 AM), https://www.huffpost.com/entry/countries-voting-mandatory-united-states_n_5ed130lec5b6658234cf8796 (stating that countries with mandatory voting laws have a voter turnout percentage well above the United States).

⁴⁵ See Yascha Mounk, *What Nonvoters Want*, ATLANTIC (Feb. 26, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/truth-about-non-voters/607051/>.

⁴⁶ See *Automatic Voter Registration, a Summary*, BRENNAN CTR. FOR JUST. (July 10, 2019), <https://www.brennancenter.org/our-work/research-reports/automatic-voter-registration-summary>.

the commencement of their eligibility. Presently, sixteen states and the District of Columbia have enacted AVR laws.⁴⁷

*Early Voting (“EV”)*⁴⁸ allows all eligible voters to cast their ballots in person in the weeks leading up to Election Day, so as to decrease the time it takes to vote on Election Day and thereby increase turnout by allowing citizens to vote on a date that is best for them.

*Vote-by-Mail (“VBM”)*⁴⁹ or no-excuse absentee voting, allows voters to cast a ballot by mail for any reason or for no reason at all. When done effectively,⁵⁰ VBM has proven to substantially reduce election-related costs⁵¹ and help both parties boost turnout.⁵² VBM has

⁴⁷ *Id.* Professor Daniel P. Tokaji has proposed a compromise whereby Democrats and Republicans will pass federal legislation that both eases the ability to register to vote and strengthens voter identification laws. See Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL’Y REV. 71, 95–107 (2014).

⁴⁸ See DIANA KASDAN, BRENNAN CTR. FOR JUSTICE, EARLY VOTING: WHAT WORKS 2 (2013), https://www.brennancenter.org/sites/default/files/2019-08/Report_VotingReport_Web.pdf.

⁴⁹ See *All-Mail Elections (aka Vote-By-Mail)*, NAT’L CONF. ST. LEGISLATURES (Mar. 24, 2020), <https://www.ncsl.org/research/elections-and-campaigns/all-mail-elections.aspx>.

⁵⁰ When done poorly, however, VBM could lead to several issues—security problems, printing issues, and election staffing shortages—that may ultimately disenfranchise voters. See, e.g., Kim Zetter, *Why Vote-by-Mail May Not Save Our Elections from the Virus’ Disruption*, POLITICO (Mar. 17, 2020, 6:50 PM), <https://www.politico.com/news/2020/03/17/vote-by-mail-elections-coronavirus-134618>; Steven F. Huefner, *The Perils of Voting by Mail*, ALI ADVISER (Dec. 10, 2018), www.thealiadviser.org/election-administration/the-perils-of-voting-by-mail/. To ensure effective VBM, Senator Kamala Harris introduced the VoteSafe Act of 2020, which would set aside \$5 billion to standardize early in-person voting periods, require states to allow VBM, and maintain due process requirements for voters. See Jamil Smith, *Kamala Harris’ Plan to Save the Election*, ROLLING STONE (Apr. 16, 2020, 10:52 AM), <https://www.rollingstone.com/politics/political-commentary/kamala-harris-coronavirus-election-bill-984898/>.

⁵¹ See, e.g., *Colorado Voting Reforms: Early Results*, PEW CHARITABLE TR. 1–3 (Mar. 2016), <https://www.pewtrusts.org/-/media/assets/2016/03/coloradovotingreformsearlyresults.pdf>. In 2013, Colorado enacted H.B. 13-1303, the Voter Access and Modernized Elections Act of 2013, which required VBM for most elections, allowed citizens to vote in any polling place within their county of residence, created same-day voter registration, and reduced the time of the residency requirement needed to vote in Colorado. *Id.* at 2. One year later, Colorado found that election-related costs were reduced by 40%. *Id.* at 1–3.

⁵² See Daniel M. Thompson et al., *The Neutral Partisan Effects of Vote-by-Mail: Evidence from County-Level Rollouts* 11–13 (Stanford Inst. for Econ. Policy Research, Working Paper No. 20-015, 2020), <https://siepr.stanford.edu/sites/default/files/publications/20-015.pdf>. VBM is even endorsed by God. See Ron Kampeas, *Missouri Rabbis Say Voting by Mail Is a Religious Imperative After Their Governor Bars the Option*, JEWISH TELEGRAPHIC

become especially popular amid the COVID-19⁵³ pandemic as shown by the fact that 72% of all U.S. adults were found to support "a requirement for [VBM] as a way to protect voters in case of a continued spread of [COVID-19] later this year."⁵⁴

These measures, along with others that create same-day registration ("SDR"), reduce the legal voting age,⁵⁵ expand "motor voter"⁵⁶ provisions, provide voting assistance to non-English speakers,⁵⁷ and criminalize the distribution of false voting information,⁵⁸ have proven to either increase voter turnout by up to 5%,⁵⁹ or have an otherwise

AGENCY (May 6, 2020, 1:27 PM), https://www.jta.org/2020/05/06/politics/missouri-rabbis-say-voting-by-mail-is-a-religious-imperative-after-their-governor-bars-the-option/amp?__twitter_impression=true.

⁵³ While successful implementation of VBM requires proper administration in the best of circumstances, the combination of the COVID-19 pandemic and the current financial problems of the United States Postal Service may drastically harm citizens' ability to utilize VBM in the 2020 elections. See, e.g., Yelena Dzhanova, *Postal Service's Financial Stress Might Hurt Its Ability to Handle Large Volume of Mail-In Ballots*, CNBC (May 22, 2020, 7:19 AM), <https://www.cnbc.com/2020/05/22/coronavirus-postal-service-financial-stress-might-threaten-voter-turnout.html>; Richard L. Hasen, *We Cannot Hold an Election Without a Functional Post Office*, SLATE (Apr. 14, 2020, 3:38 PM), <https://slate.com/news-and-politics/2020/04/november-election-post-office-bailout.html>; Gary Fineout, *Florida Election Officials Sound the Alarm Ahead of November*, POLITICO (Apr. 7, 2020, 7:42 PM), <https://www.politico.com/states/florida/story/2020/04/07/florida-election-officials-sound-the-alarm-ahead-of-november-1273502>.

⁵⁴ Chris Kahn, *Most Americans, Unlike Trump, Want Mail-in Ballots for November if Coronavirus Threatens: Reuters/Ipsos Poll*, THOMSON REUTERS (Apr. 7, 2020, 6:53 PM), <https://www.reuters.com/article/us-usa-election-poll/most-americans-unlike-trump-want-mail-in-ballots-for-november-if-coronavirus-threatens-reuters-ipsos-poll-idUSKBN21P3G0>; cf. Greg Allen, *Even as Trump Denounces Vote by Mail, GOP in Florida and Elsewhere Relies on It*, NPR (Apr. 11, 2020, 7:00 AM), <https://www.npr.org/2020/04/11/831978099/even-as-trump-denounces-vote-by-mail-gop-in-florida-and-elsewhere-relies-on-it> (stating that Coronavirus has caused both parties to seek expansion of VBM in some states).

⁵⁵ See *Preregistration for Young Voters*, NAT'L CONF. ST. LEGISLATURES (Feb. 12, 2019), <https://www.ncsl.org/research/elections-and-campaigns/preregistration-for-young-voters.aspx>.

⁵⁶ The National Voter Registration Act of 1993, also known as the "Motor Voter Act," requires states to allow individuals to register to vote when they apply for or seek to renew their driver's license. Pub. L. No. 103-31, 107 Stat. 78 (codified as amended at 52 U.S.C. § 20504 (1993)) (formerly 42 U.S.C. § 1973gg-3).

⁵⁷ See D'Vera Cohn, *More Voters Will Have Access to Non-English Ballots in the Next Election Cycle*, PEW RES. CTR. (Dec. 16, 2016), <https://www.pewresearch.org/fact-tank/2016/12/16/more-voters-will-have-access-to-non-english-ballots-in-the-next-election-cycle/>. This assistance is required by the VRA. *Id.*

⁵⁸ *Voting Laws Roundup 2014*, *supra* note 43.

⁵⁹ Danielle Root & Liz Kennedy, *Increasing Voter Participation in America*, CTR. FOR AM. PROGRESS (July 11, 2018, 12:01 AM),

positive effect on voting.⁶⁰ In addition to the states and jurisdictions that have enacted such laws, Democrats in the House of Representatives⁶¹ and voting rights organizations have worked to support these measures, explain the registration and voting process, and/or otherwise encourage citizens to run for office.⁶²

Despite efforts by the federal, state, and local governments, as well as by voting rights organizations and political candidates to increase turnout in the United States and mitigate attempts to suppress it, voter turnout rates in the United States severely lag behind those of other developed countries.⁶³ Specifically, the United States' 55.7%

<https://www.americanprogress.org/issues/democracy/reports/2018/07/11/453319/increasing-voter-participation-america/>. In the 2016 general election in Utah, VBM was found to increase turnout by up to 7%. See Amelia Showalter, *Utah 2016: Evidence for the Positive Turnout Effects of "Vote at Home" (Also Known as Vote by Mail) in Participating Counties*, PANTHEON ANALYTICS 10 (May 3, 2018), https://docs.wix-static.com/ugd/ef45f5_fcc651c4d4f1456b8340bb4c2cc0ca12.pdf.

⁶⁰ See, e.g., Nathaniel Rakich, *What Happened When 2.2 Million People Were Automatically Registered to Vote*, FIVETHIRTYEIGHT (Oct. 10, 2019), <https://fivethirtyeight.com/features/what-happened-when-2-2-million-people-were-automatically-registered-to-vote/>. In Colorado, Oregon, Rhode Island, and Vermont, overall turnout was higher than among voters who used AVR to register, while in the District of Columbia, the result was the opposite. *Id.* However, when AVR was implemented in California, it was plagued by staffing, security, and administration issues that led to duplicate registrations, non-citizen registrations, and registration of voters who actively chose not to register. *Id.* However, data has shown that the impact of EV on turnout has been negligible. Nathaniel Rakich, *Early-Voting Laws Probably Don't Boost Turnout*, FIVETHIRTYEIGHT (Jan. 30, 2019, 4:26 PM), <https://fivethirtyeight.com/features/early-voting-laws-probably-dont-boost-turnout/>.

⁶¹ See, e.g., For the People Act of 2019, H.R. 1, 116th Cong. (as passed by House of Representatives, Mar. 8, 2019). In 2019, the House passed H.R. 1, a law that, in part, would aim to improve election security, especially from the foreign interference experienced in the 2016 general election. *Id.* § 3000(b). The bill also includes measures to seek to reduce voter purges, end strict voter identification laws and partisan gerrymandering, restore voting rights to those who lost them from a criminal conviction, and create a national AVR program. *Id.* §§ 2502, 1903, 2413, 1013(e)(1)(E), 1012.

⁶² See Amanda Litman & Ross Morales Rocketto, *In 2020 Run for Office Everywhere*, CROOKED MEDIA (Feb. 25, 2020), <https://crooked.com/articles/run-2020-election/>. Relatedly, data shows that when a race is contested, it "can reduce or even eliminate the difference in turnout between elections held [at a time other than at the same time as a midterm or presidential election]." Melissa Marschall & John Lappie, *Turnout in Local Elections: Is Timing Really Everything?*, 17 ELECTION L.J. 221, 231 (2018).

⁶³ See Drew DeSilver, *In Past Elections, U.S. Trails Most Developed Countries in Voter Turnout*, PEW RES. CTR.: FACT TANK, <https://www.pewresearch.org/fact-tank/2018/05/21/u-s-voter-turnout-trails-most-developed-countries/> (last updated Nov. 3, 2020); Niall McCarthy, *U.S. Trails Most Other Developed Nations in Voter Turnout [Infographic]*, FORBES (Nov.

voter turnout rate for its voting age population places it twenty-sixth out of its thirty-two peers from the Organization for Economic Cooperation and Development ("OECD"), a group of largely democratic and developed countries throughout the world.⁶⁴ Many of the OECD countries with higher turnout rates employ compulsory voting laws.⁶⁵ As will be discussed further in Parts II and III, these laws help ensure that elections produce a winner selected by the majority and that all eligible persons have access to the ballot, a feat that the United States should strive for in order to increase ballot access and could potentially achieve by implementing similar laws.

III. AMERICAN ELECTIONS GENERALLY: MAJORITY AND PLURALITY RULE, RANKED CHOICE VOTING, AND COMPULSORY VOTING⁶⁶

Historically, the use of the majority rule system in the United States has been predominant.⁶⁷ The United States famously uses the Electoral College, a type of majority rule system,⁶⁸ in its presidential elections.⁶⁹ Alternatively, many elections throughout the United States

6, 2018, 6:06 AM), <https://www.forbes.com/sites/niallmccarthy/2018/11/06/u-s-trails-most-other-developed-nations-in-voter-turnout-infographic/?sh=1def0793d04e>.

⁶⁴ DeSilver, *supra* note 63; McCarthy, *supra* note 63.

⁶⁵ DeSilver, *supra* note 63; McCarthy, *supra* note 63; *see also Compulsory Voting*, INT'L INST. DEMOCRACY & ELECTORAL ASSISTANCE, <https://www.idea.int/data-tools/data/voter-turnout/compulsory-voting> (last visited Nov. 23, 2020) (providing examples of countries that have enacted compulsory voting laws and how such laws have impacted voter turnout).

⁶⁶ Portions of Parts II and III are adapted from Brandon Marc Draper, *Popular Fallacy: A Public Choice Analysis of Electoral College Reform*, 1 INT'L J. PUB. L. & POL'Y 49 (2011).

⁶⁷ *See, e.g., The Legislative Process*, U.S. HOUSE REPRESENTATIVES, <https://www.house.gov/the-house-explained/the-legislative-process> (last visited Nov. 23, 2020) (discussing the passage of federal laws); ELIZABETH RYBICKI, CONG. RESEARCH SERV., RL31980, SENATE CONSIDERATION OF PRESIDENTIAL NOMINATIONS: COMMITTEE AND FLOOR PROCEDURE 6, 8, 10, 11 (2009); *Basics of the Texas Judicial System*, TEX. JUD. BRANCH, <https://www.txcourts.gov/about-texas-courts/juror-information/basics-of-the-texas-judicial-system/> (last visited Nov. 23, 2020) (discussing civil jury verdicts).

⁶⁸ Draper, *supra* note 66, at 50, 55. The Electoral College is a majority rule system even though the winner can gain only a plurality or even the largest minority of national popular votes. *Id.* However, since a candidate needs to win a majority of Electoral College votes to secure the Presidency, and the national popular vote is ultimately irrelevant, the Electoral College remains a majority rule system. *Id.*

⁶⁹ *Id.* at 50. With respect to presidential elections, a growing number of states have agreed to join the National Popular Vote ("NPV") initiative, a version of a majority/plurality rule election, where each participating state's Electoral College votes are awarded to the national popular vote winner instead of the winner of that state's popular vote. THOMAS

allow for a winner by plurality rule, otherwise known as a winner-take-all system.⁷⁰ Furthermore, a growing minority of jurisdictions have replaced standard majority/plurality rule systems with the majority rule system known as RCV, otherwise known as instant runoff voting.⁷¹ Nevertheless, none of these election systems applied throughout the United States incorporated compulsory voting or legally required its citizens to vote.

A. *Majority and Plurality Rule*

Most American election systems are comprised of some form of a standard, non-RCV, majority rule. The others employ a plurality rule system. One of the main features of a majority rule election is that the minority of voters are made worse off than the majority.⁷²

H. NEALE & ANDREW NOLAN, CONG. RESEARCH SERV., R43823, THE NATIONAL POPULAR VOTE (NPV) INITIATIVE: DIRECT ELECTION OF THE PRESIDENT BY INTERSTATE COMPACT 7–10 (2019). Notably, NPV would only take effect when a group of states representing 270 or more Electoral College votes join this interstate compact. *Id.* at 10. Presently, "15 states and the District of Columbia, controlling 196 electoral votes, have joined the [NPV] compact since 2007." *Id.* at 31. Maine and Nebraska employ yet another version of a plurality rule election known as the Congressional District Method ("CDM"). *Maine & Nebraska*, FAIRVOTE, https://www.fairvote.org/maine_nebraska (last visited Nov. 23, 2020). Under CDM, the "winner of each district is awarded one electoral vote, and the winner of the state-wide vote is then awarded the state's remaining two electoral votes." *Id.*

⁷⁰ *Electoral Systems in the United States*, FAIRVOTE, https://www.fairvote.org/research_electoralsystemsus (last visited Nov. 23, 2020).

⁷¹ See *Ranked Choice Voting in Action: 2017–2018 and Beyond*, FAIRVOTE, <https://fairvote.app.box.com/s/o5nkvsny3at0k3razp7yrg2tzqorwht> (on file with author).

⁷² See DENNIS C. MUELLER, PUBLIC CHOICE III 79 (Cambridge Univ. Press 2003). Consider the following scenarios involving a population of two parties, A and B, voting between two choices, X and Y. Further assume these preferences: A: XpY; B: YpX (A prefers ("p") X to Y and B prefers Y to X), and that A represents 51% of the population while B represents 49%. Other things being equal, assuming a majority rule system and that everyone votes, in a one-time game X will win 51% to 49%. Additionally, A will be made better off, while B will be made worse off. In a repeat game where X and Y vote in two or more consecutive votes, these results may vary. For example, Professors Maxwell Stearns, Todd Zywicki, and Thomas Miceli assessed the findings of Professor William Eskridge and claimed that parties to consecutive votes could trade some benefits from the first vote to gain more benefits from the second, and ultimately increase their overall benefits. MAXWELL STEARNS ET AL., LAW AND ECONOMICS: PRIVATE AND PUBLIC 712 (2018) [hereinafter STEARNS I]. Eskridge's example included three legislators, A, B, and C, voting on Decision 1 (total benefits = 100; A receives 55 and B receives 45) and Decision 2 (total benefits = 120; A, B, and C each receive 40). See William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 284 (1988). In a one-time game under a majority rule system, A and B would

Under a majority rule election, the outcome of the vote will redistribute utility from the minority to the majority.⁷³ One downside to a standard majority rule election is the potential for cycling, which may occur because those in the minority have an incentive to become part of the majority.⁷⁴

The most common form of a majority rule system in the United States is known as majority rule, runoff election ("MRRE").⁷⁵ MRRE is identical to majority rule in elections where the winning candidate receives a majority of votes.⁷⁶ However, when no candidate secures a majority, the two candidates with the most votes face each other in a second election, known as a runoff.⁷⁷ In contrast, a plurality rule voting system only requires that the winner secure the most votes.⁷⁸

B. Ranked Choice Voting

The history of RCV in the United States dates back to the 1940s.⁷⁹ It became more popular in the early 2000s and to date, approximately "[ten-million] voting-age adults live in U.S. jurisdictions that use RCV, or have adopted RCV and plan to implement it for their next round of elections."⁸⁰ In a RCV election with three or

vote for Decision 1 to maximize both their individual and total benefits. *Id.* However, in a repeat game, C may convince A and B to vote for Decision 3, where the result is a net increase of 20 in total benefits (A's benefits would decrease by 15 while B's by 5). *Id.* C could do so if C promised to vote in a later vote such that A and B's increase in total benefits is $20 \leq x$ (because A and B lose 20 in their vote for Decision 3 and C gains 40 from that vote). *Id.*

⁷³ See MUELLER, *supra* note 72, at 83.

⁷⁴ See, e.g., *id.* at 84.

⁷⁵ See *id.* at 147.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* While the Electoral College requires the winner to secure a majority of Electoral College votes to become President, to secure a state's Electoral College votes (except for Maine and Nebraska), the candidate need only secure a plurality of its votes to win that state.

⁷⁹ See *Ranked Choice Voting 101*, FAIRVOTE, https://www.fairvote.org/rcv#where_is_ranked_choice_voting_used (last visited Nov. 23, 2020).

⁸⁰ *Data on Ranked Choice Voting*, FAIRVOTE, https://www.fairvote.org/data_on_rcv#research_snapshot (last visited Nov. 23, 2020). In 2018, Maine became the first state to employ RCV in a statewide election. Ella Nilsen, *Maine Voters Blew up Their Voting System and Started from Scratch*, VOX (June 12, 2018, 7:00 AM), <https://www.vox.com/2018/6/12/17448450/maine-ranked-choice-voting-paul-lepage-instant-run-off-2018-midterms>. This transition was not without controversy as Maine's then-Governor

more candidates,⁸¹ voters rank their preferences for candidates instead of choosing a single candidate.⁸² Their votes are then counted to determine if one candidate secured a majority (at least 51%) of the votes.⁸³ If no candidate secured a majority, then the candidate with the fewest first place votes is eliminated, and the voters' listed rankings are reallocated, with each ranking moving up by one ranking.⁸⁴ This process would repeat until one candidate has earned a majority of the first place votes.⁸⁵ While RCV does not appear to have a strong impact on voter turnout,⁸⁶ its supporters believe that this system helps citizens to "elect a candidate that better reflects the majority of voters"⁸⁷ and that it "more accurately represents the full spectrum of voters."⁸⁸

To demonstrate RCV, consider the following scenario with the five final candidates from the 2020 Democratic presidential primary:⁸⁹

Paul LePage falsely claimed Maine's use of RCV was a "stolen election." See Marina Fang, *Maine Gov. Paul LePage Certifies Election Result but Still Complains It Was 'Stolen'*, HUFFPOST (Dec. 28, 2018, 4:33 PM), https://www.huffpost.com/entry/paul-lepage-maine-ranked-choice-voting_n_5c267e05e4b05c88b7002f8b?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAFAGcJgqrMgBvI-JuCNg_LLzWn9dSQms3HKclemUgNSgCbtF7ul-BNL9D4knt_4BDCL3mYtH_6yYS9MmWLTqMAT6o5xKbNrsfPv5K3VsS6P9wJCCzrYAHhz-cYJC3OKnxlWdeB_2GXrf2JHXzpNdvniXUbJDXcL3Du7jiF_J5phL.

⁸¹ RCV is not required in elections with fewer than three candidates since the winner will always secure a majority of votes cast. See *Reform Options for the Electoral College*, FAIRVOTE, http://archive.fairvote.org/e_college/reform.htm#irv (last updated Dec. 10, 2009, 10:27 PM).

⁸² *Id.* For an in-depth analysis of the costs, benefits, and feasibility of RCV, see also *infra* Part III(C)–(D).

⁸³ See *Reform Options for the Electoral College*, *supra* note 81.

⁸⁴ *Id.* To illustrate, if my first-place candidate was eliminated after the first tally, in the second vote count, my second choice would now be counted as my first choice

⁸⁵ *Id.*

⁸⁶ See DAVID C. KIMBALL & JOSEPH ANTHONY, UNIV. MO.-ST. LOUIS, VOTER PARTICIPATION WITH RANKED CHOICE VOTING IN THE UNITED STATES (2016), <http://www.ums.edu/~kimball/KimballRCV.pdf>.

⁸⁷ *Ranked Choice Voting 101*, *supra* note 79.

⁸⁸ *Id.*

⁸⁹ As many as twenty-three candidates participated in the 2020 Democratic primary. See Alexander Burns et al., *Who's Running for President in 2020?*, N.Y. TIMES, <https://www.nytimes.com/interactive/2019/us/politics/2020-presidential-candidates.html> (last updated Apr. 8, 2020). On April 8, 2020, Bernie Sanders dropped out of the 2020 primary, leaving Joe Biden as the presumptive Democratic nominee for President. Gregory Krieg et al., *Bernie Sanders Drops Out of the 2020 Race, Clearing Joe Biden's Path to the Democratic*

Table 1

	<i>Joe Biden</i>	<i>Bernie Sanders</i>	<i>Michael Bloomberg</i>	<i>Elizabeth Warren</i>	<i>Amy Klobuchar</i>
<i>Voter 1</i>	1st	5th	2nd	4th	3rd
<i>Voter 2</i>	1st	5th	2nd	4th	3rd
<i>Voter 3</i>	1st	5th	2nd	4th	3rd
<i>Voter 4</i>	1st	5th	2nd	4th	3rd
<i>Voter 5</i>	5th	1st	4th	2nd	3rd
<i>Voter 6</i>	5th	1st	4th	2nd	3rd
<i>Voter 7</i>	5th	1st	4th	2nd	3rd
<i>Voter 8</i>	5th	1st	4th	2nd	3rd
<i>Voter 9</i>	2nd	5th	1st	4th	3rd
<i>Voter 10</i>	2nd	5th	1st	4th	3rd
<i>Voter 11</i>	4th	2nd	5th	1st	3rd
<i>Voter 12</i>	4th	2nd	5th	1st	3rd
<i>Voter 13</i>	2nd	5th	3rd	4th	1st

Based on this election, both Biden and Sanders would receive the most first-place votes, but they would not receive the needed majority of seven. Thus, in the "instant runoff," the votes for Klobuchar would no longer count, and the ranks of the candidates below her would move up:

Table 1.B

	<i>Joe Biden</i>	<i>Bernie Sanders</i>	<i>Michael Bloomberg</i>	<i>Elizabeth Warren</i>
<i>Voter 1</i>	1st	4th	2nd	3rd
<i>Voter 2</i>	1st	4th	2nd	3rd
<i>Voter 3</i>	1st	4th	2nd	3rd
<i>Voter 4</i>	1st	4th	2nd	3rd
<i>Voter 5</i>	4th	1st	3rd	2nd
<i>Voter 6</i>	4th	1st	3rd	2nd
<i>Voter 7</i>	4th	1st	3rd	2nd
<i>Voter 8</i>	4th	1st	3rd	2nd

Nomination, CNN, <https://www.cnn.com/2020/04/08/politics/bernie-sanders-drops-out/index.html> (last updated Apr. 8, 2020, 1:17 PM). For the purpose of brevity, this hypothetical is only including the final four candidates.

<i>Voter 9</i>	2nd	4th	1st	3rd
<i>Voter 10</i>	2nd	4th	1st	3rd
<i>Voter 11</i>	3rd	2nd	4th	1st
<i>Voter 12</i>	3rd	2nd	4th	1st
<i>Voter 13</i>	1st	4th	2nd	3rd

After this instant runoff, Biden would lead with five first-place votes but would still fall short of the needed majority, thus another instant runoff would occur. Here, the votes for Warren and Bloomberg would no longer count, and the ranks of the candidates below them would move up:

Table 1.C

	<i>Joe Biden</i>	<i>Bernie Sanders</i>
<i>Voter 1</i>	1st	2nd
<i>Voter 2</i>	1st	2nd
<i>Voter 3</i>	1st	2nd
<i>Voter 4</i>	1st	2nd
<i>Voter 5</i>	2nd	1st
<i>Voter 6</i>	2nd	1st
<i>Voter 7</i>	2nd	1st
<i>Voter 8</i>	2nd	1st
<i>Voter 9</i>	1st	2nd
<i>Voter 10</i>	1st	2nd
<i>Voter 11</i>	2nd	1st
<i>Voter 12</i>	2nd	1st
<i>Voter 13</i>	1st	2nd

Finally, after two instant runoffs, Biden would gain the seven first-place votes needed to win this election, securing the 2020 Democratic nomination for President.

C. Compulsory Voting

In a system with compulsory voting, all eligible citizens must vote, and nonvoters are fined or face other consequences for their

failure to vote.⁹⁰ This measure is effectively employed by several democracies throughout the world.⁹¹ In Belgium, for example, voter turnout is 87.21%, or 31.51% higher than the rate of turnout in the United States.⁹² Some countries, like Australia, use both compulsory voting and RCV.⁹³ Though controversial, compulsory voting has popular supporters,⁹⁴ and the term "compulsory voting" can be highly misleading.⁹⁵ In Australia, for example, citizens may avoid voting if they have a "valid and sufficient reason."⁹⁶ Furthermore, while voting has never been mandatory in the United States, the idea of an action being required by law (with careful exceptions) is not. For example, U.S. citizens are all required to pay federal taxes,⁹⁷ appear for jury

⁹⁰ See *Compulsory Voting*, *supra* note 65. In Australia, for example, nonvoters are fined \$20 unless they provide a "valid and sufficient" reason for not voting. *Infra* note 234. In countries like Greece (before 2001), Venezuela (before 1993), Bolivia, Peru, and Brazil, nonvoters are barred from government and other benefits including eligibility for state employment, foreign travel, government identification, and the ability to conduct financial transactions in banks. Gabriel Cepaluni & F. Daniel Hidalgo, *Compulsory Voting Can Increase Political Inequality: Evidence from Brazil*, MASS. INST. TECH. 2 (2016), https://dspace.mit.edu/bitstream/handle/1721.1/106314/compulsory_voting.pdf?sequence=1&isAllowed=y.

⁹¹ See *Compulsory Voting*, *supra* note 65.

⁹² See DeSilver, *supra* note 63.

⁹³ See *Preferential Voting*, AUSTRALIAN ELECTORAL COMMISSION, <https://www.aec.gov.au/learn/preferential-voting.htm> (last updated Dec. 3, 2019); *infra* note 234.

⁹⁴ Perhaps the most influential supporter of compulsory voting is perhaps President Barack Obama. See Ilya Somin, *President Obama Endorses Mandatory Voting*, WASH. POST (Mar. 19, 2015, 10:20 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/19/president-obama-endorses-mandatory-voting/>.

⁹⁵ See *id.* A possible solution to this "controversy" is to refer to compulsory voting by a term that does not imply that a person absolutely must do something. Recent examples of a name impacting perception of legislation include the Affordable Care Act/ObamaCare and the estate tax/death tax. See, e.g., James Hamblin, *Some Americans Say They Support the Affordable Care Act but Not Obamacare*, ATLANTIC (Oct. 1, 2013), <https://www.theatlantic.com/health/archive/2013/10/some-americans-say-they-support-the-affordable-care-act-but-not-obamacare/280165/>; Joshua Green, *Meet Mr. Death*, AM. PROSPECT (Dec. 19, 2001), <https://prospect.org/features/meet-mr-death/>.

⁹⁶ See *infra* notes 234–36 and accompanying text.

⁹⁷ 26 U.S.C. § 6151 (2018).

duty,⁹⁸ enlist for military service,⁹⁹ contribute to Social Security,¹⁰⁰ and most recently, have healthcare.¹⁰¹

IV. PUBLIC CHOICE, THE "BEST" VOTING RULE, AND AN ANALYSIS OF RANKED CHOICE VOTING COUPLED WITH COMPULSORY VOTING

A. *Public Choice*

Public choice provides a unique framework to explain how RCV, coupled with compulsory voting, is the ideal election system to ensure that election winners always have the majority of support, and that the promise of the Fifteenth Amendment is fulfilled. Public choice "applies the tools of economic analysis to nonmarket decision-making or, perhaps more simply, to politics[, and] have been extended to the study of law and lawmaking institutions."¹⁰² It "helps to restore confidence [in institutions] by demonstrating the inherent limits with any institution and remarkable adaptation of actual lawmaking institutions in overcoming (although certainly not all) of the problems that many scholars have too quickly determined to be intractable."¹⁰³ In my analysis of RCV with compulsory voting, I (1) assume that all relevant individuals act rationally,¹⁰⁴ (2) depict the preference revelation process as analogous to the market (voters engage in exchange),¹⁰⁵ and (3) ask the same questions as traditional price theory (Do equilibria exist? Are they stable? Pareto efficient? How are they obtained?).¹⁰⁶ When I later discuss how to implement this system in the United States, I will further assume that the federal government has the following actors:¹⁰⁷

⁹⁸ 28 U.S.C. § 1864(b) (2018).

⁹⁹ 50 U.S.C. § 3802 (2018). This requirement only applies to males age 18-26.

¹⁰⁰ 26 U.S.C. § 3111(a) (2018).

¹⁰¹ 42 U.S.C. § 18091 (2018).

¹⁰² See STEARNS I, *supra* note 72, at 6.

¹⁰³ MAXWELL STEARNS & TODD ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (2009).

¹⁰⁴ See MUELLER, *supra* note 72, at 1.

¹⁰⁵ *Id.* at 3.

¹⁰⁶ *Id.*

¹⁰⁷ Given their recent history, there is little evidence on a national level that the Republican Party would support an expansion of access to the ballot or voter turnout. See, e.g., Sam Levine, *Trump Says Republicans Would 'Never' Be Elected Again if It Was Easier to Vote*, GUARDIAN (Mar. 30, 2020, 2:32 PM), <https://www.theguardian.com/us-news/2020/mar/30/trump-republican-party-voting-reform-coronavirus>; Ari Berman, *The GOP*

a Democratic President, a Democratic majority in the House of Representatives, and a Democratic majority in the Senate.¹⁰⁸

My selection of RCV with compulsory voting is not meant to imply that it is a perfect voting system. Professor and Nobel Laureate Kenneth J. Arrow proved that every voting system is flawed in a legitimate way, commonly known as "Arrow's Theorem."¹⁰⁹ In his theorem, Arrow proved that no collective decision-making body could concurrently satisfy four fairness conditions:

[R]ange (the outcome must be consistent with the members' selection among any conceivable ordering over three options), *unanimity* (the Pareto criterion,¹¹⁰ but with a twist), *independence of irrelevant alternatives* (in choosing among the options presented, the decision makers are to decide based solely upon the merits and without regard to how they would rank options that might later be preferences of an individual against the contrary preferences of the group as a whole), and *non-dictatorship* (the decision-making rule cannot systematically honor the preferences of an individual against the contrary preferences of the group as a whole), while ensuring [transitivity,¹¹¹ or that] the ability to produce collective results that are rational].¹¹²

In applying Arrow's Theorem to RCV with compulsory voting, my hope is to avoid the nirvana fallacy, which scholars commit "when they identify a perceived institutional defect and then propose fixing the problem by shifting decisional responsibility somewhere else without first assessing whether the alternative institution would be better or worse at performing the assigned task."¹¹³

War on Voting, ROLLING STONE (Aug. 30, 2011, 11:40 PM), <https://www.rollingstone.com/politics/politics-news/the-gop-war-on-voting-242182/>.

¹⁰⁸ See CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., 98-425, INVOKING CLOTURE IN THE SENATE (2017).

¹⁰⁹ See STEARNS I, *supra* note 72, at 550–64.

¹¹⁰ The Pareto criterion holds that "[i]f an individual's preference is unopposed by any contrary preference of any other individual, this preference is preserved in the social ordering." See MUELLER, *supra* note 72, at 583 (citing William Vickrey, *Utility, Strategy, and Social Decision Rules*, 74 Q.J. ECON. 707–35 (1960)).

¹¹¹ Transitivity entails that "[t]he social welfare function gives a consistent ordering of all feasible alternatives. That is, (aPbPc) (aPc), and (aIbIc) (aIc)." *Id.*

¹¹² See STEARNS I, *supra* note 72, at 552.

¹¹³ *Id.* at 516.

B. The "Best" Voting Rule

When selecting which system of voting is "best," scholars commonly seek out a system that has the highest Condorcet efficiency.¹¹⁴ An election winner is Condorcet efficient when they defeat all other candidates in a pairwise comparison and win the election.¹¹⁵ To demonstrate how a candidate can defeat all other candidates in a pairwise comparison, without winning the election, consider the following hypothetical based on the 2016 United States presidential election:

Table 2

	<i>Voter 1</i>	<i>Voter 2</i>	<i>Voter 3</i>	<i>Voter 4</i>	<i>Voter 5</i>
<i>1st</i>	Donald Trump	Donald Trump	Hillary Clinton	Hillary Clinton	Gary Johnson
<i>2nd</i>	Gary Johnson	Hillary Clinton	Jill Stein	Jill Stein	Hillary Clinton
<i>3rd</i>	Jill Stein	Jill Stein	Gary Johnson	Gary Johnson	Jill Stein
<i>4th</i>	Hillary Clinton	Gary Johnson	Donald Trump	Donald Trump	Donald Trump

In this hypothetical, Hillary Clinton is the Condorcet winner, as she defeated Donald Trump 3:2, Gary Johnson 3:2, and Jill Stein 4:1. However, Clinton did not win the election as she did not secure a majority of first-place votes.¹¹⁶

Another consideration for what feature makes an election system the "best" is its utilitarian efficiency. Utilitarian efficiency shows the probability of a voting system to produce a winner approved by the greatest portion of voters.¹¹⁷ Samuel Merrill, III, previously found the

¹¹⁴ See, e.g., T. Nicolaus Tideman & Florenz Plassmann, *Which Voting Rule Is Most Likely to Choose the 'Best' Candidate?*, 158 PUB. CHOICE 331 (2014), <https://www.jstor.org/stable/24507603?seq=1>.

¹¹⁵ See MUELLER, *supra* note 72, at 148.

¹¹⁶ Because this hypothetical election resulted in a tie, it would have to be resolved with a runoff, instant runoff, or other appropriate measure.

¹¹⁷ See MUELLER, *supra* note 72, at 151. For example, in an election with candidates A, B, and C, and voters, X, Y, and Z, assume the following rankings/utilities: X—B/10, C/5, A/0; Y—C/10, B/0, A/-5; Z—A/10, B/8, C/5. Here, B is the Condorcet winner (B defeats A and C 2:1). But, if C won, net utility would equal 20, while if B won, net utility would equal 18. Net utility if A won would equal 5. Furthermore, only C is approved of by all

differing levels of Condorcet and utilitarian efficiency in MRRE and plurality systems, specifically finding that MRRE is both more Condorcet and utilitarian efficient than plurality systems, even when the number of candidates increases.¹¹⁸

More recently, Professors T. Nicolaus Tideman and Florenz Plassmann examined several voting systems to determine which system produced the "best" candidate as the winner.¹¹⁹ Tideman and Plassmann defined "best" as "the one that is closest to the mean of the distribution from which [voters'] ideal points are drawn [or, put differently, the one that] minimizes the aggregate loss of all voters from having a candidate who is not their ideal."¹²⁰ In a comparison of fourteen voting rules, Tideman and Plassmann found that a black rule voting system produces the best candidates, especially in elections with few voters, because, in addition to being Condorcet consistent,¹²¹ it "has the second highest frequency of identifying the best candidate and generally the second lowest rate of resorting to a tie-breaker."¹²² For RCV,¹²³ they found that it was among the voting systems that were *not* Condorcet consistent.¹²⁴ With respect to plurality rule systems, they found that these systems were "significantly worse" at identifying the best candidate than eleven of the fourteen other systems, and as such, "should be set aside in favor of others."¹²⁵ There were, however, several important limitations to this study. First, Tideman and Plassmann noted that "when the number of voters exceeds about 1,000, most voting rules identify the best candidate with comparable

three voters. Thus, C is the utilitarian efficient candidate even though B is the Condorcet efficient candidate.

¹¹⁸ See Samuel Merrill, III, *A Comparison of Efficiency of Multicandidate Electoral Systems*, 28 AM. J. POL. SCI. 23, 45-46 (1984). Merrill also found that both Condorcet and utilitarian efficiency in both MRRE and plurality elections decreased as the number of candidates increased. *Id.* at 28, 39.

¹¹⁹ See Tideman & Plassmann, *supra* note 114, at 331.

¹²⁰ *Id.* at 338.

¹²¹ An election rule is Condorcet consistent when it always produces a Condorcet winner. *Id.* at 340.

¹²² *Id.* at 351. Tideman and Plassmann note the limitations of their study, specifically that their results are "valid only for elections with three candidates." *Id.* at 352.

¹²³ In Tideman and Plassmann's study, they refer to RCV as "[t]he Alternative Vote." *Id.* at 340.

¹²⁴ *Id.*

¹²⁵ *Id.* at 351.

frequency.¹²⁶ However, an important exception to this limitation is the plurality rule, which retains this inability.¹²⁷ Second, their results were limited to elections with three candidates.¹²⁸ This limitation is important because United States elections do not limit the number of candidates who may compete,¹²⁹ and most elections involve more than one-thousand voters.¹³⁰ Thus, while plurality rule continues to be an inferior voting system, RCV and black rule systems demonstrate a similar ability to identify the best candidate in elections that resemble the features of most seen in the United States.¹³¹

C. Public Choice Benefits of RCV and Compulsory Voting

When analyzed through the lens of public choice, the benefits of a RCV system with compulsory voting, to the degree that they enhance ballot access, increase voter turnout, and ensure the promises of the Fifteenth Amendment, are readily apparent.¹³² Most notably, such benefits are seen through representativeness.

Representativeness is the power of a voting system to accurately reflect the choice of the voters.¹³³ Because RCV necessarily involves the possibility of a runoff to ensure that the winning candidate has

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 352. They further noted that, in order to conduct a similar study with four candidates, they would need a new algorithm which they have not yet developed.

¹²⁹ Meghann Mollerus, *Verify: Is There a Cap on Presidential Candidates?*, WFMY NEWS 2, <https://www.wfmynews2.com/article/news/local/verify/verify-is-there-a-cap-on-presidential-candidates/83-c6711779-69e3-43ea-ae36-05b954e93ff6> (last updated May 6, 2019, 5:04 PM).

¹³⁰ See DeSilver, *supra* note 63.

¹³¹ See Tideman & Plassmann, *supra* note 114, at 343, 351–52.

¹³² See *Benefits of Ranked Choice Voting*, FAIR VOTE, <https://www.fairvote.org/rcv-benefits> (last visited Nov. 23, 2020) (discussing advantages of RCV, including ballot access); Chris Weller, *Half of Americans Probably Won't Vote – But Requiring Them to Would Change That*, BUS. INSIDER (Nov. 7, 2016, 10:58 AM), <https://www.businessinsider.com/compulsory-voting-what-if-americans-have-to-vote-2016-11> (discussing a projected increase in voter turnout generally if voting were mandatory, and specifically an increase in participation among minority groups).

¹³³ Guido Ortona, *A Weighted-Voting Electoral System That Performs Quite Well 2* (Inst. of Pub. Policy & Public Choice, POLIS Working Paper No. 4, June 1999), https://www.dig-spes.uniupo.it/sites/default/files/elfinder_library/file/polis/pubbl/RePEc/uca/ucapdv/ortona2.pdf.

earned a majority of first-place votes,¹³⁴ it maximizes representativeness better than the standard majority rule and plurality rule systems present in the United States. Furthermore, because runoffs in an RCV system are instantaneous, they are more cost effective than those in a standard MRRE system, which requires a new election on a new date.¹³⁵ Representativeness is especially important with respect to a system that employs compulsory voting because of the increased percentage of people who vote and have their choices represented.¹³⁶ Although countries that have compulsory voting do not represent the choices of 100% of the voting-eligible population, voter turnout in such countries is up to 31.51% greater than it is in the United States; therefore, countries with compulsory voting are significantly more representative than the United States.¹³⁷ Another benefit of RCV is that it avoids the "spoiler effect" that is possible in plurality rule elections with three or more candidates.¹³⁸ The "spoiler effect" occurs when candidates representing the majority split their total votes, thereby allowing a candidate representing the minority to win the most votes and thus, the election.¹³⁹

Compulsory voting also has several benefits. The most immediate impact would be a likely increase in turnout.¹⁴⁰ For example, voter

¹³⁴ This only applies where there are three or more candidates and, after the first vote tabulation, the leader has not secured a majority of first-place votes.

¹³⁵ Costs often include the additional money paid by taxpayers to conduct a runoff, and the additional money candidates must raise and spend to campaign for the runoff. See, e.g., Alec Slatky & Rob Richie, *Time's up on Costly Runoff Elections*, POLITICO (July 13, 2010, 4:47 AM), <https://www.politico.com/story/2010/07/times-up-on-costly-runoff-elections-039611>.

¹³⁶ See *Compulsory Voting*, *supra* note 65.

¹³⁷ See DeSilver, *supra* note 63. *But see* Cepaluni & Hidalgo, *supra* note 90, at 8 (finding that compulsory voting laws in Brazil were more likely to increase voting among more educated citizens).

¹³⁸ See *Correcting the Spoiler Effect*, FAIRVOTE, <https://archive3.fairvote.org/reforms/instant-runoff-voting/irv-and-the-status-quo/spoiler-effect/> (last visited Nov. 23, 2020). In 2016, for example, Clinton defeated Trump in Maine but won less than 48% of the vote. Russell Berman, *A Step Toward Blowing Up the Presidential-Voting System*, ATLANTIC (Sept. 20, 2019), <https://www.theatlantic.com/politics/archive/2019/09/ranked-choice-voting-2020/598303/>. If those who voted for a third-party candidate preferred Trump to Clinton, their votes likely "spoiled" a victory in Maine for Trump. *Id.* If RCV had been implemented, those who voted for a third-party candidate first may have voted for Trump second, and the instant runoff could have led to a win in Maine for Trump. See *id.*

¹³⁹ *Correcting the Spoiler Effect*, *supra* note 138.

¹⁴⁰ See Michael M. Bechtel et al., *Does Compulsory Voting Increase Support for Leftist Policy?*, 60 AM. J. POL. SCI. 752, 753, 765 (2016).

participation rates in countries with compulsory voting laws are 7% to 15% higher than in those without such laws.¹⁴¹ This increase would represent the largest increase in turnout in the United States since turnout increased by approximately 22.4% between the 1836 and 1840 presidential elections.¹⁴² Notably, Tiffany D. Barnes and Gabriela Rangel recently found that increased turnout, a positive effect of compulsory voting, is largely neutralized in elections that are highly competitive.¹⁴³ However, since many elections in the United States are either uncontested or are otherwise uncompetitive,¹⁴⁴ compulsory voting can consistently increase voter turnout in ordinarily uncompetitive elections. As suggested by Barnes and Rangel, when voting is compulsory, campaigns can focus on appeals to casting a thoughtful and reasoned vote, rather than on trying to get people to vote.¹⁴⁵ Such benefits are not limited to increased voter turnout. Previous research has found that compulsory voting is linked to a reduction in the socioeconomic inequalities in voting,¹⁴⁶ the adoption of redistributive policies,¹⁴⁷ a reduction in income inequality,¹⁴⁸ and a strengthening of citizens' sense of fulfilling their civic duty.¹⁴⁹ Furthermore, even though compulsory

¹⁴¹ *Id.* at 754; see also Shane Singh, *How Compelling Is Compulsory Voting? A Multi-level Analysis of Turnout*, 33 POL. BEHAV. 95, 98 (2011).

¹⁴² *Voter Turnout in Presidential Elections*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/data/voter-turnout-in-presidential-elections> (last visited Nov. 23, 2020).

¹⁴³ Tiffany D. Barnes & Gabriela Rangel, *Subnational Patterns of Participation: Compulsory Voting and the Conditional Impact of Institutional Design*, 71 POL. RES. Q. 826, 834–35 (2018).

¹⁴⁴ See, e.g., Matt Taibbi, *Far Too Many House Seats Have Been Uncontested for Too Long*, ROLLING STONE (Nov. 6, 2018, 3:32 PM), <https://www.rollingstone.com/politics/politics-features/uncontested-house-seats-history-752658/>.

¹⁴⁵ Barnes & Rangel, *supra* note 143, at 837–38.

¹⁴⁶ Ruth Dassonneville & Marc Hooghe, *Voter Turnout Decline and Stratification: Quasi-Experimental and Comparative Evidence of a Growing Educational Gap*, 37 POLITICS 184–200 (2017); see also Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2165 (1996) [hereinafter Hasen I] (citing Malcolm M. Feeley, *A Solution to the "Voting Dilemma" in Modern Democratic Theory*, 84 ETHICS 235, 241 (1974)).

¹⁴⁷ Bechtel et al., *supra* note 140, at 755; see Anthony Fowler, *Electoral and Policy Consequences of Voter Turnout: Evidence from Compulsory Voting in Australia*, 8 Q.J. POL. SCI. 159–82 (2013).

¹⁴⁸ John M. Carey & Yusaku Horiuchi, *Compulsory Voting and Income Inequality: Evidence for Lijphart's Proposition from Venezuela*, 59 LATIN AM. POL. & SOC'Y 122, 122–23 (2017).

¹⁴⁹ See Fernando Feitosa et al., *Does Compulsory Voting Foster Civic Duty to Vote?*, 19 ELECTION L.J.: RULES, POL., & POL'Y 19–44 (2020). The authors define "civic duty" as "a

voting is unlikely to change the result of most elections, its implementation would effectively remove the criticism that a candidate won due to low turnout.¹⁵⁰ Although the purpose in implementing this policy is to ensure the promises of the Fifteenth Amendment and increase voter turnout, these tangential benefits would likely be welcomed by many within the United States.¹⁵¹

D. Public Choice Costs of RCV and Compulsory Voting

A system of RCV with compulsory voting is not without flaws.¹⁵² For example, in an election that does not yield a majority winner after the first count, the eventual winner will technically be the original first choice of less than a majority of the voting population.¹⁵³ Thus, while the winner will have eventually earned a majority, it will only be after she did so with the help of voters who originally ranked her second or lower.¹⁵⁴ This system also fails to accurately reflect the intensity of the voters' preferences.¹⁵⁵ As demonstrated by

belief that one has a moral obligation to vote in an election." *Id.* at 21. The authors' study focused on Chile, which abolished compulsory voting in 2012. *Id.* at 23. They found that civic duty would have been "10 percentage points higher in 2015" had Chile retained compulsory voting. *Id.* at 26.

¹⁵⁰ See John Sides et al., *If Everyone Had Voted, Would Bubba and Dubya Have Won?*, 38 PRESIDENTIAL STUD. Q. 521, 521–39 (2008). Here, the authors found that "universal turnout would only change the outcome of an already close contest rather than leading to a wholesale transformation of competitive dynamics." *Id.* at 521. However, because this likely would have changed the result in the 1992, 2000, and 2004 presidential elections, the impact of this small change could be transformative. *Id.* at 523; see also *The Silent-Near Majority: If Everyone Had Voted, Hillary Clinton Would Probably Be President*, ECONOMIST (July 6, 2019), <https://www.economist.com/graphic-detail/2019/07/06/if-everyone-had-voted-hillary-clinton-would-probably-be-president>.

¹⁵¹ Barnes & Rangel, *supra* note 143, at 827, 837.

¹⁵² RCV, by itself, may also reduce voter turnout. See Jason A. McDaniel, *Electoral Rules and Voter Turnout in Mayoral Elections: An Analysis of Ranked-Choice Voting*, SEMANTIC SCHOLAR 5 (2019), https://pdfs.semanticscholar.org/ea71/77f2007860a9b1ad13ce4142d05753f96f3a.pdf?_ga=2.267512454.966626099.1592414519-1225594456.1592414519. Since I am proposing to couple RCV with compulsory voting, this potential flaw will not be discussed in further detail.

¹⁵³ *Correcting the Spoiler Effect*, *supra* note 138.

¹⁵⁴ Anna Purna Kambhampaty, *New York City Voters Just Adopted Ranked-Choice Voting in Elections. Here's How It Works*, TIME (Nov. 6, 2019, 5:45 PM), <https://time.com/5718941/ranked-choice-voting/>.

¹⁵⁵ In other words, voting for a certain candidate does not necessarily mean that candidate is the voter's preference. See Eric Pacuit, *Voting Methods*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/voting-methods/> (last updated June 24, 2019).

the 2016 presidential election, a candidate can win the Electoral College or the national popular vote while being extremely unpopular with those who voted for the other candidate or the electorate at large.¹⁵⁶ To be sure, no American voting system for governmental office currently considers intensity of preferences when determining the winner. While the goal of changing to RCV with compulsory voting is to improve the current American election systems, this system does not meet that goal with respect to intensity of preferences.

RCV with compulsory voting in the United States may also suffer from the fallacy of composition, which is the "assumption that if phenomenon X produces result Y, more of phenomenon X will produce more of result Y."¹⁵⁷ Presently, many countries, jurisdictions, and other organizations conduct elections with RCV, compulsory voting, or both.¹⁵⁸ However, none have the voting-eligible population of the United States. Specifically, the United States population is approximately 328,000,000,¹⁵⁹ while the next largest country that uses both RCV and compulsory voting is Australia, whose population is approximately 25,000,000.¹⁶⁰ Thus, there is no data to show that a country as large as the United States could use RCV with compulsory voting on a national level as successfully as Australia.

One feature of voting systems that is particularly important when considering a switch to RCV with compulsory voting is strategic voting, which may occur when a voter decides to vote for a candidate other than the one that they prefer most.¹⁶¹ There are several reasons

¹⁵⁶ For example, in 2016, both Clinton and Trump were historically unpopular candidates for President. See Lydia Saad, *Trump and Clinton Finish with Historically Poor Images*, GALLUP (Nov. 8, 2018), <https://news.gallup.com/poll/197231/trump-clinton-finish-historically-poor-images.aspx>.

¹⁵⁷ See STEARNS I, *supra* note 72, at 517–18. A commonly cited example of this fallacy is a home alarm system. When one person in a neighborhood has an alarm, burglars are likely diverted to homes without one. But when every home has an alarm, such benefit is greatly reduced. *Id.* at 518.

¹⁵⁸ See *Where Ranked Choice Voting Is Used*, FAIRVOTE, https://www.fairvote.org/where_is_ranked_choice_voting_used (last visited Nov. 23, 2020); see also *Compulsory Voting*, *supra* note 65.

¹⁵⁹ *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last visited Nov. 23, 2020).

¹⁶⁰ *Population Clock*, AUSTRALIAN BUREAU STAT., <https://www.abs.gov.au/austats/abs%40.nsf/94713ad445ff1425ca25682000192af2/1647509ef7e25faaca2568a900154b63?OpenDocument> (last visited Nov. 23, 2020).

¹⁶¹ See STEARNS I, *supra* note 72, at 28–29.

to vote strategically.¹⁶² For example, in parliamentary governments,¹⁶³ someone may vote strategically because (1) they do not want to vote for a candidate who likely cannot win; or (2) they do not want to vote for a political party that likely cannot "join[] the coalition that forms the government."¹⁶⁴ In primary elections in the United States, "many voters base their votes in significant part on the apparent electoral viability of the available candidates, rather than on which of those candidates is closest to their "ideal point."¹⁶⁵

Strategic voting may also be encouraged by candidates. For example, in the 2018 San Francisco mayoral election, which utilized an RCV system, candidates Mark Leno and Jane Kim each endorsed the other as their second choice so as to prevent the election of their main competitor, London Breed.¹⁶⁶ Similarly, on the eve of Super Tuesday in the 2020 Democratic primary, a plurality rule system, candidates Pete Buttigieg and Amy Klobuchar dropped out of the election and endorsed Joe Biden.¹⁶⁷ However, vote swapping, a form

¹⁶² See, e.g., GARY W. COX, MAKING VOTES COUNT (James E. Alt & Douglass C. North eds., Cambridge Univ. Press 1997). However, the likelihood of strategic voting drastically decreases in uncompetitive or uncontested elections. See *id.* at 85–89.

¹⁶³ This is "a system of government having the real executive power vested in a cabinet composed of members of the legislature who are individually and collectively responsible to the legislature." *Parliamentary Government*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/parliamentary%20government> (last visited Nov. 23, 2020).

¹⁶⁴ MUELLER, *supra* note 72, at 296.

¹⁶⁵ STEARNS I, *supra* note 72, at 28 (citing Abramson et al., "Sophisticated" Voting in the 1988 Presidential Primaries, 86 AM. POL. SCI. REV. 55 (1992)).

¹⁶⁶ See *San Francisco Mayoral Candidates Team Up in Rank Choice Voting Strategy*, KTVU FOX 2 (May 10, 2018), <https://www.ktvu.com/news/san-francisco-mayoral-candidates-team-up-in-rank-choice-voting-strategy>. Their strategy was ultimately unsuccessful as Breed defeated Leno and Kim by securing approximately 60% of first-place votes. See Associated Press, *San Francisco Mayor London Breed Claims Election Victory*, L.A. TIMES (Nov. 5, 2019, 10:54 PM), <https://www.latimes.com/california/story/2019-11-04/san-francisco-mayor-london-breed-faces-an-easy-reelection-but-a-daunting-list-of-challenges>.

¹⁶⁷ See Elena Moore & Miles Parks, *Pete Buttigieg and Amy Klobuchar Endorse Joe Biden*, NPR (Mar. 2, 2020, 1:39 PM), <https://www.npr.org/2020/03/02/800856100/sen-amy-klobuchar-ends-presidential-campaign>. This strategy appears to have succeeded as Biden secured several victories on Super Tuesday and is now the Democratic nominee for President. See Domenico Montanaro, *5 Takeaways from Super Tuesday and Joe Biden's Big Night*, NPR (Mar. 4, 2020, 5:00 AM), <https://www.npr.org/2020/03/04/811868704/5-takeaways-from-super-tuesday-and-joe-bidens-big-night>; Toluse Olorunnipa et al., *Joe Biden Officially Becomes the Democratic Party's Nominee on Convention's Second Night*, WASH. POST (Aug. 19, 2020, 12:07 AM), <https://www.washingtonpost.com/elections/2020/08/18/democratic-national-convention-live-updates/>.

of strategic voting where someone pays another to vote (or not vote) in a specific way, is unlikely as it is usually illegal.¹⁶⁸

While the costs of runoffs are eliminated in RCV with compulsory voting, the demands for a recount may be just as likely.¹⁶⁹ Perhaps the most famous attempted recount occurred in the 2000 presidential election, where Democratic nominee Al Gore sought a recount of the vote in Florida.¹⁷⁰ At the time, William R. Brody, then-President of Johns Hopkins University, determined that a "plurality of 300 votes out of nearly 6 million votes cast constitutes a margin of only 1 in 20,000."¹⁷¹ In that vote, an accurate recount would require an error rate of less than 0.00005%. Put differently, if an election worker made one error for every twenty-thousand votes recounted, his error would prevent an accurate recount.

With RCV, recounts likely become much more difficult to administer. First, depending on the number of candidates in the election, election workers would need to recount both the number of votes and the rank of each vote.¹⁷² Second, losing candidates, other than the second-place candidate, may demand a recount if she believed a recount would place her in the instant runoff.¹⁷³ In a political climate where losing candidates are claiming that the election is "rigged,"

¹⁶⁸ See, e.g., Maxwell L. Stearns, *Direct (Anti-)Democracy*, 80 GEO. WASH. L. REV. 311, 354 (2012); Jesse Sisgold, *Vote-Swapping over the Internet: Free Speech or Voter Corruption?*, 24 HASTINGS COMM. & ENT. L.J. 149, 152–53 (2001).

¹⁶⁹ See James P. Langan, *Instant Runoff Voting: A Cure That Is Likely Worse than the Disease*, 46 WM. & MARY L. REV. 1569, 1583 (2005); see also *Audits and Recounts*, FAIRVOTE, https://www.fairvote.org/audits_and_recounts (last visited Nov. 23, 2020).

¹⁷⁰ See *How We Got Here: A Timeline of the Florida Recount*, CNN (Dec. 13, 2000, 9:03 PM), <https://www.cnn.com/2000/ALLPOLITICS/stories/12/13/got.here/index.html>.

¹⁷¹ William R. Brody, *The Truth About Recounts*, WASH. POST (Nov. 22, 2000), <https://www.washingtonpost.com/archive/opinions/2000/11/22/the-truth-about-recounts/cf1e6f7f-5c79-4d56-9058-37420bbf202f/>. In Florida, a state where approximately six million votes were cast, George W. Bush defeated Al Gore by approximately 537 votes. See Eileen J. Canavan & R. Bryan Whitener, *Federal Elections 2000: Election Results for the U.S. President, the U.S. Senate and the U.S. House of Representatives*, FED. ELECTION COMMITTEE 12 (June 2001), <https://www.fec.gov/resources/cms-content/documents/federal-elections00.pdf> (providing that, in Florida, Bush received 2,912,790 votes while Gore received 2,912,253 votes).

¹⁷² See *Conducting a Statewide Hand-Recount with Ranked Choice Voting*, FAIRVOTE 1, https://d3n8a8pr07vhmx.cloudfront.net/fairvote/pages/3042/attachments/original/1450458099/FV_RCV_Recounts_Memo.pdf (last visited Nov. 23, 2020).

¹⁷³ See *id.*

simply because they lost, or even before the election has occurred, recounts in RCV could be problematic.¹⁷⁴

Finally, RCV may be susceptible to monotonicity failure, which occurs when "getting more (first preference) votes [in the first count] may result in defeat for a candidate who would otherwise win[,] and getting fewer votes may result in victory for a candidate who would otherwise lose."¹⁷⁵ Notably, the 2009 mayoral election in Burlington, Vermont produced such a result.¹⁷⁶ This feature of RCV may also produce two types of strategic voting: (1) "candidate X loses when everyone votes sincerely but some supporters of X can cause X to win by strategically lowering X in their ballot rankings[.]" or (2) "X wins when everyone votes sincerely but X loses when some voters who have Y as their first preference and Z as their second strategically move X to the top of their rankings."¹⁷⁷ Or worse, a candidate may successfully campaign to the extent that voters increase the candidate's ranking when they place their votes, and such increase then causes the candidate to lose to the election.¹⁷⁸ However, as stated in the title of Nicholas Miller's study, his results are limited to RCV elections with only three candidates.¹⁷⁹ This limitation is important since many elections in the United States, including the 2020 Democratic primary and 2016 Republican primary, featured well over three

¹⁷⁴ For example, in 2019, Matt Bevin initially publicly questioned the legitimacy of the election for Governor of Kentucky, in which he lost to Andy Beshear, even though no reliable or respectable data suggested any issue with the election. See Miles Parks, *Skeptics Urge Bevin to Show Proof of Fraud Claims, Warning of Corrosive Effects*, NPR (Nov. 10, 2019, 7:01 AM), <https://www.npr.org/2019/11/10/77730061/skeptics-urge-bevin-to-show-proof-of-fraud-claims-warning-of-corrosive-effects>.

¹⁷⁵ Nicholas R. Miller, *Closeness Matters: Monotonicity Failure in IRV Elections with Three Candidates*, 173 PUB. CHOICE 91, 92 (2017). As stated in the title, Miller's study is limited to RCV elections with only three candidates. *Id.*

¹⁷⁶ *Id.* at 92–93.

¹⁷⁷ *Id.* at 106.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 91–92; see also Adam Graham-Squire & N. Zayatz, *Lack of Monotonicity Anomalies in Empirical Data of Instant-Runoff Elections*, J. REPRESENTATIVE DEMOCRACY (2020) (finding that the 2009 Burlington mayoral election was the only RCV election out of over one-hundred studied that demonstrated monotonicity failure).

candidates.¹⁸⁰ Furthermore, it appears unlikely that either major political party could successfully strategize to produce their intended result.¹⁸¹

Like any feature of an election system, compulsory voting also has potential flaws.¹⁸² Most prominently, these include "crowding out,"¹⁸³ the quality of the vote/uniformed voters,¹⁸⁴ dissatisfaction with democracy,¹⁸⁵ false legitimacy,¹⁸⁶ the level of improperly cast ballots,¹⁸⁷ and enforcement.¹⁸⁸ Another interesting potential flaw of compulsory voting is its ability to exacerbate inequality in turnout where there is a non-monetary penalty for failing to vote.¹⁸⁹ Gabriel Cepaluni and F. Daniel Hidalgo recently found that "the causal effect of compulsory voting among the more educated is at least twice the size of the

¹⁸⁰ See *Democratic Presidential Nomination, 2020*, BALLOTPEDIA, https://ballotpedia.org/Democratic_presidential_nomination_2020 (last visited Nov. 23, 2020); Carl Bialik, *How the Republican Field Dwindled from 17 to Donald Trump*, FIVETHIRTYEIGHT (May 5, 2016, 4:38 PM), <https://fivethirtyeight.com/features/how-the-republican-field-dwindled-from-17-to-donald-trump/>.

¹⁸¹ See Miller, *supra* note 175, at 106.

¹⁸² Issues related to implementing compulsory voting will be discussed in Part IV.

¹⁸³ Emilee Booth Chapman, *The Distinctive Value of Elections and the Case for Compulsory Voting*, 63 AM. J. POL. SCI. 101, 106–07 (2019).

¹⁸⁴ Ruth Dassonneville et al., *Compulsory Voting Rules, Reluctant Voters and Ideological Proximity Voting*, 41 POL. BEHAV. 209 (2018).

¹⁸⁵ Shane P. Singh, *Compulsory Voting and Dissatisfaction with Democracy*, 48 BRITISH J. POL. SCI. 843 (2018).

¹⁸⁶ Keith Jakee & Guang-Zhen Sun, *Is Compulsory Voting More Democratic?*, 129 PUB. CHOICE 61, 69–71 (2006).

¹⁸⁷ See Barnes & Rangel, *supra* note 143, at 830. Higher rates of invalidly cast ballots are found where voting is compulsory. *Id.* However, while studies show that up to 5% of votes in Australia were invalidly cast, data suggests that most were due to "the interaction between low levels of literacy, numeracy and English language competence and a complex voting system" as opposed to protest votes. Lisa Hill & Sally Young, Note, *Protest or Error? Informal Voting and Compulsory Voting*, 42 AUSTRALIAN J. POL. SCI. 515, 515 (2007). Also, traditionally marginalized groups appear more likely to cast a valid vote where voting is mandatory. See Barnes & Rangel, *supra* note 143, at 837. One way to ensure that all ballots cast were valid would be to remove secrecy from the ballot. However, such measure is a clear First Amendment violation, thus not viable or appropriate. Furthermore, when citizens learn that their vote is secret, data suggests that turnout can increase by 3.5%. See Alan S. Gerber et al., *Do Perceptions of Ballot Secrecy Influence Turnout? Results from a Field Experiment*, 57 AM. J. POL. SCI. 537, 538 (2013).

¹⁸⁸ See Hasen I, *supra* note 146, at 2175.

¹⁸⁹ See Cepaluni & Hidalgo, *supra* note 90, at 273–80.

effect among those with less education.¹⁹⁰ The authors attribute this difference to the penalty associated with not voting.¹⁹¹

V. HOW TO IMPLEMENT RCV WITH COMPULSORY VOTING IN THE U.S. AND POTENTIAL PITFALLS

While RCV with compulsory voting is preferable to most American voting systems in its ability to ensure that the winner secures a majority and to uphold the promise of the Fifteenth Amendment, the path to successful implementation on a national scale is likely to be difficult. Furthermore, even if this system can be implemented, it is also likely to face a variety of legal challenges.

A. *Structure of Potential RCV and Compulsory Voting Laws*

1. RCV

Although RCV is only implemented in a handful of states and jurisdictions throughout the United States, local RCV laws from Maine, San Francisco, and Minneapolis serve as a useful guide to the potential structure of future RCV laws in additional states and local jurisdictions. For example, the 128th Legislature for the State of Maine enacted RCV as its voting system for federal House and Senate elections.¹⁹² Their law provides a brief definition of RCV, other relevant definitions, and procedures for vote tabulation, write-in candidates, procedures, and ties.¹⁹³ RCV laws from San Francisco and Minneapolis also provide tested guides for effective local RCV laws.¹⁹⁴ Furthermore, should a city, state, or other jurisdiction seek guidance

¹⁹⁰ *Id.* at 273.

¹⁹¹ *Id.* at 279.

¹⁹² ME. STAT. tit. 21-A, § 1 (2015). The law also allows for RCV to be used in gubernatorial and state races, but Maine must first amend its Constitution to do so. *See Rachel Withers, The Somewhat Absurd Controversy Over Maine's Ranked-Choice Voting System, Explained*, VOX (Dec. 9, 2018, 5:08 PM), <https://www.vox.com/2018/12/9/18133184/maine-ranked-choice-voting-australia-ireland>.

¹⁹³ tit. 21-A, § 1, 723-A.

¹⁹⁴ S.F., CAL., CHARTER art. 13, § 13.102(b) (2002); MINNEAPOLIS, MINN. CHARTER art. 3, § 3.1(b) (2013); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 8.5, ch. 167, §§ 167.10–167.140 (2008).

to create and implement an effective RCV law, FairVote provides templates for laws, ballots, and other best practices.¹⁹⁵

Most importantly, RCV laws from Maine, San Francisco, and Minneapolis have all withstood a variety of constitutional challenges.¹⁹⁶ Specifically, in *Minnesota Voters Alliance* (“MVA”), *Dudum*, and *Baber*; RCV opponents claimed that RCV violated the VRA,¹⁹⁷ Article 1 of the United States Constitution,¹⁹⁸ the Fourteenth Amendment (Equal Protection and/or Due Process),¹⁹⁹ and the First Amendment.²⁰⁰ Furthermore, they claimed that because RCV imposes a severe burden on voters, it is both subject to and cannot overcome strict scrutiny.²⁰¹ With respect to these claims, courts have found that RCV is constitutional, and that it does not impose a severe burden on voters.²⁰² In *Dudum*, the court acknowledged that severe burdens on voting regulations are subject to “strict scrutiny,”²⁰³ but found that, as in this case, where “non-severe, [l]esser burdens’ on voting are at stake, we apply ‘less exacting review, and a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.”²⁰⁴ Ultimately, the court determined that the City of San

¹⁹⁵ See *Resources and Links*, FAIRVOTE, https://www.fairvote.org/rev_resources_and_links (last visited Nov. 23, 2020); see also *RCV Ballot Design*, FAIRVOTE, https://www.fairvote.org/rev_ballot_design (last visited Nov. 23, 2020).

¹⁹⁶ See *Minn. Voters All. v. City of Minneapolis*, 766 N.W.2d 683 *passim* (Minn. 2009); *Dudum v. Arntz*, 640 F.3d 1098, 1101 (9th Cir. 2011); *Baber v. Dunlap*, 376 F. Supp. 3d 125 *passim* (D. Me. 2018). In *Dudum*, the Ninth Circuit ruled on the constitutionality of “restricted” RCV in San Francisco. 640 F.3d at 1101 (“[San Francisco’s RCV law] provides that if the voting system or equipment cannot feasibly accommodate ranking [all of available] choices, the Director of Elections can limit the number of candidates to no fewer than three.”) (citing S.F., CALL, CHARTER art. 13, § 13.102(b) (2002)). In practice, the Department limited the number of rankings on all RCV ballots to three. *Id.*

¹⁹⁷ See, e.g., *Baber*, 376 F. Supp. 3d at 133.

¹⁹⁸ See, e.g., *id.* at 133–38.

¹⁹⁹ See *id.* at 138–45; see also *Minn. Voters All.*, 766 N.W.2d at 698.

²⁰⁰ See *Baber*, 376 F. Supp. 3d at 145.

²⁰¹ See *Dudum*, 640 F.3d at 1106–17; see also *Minn. Voters All.*, 766 N.W.2d at 689–97.

²⁰² The court in *Baber* did not address whether RCV violated the VRA because the “[p]laintiffs [had] not alleged facts or otherwise shown that the Voting Rights Act has any application to this case.” 376 F. Supp. 3d at 133.

²⁰³ When subject to strict scrutiny, the voting law “must be narrowly drawn to advance a state interest of compelling importance.” *Burdick v. Takuski*, 504 U.S. 428, 434 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

²⁰⁴ 640 F.3d at 1106 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)).

Francisco's interest in "maintaining the orderly administration of [its] elections and avoiding voter confusion[.]"²⁰⁵ decreasing election costs,²⁰⁶ and "providing voters an opportunity to express nuanced voting preferences and elect[] candidates with strong plurality support[.]"²⁰⁷ met the lower burden of rational basis scrutiny.²⁰⁸

As stated in *Baber*, "[t]he First Article of the Constitution, in effect, assigns to the People of the Several states the authority to choose their representatives to the national Congress, and directs that the States shall prescribe the times, places, and manner by which representatives are chosen."²⁰⁹ The court in *Baber* rejected the plaintiffs' argument that Article 1 further required states to conduct elections solely under plurality rule systems.²¹⁰ Ultimately, the court in *Baber* found that "RCV is not invalidated by Article 1 because there is no textual support for such result and because it is not inherently inconsistent with our Nation's values."²¹¹ Thus, should RCV be implemented on the state-level, these states should be able to overcome claims that it violates Article 1.

The courts in *Baber* and *MVA* also rejected claims that RCV violated the Equal Protection and Due Process clauses of the Fourteenth Amendment. In *Baber*, the court found that the plaintiffs could not demonstrate that RCV caused their votes to receive less weight than others in the State, and it noted that even plaintiffs' election law expert testified that the plaintiffs "participated fully in the election."²¹² Regarding Equal Protection, the court also found that RCV allowed Maine to "realize the perceived benefits of a majority candidate, while avoiding the shortcomings of a run-off election."²¹³ Finally, with respect to Due Process, the court in *Baber* noted that even if RCV ballots were more confusing than ballots that ask the voter to select one candidate, the "Constitution does not require an

²⁰⁵ *Id.* at 1115.

²⁰⁶ San Francisco found that each runoff election costs between \$1.5 million and \$3 million. *Id.* at 1116.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ 376 F. Supp. 3d 125, 134 (D. Me. 2018)

²¹⁰ *Id.*

²¹¹ *Id.* at 137.

²¹² *Id.* at 141.

²¹³ *Id.* at 142.

easy ballot[,]”²¹⁴ and it is not “unduly burdensome for voters to educate themselves about the candidates in order to determine the best way to rank preferences.”²¹⁵ On the local level, the court in *MVA* similarly rejected the plaintiffs’ Equal Protection claims and found that in RCV “every ballot and every vote is counted by the same rules and standards.”²¹⁶

Regarding the First Amendment, the court in *Baber* found that RCV “actually encourages First Amendment expression, without discriminating against any voter based on viewpoint, faction, or other invalid criteria.”²¹⁷ As such, the court found that the plaintiffs’ First Amendment right of expression was not violated “in any fashion” by RCV.²¹⁸ Furthermore, in both *Baber* and *MVA*, the plaintiffs argued that RCV is unconstitutional because may lead to non-monotonic election results.²¹⁹ In *Baber*, the court was unpersuaded by this argument. Ultimately, it found that the plaintiffs had “not provided any evidence to suggest that the RCV Act is likely to produce [a non-monotonic] result in a statewide general election for federal office given the realities of modern electoral politics and the abundance of information that is generally available in advance of such an election.”²²⁰

The court in *MVA* was similarly unpersuaded by the potential for monotonicity failure.²²¹ Here, the parties agreed, and the district court found that Minnesota’s RCV system *is* non-monotonic.²²² Despite this agreement, the Supreme Court of Minnesota found that the plaintiffs provided no evidence regarding the frequency at which an RCV election in this system would produce a non-monotonic result

²¹⁴ *Id.* at 144 (citing *Griffin v. Roupas*, 385 F.3d 1128, 1133 (7th Cir. 2004)).

²¹⁵ *Id.* at 144–45.

²¹⁶ 766 N.W.2d 683, 698 (Minn. 2009)

²¹⁷ 376 F. Supp. 3d at 145.

²¹⁸ *Id.*

²¹⁹ *Id.* at 132 n.10; *Minn. Voters All.*, 766 N.W.2d at 695. *See generally* Miller, *supra* note 175.

²²⁰ 376 F. Supp. 3d at 132 n.10. Notably, the plaintiff’s expert cited Nicolas Miller’s study regarding monotonicity failure in his expert report. *See* Sworn Expert Report of James G. Gimpel, Ph.D, *Baber v. Dunlap*, No. 1:18-cv-00465, 2018 WL 10125067 (D. Me. Nov. 26, 2018). Even with this evidence against RCV, the court ruled that RCV was constitutional. *Baber*, 376 F. Supp. 3d at 132 n.10.

²²¹ 766 N.W.2d at 695.

²²² *Id.*

or how many voters would be adversely affected.²²³ Here, the court found that monotonicity failure was not a severe burden on the right to vote.²²⁴

While there is presently no national RCV law, there are two pieces of RCV legislation currently pending in the House of Representatives: the Ranked Choice Voting Act²²⁵ ("RCVA"), and the Fair Representation Act ("FRA").²²⁶ Both Acts would, as amendments to the Help America Vote Act of 2002 ("HAVA"),²²⁷ require that all elections for Senators and Representatives employ a version of RCV. The Acts purport constitutionality under the Elections Clause,²²⁸ while the text of the FRA claims additional constitutionality under Sections 2 and 5 of the Fourteenth Amendment.²²⁹ Ultimately, both are examples of thorough and federal RCV laws likely to withstand constitutional scrutiny.

2. Compulsory Voting

Because no American state or jurisdiction requires its citizens to vote in a political election,²³⁰ Australia offers an excellent example of what the language of a compulsory voting law in a western democracy could look like if implemented in the United States. Australia's law²³¹ succinctly states that "[i]t shall be the duty of every elector to vote at each election."²³² Furthermore, it is "an offence to fail to vote at an election without a valid and sufficient reason for the failure . . .

²²³ *Id.* at 696.

²²⁴ *Id.* Because this opinion predates Miller's research into the breadth of monotonicity failure, it is unclear if this court would have reached the same opinion with that new evidence.

²²⁵ Ranked Choice Voting Act, H.R. 4464, 116th Cong. (2019).

²²⁶ Fair Representation Act, H.R. 4000, 116th Cong. (2019).

²²⁷ Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 52 U.S.C.).

²²⁸ U.S. CONST. art. I, § 4, cl. 1.

²²⁹ *See* U.S. CONST. amend. XIV, §§ 2, 5.

²³⁰ However, two local legislators in Massachusetts and California have proposed legislation to enact compulsory voting in their jurisdictions. *See* H.B. 653, 191st Gen. Ct. (Mass. 2019); A.B. 2070, 2019-20 Reg. Sess. (Cal. 2020).

²³¹ *Commonwealth Electoral Act 1918*, FED. REG. LEGIS, <https://www.legislation.gov.au/Details/C2019C00103> (last visited Nov. 23, 2020).

²³² *Id.* at XVI, § 245(1).

.²³³ Importantly, Australia's law fails to explicitly state every reason that is "valid and sufficient," though it explicitly includes a religious exemption.²³⁴ With respect to the punishment for noncompliance, an American law could follow the Australian model of a small fine,²³⁵ opt for the South American model of reduced access to specific state services,²³⁶ or offer a federal tax rebate to all voters.²³⁷

When considering how to draft exceptions to the voting requirement, Texas's voter ID law provides a useful template. Under the Texas law, someone may vote without approved photo identification where he (1) presents a birth certificate, a current utility bill, a bank statement, a government check, a paycheck, or a government document showing his name and address; and where he (2) swears or affirms under the penalty of perjury that he faces a reasonable impediment to securing approved identification.²³⁸ Acceptable photo identification includes a Texas driver license, a United States military identification card, a United States citizenship certificate, a United States passport book or card, or a Texas license to carry a handgun.²³⁹ Reasonable impediments include a lack of transportation, a lack of a birth certificate or other documents needed to obtain an acceptable form

²³³ *Id.* at § 245(5)(b). In practice, however, the list of acceptable "valid and sufficient" reasons appears limited. For example, a citizen must vote even when she claims indifference towards all candidates, is a socialist when all candidates are capitalists, or is ignorant regarding the candidates. See *Electoral Backgrounder: Compulsory Voting*, AUSTRALIAN ELECTORAL COMMISSION, https://www.aec.gov.au/about_aec/publications/backgrounders/compulsory-voting.htm (last updated Apr. 4, 2019). However, included among "valid and sufficient" reasons are physical obstruction, illness, a car or similar accident, crime prevention, and a natural disaster. *Id.*

²³⁴ *Commonwealth Electoral Act 1918* § 245(14) (Austl.) ("Without limiting the circumstances that may constitute a valid and sufficient reason for not voting, the fact that an elector believes it to be part of his or her religious duty to abstain from voting constitutes a valid and sufficient reason for the failure of the elector to vote."). There are further explicit exemptions for citizens who are dead, not present in Australia for Election Day, or otherwise ineligible to vote. *Id.* § 245(4).

²³⁵ Nonvoters are fined \$20 should they fail to provide a valid and sufficient reason for their failure. *Id.* § 245(5)(c)(iii).

²³⁶ See Cepaluni & Hidalgo, *supra* note 90, at 274.

²³⁷ See Robert C. Pozen & Nicco Mele, *How Do We Get People to Vote? Let's Try Financial Incentives*, WASH. POST (Apr. 4, 2019, 6:46 PM), <https://www.washingtonpost.com/opinions/2019/04/04/how-do-we-get-people-vote-lets-try-financial-incentives/>.

²³⁸ *Reasonable Impediment Declaration*, TEX. SECRETARY ST.: ELECTION FORMS (Jan. 2018), <https://www.sos.state.tx.us/elections/forms/pol-sub/reasonable-impediment-declaration.pdf>.

²³⁹ TEX. ELEC. CODE § 63.0101(a) (2018).

of photo ID, a work schedule, a lost or stolen identification, a disability or illness, family responsibilities, and an acceptable form of photo ID applied for but not received.²⁴⁰ Furthermore, the State may not question the reasonableness of the impediment when the declaration is provided.²⁴¹

For compulsory voting in the United States, voters could similarly claim a reasonable impediment to vote due to a lack of transportation, work schedule, disability or illness, or family responsibilities. Like Australia, such law could also involve a religious exemption. Unlike Australia, however, such law could allow voters to choose "none of the above."

B. How to Implement RCV and Compulsory Voting Laws

1. RCV

Based on the past success of state and local RCV laws, future laws on the state and local levels should be implemented in the same manner. However, there is one notable exception to this standard. Specifically, in 2003, the Texas Attorney General issued an opinion that the Texas Election Code precluded the use of RCV and required a runoff election should the winner not receive a majority.²⁴² While such opinions are not binding in Texas, Texas courts may find them highly persuasive.²⁴³ Also, should a party seek to enact RCV in a state like Texas, and fail after litigation, the presence of such opinion might lead to a finding of bad faith to the party.²⁴⁴ Thus, those seeking to implement RCV in a state like Texas should either reconsider or request a new opinion.

2. Compulsory Voting

The much more difficult task is how to enact and then enforce compulsory voting. However, Professor Nicholas Stephanopoulos has

²⁴⁰ *Reasonable Impediment Declaration*, *supra* note 238.

²⁴¹ *Id.*

²⁴² See Op. Tex. Att'y Gen., No. GA-0025 (2003) (citing TEX. ELEC. CODE § 2.021); Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, CALIF. L. REV. 1, 58–59 (2020).

²⁴³ *About Attorney General Opinions*, ATT'Y GEN. TEX., <https://www2.texasattorneygeneral.gov/opinion/about-attorney-general-opinions> (last visited Nov. 23, 2020).

²⁴⁴ See *id.*

proposed a plan to implement compulsory voting throughout the country. Specifically, Stephanopoulos suggests by starting with "a blue city in a purple state," holding such election on the first Tuesday in November in order to allow voters to concurrently cast ballots in local, state, and federal elections.²⁴⁵ Stephanopoulos posits that the state would then follow the city's lead and implement compulsory voting throughout the state in order to reduce the presumed advantage to the Democratic Party for any state or federal elections.²⁴⁶ This would hypothetically lead to more blue states, perhaps eventually causing the federal government to implement compulsory voting.²⁴⁷

If compulsory voting were to start at the federal level, the Harvard Law Review ("HLR") has thoughtfully articulated how a compulsory voting law could be enacted.²⁴⁸ HLR specifically noted that Congress may try to rely on Article II to enforce compulsory voting in presidential elections, and Article I to enforce it in congressional elections.²⁴⁹ Next, Congress may consider reliance on the Reconstruction Amendments, specifically the Fifteenth Amendment.²⁵⁰ However, because these amendments only bar intentional discrimination, Congress would likely struggle to impose compulsory voting where there is "congruence and proportionality" between the injury and remedy.²⁵¹ Finally, HLR considers enforcement through the Republican

²⁴⁵ Nicholas Stephanopoulos, *A Feasible Roadmap to Compulsory Voting*, ATLANTIC (Nov. 2, 2015), <https://www.theatlantic.com/politics/archive/2015/11/a-feasible-roadmap-to-compulsory-voting/413422/>.

²⁴⁶ *Id.*

²⁴⁷ *Id.* Stephanopoulos also notes that states are likely to run into constitutional problems should they ban compulsory voting. *Id.* A state would probably need a unified state government to enact such ban, making it unlikely in most states. *Id.* Furthermore, several states grant broad policymaking power to their local jurisdictions, making a ban more unlikely. *Id.*

²⁴⁸ See *The Case for Compulsory Voting in the United States*, 121 HARV. L. REV. 591, 604–07 (2007).

²⁴⁹ *Id.* at 604–05. To be clear, the Article notes that it is unlikely that enforcement pursuant to Article II would be upheld, but that those required to vote in a congressional election would likely also vote in a simultaneous presidential election. *Id.* at 605.

²⁵⁰ *Id.* at 605.

²⁵¹ See *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997). However, based on several statements from President Trump, his administration, and other prominent Republicans, Congress today would be more likely to show explicit statements showing intent to discriminate based on race. See, e.g., David W. Blight, *Trump Reveals the Truth About Voter Suppression*, N.Y. TIMES (Apr. 11, 2020), <https://www.nytimes.com/2020/04/11/opinion/sunday/republicans-voter-suppression.html?smid=em-share>; Z. Byron Wolf, *Trump's*

Guarantee Clause, but quickly admits that Congress most certainly could not enforce compulsory voting through this clause.²⁵²

C. Potential Challenges to RCV and Compulsory Voting Laws

1. RCV

While a successful challenge to federal implementation of RCV appears unlikely, Professors Richard H. Pildes and G. Michael Parsons fear that an advisory opinion from Maine's Supreme Judicial Court may have national implications on the viability of RCV in local elections.²⁵³ Specifically, this court's opinion that Maine's Constitution requires candidates for state offices to be elected "by a plurality of the votes," if adopted by the almost forty states with similar constitutional language, could gut these states' abilities to implement RCV on the state and local levels.²⁵⁴

Even if RCV overcame all legal issues, it may still face cultural or other issues. For example, RCV is regularly criticized for its potential to confuse voters accustomed to voting for only one candidate.²⁵⁵ Professors David C. Kimball and Joseph Anthony's findings further support the downside to RCV: that such confusion and other voting costs are more likely to negatively impact both poor and minority voters.²⁵⁶ This data is clearly problematic in the short term. However, as voters became more familiar and accustomed to elections under an RCV system, based in part on the success of RCV both locally and in Australia, such impacts should subside.

Attacks on Judge Curiel Are Still Jarring to Read, CNN: POL. (Feb. 27, 2018, 8:24 PM), <https://www.cnn.com/2018/02/27/politics/judge-curiel-trump-border-wall/index.html>; Scott Bauer, *Trump Adviser Tells Wisconsin Republicans That GOP Has 'Traditionally' Relied on Voter Suppression but Will 'Start Playing Offense' in 2020*, CHI. TRIB. (Dec. 20, 2019, 6:17 PM), <https://www.chicagotribune.com/midwest/ct-trump-gop-wisconsin-voter-suppression-20191221-wm6pi27zufctxmb6gx4i2r4ce-story.html>; Cristian Farias, *Is There Racist Intent Behind the Census Citizenship Question?*, NEW YORKER (June 26, 2019), <https://www.newyorker.com/news/news-desk/is-there-racist-intent-behind-the-census-citizenship-question-wilbur-ross>.

²⁵² *The Case for Compulsory Voting in the United States*, *supra* note 248, at 607.

²⁵³ Pildes & Parsons, *supra* note 242, at 3.

²⁵⁴ *Id.* at 3.

²⁵⁵ KIMBALL & ANTHONY, *supra* note 86, at 4.

²⁵⁶ *Id.*

2. Compulsory Voting

Compulsory voting may also face several legal issues. Most importantly, the legal framework that courts must analyze voting rights cases under, on the national level, is presently unknown.²⁵⁷ Should Congress seek to enforce a national compulsory voting law pursuant to the Fifteenth Amendment, the Supreme Court has not clearly stated what legal standard such law must meet.²⁵⁸ While this does not make implementation impossible, it at the very least serves as a disincentive to any attempt to expend political capital on such cause.

At any level, a compulsory voting law would also likely face claims of First Amendment infringement.²⁵⁹ However, since compulsory voting, as implemented, would not require anyone to vote for a particular candidate, such claims would likely fail.²⁶⁰ Furthermore, the Supreme Court has already rejected arguments that the act of voting is expressive speech.²⁶¹ Ultimately, any compulsory voting law that allows for a "none of the above" option, or other legitimate excuses, should avoid successful First Amendment challenges.

The penalty for nonvoters (or conversely, reward for voters) may also be subject to legal scrutiny. If the United States followed the Australian model, nonvoters who fail to state a valid and sufficient reason for not voting would be fined.²⁶² Since federal laws that require compliance and impose identical penalties are already legal in the United States, this system for penalties should be similarly

²⁵⁷ Richard L. Hasen, *The Curious Disappearance of Boerne and the Future Jurisprudence of Voting Rights and Race*, SCOTUSBLOG (June 25, 2013, 7:10 PM) [hereinafter Hasen II], <https://www.scotusblog.com/2013/06/the-curious-disappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race/>. Previously, it was known that such law, as a viewpoint neutral law, would be subject to intermediate scrutiny. *The Case for Compulsory Voting in the United States*, *supra* note 248, at 602 n.71 and accompanying text.

²⁵⁸ See Hasen II, *supra* note 257.

²⁵⁹ See, e.g., Hans A. von Spakovsky, *Compulsory Voting Is Unconstitutional*, HERITAGE FOUND. (Apr. 1, 2015), <https://www.heritage.org/political-process/commentary/compulsory-voting-unconstitutional>.

²⁶⁰ See Hasen I, *supra* note 146, at 2176 n.163; Sean Matsler, *Compulsory Voting in America*, 76 S. CALIF. L. REV. 953, 961, 971–73 (2003) (arguing that compulsory voting with an abstention option would not constitute unconstitutional compelled speech).

²⁶¹ See Hasen I, *supra* note 146, at 2176 n.163 (citing *Burdick v. Takushi*, 504 U.S. 428, 438 (1992)).

²⁶² *Id.*

successful.²⁶³ However, should voters be rewarded with a tax incentive or receive access to specific state services like government jobs, welfare, or any cost or benefit that impacts citizens unequally, any compulsory voting law should expect claims that it violates the Equal Protection Clause.²⁶⁴

If implemented in the United States, compulsory voting would be subject to uniquely American criticisms.²⁶⁵ For example, it may not be accepted in our society because of a perception that it violates "the libertarian belief prevalent in the United States against government interference with the decision to vote."²⁶⁶ According to Professor Richard Hasen, Americans remain opposed to compulsory voting because of the United States' history with voluntary voting, and because it violates American "individualism."²⁶⁷

VI. CONCLUSION

As the 2020 election approaches, the United States is at a crossroads with respect to its commitment to ensuring ballot access to all citizens who seek to exercise their right to vote. Presently, ballot access for all eligible citizens is limited by local governments enacting laws that significantly suppress the ability to vote, and by the Supreme Court gutting meaningful enforcement of discrimination in voting through its decision in *Shelby*. To ensure ballot access for all who seek to vote, increase overall voter turnout, and guarantee the promises of the Fifteenth Amendment, the federal government and local governments should enact RCV and compulsory voting laws.

Though necessary, successfully implementing these measures on a national scale will be difficult, costly, and time-consuming.²⁶⁸ For

²⁶³ *The Case for Compulsory Voting in the United States*, *supra* note 248, at 611.

²⁶⁴ *Id.* at 612.

²⁶⁵ See, e.g., Betsy Woodruff, *Obama Floats the Idea of Mandatory Voting. The Right Pushes Back*, SLATE (Mar. 19, 2015, 4:55 PM), <https://slate.com/news-and-politics/2015/03/obama-suggests-mandatory-voting-marco-rubio-and-conservative-wonks-push-back.html>. Obama was criticized by conservative senators and organizations like the Heritage Foundation, who claimed that such measure would violate the First Amendment. *Id.*

²⁶⁶ Hasen I, *supra* note 146, at 2174; see also RUY A. TEIXEIRA, *THE DISAPPEARING AMERICAN VOTER*, 154 (The Brookings Institute 1992).

²⁶⁷ Hasen I, *supra* note 146, at 2177.

²⁶⁸ Interestingly, the enforcing of compulsory voting may not be particularly costly. See *id.* at 2175. In Belgium, which has the highest turnout of all countries that employ

example, voters presently face several costs in exercising their right to vote, including registration, voter ID laws, and the limited time available to vote.²⁶⁹ If RCV and compulsory voting laws were enacted, and no other changes were made, these costs would likely rise and turnout would continue to suffer. Additionally, voters would likely have to wait weeks just to know the election results.²⁷⁰ To reduce these costs to voters, Congress would need to enact a law to replace Election Day with Election Day Weekend.²⁷¹ State governments would need to expand their early voting periods, and provide universal VBM, AVR, guaranteed access to appropriate voter ID (where such ID is necessary), additional staffing at polling places, additional polling places, and educate voters as to how to cast a valid RCV ballot.²⁷² While these measures would decrease costs to voters, they would almost certainly increase the costs of effectively administering an election. To handle these likely additional costs, Congress would have to provide federal funding to the states to make sure their needs are met.

Even if federal and state governments could determine how to reduce and otherwise handle these costs, enacting them given our current political landscape would epitomize an uphill battle. To enact these laws on a national level, legislators would have to spend enormous political capital and overcome what would likely be a Supreme Court hostile to these changes. While pursuing these laws solely on a local level would avoid the Supreme Court, it would mean that RCV and/or compulsory voting would, at best, be implemented slowly and sporadically. Ultimately, both paths to enacting these laws would be extremely difficult. Despite these difficulties, the United States should

compulsory voting, "less than one quarter of one percent of nonvoters are even prosecuted." *Id.* at 2170.

²⁶⁹ See Quan Li et al., *Cost of Voting in American States*, 17 ELECTION L.J.: RULES, POL., & POL'Y 234 (2018) (finding that voter turnout is lower where costs related to voting is higher).

²⁷⁰ This result may already occur now as states grapple with COVID-19 causing a rise in the request for and use of absentee ballots. See, e.g., Sahil Kapur, *Americans May Not Know Who Won the Presidency or Senate on Election Night*, NBC (June 9, 2020, 2:58 PM), https://www.nbcnews.com/news/amp/ncna1218266?_twitter_impression=true.

²⁷¹ See, e.g., Selena Simmons-Duffins, *Why Are Elections on Tuesdays?*, NPR (Oct. 23, 2012, 4:37 AM), <https://www.npr.org/sections/itsallpolitics/2012/10/23/162484410/why-are-elections-on-tuesdays>. To handle a near-doubling of the voting population, even a full weekend and the Monday may not be enough.

²⁷² See, e.g., Marc Elias, *How to Fix Our Voting Rules Before November*, ATLANTIC (Apr. 5, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/how-fix-voting-right-now/609454/>.

vigorously pursue such measures that make our society more democratic and better reflect the views of its citizens.