

COMPULSORY VOTING: A POSSIBLE CURE FOR PARTISANSHIP AND APATHY IN U.S. POLITICS

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INTRODUCTION

Voting lies at the core of the democratic system of government; it is the citizen’s opportunity to influence the political machine and shape government policy. The very definition of a democracy is “[g]overnment

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by the people, either directly or through representatives elected by the people.”² However, over the last twenty years, voter participation in the United States has fluctuated between fifty and sixty percent in presidential elections.³ Even in the highly contentious presidential race of 2004, voter turnout was estimated not to have exceeded sixty percent.⁴ Turnout has been even lower in senatorial and representative races.⁵ Put simply, “[t]he problem of the twentieth century has shown itself to be that of persuading the peoples to make use of the right for which they clamored”⁶

The result of this dynamic is the proliferation of candidates who run campaigns designed to mobilize highly ideological political groups, focusing on hot-button issues instead of solid governmental principles.⁷ This increase in highly polarized politicians has led to serious problems for our national government; ideological battles and government gridlocks have grabbed the attention of the mass media and public at large.⁸ In short, “[t]he fact that more and more citizens decide not to vote can now be considered a serious problem for the health of American Democracy”⁹

² BLACK’S LAW DICTIONARY 497 (9th ed. 2009).

³ Norman Ornstein, Op-Ed., *Vote – or Else*, N.Y. TIMES, Aug. 10, 2006, at A23.

⁴ COMM. FOR THE STUDY OF THE AM. ELECTORATE, PRESIDENT BUSH, MOBILIZATION DRIVES PROPEL TURNOUT TO POST-1968 HIGH KERRY, DEMOCRATIC WEAKNESS SHOWN 12 (2004), available at <http://www.american.edu/spa/cdem/upload/csae041104.pdf>.

⁵ Ornstein, *supra* note 3.

⁶ William Robson, *Compulsory Voting: What It Is and How It Works*, POL. SCI QUARTERLY 2 (1923).

⁷ See, e.g., Kevin Diaz, *Bachman Wins Re-election in Sixth; Graves Concedes*, STAR TRIB. (Nov. 7, 2012), <http://www.startribune.com/politics/national/177546431.html?refer=y>; Lisa Mascaro, *Wisconsin Sends Democrat Tammy Baldwin to Senate*, L.A. TIMES (Nov. 6, 2012), <http://www.latimes.com/news/politics/la-pn-baldwin-wisconsin-senate-20121106,0,6590540.story>; Chris Ladd, *The Tea Party vs. Math: A Detailed Look at the 2012 Results*, HOUS. CHRON. (Nov. 26, 2012), <http://blog.chron.com/goplifer/2012/11/the-tea-party-vs-math>.

⁸ See Doug Fabrizio, *It’s Even Worse Than It Looks* (Sept. 11, 2012), RADIOWEST KUER, <http://radiowest.kuer.org/post/its-even-worse-it-looks>; Philip Rucker, *Romney Campaign Attacks Gingrich As ‘Granddaddy of Earmarks’*, WASH. POST (Jan. 20, 2012), http://www.washingtonpost.com/blogs/post-politics/post/romney-campaign-attacks-gingrich-as-granddaddy-of-earmarks/2012/01/20/gIQAxKMWDQ_blog.html; David Chalian & Terence Burlij, *Debt Ceiling Negotiations Enter Round 3*, PBS (July 11, 2011), <http://www.pbs.org/newshour/rundown/2011/07/deficit-negotiations-enter-round-three-with-no-signs-of-imminent-deal.html>; Bart Engelen, *Why Compulsory Voting Can Enhance Democracy*, 42 ACTA POLITICA 23, 33 (2007).

⁹ Sofie Mariën, *Is Compulsory Voting a Good Idea? The Consequences of Compulsory Voting in Belgium* 3 (PartiRep Research Network, Working Paper Oct. 2007), available at <http://www.partirep.eu/upload/1273756118.pdf>.

Based on successful implementation of compulsory voting laws in Western democracies demographically and culturally similar to the United States, this comment suggests that enactment of comparable laws would benefit our political system in four ways. Such law would (1) provide a system more representative of the general public, (2) increase the amount of moderate politicians who are willing to cooperate and compromise with each other, (3) reduce the incentive for campaigns to target special interest groups, super PACs, and corporations, who now have unbridled ability to fund election efforts under the recent *Citizens United* decision,¹⁰ and (4) instill a sense of civic responsibility in the American electorate, thereby increasing participation in the U.S. political system. Research also shows that low voter turnout in democracy leads to “unequal and socioeconomically biased turnout.”¹¹ International scholars have demonstrated that there is a clear pattern: as turnout diminishes, inequality rises.¹² Thus, enacting compulsory voting could satisfy a number of important policy concerns.

Part I of this note examines the legislative history and effects of compulsory voting laws in Australia and Belgium. A number of modern democracies have a compulsory voting scheme in place; Australia and Belgium simply provide comparable examples.¹³ These laws have been extremely effective at achieving their primary goal of voter turnout. Abstention levels in countries with compulsory voting are more than fifteen percent lower than countries without the laws.¹⁴ Australia’s abstention rates are some of the lowest in the world, averaging 5.5 percent in the twenty-four elections between 1946 and 2004.¹⁵ Enactment of the laws has apparently produced auxiliary benefits, most importantly

¹⁰ In *Citizens United v. Federal Election Commission*, the Supreme Court in a highly contentious 5-4 decision held that the First Amendment prohibits government from placing limits on the amounts corporations and unions are able to expend on electioneering communications. 558 U.S. 310, 130 S. Ct. 876 (2010). In a vehement dissent, Justice Stevens argued that “the Court’s opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self government since the founding . . .” *Id.* at 979.

¹¹ Simon Jackman, *Compulsory Voting*, 6 (May 24, 2004) (unpublished manuscript), available at <http://jackman.stanford.edu/papers/cv.pdf>.

¹² See Mariën, *supra* note 9, at 10–11.

¹³ Approximately twenty-three nations have some kind of compulsory voting law, including Argentina, Australia, Brazil, Greece, and Mexico. *The World Factbook: Suffrage*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/fields/2123.html> (last visited Feb. 9, 2013).

¹⁴ See Mariën, *supra* note 9 at 5.

¹⁵ See SCOTT BENNETT, PARLIAMENT OF AUSTL., DEP’T OF PARLIAMENTARY SERVS., *COMPULSORY VOTING IN AUSTRALIAN NATIONAL ELECTIONS 12* (2005).

instilling the concept that voting is a necessary civic duty into the minds of the public. A survey conducted in Belgium indicated that over half of the respondents would vote “always” or “most of the time” if compulsory voting laws were repealed.¹⁶ The history of the laws in Australia and Belgium provide potential road maps for the enactment of a similar system in the United States.

Part II examines possible routes to enactment of compulsory voting through legislation on a federal or state level. Implementing compulsory voting at the federal level would require overcoming strong case precedent and substantial constitutional obstacles. However, it is not outside the realm of possibility. There is significant dissent over whether there is an implied right to not vote in the United States.¹⁷ However, the current understanding of First Amendment rights and compulsory voting are not necessarily mutually exclusive. Furthermore, the recent Court of Appeals decisions surrounding the Patient Protection and Affordable Care Act (“Obamacare”) legislation have reinterpreted the meaning of “activity” in relation to Congress’ powers under the Commerce and Necessary and Proper Clauses; the decisions have opened up the possibility of specific forms of inactivity to be regulated, even potentially compelling action by individual citizens.¹⁸ This comment will argue for application of similar reasoning to abysmal voter turnout rates, hopefully increasing the effectiveness and legitimacy of our government.

A constitutional amendment could also establish a compulsory voting scheme. Belgium used their amendment process in 1893 to include *le vote obligatoire*, responding to alarming abstention rates and bribes offered to individuals to refrain from voting.¹⁹ However, this method is unlikely to be successful in the United States due to the substantial differences in Belgium’s constitutional amendment procedures compared to our own.²⁰

¹⁶ See Mariën, *supra* note 9, at 6–7.

¹⁷ See Robert Kirby, *Kirby: Exercising My Right Not To Vote*, SALT LAKE TRIB. (Nov. 5, 2012), <http://www.sltrib.com/sltrib/lifestyle/55178054-80/vote-kirby-candidate-percent.html.csp>; Pierre Tristam, *When Not Voting Is the Loudest Vote*, FLAGLERLIVE.COM (Aug. 24, 2010), <http://flaglerlive.com/9755/right-not-to-vote-tristam/>; Peter Orszag, *Make Voting Mandatory*, BLOOMBERG (June 19, 2012), <http://www.bloomberg.com/news/2012-06-19/voting-should-be-mandatory.html>.

¹⁸ See *Seven-Sky v. Holder*, 661 F.3d 1, 20 (D.C. Cir. 2011).

¹⁹ Robson, *supra* note 6, at 572.

²⁰ Compare U.S. CONST. art. V with 1994 CONST. arts. 187–194 (Belg.).

Alternatively, states have broad powers to regulate statewide elections based on the Tenth Amendment and strong case precedent.²¹ Two states passed compulsory voting laws around the turn of the century, but their legislatures never wrote them into law.²² Thus, state law provides another option for the implementation of a compulsory voting scheme in the United States. These laws, if successful, could lead to a movement to institute the system at a federal level. Australia's compulsory voting laws were first passed at a territorial level for local elections. After a number of years where voter turnout for federal elections in Queensland was ten to twenty percent higher than that for the Commonwealth, politicians proposed instituting the laws on a national level.²³

Part III discusses the potential benefits and consequences of implementing compulsory voting within the United States. Ultimately, this comment will conclude that the United States should consider adopting some form of compulsory voting as higher voter turnout would reduce inequality while producing a more efficient government. These gains seem to outweigh any foreseeable negative consequences.

I. LEGISLATIVE HISTORY OF COMPULSORY VOTING LAW IN BELGIUM AND AUSTRALIA

Politically, demographically, and culturally, Australia and Belgium share a number of similarities with the United States. Both have bicameral republican systems split between federal and local governments, a geographically and culturally diverse polity, and, until the recent global recession, relatively stable national economies.²⁴ Thus, both countries provide potential models for the enactment of compulsory voting legislation in the United States. Belgium took a more traditional

²¹ U.S. CONST. amend. X; *Oregon v. Mitchell*, 400 U.S. 112 (1970) (holding that states could establish individual voting age requirements in state and local elections without interference from Congress).

²² VOTING, CONSTITUTIONAL RIGHTS FOUND. CHICAGO 2 (2005), available at http://www.classroomlaw.org/files/DID_Lesson_Voting.pdf.

²³ Sean Matsler, Note, *Compulsory Voting in America?*, 76 S. CAL. L. REV. 953, 963 (2003); BENNETT, *supra* note 15, at 3–4.

²⁴ Compare *The World Factbook: United States*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last updated Feb. 5, 2013), with *The World Factbook: Belgium*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/be.html> (last updated Feb. 5, 2013), and *The World Factbook: Australia*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/as.html> (last updated Feb. 5, 2013).

route, simply amending its Constitution to include an obligatory voting requirement.²⁵ However, Belgium's amendment process is substantially different than that of the United States.²⁶

In contrast, Australia established their compulsory voting system through the legislative process. Australia provides a particularly compelling example, as provincial legislation similar to U.S. state law was so successful, it spawned a national movement to enact the model at a federal level.²⁷ Although neither country has experienced much resistance to the law, due to differences in the civil and political histories of Belgium and Australia, their paths to enactment would encounter obstacles in the United States.

A. HISTORY AND DESCRIPTION OF BELGIUM'S COMPULSORY VOTING SYSTEM

Belgium introduced *le vote obligatoire* nationwide in 1893 through constitutional amendment.²⁸ The revision drew support amid poor voter turnout in then recent national and provincial elections.²⁹ The law currently exists in Chapter I, Sec. 1, Art. 62, and reads, "[v]oting is obligatory and secret. It takes place in the municipality, except in the cases determined by the law."³⁰ The duty is strictly enforced, resulting in a fine and disenfranchisement after repeat offenses unless an acceptable excuse is provided.³¹

Progressive sanctions exist to discourage citizens from becoming repeat offenders of the law.³² If an individual commits three offenses in a ten-year period, their name will be posted on the local city hall façade.³³ If an individual violates the law four times within a fifteen year period, a serious penalty is exacted: the citizen has their name taken off the national register, precluding them from obtaining any promotion or employment position with the government.³⁴ As around sixteen percent

²⁵ Robson, *supra* note 6, at 572.

²⁶ See *supra* note 20 and accompanying discussion.

²⁷ See Matsler, *supra* note 23, at 963.

²⁸ ELECTORAL COMM'N, COMPULSORY VOTING AROUND THE WORLD 14 (2006)

²⁹ Matsler, *supra* note 23, at 966.

³⁰ 1994 CONST. art. 62 (Belg.).

³¹ ELECTORAL COMM'N, *supra* note 28, at 19.

³² Matsler, *supra* note 23, at 967.

³³ *Id.*

³⁴ See *id.*

of the population is employed in some sort of public service at any given time, this is a particularly threatening penalty.³⁵

The Belgian amendment process has been utilized much more frequently than its U.S. counterpart, and differences between the two processes have led to a disproportionate amount of successful revisions in the countries.³⁶ To amend the U.S. Constitution, two-thirds of both the House and Senate must vote in favor of proposing the amendment³⁷ or two-thirds of the state legislatures must request that Congress call a national convention to propose amendments.³⁸ To ratify an amendment, either three-fourths of the state legislatures or ratifying conventions in three-fourths of the states must approve the change.³⁹ Hundreds of amendments are proposed during each congressional session; out of those thousands, only twenty-seven, including the Bill of Rights, have been ratified.⁴⁰

In contrast, the Belgian Constitution has been amended twenty-seven times since 1994 with as many as four amendments occurring within the span of a year.⁴¹ The amendment process for the Belgian Constitution is described in Title VIII of the document.⁴² Any member of the bicameral parliament may file an initiative proposing an amendment to an existing clause, or the King may declare a need for a revision.⁴³ The

³⁵ GOVERNMENT AT A GLANCE 2011, COUNTRY NOTE: BELGIUM, THE ORG. FOR ECON. CO-OPERATION AND DEV. 2 (2011), available at <http://www.oecd.org/belgium/47876144.pdf>.

³⁶ See *supra* note 20 and accompanying discussion.

³⁷ U.S. CONST. art. V, § 1.

³⁸ *Id.* The latter method has never been used.

³⁹ *Id.*

⁴⁰ See U.S. CONST. amends. I-XXVII; *Measures Proposed To Amend the Constitution*, U.S. SENATE, http://www.senate.gov/pagelayout/reference/three_column_table/measures_proposed_to_amend_constitution.htm (last visited Apr. 8, 2013).

⁴¹ See BELGIAN HOUSE OF REPRESENTATIVES, THE BELGIAN CONSTITUTION, intro. (2007), available at <http://legislationline.org/download/action/download/id/1744/file/b249d2a58a8d0b9a5630012da8a3.pdf>.

⁴² 1994 CONST. Title VIII (Belg.).

⁴³ See Francis Delpérée, *The Process for Amending the Belgian Constitution*, 18 CAN. PARLIAMENTARY REV. Autumn 1991, at 18, 19, available at http://www.revparl.ca/14/3/14n3_91e_Delpérée.pdf. Delpérée authored this piece in 1991, three years before most recent version of the Belgian Constitution was published. The Amendment Process provision was renumbered from Article 131 to Article 195 in this version. Despite the renumbering, the substance of the provision remains the same. Christian Behrendt, *The Process of Constitutional Amendment in Belgium*, in *ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA* 35, 36 (Xenophon Contiades, ed., 2013).

initiative or declaration requires the support of the King, as well as majorities of both the Senate and Chamber of Representatives.⁴⁴ Following this decision, the Chamber of Representatives and the Senate are automatically dissolved and an election must take place.⁴⁵

During this election period, candidates and their respective parties take a stand on the political issues surrounding the proposed amendment.⁴⁶ The election thus provides private citizens the opportunity to vote for candidates whose interpretation of the issue comports with their sentiments.⁴⁷ Following this election, the new representatives may amend the articles the original proposal specified within four years.⁴⁸ There must be a super-majority quorum (more than two-thirds) present at debates surrounding the substantive element of the amendment; adoption also requires support from two-thirds of the votes cast.⁴⁹

In contrast to the quasi-legislative nature of the Belgian amendment process, the super-majority requirements of the U.S. amendment process⁵⁰ makes the enactment of compulsory voting unlikely given the potential political and social ire it is likely to draw from the general public. The Belgian amendment procedure avoided the 3/4 percentages required by its U.S. counterpart by entrusting proposals to the existing parliament and ratifications to a group of newly elected representatives.⁵¹ Thus, amendments are more likely to pass as there is less reliance on the consensus of the popular vote, which is naturally harder to secure. As discussed above, a higher degree of trust is placed in the representatives' decisions due to their recent campaigns explaining their stance on the issue and possibly an advanced understanding of the dynamic nature of government.

“In Belgium, like other countries employing a system of compulsory voting, the duty to vote is not resented but revered.”⁵²

⁴⁴ Delpérée, *supra* note 43, at 19–20.

⁴⁵ *Id.* at 20.

⁴⁶ *Id.* at 20.

⁴⁷ *See id.*

⁴⁸ 1994 CONST. art. 195 (Belg.); Delpérée, *supra* note 43, at 20.

⁴⁹ Delpérée, *supra* note 43, at 18; 1994 CONST. art. 195 (Belg.).

⁵⁰ U.S. CONST. art. V, § 1.

⁵¹ *See supra* notes 36–49 and accompanying discussion.

⁵² Matsler, *supra* note 23, at 966.

Belgians recognize voting as an important civic duty that they are responsible for fulfilling as citizens of their country.⁵³

B. HISTORY AND DESCRIPTION OF AUSTRALIA'S GOVERNMENT AND COMPULSORY VOTING SYSTEM

1. SYSTEM OF AUSTRALIAN GOVERNMENT

Similar to Belgium, Australia's federal and local governments share a number of common characteristics with their U.S. counterparts.⁵⁴ Since compulsory voting law spawned at a local level and later gained support in the federal system, this analysis will follow the same pattern, examining state government first and the federal legislative system second. Australia's six states are ruled by a governor or premier, and are allowed to pass local legislation on any matter not otherwise controlled by Article 51 of the Australian Constitution.⁵⁵ The state system is seen as an essential element of Australian government, possessing the important abilities of responding rapidly and efficiently to problems in diverse locations, applying local knowledge and solutions, and accessing local communication channels.⁵⁶ In contrast, Australia's federal system consists of a bicameral legislative Parliament composed of a House of Representatives and a Senate, an Executive branch overseen by a Prime Minister and his Cabinet, and a judiciary consisting of federal and territorial courts.⁵⁷

Queensland was the first territory to compel voting in 1914.⁵⁸ Compulsory registration of all citizens was instituted nationwide a number of years earlier as "a means of improving the accuracy of electoral rolls."⁵⁹ Compulsory voting was argued to be a natural

⁵³ *Id.* (quoting one native Belgian, "[e]very Belgian citizen over [eighteen] years old has both the right and the duty to vote because the country is a democracy – government of the people, for the people and by the people, all the people.") (citation omitted).

⁵⁴ *See supra* notes 24–25.

⁵⁵ *State and Territory Government*, AUSTL. GOV'T, <http://australia.gov.au/about-australia/our-government/state-and-territory-government> (last visited Apr. 10, 2013).

⁵⁶ R.J.K. CHAPMAN & MICHAEL WOOD, AUSTRALIAN LOCAL GOVERNMENT 10 (1984).

⁵⁷ L.F. CRISP, AUSTRALIAN NATIONAL GOVERNMENT 350–52 (1970 ed.); *The World Factbook: Australia*, CIA, *supra* note 24.

⁵⁸ *Id.* at 137, 142. Queensland had compulsory voter registration in 1914. *Id.* at 137. Queensland's first election with compulsory voting was in 1915. *Id.*

⁵⁹ M. Mackerras & I. McAllister, *Compulsory Voting, Party Stability, and Electoral Advantage in Australia*, 18 ELECTORAL STUD. 217, 219–20 (1999).

extension of this concept.⁶⁰ Queensland traditionally holds about a fifth of Australia's population.⁶¹

One might expect proponents of colonialism and federalism to cringe at such an intrusive action by government. However, voter enrollment was made obligatory through nationwide legislation in 1924.⁶² Thus, compulsory voting was not so substantial a leap to incite retaliation from staunch federalists. The Queensland compulsory voting law was successful, achieving its primary goal of increasing voter turnout in local elections while also unexpectedly boosting voter turnout for federal elections in the territory as well.⁶³ Following its success in Queensland, compulsory voting for the Commonwealth gained national support and was eventually enacted in 1924.⁶⁴

2. AUSTRALIA'S ENACTMENT OF COMPULSORY VOTING

By 1922, eighty-two percent of the eligible voters in Queensland were voting in federal elections, surpassing the national average by twenty percent.⁶⁵ The system gained support nationally and in 1925, the government passed the Commonwealth Electoral Act, requiring individuals to attend the polls on Election Day.⁶⁶ Between 1984 and 2004, voter turnout in federal elections averaged well over ninety percent.⁶⁷

The text of the law was drafted with considerable care, providing enough flexibility to avoid widespread protest while having enough teeth to effectuate its goals. The term "compulsory voting" is really a misnomer. The Act only requires registration and attendance, not an actual choice at the polls.⁶⁸ Several court decisions have upheld the requirement of actually issuing some type of a ballot as opposed to

⁶⁰ *Id.*

⁶¹ See 3101.0 - *Australian Demographic Statistics, Jun 2012*, AUSTRALIAN BUREAU OF STAT. (Dec. 18, 2012), <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0#>.

⁶² BENNETT, *supra* note 15, at 4.

⁶³ Mackerras & McAllister, *supra* note 59, at 220.

⁶⁴ *Id.*; *Commonwealth Electoral Act 1924* (Cth) (Austl.). This act created the Commonwealth Electoral Act 1918-1924 (referred to in this section as the "Act") by amending new provisions into the already existing Commonwealth Electoral Act 1918-1922. *Id.*

⁶⁵ BENNETT, *supra* note 15, at 4.

⁶⁶ *Id.* at 3-4.

⁶⁷ *Id.* at 12.

⁶⁸ Lisa Hill, Comment, *Compulsory Voting in Australia: A Basis For a 'Best Practice' Regime*, 32 *FED. L. REV.* 479, 481 (2004).

merely registering attendance.⁶⁹ The relevant text of the Act, section 128A. (1.), reads: “[i]t shall be the duty of every elector to record his vote at each election.”⁷⁰ Some have called to include a blank “abstention box” to accommodate those electors unwilling to express a preference among candidates.⁷¹ A similar provision in a potential U.S. statute would reduce First Amendment concerns. In practice, between one and two percent of Australian voters utilize the “no candidate” ballot.⁷²

The law provides sanctions for noncompliance,⁷³ starting with a fine of \$50 AUP with the severity of the penalty progressively increasing in cases of repeat offenders.⁷⁴ Refusal to pay or to provide a legitimate excuse can result in prosecution, but less than two percent of nonvoters are prosecuted.⁷⁵

All parties tacitly supported the legislation at the time of its enactment.⁷⁶ The law gave them relief from mounting electioneering obligations and costs.⁷⁷ Since the law’s enactment, there has been a stable level of participation in the six major political parties, though statistics suggest that compulsory voting favors left leaning parties.⁷⁸ Additionally, political parties no longer have to worry about “getting out the vote,” thus enabling them to focus on persuading unassociated voters, typically through extolling their political stance on material issues.⁷⁹ Furthermore, the law has not given a marked advantage to individual political parties or causes. “There appears to be a consensus that there would have been the same result at each of the four elections [leading up to 2006] if they

⁶⁹ See TIM EVANS, AUSTL. ELECTORAL COMM’N, COMPULSORY VOTING IN AUSTRALIA 4 (2006), available at http://www.aec.gov.au/About_AEC/Publications/voting/.

⁷⁰ See *Commonwealth Electoral Act 1924* (Cth) s 2 (Austl.) (inserting a new section 128A into the newly created Commonwealth Electoral Act 1918-1924).

⁷¹ BENNETT, *supra* note 15, at 23–24.

⁷² *Id.* at 19.

⁷³ Section 128A(12) provides these sanctions: Any eligible voter who (a) fails to vote at an election without a valid and sufficient reason for such failure; or (b) on receipt of a notice in accordance with sub-section (4.) of this section, fails to fill up, sign, and post within the time allowed under sub-section (5.) of this section the form (duly witnessed) which is attached to the notice; or (c) states in such form a false reason for not having voted, or, in the case of an elector filling up or purporting to fill up a form on behalf of any other elector, in pursuance of sub-section (7.) of this section, states in such a form a false reason why that other elector did not vote, shall be guilty of an offense. *Commonwealth Electoral Act 1924* (Cth) s 2 (Austl.).

⁷⁴ ELECTORAL COMM’N, *supra* note 28, at 7.

⁷⁵ Mackerras & McAllister, *supra* note 63, at 224.

⁷⁶ CRISP, *supra* note 57, at 142.

⁷⁷ *Id.* at 142.

⁷⁸ CRISP, *supra* note 57, at 142–43; Mackerras & McAllister, *supra* note 63, at 227.

⁷⁹ EVANS, *supra* note 69, at 14.

had been held under a voluntary regime.”⁸⁰ Thus, parties start with the knowledge that there will be a ninety-five to ninety-six percent turnout,⁸¹ with a victory turning on which party can swing the “floating vote” and independents, especially in marginal seats.⁸²

The Australian law has gone essentially unopposed by the public and legislative bodies. Activists sporadically protest the fines or penalties exacted, claiming that the right to vote implies an inverse right not to vote.⁸³ However, these challenges have been unsuccessful thus far. Surveys taken between 2004 and 2006 indicate that over seventy percent of the population is in support of retaining some form of compulsory voting.⁸⁴ Thus, case law on the subject is limited.

II. POSSIBLE ENACTMENT OF COMPULSORY VOTING LAW IN THE UNITED STATES

Enacting compulsory voting in the United States faces a number of substantial obstacles. Changing voting behavior is especially difficult as it is partially norm-driven.⁸⁵ Additionally, there are powerful social, political, and constitutional arguments against the enactment of compulsory voting; however, given the distressed state of our federal and state governments, the American public may be more amenable to alternative solutions. As noted above, voting is only a habit among certain social groups; a substantial body of comparative research indicates that there are strong negative correlations between voting and socio-economic status characteristics like low levels of education, residential instability and homelessness, economic marginality, and unemployment.⁸⁶ There are three theoretical paths to enact compulsory voting legislation in the United States: federal legislation, state

⁸⁰ *Id.*

⁸¹ BENNETT, *supra* note 15, at 12.

⁸² *Id.*

⁸³ See Miles Kemp, *Supreme Court of South Australia Hears Compulsory Voting Challenge*, ADELAIDENOW (Apr. 2, 2012), <http://www.adelaidenow.com.au/fight-for-right-not-to-vote/story-e6frea6u-1226316856905>.

⁸⁴ BENNETT, *supra* note 15, at 22.

⁸⁵ According to results generated by polling in Britain, ‘civic duty’ and ‘habit’ are the primary reasons why three in five citizens chose to vote. Hill, *supra* note 68, at 482.

⁸⁶ See, e.g., Lisa Hill, *On the Reasonableness of Compelling Citizens to ‘Vote’: The Australian Case*, 50 POL. STUD. 80, 84 (2002); MARTIN HARROP & WILLIAM L. MILLER, ELECTIONS AND VOTERS: A COMPARATIVE INTRODUCTION 158 (1987); Arend Lijphart, *Unequal Participation: Democracy’s Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1 (1997).

legislation, or through a constitutional amendment. Legislation is the most likely route, regardless of what level it is proposed on. Since the enactment of the Bill of Rights, the U.S. Constitution has only been amended seventeen times.⁸⁷

The direct effect of compulsory voting legislation is obviously higher voter turnout, but there are numerous ancillary benefits. Other countries have found that compulsory voting may instill or foster a sense of civic responsibility in regards to voting. “The Netherlands averaged a turnout of 94.7 per cent before compulsory voting was abolished in 1971, and a turnout of 81.4 per cent in the years since.”⁸⁸ Italy’s compulsory voting law was repealed after existing for almost a decade,⁸⁹ but its voter turnout still remains one of the highest in the Western world.⁹⁰ Thus, if the counterarguments to the concept could be overcome, compulsory voting could be a powerful way to reengage an American polity that has become disillusioned and apathetic about government.

A. FEDERAL LEGISLATION

Federal legislation compelling all eligible individuals to vote is one way to implement compulsory voting in the United States. Compulsory voting could potentially be passed through Congress’ enumerated powers under the Commerce Clause, the Taxing and Spending Clause or the Election Clause.

Generally, there have been implicit limitations on Congress’ ability to address individual non-action. However, the recent federal health care legislation has blurred this limitation through a mandate requiring that individuals purchase a government sanctioned health insurance policy or pay a fee.⁹¹ This mandate has been subject to extensive challenges at the state level as discussed below. Some lower courts have upheld the law based on the combination of powers contained in the Commerce Clause and a broad interpretation of the Necessary and Proper Clause. The Supreme Court ultimately upheld the

⁸⁷ See U.S. CONST. amends. XI – XXVII.

⁸⁸ BENNETT, *supra* note 15, at 1.

⁸⁹ *ITALY Camera dei Deputati (Chamber of Deputies)*, INT’L PARLIAMENTARY UNION, http://www.ipu.org/parline/reports/2157_B.htm (last visited Mar. 2, 2013).

⁹⁰ COMPULSORY VOTING AROUND THE WORLD, THE ELECTORAL COMM’N 14 (2006).

⁹¹ See generally 26 U.S.C. § 5000A (2006 & Supp. V 2012).

individual mandate as constitutional under the Taxing and Spending Clause, departing from the logic applied by the Courts of Appeals.⁹²

Federal legislation is a viable option to establish a compulsory voting system. In order for Congress to pass legislation, it must be connected to an enumerated power granted to them by the Constitution. The U.S. Constitution vests in the federal government certain powers regarding voting under Article I, Section 4, and Article II, Section I. Article I, Section 4 grants Congress the ability to structure national elections.⁹³ “Congress may at any time by Law make or alter such Regulations” regarding “[t]he Times, Places and Manner of holding Elections for Senators and Representatives.”⁹⁴ The Twelfth Amendment provides voting procedures for the Electoral College; Article II gives Congress the power to set the date of the presidential election.⁹⁵ Although textually limited, the Supreme Court has read Congress’ power to regulate presidential elections broadly in light of the Necessary and Proper Clause.⁹⁶ Typically, the Court has sustained provisions designed to prevent chaos, fraud, or corruption.⁹⁷

The Supreme Court has upheld federal legislation regulating the electoral process in various degrees.⁹⁸ The *McConnell* decision contains a detailed snap shot of the current ability of Congress to adjust federal election procedures and the potential justifications for doing so. The case arose from challenges to the Bipartisan Campaign Reform Act, also known as the McCain-Feingold Act.⁹⁹ The legislation was enacted to provide a cap on the funds national political party committees could raise

⁹² Compare *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1328 (11th Cir. 2011), *aff’d in part, rev’d in part sub nom Nat’l Fed’n of Indep. Bus. v. Sebelius* 567 U.S. ___, 132 S. Ct. 2566 (2012) (holding that the Individual Mandate could not be sustained under the either the Taxing and Spending Clause or the Commerce Clause), and *Seven-Sky v. Holder*, 661 F.3d 1, 5 (D.C. Cir. 2011), *cert. denied* 133 S. Ct. 63 (2012) (holding that the Individual Mandate was valid under the Commerce Clause), with *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566, 2608 (2012) (holding that the Individual Mandate was improper under the Commerce Clause, but valid under the Taxing and Spending Clause).

⁹³ U.S. CONST. art. I, § 4.

⁹⁴ *Id.*

⁹⁵ U.S. CONST. art. II, amend. XII.

⁹⁶ *Buckley v. Valeo*, 424 U.S. 1, 90–91 (1976) (per curiam).

⁹⁷ “[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724 (1974)).

⁹⁸ See *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003).

⁹⁹ *Id.* at 114.

and spend on elections—both at a federal and a state level—and to address the proliferation of issue advocacy advertisements, which these funds have traditionally covered.¹⁰⁰ The opponents of the law claimed that it infringed upon their right to free speech by limiting the expression of their political opinion through behavior.¹⁰¹

The Court ultimately upheld the legislation based on Congress' power under the Election Clause.¹⁰² However, the Court worded its opinion carefully, signaling that the Court may not be so quick to defer to drastic overhauls of federal election law.¹⁰³ Thus, it appears that Congress may have considerable reach in regulating the electoral process both at a federal and a state level in the name of maintaining the integrity of officeholders.¹⁰⁴ If Congress' interest is substantial enough to satisfy the high level of scrutiny required when an electoral law potentially infringes upon a citizen's right to free speech, then Congress may regulate elections.¹⁰⁵

The *McConnell* decision was overturned in part by the Court's subsequent decision in *Citizens United v. Federal Election Commission*, a highly contentious decision that is still vigorously debated.¹⁰⁶ However, compulsory voting legislation could potentially draw on the principles expounded in *McConnell* and be distinguished from the law challenged in the *Citizens United* decision. The language of "maintaining the integrity" discussed in *McConnell* is a malleable and potentially broad concept. Compulsory voting is arguably consistent with maintaining this integrity, as it has the potential to ensure that officeholders are actually elected by the majority of the polity, and to also restore some faith in our

¹⁰⁰ See *McConnell*, 540 U.S. at 132.

¹⁰¹ *Id.* at 158–59.

¹⁰² *Id.* at 187. "Congress has a fully legitimate interest in maintaining the integrity of federal officeholders and preventing corruption of federal electoral processes through the means it has chosen. Indeed, our above analysis turns on our finding that those interests are sufficient to satisfy First Amendment scrutiny." *Id.*

¹⁰³ *Id.* at 117. "Congress' careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference." *Id.* (internal quotation marks omitted).

¹⁰⁴ *Id.* at 187.

¹⁰⁵ See *id.*

¹⁰⁶ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. ___, 130 S. Ct. 876 (2010); see generally Comment, *Citizens United v. FEC: Corporate Political Speech*, 124 HARV. L. REV. 75 (2010); see generally Floyd Abrams, *Citizens United and Its Critics*, YALE L.J. ONLINE (2010), <http://yalelawjournal.org/the-yale-law-journal-pocket-part/constitutional-law/citizens-united-and-its-critics/>.

government, while not implicating any of the due process or First Amendment issues with which the *Citizens United* decisions takes issue.

1. USE OF THE EXPANDED INTERPRETATION IN THE “OBAMACARE”
DECISIONS OF THE NECESSARY AND PROPER CLAUSE COUPLED
WITH OTHER CONGRESSIONAL POWERS TO ENACT COMPULSORY
VOTING

Rarely is the Federal Government allowed to mandate a citizen to act. However, recent federal litigation has begun to expand Congress’ powers to compel individual action. Recent decisions addressing challenges to the individual mandate in the Patient Protection and Affordable Care Act (“PPACA”), referred to colloquially as “Obamacare,” have expanded Congress’ power in an interesting way. The language in the opinions potentially extends Congress’ power under the Necessary and Proper Clause further than ever before, perhaps even far enough to legally support some form of compulsory voting.¹⁰⁷ In the past, Congress has been able to encourage organizations and citizens to behave in a specific way; sometimes this “encouragement” borders on coercion as seen in the discussion of the use of the Taxing and Spending Clause below. The individual mandate in the Act does precisely that: every “applicable individual” is required to purchase some form of health insurance.¹⁰⁸ Congress passed the Act under the authority it claimed under the Commerce Clause coupled with the Necessary and Proper Clause.¹⁰⁹ The legislation was challenged on constitutional grounds, and two out of the three federal district courts that heard the case declared the individual mandate provision constitutional. The Eleventh Circuit struck the provision down, but the Sixth and Federal Circuits upheld it based on

¹⁰⁷ *Seven-Sky v. Holder*, 661 F.3d 1, 19–20 (D.C. Cir. 2011), *cert. denied* 133 S. Ct. 63 (2012) (stating that Congress may potentially have the power to regulate inactivity inside a state); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 560 (6th Cir. 2011) *abrogated by Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566 (2012). In *Thomas More*, the Sixth Circuit held that the Commerce Clause does not contain an action/inaction dichotomy that limits congressional power.

¹⁰⁸ 26 U.S.C. § 5000A(a) (2006 & Supp. V 2012). The term “applicable individual” generally includes all individuals except those who qualify under a religious exemption, those not lawfully present in the United States, and incarcerated individuals. *Id.* § 5000A(d).

¹⁰⁹ In defending the Act before the Supreme Court, the Government argued that the individual mandate was a valid exercise of power under the Commerce Clause and the Necessary and Proper Clause. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566, 2585 (2012); U.S. CONST. art. I, § 8, cls. 3, 18.

an expansion of the powers implied by the Necessary and Proper Clause read in conjunction with the Commerce Clause.¹¹⁰

Judge Roger Vinson, writing for the Northern District Court of Florida, declared the law unconstitutional on grounds that the individual mandate to purchase insurance exceeded the authority of Congress to regulate interstate commerce.¹¹¹ Vinson further ruled that the mandate clause was not severable, which had the effect of striking down the entire law.¹¹² On appeal, the Eleventh Circuit Court of Appeals affirmed the lower court's decision in part: the court agreed that the mandate was unconstitutional, but held that it could be severed, allowing the rest of the PPACA to remain.¹¹³

The Sixth Circuit and the D.C. Circuit both upheld the law in its entirety, and both decisions relied on a similar and important finding: because virtually everyone will eventually need some sort of health services, no one is truly inactive in the market, and the health services market is inextricably intertwined with health insurance.¹¹⁴ Congress found that those who opt to self insure almost always consume health care services they cannot afford, thus affecting the national health care market and the insured; the insured cover these costs through higher premiums to the tune of \$43 billion annually.¹¹⁵ Thus, Congress concluded that decisions about how to pay for health care, in the aggregate, substantially affect interstate commerce.¹¹⁶ The D.C. Circuit held that no Supreme Court decision has ever held or implied that Congress' Commerce Clause authority is limited to individuals who are presently engaging in an activity involving, or substantially affecting, interstate commerce.¹¹⁷ Regarding federal law addressing inactivity, the court found that existing activity is not some sort of touchstone or a

¹¹⁰ Florida *ex. rel.* Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1328 (11th Cir. 2011), *aff'd in part, rev'd in part sub nom* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. ___, 132 S. Ct. 2566 (2012); *Seven-Sky*, 661 F.3d at 5; *Thomas More Law Ctr.*, 651 F.3d at 534.

¹¹¹ Florida *ex. rel.* Att'y Gen. v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1306 (N.D. Fla. 2011), *aff'd in part, rev'd in part* 648 F.3d 1235, 1328 (11th Cir. 2011), *aff'd in part, rev'd in part sub nom* Nat'l Fed'n of Indep. Bus. v. Sebelius 567 U.S. ___, 132 S. Ct. 2566 (2012).

¹¹² *Id.*

¹¹³ Brent Kendall, *Health Overhaul Is Dealt Setback*, WALL ST. J. (Aug. 13, 2011), <http://online.wsj.com/article/SB10001424053111904006104576504383685080762.html>; *Florida*, 648 F.3d at 1328.

¹¹⁴ *Seven-Sky*, 661 F.3d at 14; *Thomas More Law Ctr.*, 651 F.3d at 548.

¹¹⁵ *Seven-Sky*, 661 F.3d at 14.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 16.

necessary precursor to Commerce Clause regulation, citing the seminal case *Wickard v. Filburn* as the closest precedent on point.¹¹⁸

Unfortunately, the Supreme Court's decision to uphold the individual mandate in *National Federation of Independent Business v. Sebelius* was primarily based on Congress' power under the Taxing and Spending Clause.¹¹⁹ The Court essentially found that the mandate was a tax for not having adequate insurance.¹²⁰ While an interesting opinion, the language does little to expand Congress' power under the Necessary and Proper Clause in contrast to the Courts of Appeals opinions. Thus, it is unclear whether the logic of the lower courts' opinions could be employed to support some type of compulsory voting legislation.

Alternatively, compulsory voting could be constitutionally sustained by applying an expanded interpretation of the Necessary and Proper Clause in conjunction with the Election or Republican Guarantee Clause. *Thomas More's* and *Seven-Sky's* idea of "activity" extending to individuals who undoubtedly will interact with a given system can be analogized to the voting context: every citizen has little choice regarding whether to engage with some form of government. Whether it is an action as basic as serving on a jury, attending public school or paying taxes, one would be hard pressed to find an American citizen who hasn't interacted with government. Thus, a civic duty to vote should be implied and enforced by the government upon every citizen. By not voting, an individual contributes to a widening of the socioeconomic gaps and a less functional government.¹²¹ Although these effects are not as readily measurable as the burden of uninsureds on the health services market, Congress could commission research to document the costs of abstention as quantitative data.

For compulsory voting legislation to succeed, Congress must accept the idea that low voter turnout rates entail severe consequences that must be avoided. A common theme underlying many of the

¹¹⁸ *Id.* at 17; *Wickard v. Filburn* involved a farmer who harvested a quantity of wheat in excess of a federal quota set under the Agricultural Adjustment Act of 1938. 317 U.S. 111, 113 (1942). The farmer averred that the Act violated the Commerce Clause because it defined the quotas to include wheat consumed "on the premises" of the farm as well as wheat sold on the conventional market. *Id.* at 118–19. The Court upheld the Act as a valid exercise of Commerce Clause powers, reasoning that Congress had the power to regulate the interstate wheat market, and crop yields in excess of quotas, regardless of whether they are sold on the conventional market, affect the market by increasing supply. *See id.* at 128–29.

¹¹⁹ Nat'l Fed'n of Indep. Bus. v. Sebelius 567 U.S. ___, 132 S. Ct. 2566, 2608 (2012).

¹²⁰ *Id.*

¹²¹ *See* Mariën, *supra* note 9, at 3–4.

Obamacare decisions is recognition of the “crisis” that the health care services market is currently experiencing, the effects of which are measurable by financial documentation.¹²² Although the crisis of an apathetic polity is harder to document through quantitative measures, the apparent disconnect between politicians and their constituents’ desires has become increasingly clear and has seriously undermined the effectiveness of our government.

2. USE OF TAXING AND SPENDING CLAUSE POWERS TO ENACT COMPULSORY VOTING

Congress could also potentially utilize the implied powers of the Taxing and Spending Clause in order to enact compulsory voting.¹²³ Although the text of the Clause is relatively limited,¹²⁴ the Supreme Court has upheld Congressional attempts to attach strings to federal funding. In 1984, Congress passed the National Minimum Drinking Age Act (“NMDAA”), which withheld federal highway funding from any state that lowered its legal drinking age to below twenty-one years.¹²⁵ South Dakota lowered its drinking age to nineteen and challenged the NMDAA, claiming that Congress had exceeded its power under the Taxing and Spending Clause.¹²⁶ In a 7-2 decision, the Court upheld the NMDAA as a valid exercise of Congress’ power.¹²⁷

The Court has extended the Taxing and Spending Clause so far as to slightly impugn First Amendment protections. In the mid-2000s, law schools restricted military recruiters’ access to their campuses in protest of the Federal Government’s “Don’t Ask, Don’t Tell” policy concerning homosexuals in the armed forces.¹²⁸ In response, Congress enacted 10 U.S.C. § 983, known as the Solomon Amendment, which

¹²² See *Seven-Sky v. Holder*, 661 F.3d 1, 4, 21 (D.C. Cir. 2011), *cert. denied* 133 S. Ct. 63 (2012); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 534, 535 (6th Cir. 2011) *abrogated by Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566 (2012).

¹²³ U.S. CONST. art. I, § 8, cl. 1.

¹²⁴ The clause reads “[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.” *Id.*

¹²⁵ *South Dakota v. Dole*, 483 U.S. 203, 205 (1987); National Minimum Drinking Age Act, Pub. L. No. 98-363, 98 Stat. 435, 437 (codified as amended at 23 U.S.C. § 158 (2006)).

¹²⁶ *Dole*, 483 U.S. at 205.

¹²⁷ *Id.* at 204.

¹²⁸ See *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 51 (2006).

contained a provision withholding specific federal funds (primarily those from the Department of Defense, Homeland Security, and the C.I.A.) from any university who chose to disallow the recruiters on their campus.¹²⁹

Law schools around the country filed suit challenging the Solomon Amendment, claiming that it infringed upon their First Amendment freedoms of speech and association.¹³⁰ In a unanimous decision, the Supreme Court upheld the amendment as a valid exercise of the Taxing and Spending Clause.¹³¹ The Court held that “Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept,” and that the provision “neither limits what law schools may say nor requires them to say anything.”¹³² Essentially, the Court allowed Congress to pressure the universities into supporting the U.S. Army through allowing military recruiters on their campuses.¹³³ However, the Court lessened the potential impact of their decision by manipulating what the word “speech” included, finding that no speech was compelled here, as the universities did not “speak” simply by allowing the recruiters on campus.¹³⁴

The Court essentially allowed Congress to indirectly encourage state action through the Taxing and Spending Clause. Thus, the Clause could be a powerful tool in order to pass compulsory voting legislation by withholding federal electoral funding attached to the electoral process to “encourage” states to incorporate the concept into their voting procedures. There is an obvious nexus between Congress’ goals (encouraging voter turnout) and the subject matter of the funding (election procedures).

The Taxing and Spending Clause has generally enjoyed broad applicability. However, there has been recent limitation on its scope. Congress passed 42 U.S.C. § 2996, known as the Legal Services Corporation Act, in 1996 in order to distribute funds to provide free legal assistance to indigent clients through the Legal Services Corporation

¹²⁹ The Solomon Amendment, Pub. L. No. 104–106, 110 Stat. 186, 315 (1996) (codified as amended at 10 U.S.C. § 983 (2006)).

¹³⁰ *Rumsfeld*, 547 U.S. at 52–53.

¹³¹ *Id.* at 50, 58–59.

¹³² *Id.* at 59 (internal quotations omitted).

¹³³ *See id.* at 69.

¹³⁴ *Id.*

(“LSC”), a newly created administrative agency.¹³⁵ Congress prohibited LSC from distributing funds to any organization that represented clients for the purpose of amending or otherwise challenging existing welfare law.¹³⁶

Private contributors, indigent clients, and local public officials brought suit against the law in the United States District Court for the Eastern District of New York alleging that the provision prohibiting challenges to existing welfare law violated their First Amendment rights.¹³⁷ The court struck down the provision, but explicitly held that viewpoint-based funding decisions can be sustained in which the government is itself the speaker.¹³⁸ Even more intriguingly, the court held that when the government disburses public funds to private entities to convey a governmental message, it may prescribe a specific viewpoint provided that appropriate steps are taken to ensure that its message is neither garbled nor distorted by the grantee.¹³⁹ However, the court struck down the law based on the program and the law’s “presumption that private, nongovernmental speech is necessary and a **substantial restriction is placed upon that speech.**”¹⁴⁰ Inclusion of a “no candidate” ballot or other potential exception procedures in the compulsory voting legislation could eliminate the insidious “substantial restriction” issue.

There is existing law that could be amended to include compulsory requirements. The National Voter Registration Act of 1993 (“NVRA”) and the Help America Vote Act of 2002 (“HAVA”) both set standards for the states in terms of national and federal election procedures designed to encourage eligible individuals to vote.¹⁴¹ The NVRA begins by putting forth a number of factual findings, including that it is the duty of Federal, State, and local government to promote the exercise of an individual’s franchise.¹⁴² Simply amending this duty to require state governments to mandate voting as opposed to encouraging an individual to exercise their franchise seems simple enough. The cost

¹³⁵ U.S. v. Velazquez, 531 U.S. 533, 536 (2001); *see generally* 42 U.S.C. § 2996 (1996).

¹³⁶ *Velazquez*, 531 U.S. at 536–37.

¹³⁷ *Id.* at 547.

¹³⁸ *Id.* at 541.

¹³⁹ *Id.* at 541 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

¹⁴⁰ *Id.* at 544 (emphasis added).

¹⁴¹ *See* 42 U.S.C. § 1973gg (2011); Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 [hereinafter HAVA].

¹⁴² 42 U.S.C. § 1973gg(a)(2) (2011).

of establishing such a program under the laws would be minimal. The Election Assistance Commission already enforces both acts.¹⁴³ Thus, any counterargument based on the claim that significant administrative costs would be incurred is erroneous. Moreover, noncompliance penalties would offset the cost of enforcement. Both the Australian and Belgian systems arguably show that the actual instances which require a full prosecution proceeding are insignificant, usually somewhere in between two and three percent, and the program could actually generate revenue as first and second time offenders could be charged a nominal fee to help encourage compliance.

Thus, Congress' Taxing and Spending power could be used to withhold funding from states which do not enact some baseline form of compulsory voting. Based on the language in the *Dole* and *Rumsfeld* decisions, the law would need to be reasonable and unambiguous and require a no-candidate ballot option to avoid "requiring" or "limiting" an individual citizen's speech. Any challenges to the law could be summarily dispatched by the court's holdings in *Dole* and *Rumsfeld* by allowing a viewpoint neutral "restriction" on an individual's right not to vote.

Alternatively, as discussed above, the Supreme Court's logic in their decision upholding Obamacare could potentially be applied in a compulsory voting context. Chief Justice Roberts upheld the individual mandate in his majority opinion based on Congress' Taxing and Spending powers.¹⁴⁴ The opinion is couched in cautionary language, so it is unclear whether the decision substantially expands Congress' power.¹⁴⁵ However, the end result was the affirmation of a penalty based on the failure to complete a specific action, which is essentially what compulsory voting legislation would involve.¹⁴⁶

Despite the broad application of the Taxing and Spending and Commerce powers, it is unlikely that compulsory voting would be passed at a federal level. Our country has a deep aversion against federal involvement with our individual actions. The structure of our Constitution explicitly limits federal powers while granting all other powers exclusively to the states, reflecting the desires of the framers to

¹⁴³ *About EAC*, U.S. ELECTION ASSISTANCE COMM'N, http://www.eac.gov/about_the_eac/ (last visited Mar. 30, 2013).

¹⁴⁴ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566, 2600 (2012).

¹⁴⁵ *Id.* at 2583.

¹⁴⁶ *Id.* at 2600.

avoid creating a system that would allow a dominant central government.¹⁴⁷ Thus, compulsory voting has a better chance of being passed at a state level.

B. STATE LEGISLATION

States or municipalities could enact compulsory voting in their jurisdictions. This method would avoid some of the political and constitutional issues described above. It is possible, as seen in Australia, that the success of these individual laws could spawn national support for the idea. Under the plenary power of the Tenth Amendment, States have broad powers to regulate the franchise of their citizens.¹⁴⁸ Some states disenfranchise felons and individuals deemed mentally incompetent, while others encourage voter participation through law.¹⁴⁹ Thus, compelling individuals to vote is arguably just a matter of degree. Alternatively, individual states could simply amend their constitutions to compel voting. Around the beginning of the nineteenth century, two states amended their constitutions to permit compulsory voting legislation;¹⁵⁰ however, those laws were never enacted by their respective legislatures.¹⁵¹

Enactment of compulsory voting law through the plenary power of the Tenth Amendment is a promising option. The basic structure framed by the Constitutional draftsmen following the Revolutionary War was designed to prevent unbridled central government.¹⁵² Thus, the framers required any federal legislation to be explicitly connected to one

¹⁴⁷ U.S. CONST. amend. X.

¹⁴⁸ *Id.*

¹⁴⁹ See WIS. CONST. art III, §§ 2 (4)(a)–(b); UTAH CODE ANN. § 20A-3-702 (West 2013); VA. CODE ANN. § 24.2-648 (West 2013).

¹⁵⁰ South Dakota and Massachusetts amended their constitutions to allow compulsory voting in 1898 and 1918, respectively. Jackman, *supra* note 11, at 2–3.

¹⁵¹ *Id.*

¹⁵² See Kurt T. Lash, *A Brief History of the Tenth Amendment*, TENTH AMENDMENT CTR., <http://tenthamendmentcenter.com/2013/03/05/a-brief-history-of-the-tenth-amendment> (last visited Mar. 31, 2013). For example, the New York Constitutional Convention declared that “every power, jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments, to whom they may have granted the same; and that those clauses in the said Constitution, which declare, that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution; but such clauses are to be construed either as exceptions to certain specified powers, or as inserted merely for greater caution.” *Id.*

of the enumerated powers under Art. I, Section 8.¹⁵³ All other powers were vested in state government by the Tenth Amendment.¹⁵⁴

States have broad control over elections under the Supreme Court's interpretation of plenary power. In *Oregon v. Mitchell*, a number of states challenged amendments to the Voting Rights Act, including amendments lowering the voting age to eighteen and eliminating residency requirements and literacy tests.¹⁵⁵ The states claimed that the new statute usurped powers reserved to the states to control their elections.¹⁵⁶ The Supreme Court ultimately upheld most of the statute, holding that the states' authority to enact voting legislation was limited in light of Congress' power to regulate elections under Article I, Section 4, coupled with its Necessary and Proper Clause powers.¹⁵⁷ However, while Congress could set requirements for voting in federal elections, it did not have the power to set the voting age for state elections.¹⁵⁸

Courts at all levels frequently strike down legislation pertaining to elections, including residency requirements, literacy tests, and legislation excluding non-party members from primary elections.¹⁵⁹ The focus of many of these opinions is whether the purported goal of the regulation is important enough in relation to the potential burden it creates.¹⁶⁰

III. CONSTITUTIONAL AND PRACTICAL CONSIDERATIONS RELATING TO POTENTIAL COMPULSORY VOTING LEGISLATION

Constitutionally, compulsory voting highlights a complex problem – “whether the vote which a citizen possesses is indeed a mere right which he may or may not use . . . or whether it is a social duty, an obligation to the community the fulfilment of which the state should enforce.”¹⁶¹ Compulsory voting law potentially infringes on citizens'

¹⁵³ See U.S. CONST. art. I, § 8; see also U.S. CONST. amend. X.

¹⁵⁴ U.S. CONST. amend. X.

¹⁵⁵ *Oregon v. Mitchell*, 400 U.S. 112, 117 n.1 (1970).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 134.

¹⁵⁸ *Id.* at 130.

¹⁵⁹ See *Tashjian v. Republican Party*, 479 U.S. 208 (1986); *Moen v. Erlandson*, 80 Wn. 2d 755, 758 (Wash. 1972) (en banc); *Guinn v. United States*, 238 U.S. 347 (1915).

¹⁶⁰ *Moen v. Erlandson*, 80 Wn. 2d at 757.

¹⁶¹ Robson, *supra* note 6, at 7.

right to freedom of speech and could incite dissent against the Federal Government as an intrusion on personal autonomy.

An important question is whether the right to vote inversely implies the right not to vote. Rephrased, does a right automatically imply the ability to waive itself? The limited challenges to the Australian law have been based on this concept.¹⁶² The Supreme Court has not addressed the ability to waive voting rights specifically, but with respect to the right to waive a jury trial, “[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.”¹⁶³ Although the Supreme Court has never held that exercising the right not to vote is a form of speech, some pundits believe that it should receive First Amendment protections.¹⁶⁴ It is possible to distinguish compulsory attendance at the polls from compulsory expression by providing a “no candidate” ballot similar to the Australian system, or an application for excusal based on an individual’s desire to express themselves through non-communication.

Arguably, compulsory voting legislation could actually increase activity in the “marketplace of ideas,” especially in the voting context, thus discounting the powerful First Amendment arguments against such legislation. Increasing the amount of voters would theoretically increase the political awareness of candidates and government, thus prompting discussion between individuals at all levels of society of how the issues should be addressed by federal and local entities. Compulsory voting law could reduce the incentive for political campaigns to focus solely on motivating the extreme bases of their parties by making drastic promises that impede their ability to be effective and cooperative politicians.¹⁶⁵

As noted above, the interpretation of the Necessary and Proper Clause in the Courts of Appeals’ decisions upholding Obamacare

¹⁶² Miles Kemp, *Fight for the Right Not To Vote*, NEWS.COM.AU (Apr. 3, 2012), <http://www.news.com.au/national-oldd/fight-for-right-not-to-vote/story-e6frfkvr-1226317057696>.

¹⁶³ *Singer v. United States*, 380 U.S. 24, 34–35 (1965).

¹⁶⁴ George F. Will, Op-Ed, *Not Voting Is, Itself, an Exercise of Free Speech*, COLUMBUS DISPATCH (Dec. 21, 2012), <http://www.dispatch.com/content/stories/editorials/2012/12/21/not-voting-is-itself-an-exercise-of-free-speech.html>; see also Robert Kirby, *Exercising My Right Not To Vote*, SALT LAKE TRIB. (Nov. 5, 2012), <http://www.sltrib.com/sltrib/lifestyle/55178054-80/vote-kirby-candidate-percent.html.csp>.

¹⁶⁵ See generally Matsler, *supra* note 23. Matsler argues that institutional forces within each political party might view compulsory voting as a threat to their attempts to seize or maintain power. *Id.* at 977–78. “[U]nequal participation [in the electoral system] can result in unequal influence.” Mariën, *supra* note 9, at 4. If a party’s extreme bases mostly influence that party’s platform, compulsory voting will tend to make party agendas more representative of the electorate at large.

potentially prompts an intriguing conclusion. If an individual will almost inevitably interact with a system or process that is allowed to be regulated by the Federal Government and their refusal to responsibly interact with that system has a detrimental effect on others, Congress may compel an individual citizen to complete a specific action.

Another important concern compulsory voting addresses is voter fraud. Much of recent electoral legislation on the state level purports to address increasing instances of voter fraud.¹⁶⁶ Although it is unclear whether this drastic increase in voter fraud is even real,¹⁶⁷ compulsory voting could almost completely eradicate the problem if administered effectively. If every citizen is obligated either to vote or at least register attendance at the polls on Election Day, fraudulent voters are unlikely to be successful short of stealing someone's identity.

The connection between the decline in socioeconomic status and low voter turnout has been well documented.¹⁶⁸ Support could be garnered for compulsory voting legislation by bringing this connection to the attention of the general public. It seems logical that if individuals believe that a candidate's stance coincides closely with their own, they are more likely to express their agreement with the policy at the polls. In order to ascertain a candidate's views and compare them to their own, the citizen would need to attend campaign events and follow the news closely, which are desirable consequences. Compulsory voting would solve what appears to be the biggest problem with our voting system today: disconnect between politicians' understanding of the issues and desired resolution of those issues by the general public.

This disconnect creates apathy and reinforces the idea that "one vote won't make the difference." One can enjoy the benefits of living in a free, democratic society whether one expends the time and effort to vote or not.¹⁶⁹ Compulsory voting legislation would simply be a gentle reminder that an element of democracy is the contract between you and your fellow citizens to participate in government. Citizens are required to

¹⁶⁶ See Andrew Harris, *Wisconsin Attorney General Seeks To Restore Voter-ID Law*, BLOOMBERG (Aug. 21, 2012), <http://www.bloomberg.com/news/2012-08-21/wisconsin-attorney-general-seeks-to-restore-voter-id-rule.html>; see also Stephanie Saul, *Looking, Very Closely, for Voter Fraud*, N.Y. TIMES (Sept. 16, 2012), <http://www.nytimes.com/2012/09/17/us/politics/groups-like-true-the-vote-are-looking-very-closely-for-voter-fraud.html?>

¹⁶⁷ See Saul, *supra* note 166.

¹⁶⁸ Arend Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1, 1 (1997).

¹⁶⁹ *The Case for Compulsory Voting in the United States*, 121 HARV. L. REV. 591, 591 (2007).

sit on juries and pay taxes; how is voting a less important civic duty?¹⁷⁰ However, as established above, voting is largely norm-driven and highly habitual. Thus, in order to reverse the growing trend of abstention and encourage future generations of potential voters to develop the habit of voting, a drastic solution is necessary.

CONCLUSION

Compulsory voting is constitutionally sustainable and could benefit the United States in a number of significant ways, including reducing social inequality, increasing the perceived legitimacy of state and federal government, eliminating opportunities for voter fraud and providing a more functional and innovative group of cooperative representatives who are actually elected by the majority of eligible voters. A constitutional amendment could establish compulsory voting, but is unlikely. In contrast to Belgium's amendment procedure, the United States requires a higher level of support for the change. Given the general public's aversion to government involvement in everyday life, especially actions with free speech implications, a constitutional amendment establishing compulsory voting would probably not be successful.

However, federal legislation is arguably constitutionally sustainable in light of the recent expansion of the powers implied by the Necessary and Proper Clause by decisions regarding the individual mandate included in the Patient Protection and Affordable Care Act. The legislation could be based on a number of Congressional powers enumerated in Article 8, including the Republican Guarantee, Election, or Taxing and Spending Clause. The success of any potential challenges would depend on the judiciaries' understanding of the severity of the negative impact abstention has inflicted upon our society.

Compulsory voting legislation at a state level shows promise theoretically as well. The states have broad authority to enact legislation under the plenary power of the Tenth Amendment. Alternatively, as seen around the turn of the century, they could simply amend their state constitutions to implement the concept. Additionally, it is likely that if state legislation enacting compulsory voting was effective and accepted, it would gain national support as seen in Australia, possibly leading to eventual establishment of nationwide legislation. There is case law and

¹⁷⁰ U.S. CONST. amend. VI, XVI.

current legislation that has interpreted state authority to include the ability to control and encourage their electorate. Thus, as seen on a federal level through the Taxing and Spending Clause, “encouragement” can easily border on practically compelling action, providing a strong basis for compulsory voting legislation to stand on.

Finally, although a number of constitutional and practical arguments exist challenging the enactment of compulsory voting in the United States, equally compelling arguments exist to discount these challenges. The benefits far outweigh the foreseeable consequences of implementation of compulsory voting, and given the dysfunction in our state and national governments, the American polity is more likely to try less traditional solutions in order to remedy these disturbing problems.

Thus, this comment suggests that the current political environment in the United States calls for compulsory voting as a necessary solution to habitual behavior of abstention and apathetic attitudes toward government. Every citizen owes a duty to his fellow citizen to engage in government in order to ensure its legitimacy, and compulsory voting is the ideal and least intrusive way to guarantee that the values of democracy continue to run strong in the United States.