

U.C.L.A. Law Review

How Much Electoral Participation Does Democracy Require? The Case for Minimum Turnout Requirements in Candidate Elections

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ABSTRACT

Elections are the linchpin of a representative democracy's legitimacy and power. In the absence of electoral participation by a critical mass of the population, a society cannot meaningfully claim to be democratically governed.

Persistently low voter turnout decreases the quality and equality of political representation in the United States and jeopardizes the integrity of our system of government. Not only do turnout rates currently have no practical impact on electoral outcomes, but there is also no social expectation that they should. This Comment proposes incentivizing electoral participation in candidate races through implementation of a minimum turnout requirement, which puts the onus on government officials to foster greater voter turnout. In doing so, this Comment offers a new framework for assessing and improving the health of our democracy.

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INTRODUCTION

Democracy, by definition, is rule by the people.¹ Yet representatives are routinely elected even when a critical mass of the population does not vote. To win an election, a candidate must simply receive more votes than her competitors; the total number of citizens who participate in that election is of no consequence.² A victor is declared even when only a small minority of eligible voters participated in the election.

Political coverage of elections often obfuscates the impact of low voter turnout. For instance, reporting around New York Congresswoman Alexandria Ocasio-Cortez’s 2018 primary race against a ten-term incumbent lauded her victory as a “near-landslide.”³ However, this result was based on a voter turnout rate of less than 13 percent of the district’s eligible Democratic voters; fewer than 30,000 voters cast ballots in that party primary.⁴ Similarly, the 2019 Mississippi gubernatorial election was described by various media sources as “surprisingly competitive”⁵ despite the fact that less than half of eligible voters turned out to vote.⁶

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1. Democracy is defined by the Encyclopaedia Britannica as “literally, rule by the people.” The term comes from the Greek words for ‘people’ (demos) and ‘rule’ (kratos). Democracy, ENCYCLOPAEDIA BRITANNICA (Nov. 18, 2018) <https://www.britannica.com/topic/democracy> [https://perma.cc/3C6H-NLYG].
 2. Under our current laws, any nonzero level of turnout is enough to legitimate an election.
 3. Andy Newman et al., *Alexandria Ocasio-Cortez Emerges as a Political Star*, N.Y. TIMES (Jun. 27, 2018), <https://www.nytimes.com/2018/06/27/nyregion/alexandria-ocasio-cortez-bio-profile.html> [https://perma.cc/CAA5-HJYX].
 4. Nolan Hicks & Carli Campanile, *Most voters stayed home for stunning Alexandria Ocasio-Cortez win*, N.Y. POST (Jun. 28, 2018), <https://nypost.com/2018/06/28/most-voters-stayed-home-for-stunning-alexandria-ocasio-cortez-win> [https://perma.cc/25HX-ZA6Y] (“There are 214,750 active registered Democratic voters in the district. Only 27,744 voted, and Ocasio-Cortez won by more than 4,000 votes.”).
 5. See, e.g., Walt Hickey, *Mississippi elected Republican Tate Reeves governor on Tuesday following a surprisingly competitive race*, BUS. INSIDER (Nov. 5 2019), <https://www.businessinsider.com/mississippi-governor-election-results-live-vote-count-reeves-hood-2019-11> [https://perma.cc/JVX3-XVG7]; Nick Corasanti, *Election 2019 Ad Wars*, N.Y. TIMES (Nov. 5, 2019), <https://www.nytimes.com/2019/11/05/us/politics/on-politics-2019-ads.html> [https://perma.cc/CJH7-4W6G].
 6. Compare Bobby Harrison, *For First Time, Hood Faces Same Headwinds as Other Mississippi Democrats*, MISS. TODAY (Nov. 10, 2019), <https://mississippitoday.org/2019/11/10/for-first-time-hood-faces-same-headwinds-as-other-mississippi-democrats> [https://perma.cc/SN9V-VSB2] (stating that 862,609 votes were cast in the 2019 Mississippi gubernatorial race) with U.S. CENSUS BUREAU, *Sex By Age By Nativity and Citizenship Status*, <https://data.census.gov/cedsci/table?q=B05003> (set Geographies to Mississippi, and Years to 2017, then add the populations of male and female native-born and naturalized citizens) (showing that, as of 2017, there were estimated to be 2,234,722 citizens of voting age in Mississippi).

Insufficient attention is given to the distorting effects of low voter turnout when election results are presented and correlated with the will of the people. Typically, when a candidate receives a large share of the total votes cast, she is said to have a popular mandate and more power to move forward her policy agenda because the people have theoretically expressed their support for that agenda.⁷ However, the extent of that electoral mandate is necessarily limited by what percentage of the electorate delivered it. When only a small fraction of eligible voters participate in electing representatives, there is no way to know whether those elected officials truly represent the will of the people, or just the preferences of an outspoken minority. Indeed, our electoral system's failure to acknowledge the centrality of voter turnout to electoral legitimacy may result in nonvoters being viewed as disaffected members of society rather than as people who face structural impediments to civic participation.

As a solution, this Comment advocates for the adoption of a minimum turnout requirement in candidate elections. Part I describes the problem of low voter turnout in United States elections. Part II outlines how low voter turnout undermines democratic legitimacy. Part III sets forth criteria for a minimum voter turnout requirement and offers a proposal for how such a turnout requirement could be implemented fairly and effectively. Part IV examines compulsory voting as an alternative solution. Part V addresses shortcomings of the minimum turnout requirement proposal. Rather than proposing a perfect solution, this Comment aims to inspire enactment of holistic electoral reforms that will make it easier for Americans to vote and spur greater voter turnout.

The *electorate* is conceived of here as the entire universe of eligible voters, whether they are registered to vote or not. To avoid confusion, and in recognition of current limitations on the franchise,⁸ this Comment

7. See, e.g., *Obama's First 100 Days*, PEW RES. CTR. (Apr. 28, 2009), <https://www.journalism.org/2009/04/28/obamas-first-100-days> [https://perma.cc/H3M5-GTXF] (describing President Obama as having a stronger popular mandate than other recent presidents based solely on his share of the vote, rather than accounting for the level of voter turnout in his election).

8. Not all citizens of voting age have the right to vote. All but two states curtail the voting rights of people with certain types of felony convictions. See *Prison Populations and the Census—FAQ*, THE PRISON POLY INITIATIVE, <https://www.prisonersofthecensus.org/faq.html> [https://perma.cc/NJH4-AWEA] (last updated Nov. 6, 2019). In most states, people under guardianship can be stripped of their voting rights, despite their having capacity to and interest in expressing a preference at the ballot box. See Matt Vasilogambros, *Thousands Lose Right to Vote Under 'Incompetence' Laws*, PEW RES. CTR. (Mar. 21, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/03/21/>

characterizes the electorate as *eligible voters* rather than as *adult citizens*.⁹ The term *nonvoters* is used herein to refer to all eligible voters who did not vote in a particular election or who do not vote, generally; meanwhile *voters* are those who have actually cast ballots.¹⁰

I. THE UNRESOLVED PROBLEM OF LOW VOTER TURNOUT

Since the early 2000s, voter turnout for United States federal elections has averaged about 60 percent of eligible voters in presidential years and in the 40 percent range during midterms.¹¹ In municipal elections turnout rates are often even lower, averaging about 30 percent overall¹² and falling below 15 percent for recent elections in 10 of the 30 largest American cities.¹³ During the latter half of the twentieth century, voter turnout in the United States was lower than that of nearly all first-world democracies.¹⁴

thousands-lose-right-to-vote-under-incompetence-laws [https://perma.cc/54FV-FPQB] (though individuals may be placed under guardianship to receive assistance in making healthcare or financial decisions, many retain the capacity to express electoral preferences).

9. The eligible voting population referred to herein includes all citizens of voting age who can legally vote under current law. An alternative would have been to use all (or a larger subset of) adult citizens as the baseline for the size of the electorate when calculating the minimum turnout requirement in Part III. This approach would have put greater pressure on jurisdictions to expand the franchise to prisoners, returning citizens, and people incorrectly deemed mentally incompetent for voting purposes. While democratic legitimacy would be improved if all competent adult citizens were included in the electorate, for simplicity, this Comment refers to the electorate only as those citizens currently eligible to vote.
10. *Abstention* is used herein in the narrow sense of purposefully not voting. Abstention is commonly cited as a reason for low voter turnout; however, as explained in Part II.C, it is often unclear whether any given nonvoter has made a meaningful choice to abstain from voting.
11. *Voter Turnout*, FAIRVOTE, http://www.fairvote.org/voter_turnout#voter_turnout_101 [https://perma.cc/27ZD-A3SR] (last visited Oct. 24, 2019). For the past century, turnout in midterm elections has ranged from a low of 32.9 percent in 1926 to a high of 49.6 percent in 2018, while presidential election turnout has ranged from 48.9 percent in 1924 to 63.8 percent in 1960. *Id.*
12. JOSHUA GREENBAUM & NEIL HARWOOD, U.S. VOTE FOUND., *FIXING THE PROBLEM OF LOW VOTER TURNOUT IN US LOCAL ELECTIONS: A DATA-DRIVEN SOLUTION* 5 (2017), https://www.usvotefoundation.org/sites/default/files/US_Vote_LOCelections_Whitepaper.pdf [https://perma.cc/YFA4-QP34] (noting that in some mayoral elections turnout has been as low as 2 percent).
13. *Who Votes for Mayor?*, PORTLAND STATE UNIV. (2016), <http://whovotesformayor.org> [https://perma.cc/FTP5-QUTR].
14. See RAFAEL LÓPEZ PINTOR ET AL., INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, *VOTER TURNOUT SINCE 1945* at 78–79 fig.11 (2002), <https://www.idea.int/sites/default/files/publications/voter-turnout-since-1945.pdf> [https://perma.cc/T6LQ-8FMP] (showing that the United States was ranked 120th in voter turnout rates

Under our current system, the outcome of any given election is too often a function of voter turnout (specifically, *who* turns out to vote) rather than an expression of the preferences of the electorate as a whole. On the federal level, for instance, electoral outcomes vary greatly, depending on whether it is a midterm year or a presidential election year.¹⁵ But this variation is due not just to a change in voter preferences from one cycle to the next;¹⁶ it is largely driven by changes in how many (and which) people vote in those elections.¹⁷

A. The Many Causes of Low Voter Turnout

Over 10,000 jurisdictions administer elections within the United States.¹⁸ Each state has idiosyncratic election laws that are implemented on the local level by smaller entities such as county election boards.¹⁹ The electoral system is complicated and can be confusing to voters, especially when they move to a new jurisdiction.²⁰

overall, below countries that had experienced coups d'état or civil wars in the previous decade, like Venezuela and Yemen).

15. *How 'Drop-Off' Voters Differ From Consistent Voters and Nonvoters*, PEW RES. CTR. (Sept. 14, 2017), <https://www.people-press.org/2017/09/14/how-drop-off-voters-differ-from-consistent-voters-and-non-voters> [<https://perma.cc/YWQ4-MBJE>] (“The 2018 midterm elections will be determined in large part by who goes to the polls and who stays home. Historically, far fewer Americans turn out to vote in midterm than presidential elections . . .”).
16. Americans frequently vote for divided government. In midterm years, the president’s party often loses seats. See Drew Desilver, *Voter Turnout Always Drops off for Midterm Elections, But Why?*, PEW RES. CTR. (July. 24, 2014), <https://www.pewresearch.org/fact-tank/2014/07/24/voter-turnout-always-drops-off-for-midterm-elections-but-why> [<https://perma.cc/F4FZ-Z4NZ>] (describing the “presidential penalty”).
17. People who vote consistently are likely to be whiter, older, more financially secure, slightly better educated, and more ideologically conservative than inconsistent voters. *How 'Drop-Off' Voters Differ*, *supra* note 15.
18. *Election Costs: What States Pay*, NAT’L CONFERENCE OF STATE LEGISLATURES (Aug. 3, 2018), <http://www.ncsl.org/research/elections-and-campaigns/election-costs.aspx> [<https://perma.cc/L3A9-YP4C>]. These jurisdictions are estimated to administer approximately 250,000 elections every year. JAMES A. GARDNER & GUY-URIEL CHARLES, *ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM* 825 (2012) (stating that in the United States there are more than 500,000 elected officials at the local, state, and national levels and estimating the number of elections needed to select them, given that most officials serve roughly two-year terms).
19. *Id.* at 826–27.
20. See generally MYRNA PÉREZ, BRENNAN CTR. FOR JUSTICE, *WHEN VOTERS MOVE* (2009), https://www.brennancenter.org/sites/default/files/2019-08/Report_When-Voters-Move.pdf [<https://perma.cc/8HCP-8HP7>] (explaining how the United States’ electoral system does not allow for portability of voter registration, despite the fact that 45 percent of the population moves during each 5-year period).

Many factors reduce turnout. Some of these are artifacts of the American system of elections: requiring personal voter registration,²¹ permitting staggered timing of local, state, and federal elections,²² and a first-past-the-post electoral system.²³ Other factors are more election-specific: which offices are on the ballot,²⁴ the competitiveness of the race,²⁵ whether election day registration is permitted,²⁶ and how information about elections is distributed to voters.²⁷

The United States has a long history of excluding people from the franchise on the basis of race,²⁸ sex,²⁹ property ownership,³⁰ criminal

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21. Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL'Y REV. 370, 372–74 (1991).
 22. See SARAH F. ANZIA, TIMING AND TURNOUT: HOW OFF-CYCLE ELECTIONS FAVOR ORGANIZED GROUPS 91 (2013). To reduce costs, many states have shifted their electoral calendars to match that of federal elections. Paul Braun et al., *Why These 5 States Hold Odd-Year Elections, Bucking The Trend*, NAT'L PUB. RADIO (Nov. 4, 2019, 5:00 AM) <https://www.npr.org/2019/11/04/767959274/why-these-5-states-hold-odd-year-elections-bucking-the-trend>. Voter turnout tends to be lower for elections that are not held in tandem with congressional and presidential elections. See *id.*
 23. The United States has a first-past-the-post (also known as “winner takes all”) electoral system. In such a system, the candidate who receives the most votes in a given district wins, regardless of their party’s vote share in neighboring districts. ANDRE BLAIS, TO KEEP OR TO CHANGE FIRST PAST THE POST? THE POLITICS OF ELECTORAL REFORM 1 (2008). By comparison, under a system of proportional representation, each party will receive the number of seats roughly corresponding to their overall share of the vote across the entire region. *Id.* at 2.
 24. Particularly salient elections for statewide or federal offices correspond with greater voter turnout. NONPROFIT VOTE, *According to the Literature: Why People Vote*, <https://www.nonprofitvote.org/documents/2011/11/why-people-vote.pdf> [<https://perma.cc/T4HD-GBSE>].
 25. MARK N. FRANKLIN, VOTER TURNOUT AND THE DYNAMICS OF ELECTORAL COMPETITION IN ESTABLISHED DEMOCRACIES SINCE 1945, at 223 (2004).
 26. See Jacob R. Neiheisel & Barry C. Burden, *The Impact of Election Day Registration on Voter Turnout and Election Outcomes*, 40 AM. POL. RES. 636, 654–55 (2012).
 27. States have differing practices for distributing information to voters. See *Voter Information: Varied State Requirements*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/voter-information-state-approaches.aspx> [<https://perma.cc/3PEW-972K>] (last visited Oct. 21, 2019).
 28. See ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 158 (2015) (quoting a letter by an Alabama congressman, which reads in part: “We have always, as you know, falsely pretended that our main purpose was to exclude the ignorant vote . . . when, in fact, we were trying to exclude not the ignorant vote but the Negro vote.”). Indigenous peoples were also formally excluded from the franchise for decades into the twentieth century. See STAFF OF H.R. COMM. ON ADMIN., 116TH CONG., REP. ON VOTING RIGHTS AND ELECTION ADMINISTRATION IN THE UNITED STATES OF AMERICA, 86–87 (Comm. Print 2019) (prepared by the office of Congresswoman Marcia Fudge).
 29. See generally ELAINE WEISS, THE WOMAN’S HOUR: THE GREAT FIGHT TO WIN THE VOTE (2019).

convictions,³¹ and disability status.³² Indeed, our electoral system was originally designed to purposefully exclude a broad swath of the current electorate.³³

Unfortunately, some of those exclusions effectively continue today. Since 2013, when the U.S. Supreme Court crippled enforcement of the Voting Rights Act through its decision in *Shelby County v. Holder*,³⁴ government actors have ramped up efforts to intimidate voters or erect barriers to their participation.³⁵ Across the country, states have attempted to reduce the time frame for voter registration,³⁶ impose identification requirements that many

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30. JOHN PHILLIP REID, *THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION* 39 (1989) (quoting Sir William Blackstone as stating: “The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own.”).
 31. “Civil death” has been part of the penalty for serious moral or voting-related offenses in the United States since the colonial era. Post-Revolutionary War, states began disenfranchising all people convicted of felonies. Following the expansion of the franchise to Black men, Southern states began tailoring felon disenfranchisement laws to target communities of color. Jean Chung, *Felony Disenfranchisement: A Primer*, THE SENTENCING PROJ. (Jun. 27, 2019), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/> [https://perma.cc/3N6D-6R2N].
 32. See *The Right to Vote*, DISABILITY JUSTICE, <https://disabilityjustice.org/right-to-vote> [https://perma.cc/7DD2-X7QJ] (last visited Oct. 24, 2019).
 33. See MICHAEL WALDMAN, *THE FIGHT TO VOTE* 17 (2017) (quoting John Adams’s response to a suggestion that suffrage should be expanded to all men in Massachusetts: “Depend upon it, sir . . . it is dangerous to open so fruitful a source of controversy and altercation as would be opened by attempting to alter the qualifications of voters. There will be no end to it. New claims will arise. Women will demand the vote. Lads from 12 to 21 will think their rights not enough attended to, and every man, who has not a farthing, will demand an equal voice with any other in all acts of state. It tends to confound and destroy all distinctions, and prostrate all ranks to one common level.”).
 34. 570 U.S. 529 (2013) (striking down the coverage formula that had previously been used to determine which jurisdictions were subject to a federal preclearance requirement for any proposed electoral changes). “In 2012, the final full calendar year before the *Shelby County* decision, the Justice Department received 18,146 election law and procedure changes from Section 5 jurisdictions.” TOMAS LOPEZ, BRENNAN CTR. FOR JUSTICE, ‘SHELBY COUNTY’: ONE YEAR LATER 7 (2014) https://www.brennancenter.org/sites/default/files/analysis/Shelby_County_One_Year_Later.pdf [https://perma.cc/Q3EF-SVJ6].
 35. See generally STAFF OF H.R. COMM. ON ADMIN, *supra* note 28 at 31–84.
 36. See, e.g., *Nine states shorten deadline for voter registration*, THE WASH. POST. (Oct. 8, 2016), https://www.washingtonpost.com/world/national-security/nine-states-shorten-deadline-for-voter-registration/2016/10/07/e62b4c92-8cc2-11e6-bf8a-3d26847eed4_story.html. A shorter timeframe for voter registration can prevent eligible citizens from registering to vote because interest in electoral participation grows as Election Day draws closer. See Emily Rong Zhang, *New York Registration Deadline Prevents Tens of Thousands From Voting*, ACLU (Nov. 7, 2018), available at <https://www.aclu.org/blog/voting-rights/fighting-voter-suppression/new-york-registration-deadline-prevents-tens-thousands> (explaining how New York’s early voter registration deadline imposes burdens on would-be voters and the impetus for a lawsuit challenging that deadline).

voters cannot meet,³⁷ and require registrants to submit documentary proof of citizenship.³⁸ Voter identification laws, like the poll taxes of the Jim Crow era, often require an individual to make monetary payments to the government (for the underlying documentation needed to obtain voter identification or for an identification card itself) before they can vote, disproportionately burdening poor and racial minority voters.³⁹ Some states have also more harshly punished people who vote or register to vote while they are ineligible.⁴⁰ These penalties have fallen most harshly on people of color.⁴¹

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37. Jennifer L. Clark, *Separating Fact From Fiction on Voter ID Statistics*, BRENNAN CTR. FOR JUSTICE (Nov. 25, 2014), <https://www.brennancenter.org/blog/separating-fact-fiction-voter-id-statistics> [<https://perma.cc/XDP4-X52S>] (noting court findings that about 600,000 Texans lacked proper voter identification per a recent new state law and that about 300,000 voters lacked acceptable photo IDs in each of three states: Wisconsin, Pennsylvania, and North Carolina); Matt Barreto et al., *Voter ID Requirements and the Disenfranchisements of Latino, Black and Asian Voters* 1, 12 (2007) (unpublished manuscript), available at [https://www.brennancenter.org/sites/default/files/legal-work/63836ceea55aa81e4f_hlm6bhkse\(1\).pdf](https://www.brennancenter.org/sites/default/files/legal-work/63836ceea55aa81e4f_hlm6bhkse(1).pdf) [<https://perma.cc/GD7Q-SQHN>] (conducting exit polls in three states in 2006 and concluding that “[o]ur results clearly suggest that voting laws which require specific or multiple forms of identification will disproportionately impact racial and ethnic minorities, immigrant populations, and those with lower incomes.”).
38. See Ana Little-Saña, *Kansas Defeats Proof of Citizenship Law*, LEAGUE OF WOMEN VOTERS (Jul. 12, 2018), <https://www.lwv.org/blog/kansas-defeats-proof-citizenship-law> [<https://perma.cc/A7A3-EZAY>] (describing the defeat of Kansas’s law requiring documentary proof of citizenship during the voter registration process); *Ariz. v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013). Such laws would pose major barriers to many eligible voters, since 7 percent of citizens (13 million people) lack steady access to their citizenship documents. BRENNAN CTR. FOR JUSTICE, *CITIZENS WITHOUT PROOF* 2 (2006), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf [<https://perma.cc/U29T-3Z42>].
39. John Lewis, *A Poll Tax by Another Name*, N.Y. TIMES (Aug. 26, 2011), <https://www.nytimes.com/2011/08/27/opinion/a-poll-tax-by-another-name.html> [<https://perma.cc/7YHX-BLEJ>]. Black Americans are 10–18 percent less likely to have drivers’ licenses than white Americans. FRANCES FOX PIVEN, *WHY AMERICANS STILL DON’T VOTE* 266 (1988). Though the U.S. Supreme Court has proclaimed that “showing a free photo identification is not a significant increase over the usual voting burdens,” obtaining underlying documentation (such as birth certificates) or physically traveling to procure those identification cards can be costly and burdensome. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 128 (2008); *Voter ID*, BRENNAN CTR. FOR JUSTICE (Oct. 15, 2012), <https://www.brennancenter.org/analysis/voter-id> [<https://perma.cc/BQ9N-JHPK>]; Keesha Gaskins & Sundeep Iyer, *The Challenge of Obtaining Voter Identification*, BRENNAN CTR. FOR JUSTICE (Jul. 28, 2012), <https://www.brennancenter.org/our-work/research-reports/challenge-obtaining-voter-identification> [<https://perma.cc/V4BL-CBHH>].
40. For example, in 2017, Alabama banned crossover voting between party primaries and primary runoff elections. Mike Casen, *Alabama Gov. Kay Ivey to sign bill banning crossover voting*, ALABAMA.COM (Jan. 13, 2019) https://www.al.com/news/birmingham/2017/05/alabama_gov_kay_ivey_to_sign_b.html [<https://perma.cc/985Q-Z2EB>]. This new law prohibits voters who have cast a ballot in one party’s primary from then voting in another party’s primary runoff election. *Id.* The Alabama Secretary of State identified and

These are just a few examples of government practices which have the (likely intended) effect of suppressing voter turnout, particularly amongst minority groups.

B. Current Protections of Voting Rights Are Insufficient to Ensure That All Americans Have Equal Access to the Political Process

This Comment proposes building minimum turnout requirements into our electoral system in order to compel states and localities to make it easier for people to vote. Currently, elected officials can enact policies that suppress voter turnout with relative impunity. Indeed, incumbents may have a perverse incentive to suppress voter turnout: By keeping the pool of voters limited to those who originally elected them, they have a greater chance of remaining in office for future terms.⁴² Existing federal laws like the Voting Rights Act, the National Voter Registration Act, and the Help America Vote Act provide some protections against voter-suppressive measures but are limited in their scope.

The Voting Rights Act of 1965 (VRA) was a landmark civil rights achievement. Through its passage, Congress significantly curbed the use of discriminatory mechanisms that deterred Black people from voting. Some of

recommended criminal prosecutions for hundreds of 2017 Democratic primary voters who had allegedly voted in the Republican primary runoff (which was held one month later) in violation of the newly-passed crossover voting ban. Press Release, Ala. Sec'y of State, UPDATE: Crossover Voting Information (Nov. 17, 2017), <https://sos.alabama.gov/newsroom/update-crossover-voting-information> [<https://perma.cc/D43G-86CW>]; ALA. SEC'Y OF STATE, COUNTIES WITH CROSSOVER REPORT, <https://sos.alabama.gov/sites/default/files/CountieswCrossover.pdf> [<https://perma.cc/D43G-86CW>] (last visited Oct. 24, 2019).

41. Recently, for example, a Texas woman was imprisoned for mistakenly casting a provisional ballot while ineligible due to a past felony conviction. For this honest mistake, Crystal Mason was sentenced to five years in prison. Her provisional ballot was not even counted, so her actions had no bearing on the outcome of the election. Ed Pilkington, *US Voter Suppression: Why This Texas Woman Is Facing Five Years' Prison*, *GUARDIAN* (Aug. 28, 2018), <https://www.theguardian.com/us-news/2018/aug/27/crime-of-voting-texas-woman-crystal-mason-five-years-prison> [<https://perma.cc/CK5J-TD5R>].
42. See, e.g., Jessica Trounstine, *Turnout and Incumbency in Local Elections*, 49 *URB. AFF. REV.* 167, 175 (2012) ("The results are clear: When institutions discourage participation, more incumbents run for reelection."). Notably, the Supreme Court has explicitly upheld state legislatures' use of incumbency protection as an acceptable redistricting criterion. See *Bush v. Vera*, 517 U.S. 952, 964 (1996) (collecting cases showing that "avoiding contests between incumbents" is a legitimate state goal during the redistricting process); Justin Levitt, *Where Are the Lines Drawn?*, *ALL ABOUT REDISTRICTING*, <http://redistricting.lls.edu/where-state.php> [<https://perma.cc/LS8N-LAHT>] (last visited Oct. 24, 2019).

the most pernicious measures, such as literacy tests and grandfather clauses,⁴³ were abolished altogether.⁴⁴ Following the VRA's enactment, Black Americans made immense electoral gains through higher voter registration numbers and the election of more Black political representatives.⁴⁵

A key provision of the VRA, § 5, was used as a shield to guard minorities from discriminatory changes in voting practices. Unique among civil rights laws, § 5 could be used not only to remedy existing discrimination but also to prevent future discrimination.⁴⁶ In *Shelby County v. Holder*, the Supreme Court upheld the constitutionality of § 5 but rendered that provision unusable by invalidating the coverage formula contained in VRA § 4(b).⁴⁷ Prior to *Shelby County*, jurisdictions that fell within the § 5 preclearance regime were required to obtain federal approval before implementing changes to their voting practices or procedures.⁴⁸ This meant that officials in nine states and dozens of counties⁴⁹ within non-covered states had to demonstrate that any proposed electoral changes would not place a racial or language minority group in a worse position than it was already in.⁵⁰ Thus, even the most robust protection provided in the VRA—the currently defunct § 5—does not mandate *progress* in the equality of our electoral

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43. It took decades after the VRA's enactment for Black representation to return to the levels of the Reconstruction Era. Dara Lind, *19 Maps and Charts That Explain Voting Rights in America*, VOX (Aug. 6, 2015, 11:50 AM), <https://www.vox.com/2015/8/6/9107183/voting-rights-map-chart> [<https://perma.cc/AEW3-6TVL>].
44. Benjamin Highton, *Voter Registration and Turnout in the United States*, 2 PERSP. ON POL. 507, 511 (2004). See generally BERMAN, *supra* note 28.
45. Highton, *supra* note 44 at 508–09 (noting how grandfather clauses were previously used to heighten the racially discriminatory impact of literacy tests).
46. See 570 U.S. 529, 534–35 (claiming that the VRA “employed extraordinary measures to address an extraordinary problem” in requiring preclearance of new laws by a subset of jurisdictions).
47. Congress can enact a new coverage formula. The Voting Rights Amendment Act of 2019 would implement a coverage formula based on jurisdictions’ use of discriminatory practices rather than a formula based on voter turnout levels. See H.R. 4, 116th Cong. § 3(a)(1) (as referred in Senate, Dec. 9, 2019).
48. Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39:3, WILLIAM & MARY L. REV., 725, 733 fn. 41. This approval could be granted either through a declaratory judgment from the D.C. Circuit Court of Appeals or via administrative preclearance from the Attorney General, who had sixty day window to object to submitted proposals.
49. *Jurisdictions Previously Covered by Section 5 at the Time of the Shelby County Decision*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> [<https://perma.cc/TVJ2-8XZM>] (last updated Aug. 6, 2015). Over 500,000 electoral changes were submitted for review by the Attorney General between 1965 and 2013. *Id.*
50. John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CAL. L. REV. 1211, 1213–14 (1998).

representation. It merely mandates non-retrogression. In other words, the most heralded federal voting rights protection merely protects the status quo and provides no legal mandate to positively improve the political representation of minority groups.⁵¹

The National Voter Registration Act of 1993 (NVRA) was enacted to increase the opportunities Americans have to register to vote and to maintain that registration.⁵² The NVRA has introduced a federal mail-in voter registration form and requires states to provide registration opportunities at various federally and state-funded agencies.⁵³ The NVRA does not set goals for what percentage of eligible citizens must be registered to vote or turn out to vote.

Congress passed the Help America Vote Act of 2002 (HAVA) after voting irregularities in Florida cast doubt on the results of the presidential election in 2000.⁵⁴ The law created a new federal agency, the Election Assistance Commission, to assist states in compliance with its mandates.⁵⁵ HAVA requires states to implement practices designed to improve election administration relating to the following: provisional voting, dissemination of information to voters, updated and upgraded voting equipment, development and maintenance of statewide registration databases, voter identification

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51. VRA § 2 and § 5 are known, respectively, as “the sword” and “the shield.” Under § 2, groups could challenge electoral procedures that result in “the denial or abridgement of the right of any citizen to vote on account of race, color, or membership in a language minority group.” Post-*Shelby County*, § 2 is still in effect and can be used to mount legal challenges anywhere in the nation. In contrast to § 5, § 2 can be used to affirmatively improve minority electoral representation in a limited manner (for example, by requiring jurisdictions to stop using at-large election systems that prevent communities of color from electing the representatives of their choice.) See *Section 2 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/crt/section-2-voting-rights-act> [<https://perma.cc/6YDK-KEFQ>] (last updated Sept. 4, 2018).
 52. *About the National Voter Registration Act*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/crt/about-national-voter-registration-act> [<https://perma.cc/BD45-XYA4>] (last updated May 21, 2019); 42 U.S.C. § 1973GG.
 53. *Id.* Several states are exempt from the NVRA’s requirements because they do not require voter registration or because they already offered election day voter registration opportunities at the time the law was enacted. *Id.*
 54. *Help America Vote Act of 2002 (HAVA)*, LEGAL INFO. INST., <https://www.law.cornell.edu/background/HAVA.html> [<https://perma.cc/SL5K-ZB4N>] (last visited Oct. 24, 2019); (GARDNER, *supra* note 18, at 859 (describing the impetus for HAVA’s creation and its basic requirements).
 55. See *The Help America Vote Act of 2002*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/crt/help-america-vote-act-2002> [<https://perma.cc/GTE9-GBYU>] (last updated Aug. 8, 2015).

procedures, and processing of administrative complaints.⁵⁶ HAVA does not require election officials to improve voter turnout.

The VRA, NVRA, and HAVA provide important guidance to state and local officials and have spurred improvements in minority representation,⁵⁷ voter registration,⁵⁸ and election administration,⁵⁹ respectively. Yet none of these statutes mandate a minimum turnout level. They also fail to provide any incentive for jurisdictions to *improve* voter turnout.

Proponents of electoral reform champion a number of measures that could improve turnout. But even the most effective reforms are estimated to increase voter participation only by single-digit percentages: expanding early voting (2–4 percent),⁶⁰ allowing election day voter registration (5–7 percent),⁶¹ or making registration portable across different states (2 percent).⁶² While localities can and should make greater efforts to improve turnout by implementing such reforms, a more direct solution would be to mandate a minimum turnout level. If electoral legitimacy were tied to the level of voter turnout, localities and lawmakers would struggle to justify making it harder for people to vote. Moreover, a mandatory minimum turnout threshold would provide election administrators and elected officials incentives to remove existing barriers to electoral participation.

56. *Help America Vote Act*, U.S. ELECTION ASSISTANCE COMM'N, <https://www.eac.gov/about/help-america-vote-act> [https://perma.cc/F4SX-R8R7] (last visited Sept. 23, 2019).

57. See Section 2 of the *Voting Rights Act*, *supra* note 51.

58. See *About the National Voter Registration Act*, *supra* note 52.

59. See *The Help America Vote Act of 2002*, *supra* note 55.

60. Paul Gronke et al., *Convenience Voting*, 11 ANN. REV. POL. SCI. 437, 442 (2008). Some scholars have argued that the adoption of early voting has counterintuitively led to lower turnout. See Rich Morin, *Study: Early Voting Associated With Lower Turnout*, PEW RESEARCH CTR. (Sept. 23, 2013), <http://www.pewresearch.org/fact-tank/2013/09/23/study-early-voting-associated-with-lower-turnout> [https://perma.cc/783A-KP39]. Early voting may result in lower turnout because it robs election day of much of its social stimulus. BARRY C. BURDEN ET AL., THE EFFECTS AND COSTS OF EARLY VOTING, ELECTION DAY REGISTRATION, AND SAME DAY REGISTRATION IN THE 2008 ELECTIONS 1, 6 (2009).

61. Wendy Weiser, *Automatic Voter Registration Boosts Political Participation*, STAN. SOC. INNOVATION REV. (Jan. 28, 2016) https://ssir.org/articles/entry/automatic_voter_registration_boosts_political_participation [https://perma.cc/3XWL-LL7D]; Kelly Born, *Increasing Voter Turnout: What, If Anything, Can Be Done?* STAN. SOC. INNOVATION REV. (Apr. 25, 2016), https://ssir.org/articles/entry/increasing_voter_turnout_what_if_anything_can_be_done. [https://perma.cc/5NMT-W9M8].

62. Weiser, *supra* note 61.

II. HOW LOW TURNOUT WEAKENS DEMOCRACY

Electoral participation is necessary to maintain a democratic form of government; it is a prerequisite for democracy itself. This Part explains: (1) why, in the abstract, the legitimacy of a democratic government rests upon being elected by the people; (2) the ways in which American voters are ideologically, culturally, and racially unrepresentative of the electorate as a whole; and (3) how, in practice, low voter turnout can undermine the efficacy of democratic institutions.

A. A Democratic Government's Legitimacy Rests Upon Receiving Popular Support in Elections

The United States is a democratic republic, a form of government in which the people elect their representatives.⁶³ The concept of obtaining “consent of the governed” is embedded deeply within our political traditions. An early proponent of this principle, the British philosopher John Locke, had a profound impact on America's Founding Fathers.⁶⁴ Thomas Jefferson paid tribute to this concept in the opening paragraph of

63. The United States needs a representative form of government because it is too populous for its citizens to effectively and directly govern themselves. As of the 2010 census over 300 million people lived in the United States. D'Vera Cohn, *The 2010 U.S. Population Is . . .*, PEW RES. CTR. (Dec. 6, 2010), <http://www.pewsocialtrends.org/2010/12/06/the-2010-u-s-population-is> [<https://perma.cc/H7Z9-6CYH>]. A more recent estimate reveals that there are approximately 227 million citizens of voting age in the United States. *Redistricting Data: Voting Age Population by Citizenship and Race and Ethnicity*, U.S. CENSUS BUREAU (Feb. 1, 2018), <https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.html> [<https://perma.cc/22QU-9ZRV>]. In comparison, the first Western democracy of record, ancient Athens, is estimated to have had, at most, 45,000 citizens in its Assembly. BILL STITES, *DEMOCRACY: A PRIMARY SOURCE ANALYSIS*, 9 (2005). Because Athenian citizenship was reserved only for a fraction of the city-state's population, slaves, women, and other minorities were excluded from the Assembly. Fabio Padovano, *Parliaments*, in *THE ELGAR COMPANION TO PUBLIC CHOICE* 153, 175 (Michael Reksulak et al. eds., 2d. ed. 2013); M.I. Finley, *Athenian Demagogues*, in *ATHENIAN DEMOCRACY* 163, 170 (P.J. Rhodes ed., 2004). Athens was ruled via a direct democracy, a system where each eligible voter directly participated in collective decision-making. But direct democracy is impracticable at the scale of the current United States electorate. The entire Athenian electorate was roughly one-sixteenth the size of a single contemporary U.S. congressional district. *Compare* STITES at 9 (showing that Athens had a maximum of 45,000 citizens) *with Members of Congress*, GOVTRACK, <https://www.govtrack.us/congress/members> [<https://perma.cc/3BUM-X56A>] (last visited Sept. 24, 2019) (showing that the states are divided into 435 congressional districts, and each district has a population of about 710,000).

64. See generally MARY-ELAINE SWANSON, JOHN LOCKE: PHILOSOPHER OF AMERICAN LIBERTY: WHY OUR FOUNDERS FOUGHT FOR “LIFE, LIBERTY, AND PROPERTY” (2012).

the Declaration of Independence, which asserts that democracies derive their power, at least in part, through the consent of the people.⁶⁵ Article Four, Clause One of the Constitution (the Guarantee Clause) promises, “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.”⁶⁶ Certainly, this means that Americans have a right to elect public officeholders.⁶⁷ At minimum, when only a small fraction of Americans participate in the electoral process, a truly republican form of government is not achieved.⁶⁸

Elections facilitate democratic governance by allowing the masses to convey their consent to be governed.⁶⁹ This legitimizes the government and allows citizens to hold that government accountable.⁷⁰ Indeed, voting is the

65. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it . . .”) (emphasis added).

66. U.S. CONST. art. IV, § 4.

67. According to constitutional law professor Erwin Chemerinsky, the Guarantee Clause is meant to, at minimum, preserve a form of government where “the people ultimately retain sovereignty and choose their officeholders,” such that it can be interpreted to provide an individual right to vote. Erwin Chemerinsky, *Why Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 867–68 (1994). Courts have so greatly limited the reach of the Guarantee Clause that it is unlikely to be interpreted to provide more than a basic commitment to representative government. See *Minor v. Happersett*, 88 U.S. 162, 173–78 (1874) (holding that female citizens could not claim the right of suffrage under the Guarantee Clause’s promise of a republican form of government); *Baker v. Carr*, 369 U.S. 186, 224 (1962) (affirming that cases challenging state or congressional action under the Guarantee Clause are nonjusticiable).

68. For a number of reasons, the Founding Fathers were unlikely to have been preoccupied with trying to achieve high voter turnout. The electoral system that prevailed in the early United States was chaotic. Elizabeth King, *How the U.S. Ended Up With Today’s Paper Ballots*, TIME (Apr. 26, 2016), <https://time.com/4305508/paper-ballot-history> [<https://perma.cc/RF34-FFEM>] (describing the use of voice votes and nonprivate ballots in early American history). Early election administrators also likely lacked the ability to systematically track voter turnout.

69. See Emilee Booth Chapman, *The Distinctive Value of Elections and the Case for Compulsory Voting*, 63:1 AM. J. OF POL. SCI. 101, 103 (2019) (“The special emphasis on voting in popular political culture is not arbitrary or misguided Rather, it is grounded in the distinctive and valuable role that periodic moments of approximately universal participation play in contemporary democratic practices.”).

70. While elections play a key role in keeping democracy functioning, other forms of civic engagement should be inclusive and accessible to all, even to those not eligible to vote. People who do not have voting rights still have representational rights in our democracy. This proposal does not endeavor to take away or limit the existing rights of nonvoters to participate in a society that is responsive to their needs and concerns.

only mechanism that allows for meaningful and equal civic participation from all eligible citizens.⁷¹ Because modern voting is conducted via secret ballots, it is impossible for one person to use her power or position at the ballot box to wield greater influence than someone else. Within an electoral district, all votes are equally counted.⁷²

Citizens⁷³ have no adequate substitute for voting to tell government what they want.⁷⁴ Other forms of civic participation are more expensive or more time- and

71. As further explained below, while there are alternative ways to hold the government accountable to the public interest, voting is the only broad-based method that gives every citizen of voting age in a given jurisdiction an equal say in how the government should operate. Alternatives to voting do not give every citizen an equal voice. See Chapman, *supra* note 69 at 102 (“Voting is not interchangeable with other forms of political influence.”).

72. This is true notwithstanding the distorting effects of racial, prison-based, and partisan gerrymandering on how political representation is allocated across electoral districts.

73. Before the expansion of the electorate and the advent of the administrative state, citizens and individuals ineligible to vote used the petitioning process extensively to participate in lawmaking. Maggie Blackhawk, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1201 n.465 (2016). “Much like a complaint filed with a court, Congress treated each petition on equal footing—no matter the petition’s source and without regard to the political power of the petitioner—and consideration was a public, transparent process.” *Id.* at 1137.

74. Polls arguably come close to fulfilling a similar role to elections because polls are designed to be of a representative sample size, provide point-in-time aggregate data of peoples’ preferences, are publicly discussed, and can inform the opinions or actions of elected officials. But, for several reasons, polls are an inadequate substitute for votes: (1) polls are conducted by private entities that are not publicly regulated; (2) the way poll questions are asked may bias the results; (3) participants may not take responding to polls as seriously as voting; and (4) polls may not draw information from the exact universe of people who are eligible to vote. Furthermore, Gallup, the nation’s longtime leader in this arena, announced that for the 2016 presidential cycle, it would not conduct its famous horse race polls because it had become too expensive to conduct traditional polls. See Daniel White, *Here’s Why Gallup Won’t Poll the 2016 Election*, TIME (Oct. 9, 2015) <http://time.com/4067019/gallup-horse-race-polling> [<https://perma.cc/VZ6P-GN2G>]; see also Walter Shapiro, *The Polling Industry Is in Crisis*, THE NEW REPUBLIC (Jun. 21, 2019) <https://newrepublic.com/article/154124/polling-industry-crisis> (describing, among other problems, a less reliable dataset for presidential preference polls because fewer Americans answer phone calls from unknown numbers). Other forms of civic participation may allow citizens to advocate for their preferences, but they often privilege people with greater access to monetary and social resources. For instance, citizens can influence the electoral process and government policy by lobbying, participating in public hearings, engaging in civil disobedience, making monetary contributions to political campaigns, or personally seeking political office. Yet, effectively engaging in these activities can be expensive and time-consuming relative to the costs of voting. And, unlike with voting, people who are well-connected, wealthier, or simply more assertive than others can wield greater influence; these alternatives do not put citizens on an equal footing.

labor-intensive, less broad-based, or not designed to provide point-in-time information about the preferences of the entire electorate.

In a world where every eligible citizen votes, elected officials would represent the preferences of the entire electorate.⁷⁵ In comparison, officials elected by only a small fraction of the electorate cannot claim the same mandate. And, while political campaigns typically base their “win number” (the number of votes needed to win) on expected turnout levels,⁷⁶ popular analysis of electoral results gives little weight to how many people turned out to vote.⁷⁷ Instead, the measure of success routinely touted by campaigns and political reporters is the margin of victory (the number or percentage of votes by which a candidate won).

Often, in our public discourse about elections, we conflate a large margin of victory with the notion that someone was elected with robust popular support. When a candidate’s vote share is particularly high, she is considered to have a popular mandate and thus has more power to move forward with her policy agenda.⁷⁸ But a larger margin of victory does not necessarily mean that constituents’ preferences are better represented. The total number of people who participate in an election matters, as well.

In fact, voter turnout levels may be more integral to the legitimacy of any given election than the percentage of votes cast in favor of the victor. As shown in the table below, perceived electoral landslides can be misleading. As this Comment aims to demonstrate, the robustness of a candidate’s perceived mandate should be closely tied to the level of voter engagement in their election. A close race with high voter turnout should yield a stronger

75. It is theoretically possible that a small sample of the electorate’s preferences could match those of the electorate as a whole. However, there is no way to verify this correlation for any given race. And, given the demographic differences between high-propensity voters and perennial nonvoters, this is unlikely to be the case.

76. See, e.g., NGP VAN, *Running For Local Office? You Need This Number to Win* (Mar. 11, 2016) <https://blog.ngpvan.com/running-for-local-office-you-need-this-number-to-win> [<https://perma.cc/4F97-T2RZ>] (describing how campaigns often calibrate their win numbers based a prediction of how many voters will cast ballots in the race at hand, which in turn is calculated by averaging the turnout rates in recent similar elections).

77. Typically, election results are reported without any acknowledgment of the level of voter turnout in that election. See, e.g., *2019 Mississippi General Election Results*, N.Y. TIMES (Nov. 14, 2019), <https://www.nytimes.com/interactive/2019/11/05/us/elections/results-mississippi-general-elections.html> [<https://perma.cc/U8TL-SBC3>] (showing merely the number of votes cast for each candidate, the percentage of the vote share received by each candidate, and the number and percentage of precincts reporting results).

78. See, e.g., John Nichols, *Obama’s 3 Million Vote, Electoral College Landslide, Majority of States Mandate*, NATION (Nov. 9, 2012), <https://www.thenation.com/article/obamas-3-million-vote-electoral-college-landslide-majority-states-mandate> [<https://perma.cc/XY7X-SVM2>].

mandate for the victor than a large margin of victory in a race with low voter turnout.

Table 1: Margin-of-Victory Versus Percentage Turnout

	Oklahoma Election ⁷⁹	Montana Election ⁸⁰
Vote Share of Victor	80%	55%
Vote Share of Other Candidates	20%	45%
Margin of Victory	60%	10%
Total Votes Cast in Election	60,000	500,000
Number of Nonvoters	590,000	150,000
Size of the Electorate⁸¹	650,000	650,000
Percentage Turnout	9%	77%

This table extrapolates from 2016 U.S. House of Representatives races to illustrate two ways of measuring the representativeness of elections. The first four rows represent how electoral results are typically reported and discussed, in terms of which candidate won the most votes. The last three rows provide information about voter turnout levels.⁸² The Oklahoma House race was won with

79. This election was for Oklahoma's First Congressional District. Theodore Landsman, *How to Get Elected to Congress With Only 50,595 Votes*, FAIRVOTE (Mar. 15, 2017), http://www.fairvote.org/how_to_get_elected_to_congress_with_only_50_595_votes [<https://perma.cc/8KAG-GT76>].

80. Montana has a single, at-large seat in the U.S. House of Representatives. *Id.*

81. A single U.S. Congressman represents, on average, 710,000 constituents. *Members of Congress*, GOVTRACK, <https://www.govtrack.us/congress/members> [<https://perma.cc/3BUM-X56A>]. While the number of constituents who actually elect each Congressman varies widely, this number is useful for illustrative purposes. *Members of Congress*, GOVTRACK, <https://www.govtrack.us/congress/members> [<https://perma.cc/3BUM-X56A>]. Since some constituents are children, noncitizens, or otherwise ineligible to vote, assume that there are about 650,000 eligible voters in any given congressional district. In the absence of a minimum turnout requirement, any number of those constituent voters could elect a U.S. Representative, no matter how large the district's electorate may be, provided that enough other eligible voters do not vote.

82. Typically, when jurisdictions release election results, they merely report the number of votes cast for each candidate. They do not usually include the number of nonvoters, the size of the electorate as a whole, or the percentage turnout. Oklahoma, for example, reports only the number of votes cast per candidate (broken up by absentee votes cast by mail, early votes, and election day votes), the number of precincts reporting, and the percentage vote share of each candidate. OKLA. STATE ELECTION BD., *Official Results: Federal, State, Legislative and Judicial Races General Election—November 8, 2016* (Nov. 17, 2016), https://www.ok.gov/elections/support/20161108_seb.html#USREP [<https://perma.cc/ZJX5-WV5T>]. Montana *does* purport to report percentage turnout, but election officials in the state calculate voter turnout using registered voters (rather than the entire potential electorate) as the baseline. *2016 Statewide General Election Canvass*, MONT. SEC. OF STATE,

approximately 50,000 of about 60,000 total votes cast (80 percent of the total votes cast).⁸³ On the other end of the spectrum, over 500,000 votes were cast in Montana's 2016 congressional race, with the victor receiving 285,358 votes (55 percent of the total cast).⁸⁴ While the Oklahoma winner had a larger margin of victory than the Montana winner, a far smaller percentage of the electorate voted in the Oklahoma race. In terms of turnout, the Oklahoma election is less legitimate than that of the Montana election; even though the Oklahoma candidate's margin of victory was larger, fewer people weighed in on the decision. In fact, even if the Oklahoma representative had won 60,000 to 0, he would be less representative of his constituency than the Montana candidate because a smaller proportion of the electorate participated in his election.

If we accept the premise that a representative democracy requires citizens to vote to elect their representatives, then *some* minimum (nonzero) level of voter turnout is required for such a government to legitimately function. If absolutely no one voted in such a system, in the absence of a default rule for choosing a representative,⁸⁵ no government could be seated. In other words, zero turnout would require a new election.

Now suppose that only three individuals cast ballots in a gubernatorial race. Such a small fraction of the electorate is not significantly more representative than zero voters. Yet if those three votes yielded a decisive victory for one of the candidates, there is no legal mechanism in place to invalidate the election or levy any other electoral consequence; that candidate would win the election.

How many people must vote for an election to be legitimate? It is a tautology that democracies are meant to be governments of the people. There are governmental forms that rely on the participation of only a relatively small subset of people: oligarchies, plutocracies, meritocracies, etc. A democracy, by

<https://sosmt.gov/wp-content/uploads/attachments/2016GeneralStatewideCanvass.pdf?dt=1494348815885&dt=1494348873534&dt=1497553987845&dt=1497555053569&dt=1497555121034&dt=1497555299184&dt=1497892315130&dt=1519325848767> [https://perma.cc/FBQ3-6V3W]. This practice leads to inflated voter turnout results.

83. Landsman, *supra* note 79.

84. *Id.*

85. For example, there is a presidential line of succession, which explains why Gerald Ford (a former Speaker of the House) became president without any new election being held. See *The Establishment and First Uses of the 25th Amendment*, GERALD R. FORD PRESIDENTIAL LIBR. & MUSEUM (Mar. 21, 2019), <https://www.fordlibrarymuseum.gov/library/exhibits/amendment25/25thamendment.html> [https://perma.cc/E3PS-25VX].

contrast, aspires to universal suffrage.⁸⁶ While our society has not settled on what level of voter turnout legitimates an election, a representative democracy does require some nonzero level of voter turnout.

B. Current Voters Are Unrepresentative of the Electorate as a Whole

An election is not representative of the will of the people when only a small subset of eligible voters cast ballots. Furthermore, the demographic distribution of current voters does not reflect the diversity of American society.⁸⁷ Voters are disproportionately whiter, higher income, more educated, and older than the potential electorate as a whole. White people are more likely to vote than are people of color.⁸⁸ Rich people vote in significantly higher numbers than poor people,⁸⁹ as do people with higher education levels compared to those with less formal education,⁹⁰ and people without disabilities vis-à-vis individuals with disabilities.⁹¹ And, despite the lowering of the voting age from 21 to 18, youth are notoriously low-propensity voters.⁹²

86. Even democracies with strictly-enforced compulsory voting have yet to actually achieve 100 percent turnout. For example, 90 percent of Australian registered voters and 94 percent of Uruguayan registered voters regularly turn out to vote in their respective countries' legislative elections. Alberto Chong & Mauricio Olivera, *On Compulsory Voting and Income Inequality in a Cross-Section of Countries* 11 (Inter-Am. Dev. Bank, Working Paper No. 533, 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1818733.

87. In 2014, 44 million eligible citizens of color did not vote. SEAN McELWEE, DEMOS, WHY VOTING MATTERS: LARGE DISPARITIES IN TURNOUT BENEFIT THE DONOR CLASS 2 (2015), <https://www.demos.org/research/why-voting-matters-large-disparities-turnout-benefit-donor-class>. That year, 66 million eligible voters earning less than \$50,000 each year also did not vote. *Id.*

88. *Id.* at 3–5. “It should also be noted that Census data overstate Black and Latino turnout, and the turnout gaps we see in some states could be as much as twice as large. Further, we do not know very much about what is happening [with regard to turnout] at the municipal level. The data is limited, but at least one study suggests that Black Americans turnout in municipal elections at a rate 8 points lower than whites, with Latinos 39 points lower and Asians 36 points lower.” *Id.* at 5. See also Joshua Harder & Jon A. Krosnick, *Why Do People Vote? A Psychological Analysis of the Causes of Voter Turnout*, 64 J. SOC. ISSUES 525, 534 (2008) (finding that white people are more inclined to vote than people of Asian or Hispanic descent).

89. *Id.* at 531.

90. ELECTION LAW: CASES AND MATERIALS 335 (Daniel Hays Lowenstein et al. eds., 4th ed. 2008).

91. Had voters with disabilities turned out at the same rate as their peers in 2016, there would have been at least 2.2 million more voters in that year's general election. Lisa Schur & Douglas Kruse, Fact Sheet: Disability and Voter Turnout in the 2016 Elections; RUTGERS SCH. OF MGMT. & LABOR RELATIONS 2, https://smlr.rutgers.edu/sites/default/files/documents/PressReleases/kruse_and_schur_-_2016_disability_turnout.pdf [<https://perma.cc/88CG-M7CS>]. Professor Rabia Belt of Stanford University warns that “people with disabilities are the ticking time bomb of the electorate,” as up to 35 percent of all American voters will need accommodations in the next 25 years. Rabia

Equality of representation is a value (theoretically) enshrined in this country's governance structure. Across states and across the country, legislative districts must be redrawn following the decennial census to be roughly equipopulous under the principle of "one-person, one-vote."⁹³ In practice, however, not all American voters have an equal voice at the ballot box. The U.S. Senate and the Electoral College were specifically designed to amplify the voices of less populous states.⁹⁴ In an increasingly urban nation, rural states with 17 percent of the country's population can wield a Senate majority.⁹⁵

Racial minorities, particularly Black voters, receive far less electoral representation. Historically, Black Americans were exploited to create more representation for white people.⁹⁶ Because of the so-called Three-Fifths Compromise, the U.S. Constitution allocated additional congressional representation to slave-owning states to account for slaves who were not legally entitled to vote.⁹⁷ In the post-Reconstruction Era, ex-Confederate states banned

Belt, *Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 STAN. L. REV. 1491, 1493 (Jun. 2016).

92. WENDELL W. CULTICE, *YOUTH'S BATTLE FOR THE BALLOT: A HISTORY OF VOTING AGE IN AMERICA* 218–23 (1992). See also *2014 Youth Turnout and Youth Registration Rates Lowest Ever Recorded; Changes Essential in 2016*, CIRCLE, <http://civicyouth.org/2014-youth-turnout-and-youth-registration-rates-lowest-ever-recorded-changes-essential-in-2016> [https://perma.cc/D5AX-LTAQ].
93. The population of congressional districts within a state must be virtually equal. See *Karcher v. Daggett*, 462 U.S. 725 (1983). Meanwhile, deviations above ten percent in the population size of a state's largest legislative district compared to its smallest are presumptively unconstitutional under the theory of one-person, one-vote. See *Larios v. Cox*, 305 F. Supp. 2d 1335, 1338–39 (N.D. Ga. 2004). Note that this threshold does not create any "safe harbor." *Id.* at 1340.
94. Emily Badger, *As American as Apple Pie? The Rural Vote's Disproportionate Slice of Power*, N.Y. TIMES (Nov. 20, 2016), <https://www.nytimes.com/2016/11/21/upshot/as-american-as-apple-pie-the-rural-votes-disproportionate-slice-of-power.html> [https://perma.cc/3JGS-H9JF].
95. *Id.*
96. Other races have also been excluded from the franchise, through means like racially-biased naturalization procedures which effectively denied citizenship to nonwhites. See, e.g., *United States v. Bhagat Singh Thind*, 261 U.S. 204, 207, 210 (1923) (determining that a person of Indian origin did not qualify as a white person eligible for naturalization despite being "Aryan"). The effects of this exclusion continue. A 1999 study concluded that "the more racially diverse a state's electorate, the lower the turnout," partly because those states "have less-easy voter registration requirements, and they are less likely to have relatively liberal Republican party elites." ELECTION LAW, *supra* note 90, at 337.
97. See Richard M. Valelly, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 28–29 (2004). U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined

enfranchisement of freedmen, which led to even greater inflation of white Southern representation.⁹⁸ In response, the sitting Congress overrode a presidential veto to enact civil rights legislation.⁹⁹ Despite the clear mandates of the Thirteenth, Fourteenth, and Fifteenth Amendments, for the next century Jim Crow laws and violence were used to terrify Black Americans to prevent them from exercising their legal right to vote. Through selective policing,¹⁰⁰ the disenfranchisement of people with felony convictions (especially Black men),¹⁰¹ and prison gerrymandering,¹⁰² the odious use of Black and brown bodies to inflate white representation continues today.

Furthermore, the preferences of poor people are not well accounted for in our politics. Compared to registered voters, people who are not registered to vote are more likely to be supportive of policies combatting racism and helping low-income Americans.¹⁰³ They are also more supportive of policies that would reduce income inequality and increase services for the poor.¹⁰⁴ Similarly, states with greater parity in the relative turnout rates of low- and high-income voters have more generous welfare policies.¹⁰⁵

Beyond the fact that high-propensity voters are, in important respects, unrepresentative of the electorate as a whole, this inequity is perpetuated by electoral rules and practices that make it harder for racial minorities and low-

by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”).

98. Following the Civil War, freedmen were suddenly counted as whole persons for the purposes of apportioning congressional representation. But when radical Reconstruction came to a rapid end, they could no longer exercise their right to vote. This resulted in even greater inflation of white Southern representation. *See id.* The penalty clause was written into the Fourteenth Amendment to prevent this exact result. It states that when the right to vote is denied to male citizens of voting age (except due to participation in crime), that state’s congressional representation “shall be [proportionally] reduced.” U.S. CONST. amend. XIV. This provision has effectively been dormant since it was ratified during the Reconstruction era. *See* Katherine Shaw, *Invoking the Penalty: How Florida’s Felon Disenfranchisement Law Violates the Constitutional Requirement of Population Equality in Congressional Representation, and What to Do About It*, 100 NW. U. L. REV. 1439, 1473 (2006).
99. *Id.* at 29–30.
100. *See* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 123 (rev. ed. 2012).
101. *Id.* at 193.
102. *See* *Prison Gerrymandering Project*, THE PRISON POLICY INITIATIVE, <https://www.prisonersofthecensus.org> [<https://perma.cc/G3QX-ULAS>] (last visited Sept. 7, 2019).
103. McElwee, *supra* note 87, at 5–7 (drawing conclusions from polls conducted by American National Election Studies).
104. *Id.* at 7–8.
105. James M. Avery, *Does Who Votes Matter? Income Bias in Voter Turnout and Economic Inequality in the American States from 1980 to 2010*, 37 POL. BEHAV. 955, 960 (2015).

income Americans to participate. Jurisdictions previously subject to VRA preclearance have closed over 1500 polling places since 2013, and many of these closures predominantly impact Latinx and Black communities.¹⁰⁶ States have also more aggressively de-registered eligible voters due to inactivity or supposed double-registrations.¹⁰⁷

Further, though as many as 11 percent of eligible voters (21 million people) do not possess government-issued photo identification,¹⁰⁸ states across the country have recently imposed voter identification requirements that many of their residents cannot satisfy.¹⁰⁹ Jurisdictions can also fail to provide important information and assistance to eligible voters, because they have no obligation to ensure that voters turn out. For example, in Maricopa County, Arizona, 140,000 new voters who registered in advance of the May 2018 primary (as far back as December 2017) were never mailed voter registration cards.¹¹⁰

Given the serious barriers to voting that many Americans face, it is unclear that United States elections, as currently conducted, are

106. DEMOCRACY DIVERTED: POLLING PLACE CLOSURES AND THE RIGHT TO VOTE, THE LEADERSHIP CONF. ED. FUND 1, 12–14 (Sep. 2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf> [<https://perma.cc/66TG-DT4M>]. A newly-published study has found that a quarter-mile increase in the distance a voter must travel to reach their polling place reduces voter turnout by 1–3 percent, with ramifications most harshly felt in high-minority areas. Enrico Cantoni, *A Precinct Too Far: Turnout and Voting Costs*, 12 AM. ECON. J.: APPLIED ECON. 1 at 63.

107. By upholding Ohio’s voter registration list-maintenance practices in *Husted v. A. Philip Randolph Institute*, the Supreme Court opened the door to more aggressive and discriminatory voter purges by other states. 138 S. Ct. 1833 (2018). In their respective dissents, Justices Breyer and Sotomayor pointed out the inequities created by Ohio’s purge procedure: over 1 million Ohioans (13 percent of the state’s voters) could have been immediately removed from the rolls even though the state had no proof that they had moved; minorities, veterans, low-income voters, and voters with disabilities had already been disproportionately impacted. *See id.* (Breyer, J., dissenting) at 1856 (“What about those registered voters—more than 1 million strong—who did not send back their return cards? Is there any reason at all (other than their failure to vote) to think they moved? The answer to this question must be no. There is no reason at all. First, those 1 million or so voters accounted for about 13% of Ohio’s voting population. . . . the streets of Ohio’s cities are not filled with moving vans; nor has Cleveland become the Nation’s residential moving companies’ headquarters.”); *id.* (Sotomayor, J., dissenting) at 1864 (“[N]umerous *amici* report that [Ohio’s voter roll purge] has disproportionately affected minority, low-income, disabled, and veteran voters.”).

108. *Id.* at 3.

109. *See, e.g.*, Clark, *supra* note 37.

110. Rebekah L. Sanders, *140,000 Maricopa County Voters Haven’t Received Registration Cards*, AZCENTRAL: REPUBLIC (Apr. 21, 2018 10:08 AM), <https://www.azcentral.com/story/news/politics/elections/2018/04/20/maricopa-county-voters-havent-received-registration-id-cards/537702002> [<https://perma.cc/JNM4-P5YX>].

representative of the will of the people. Segments of the electorate consistently do not or cannot vote, particularly people who are racially diverse, low-income, disabled, or young. Fully resolving the structural inequalities in our electoral system would far exceed the scope of this Comment. However, the proposal presented here is informed by, and aims to at least partially dismantle, these injustices.

C. Low Voter Turnout Undermines the Efficacy of Democratic Institutions

Voting for political representatives is arguably the most important context in which adequate representation should be ensured; the very legitimacy of a democratic system of government depends on it. Under our current electoral system, the top vote-getter wins no matter how many or how few people turn out to vote. Other democratically governed institutions do not, as a rule, allow such a result.

In fact, many deliberative bodies have a practice of establishing a quorum, a minimum number of people who must be present and participating for the body to conduct any official business.¹¹¹ The leading manual on parliamentary procedure has, for over a century, prescribed that deliberative bodies set quorums as a basic procedural requirement.¹¹² Organizations that tend to have quorum requirements include legislatures,¹¹³ corporate boards,¹¹⁴ and labor unions.¹¹⁵ Quorums effectively function as minimum turnout thresholds below which no decisions can be made. Unless quorum is met, there can be no deliberations on the record and no voting.

111. See, e.g., *Quorum Not Established, No Decision Made in UPAC Meeting*, GOLDEN GATE XPRESS (Dec. 12, 2010), <http://goldengatexpress.org/2010/12/12/quorum-not-established-no-decision-made-in-upac-meeting> [<https://perma.cc/PWN5-QPNR>] (explaining that since a quorum of 200 faculty members was not met, a university advisory council was not able to conduct official business).

112. HENRY M. ROBERT, ROBERT'S RULES OF ORDER REVISED 258 (1915) ("In all ordinary societies the by-laws should provide for a quorum as large as can be depended upon for being present at every meeting when the weather is not exceptionally bad.").

113. See Karl Kurtz, *Disappearing and Bolting Quorums*, NAT'L CONFERENCE OF STATE LEGISLATURES (Feb. 21, 2012), http://ncsl.typepad.com/the_thicket/2012/02/disappearing-and-bolting-quorums.html [<https://perma.cc/UA2K-LDYN>].

114. Stephen M. Bainbridge, *Why A Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 45 (2002). To some extent, shareholder "democracy" is encumbered by the prevalence of proxy voting and limited information.

115. See, e.g., UNITED AUTO. WORKERS EDUC. DEP'T, GUIDE FOR DRAFTING LOCAL UNION BYLAWS: CONSTITUTIONAL PROVISIONS AND SUGGESTED PROCEDURES 3 (2015), <https://uaw.org/wp-content/uploads/2017/02/354-Guide-for-Drafting-Local-Union-Bylaws-COMplete-BOOK.pdf> [<https://perma.cc/4ZCS-3GWN>].

Quorums prevent minority factions from taking control, because a minimally representative number of members must be present for the group to convene. This means that the loudest and most assertive members do not get to make decisions on behalf of the entire group.¹¹⁶ But that is essentially what we allow to happen in our democracy by failing to impose minimum turnout requirements: the loud, assertive minority can impose their policy goals and representatives of choice on everyone else.

Some scholars argue that it is good for a democracy to have low turnout. There is an elitist view that only the most politically sophisticated and educated people should vote because they would make better choices.¹¹⁷ But the United States is not an epistocracy,¹¹⁸ and no one is qualified to be the arbiter of what counts as a well-considered vote. Moreover, limiting the franchise contradicts American values; over time, this nation has greatly expanded the electorate. Another argument is that only the most motivated citizens will vote. However, this argument is flawed because levels of apathy or engagement may not be outcome-determinative. For example, some people face more barriers to participating than others; a working-class person with children may have a harder time getting to the polls than someone similarly situated without employment or childcare obligations. A more plausible, but also demonstrably incorrect, argument is that low turnout signals citizens' satisfaction with the current state of affairs and their government representatives. Political scientists who have studied the many causes of low turnout have found they could not identify why any given

116. Organizations that have quorums and representative democracies alike strive to achieve some level of representativeness of their full membership. Still, there are key differences between these types of institutions and in the ways their votes are conducted. Individual voters do not have the same fiduciary duties to the polity as, say, members of corporate board who play a more direct role in policymaking and can be held personally accountable for inadequate participation (through removal or other disciplinary action). Compared to an organization, the electorate is a much larger group of people. Voting for a candidate in a public election is a way of expressing a preference rather than directly taking action on an issue. And, while whether an individual citizen has voted in any given public election is a matter of public record, *how* they voted remains private. Thus, the voting records of leaders of democratically governed organizations are subject to greater scrutiny than those of individual voters in a polity.

117. See generally JASON BRENNAN, *THE ETHICS OF VOTING* (2011); JASON BRENNAN, *AGAINST DEMOCRACY* (2016).

118. An epistocracy is a society governed by those who are knowledgeable. JASON BRENNAN, *AGAINST DEMOCRACY* 14 (2016) (“More precisely, a political regime is epistocratic to the extent that political power is formally distributed according to competence, skill, and the good faith to act on that skill.”).

nonvoter did not turn out to vote.¹¹⁹ This is likely because not participating in an election is not always a purposeful choice. A non-voter may be undecided about whom to support, ill-informed, apathetic to politics, convinced that his vote will not impact the election, or unable to participate due to barriers. Researchers have been unable to ascertain which of these causes predominate.¹²⁰ Thus, it is misleading to assume that low turnout indicates nonvoters' contentment with their current government officials. When voter turnout is low, it is unclear whether a significantly large bloc of citizens approves of their elected representatives and those representatives' policy choices. And, if elected officials do not have the backing of at least a critical mass of the electorate, perhaps those officials should not be authorized to make decisions on behalf of the entire electorate.

Trust in government and voter turnout levels are directly correlated.¹²¹ According to a 2004 study of European elections, turnout is highest among voters who trust their legislative institutions "and are satisfied with the way democracy works in their country."¹²² On the other hand, citizens who are the least trustful of their legislatures and dissatisfied with their country's democracy are the least likely to turn out to vote.¹²³ Similar studies conducted in the United States conclude that the more an American trusts in the integrity of electoral system, the more likely she is to vote.¹²⁴

In sum, low voter turnout jeopardizes the legitimacy of democracies. Voting is the only way for the government to obtain meaningful and equal

119. David F. Damore et al., *Unhappy, Uninformed, or Uninterested? Understanding "None of the Above" Voting*, 65 POL. RES. Q. 895, 895 (2012) ("[T]he exact signals . . . nonvotes communicate are unclear because they may arise from motivations varying from alienation to boredom to confusion.").

120. *Id.*

121. See Kimmo Grönlund & Maija Setälä, *Low Electoral Turnout: An Indication of Legitimacy Deficit?* (April 2004), <https://ecpr.eu/Filestore/PaperProposal/d83ddd59-0a00-4535-a117-55a859e6a630.pdf> [<https://perma.cc/8GQ5-LJD3>].

122. *Id.* at 15. "We have seen that turnout is the lowest among the voters who have no trust in the system and its actors. At the aggregate level, there is also a clear and linear relationship between the aspects of democratic legitimacy and turnout." *Id.* at 21.

123. *Id.* at 15.

124. See Pippa Norris et al., *Why Don't Most Americans Vote? Maybe They Don't Trust U.S. Elections*, ELECTORAL INTEGRITY PROJECT, (Dec. 26, 2016), <https://www.electoralintegrityproject.com/eip-blogs/2016/12/24/why-problems-of-electoral-integrity-damage-us-voter-turnout> [<https://perma.cc/SFF7-THVY>]. A recent poll found that 76 percent of Americans believe that the government is run by a few people who are interested chiefly in looking out for themselves, while only 21 percent believe that the government is run for the benefit of all of its people. PEW RESEARCH CTR., *THE PUBLIC, THE POLITICAL SYSTEM AND AMERICAN DEMOCRACY* 72 (2018), <http://www.people-press.org/2018/04/26/the-public-the-political-system-and-american-democracy> [<https://perma.cc/4ZFU-PEGF>].

input from each citizen. There are a variety of reasons why people fail to vote, including circumstances outside of their control. When turnout is low, the government has no way of knowing whether voters' preferences match those of nonvoters. And when already marginalized communities vote at low rates, they receive less political representation. The current system privileges the voices of those who participate over those who do not, or *cannot*, take part.

III. A PROPOSAL FOR A MINIMUM TURNOUT REQUIREMENT

In many ways, individual Americans bear the burden of figuring out how they can participate in our democracy: They must procure legally acceptable identification, they must register themselves to vote,¹²⁵ they must educate themselves on the candidates, and they must get to the polls.¹²⁶ On the other hand, the government is an institution purportedly designed to be accountable to the people, yet it faces no negative consequences when some communities fail to vote. Indeed, some individual officials may have an incentive to make it harder for a subset of their constituents to vote, because by doing so, they can ensure their own reelection.¹²⁷ Elected officials should bear some responsibility in ensuring that Americans are able to access and exercise the franchise.

There is some precedent for instituting a minimum turnout requirement of the sort envisioned here. Many countries have adopted electoral quorums for ballot measures.¹²⁸ In many parts of the United States, a candidate must

125. Forty-nine U.S. states have voter registration requirements; notably, North Dakota does not have one. See *Voter Registration in North Dakota*, N.D. DEP'T OF MOTOR VEHICLES, <https://www.dmv.org/nd-north-dakota/voter-registration.php> [<https://perma.cc/XZ2X-3KDB>]. As the only state in the union that does not require voters to register to vote, North Dakota is not subject to the NVRA. *About the National Voter Registration Act*, U.S. DEP'T OF JUSTICE, *supra* note 52; NORTH DAKOTA.GOV, *Q: When do eligible voters register for an election?*, <https://vip.sos.nd.gov/PortalListDetails.aspx?ptlhPKID=79&ptlPKID=7> [<https://perma.cc/Y2KE-52JQ>].

126. Or, if available in their jurisdiction, seek out early or absentee voting options.

127. See, e.g., Trounstine, *supra* note 42.

128. A number of jurisdictions, particularly in Latin America and Europe, have adopted a form of minimum turnout requirement for ballot measures. See Luis Aguiar-Conraria & Pedro C. Magalhães, *Referendum Design, Quorum Rules, And Turnout*, 144 PUB. CHOICE 63, 64 (2010). A participation quorum is met when a specified minimum number of voters turn out to vote, regardless of how many of those voters approve the ballot measure. For the measure to pass, the participation quorum must be met; yet, this requirement may actually discourage some people—those who do not want the measure to pass—from voting. When choosing whether to adopt a ballot measure subject to a participation quorum, potential voters face a ternary choice: they can (1) vote to approve the measure, (2) vote against the measure, or (3) abstain from voting on the measure altogether by staying at home. Thus, participation quorums give rise to

collect a certain number of signatures from registered voters in order to have her name appear on the ballot.¹²⁹ To receive delegates in several state presidential caucuses, a candidate must have a minimum percentage of voters showing support at in-person nominating contests.¹³⁰ In some parliamentary systems, a party must meet an electoral threshold—that is, receive a minimum percent of the vote—in order to gain seats and be proportionately

a “No-Show” paradox, whereby voters who want to defeat a given ballot measure find it strategically easier to do so by staying at home than by showing up to the polls to vote against it. Nay voters would prefer not to cast ballots at all, lest their votes help the measure reach the participation quorum. See Paulo P. Côrte-Real & Paulo T. Pereira, *The Voter Who Wasn't There: Referenda, Representation and Abstention*, 22 SOC. CHOICE & WELFARE 349, 355 (2004). A group in Italy has been pushing to eliminate the use of such quorums on grounds that they are “undemocratic,” because they effectively allow nonvoters to make electoral decisions instead of voters. See *Fighting the Undemocratic Quorum*, PEOPLE2POWER (May 7, 2015), <http://www.people2power.info/report/fighting-the-undemocratic-quorum>, [https://perma.cc/N5JX-CXAP].

Approval quorums are another kind of minimum turnout requirement that some countries have adopted for votes on ballot measures. Approval quorums have two requirements: (1) a minimum number of people must vote; and (2) a set percentage of the total votes cast must be in favor of the measure. When a ballot measure is subject to an approval quorum, people who want to defeat the measure have an incentive to get out to vote: If the minimum requisite number of voters threshold are likely to participate, voting “no” is the only way to help defeat the measure.

Even though the No-Show paradox can occur with ballot measures, that problem is unlikely to occur in candidate elections. With ballot measures, the stakes are either that the referendum or initiative passes (and changes the law), or that the status quo is maintained. Most local, state, and federal elections, however, involve a choice between (at least) two alternatives: candidate A or candidate B (and often, even more candidates). Failure to vote does not lead to as predictable an outcome in the candidate election context, because any candidate could prevail in the event that there are a significant number of nonvoters. Because the minimum turnout required proposed here does not incentivize strategic abstention, it is unlikely to result in a similar No-Show paradox.

129. In thirty-eight states, candidates are required to gather signatures from voters to get onto the ballot. All states, to some extent, allow filing requirements to be met via signature gathering. The number of signatures required is either based on a number (ranging from 25 to 12,000) or a percentage. Thirty-one states define the percentage based on the number of registered voters in the candidate's district. *Petition Requirements for Filing as a Candidate for State Legislator*, NAT'L CONFERENCE ON STATE LEGISLATURES, (May 21, 2015) <http://www.ncsl.org/research/elections-and-campaigns/petition-requirements-for-filing-as-a-candidate-for-state-legislator.aspx> [https://perma.cc/6MM6-GLAZ].
130. See, e.g., Ben Jacobs, *How the Iowa Caucuses Work: A Confusing Election Process Explained*, GUARDIAN, (Jan. 19, 2016, 7:30 AM), <https://www.theguardian.com/us-news/2016/jan/19/iowa-caucuses-explained-2016-election-democrats-republicans> [https://perma.cc/6YXH-5WVZ] (explaining that to receive delegates, a candidate must obtain at least a 15 percent share of the vote in some districts, or a higher percent share in rural, less-populated precincts).

represented in the parliament.¹³¹ Electoral thresholds are especially common in Europe, ranging from 0.67 percent in the Netherlands to 10 percent in Turkey.¹³²

In sum, quorum requirements for ballot measures, candidate filing procedures, presidential election caucuses, and foreign parliamentary election systems provide some precedent for setting a minimum voter turnout requirement for candidate elections. Each of these practices require be some minimum level of voter participation to legitimate a candidate's election.

A. Criteria for an Effective Solution

This Comment, rather than settling on an ideal solution for the problem of low voter turnout, attempts to identify criteria necessary to effectuate an appropriate solution. While the electorate for each political entity, ranging from school board and city council districts to statewide districts, varies in size, the United States' 3069 counties, with some assistance from states, are largely responsible for administering elections for all levels of government.¹³³ Any solution should therefore be implementable at the county level. In addition, the solution should: (1) be reasonably easy to apply; (2) be scalable to differently-sized jurisdictions and to races for various levels of government offices; (3) be fair to all candidates and political parties, not privileging any over the others; (4) provide government officials a strong incentive to boost turnout; and (5) most importantly, create a substantial, actual, and durable increase in turnout.

B. Setting an Appropriate Turnout Threshold

A minimum turnout requirement could create an incentive for government actors to boost voter turnout. The required threshold should be calibrated based on the total number of eligible voters, because that would

131. See AREND LIJPHART, *ELECTORAL SYSTEMS AND PARTY SYSTEMS: A STUDY OF TWENTY-SEVEN DEMOCRACIES 1945–1990*, at 25–26 (1994).

132. Dylan Louter & Kate Lyons, *The World's Most Unfair Election System—How Would Your Parliament Fare?*, THE GUARDIAN (Jun. 1, 2015) <https://www.theguardian.com/world/2015/jun/01/turkey-the-worlds-most-unfair-election-system> [https://perma.cc/XP7G-MW9K] (showing that in Turkey's parliamentary system a party must win at least 10 percent of the vote to have any of its members seated—"the highest [electoral] threshold of any country in the world.").

133. See Mike Belarmino, *Counties Matter: Elections*, NAT'L ASS'N OF CTYS., (Nov. 8, 2016), http://www.naco.org/sites/default/files/documents/2016_county%20elections%20flyer_FINAL.pdf [https://perma.cc/6YGZ-KE3V].

encourage localities to help get all adult citizens registered to vote,¹³⁴ and because the entire electorate should be accounted for when determining what level of turnout should be attained. The minimum turnout requirement would only apply in *contested* races—those where there are more candidates than positions available.¹³⁵

Ideally, jurisdictions would strive to attain universal turnout—that is, participation by the entire citizen voting age population. But universal turnout has not been achieved even in countries that make voting mandatory.¹³⁶ If set too low, the turnout requirement would be so easily met that it would have negligible effect. The status quo would prevail. If set too high, government officials and citizens may not take the requirement seriously enough to attempt to meet it.

1. A Simple Majority Turnout Requirement

The simplest way to administer a minimum turnout requirement would be to require every jurisdiction to attain the same, fixed percentage turnout requirement for every election. This would allow election administrators and electoral campaigns to calibrate their efforts based on a consistent goal. The most salient benchmark to use would likely be a simple majority of eligible voters. Setting the turnout requirement to this level (50 percent of all eligible voters plus one person) comports with current democratic norms. A simple majority of all votes cast is the threshold a candidate in a two-person field (including most general elections) must surpass in order to win. This is also the level of support required to pass most legislation. Most importantly, when over half of the eligible population votes, an election can be said to have been at least minimally representative of the preferences of the electorate as whole.

134. In extreme circumstances, it is possible that a jurisdiction would never be able to reach the minimum turnout requirement unless more of its citizens registered to vote. For instance, if only 49 percent of eligible voters in a county are registered, even if 100 percent of registered voters turned out, the minimum turnout requirement could not be met.

135. When a race is uncontested, it would be unfair to penalize election administrators for failing to achieve high turnout. Potential voters recognize that in such races it would be nearly impossible for them to make a difference in the outcome of the election (barring unusual circumstances such as a well-organized write-in candidacy). For this reason, the minimum turnout requirement proposed here would only apply to contested races.

136. Indeed, between 1950 and 2010, voter turnout rates have averaged only 7.37 percent higher in countries with compulsory voting. *Compulsory Voting*, INT'L IDEA: INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, <https://www.idea.int/data-tools/data/voter-turnout/compulsory-voting> [<https://perma.cc/9FAX-8VSS>] (last visited Sept. 6, 2019).

To illustrate how the simple majority minimum turnout requirement could work, consider the following scenarios:

A: 100 people are eligible to vote for a particular race. 75 of them vote.

B: 100 people are eligible to vote for a particular race. 51 of them vote.

C: 100 people are eligible to vote for a particular race. 50 of them vote.

Scenario A represents a fairly high turnout election, with 75 percent of all eligible voters participating. Note that not all of these voters need to have voted for the same candidate, nor does it matter how close the election was between the candidates. The minimum turnout requirement would be met simply because over 50 percent of the electorate participated in the election (including those voting for the victor, those voting for a losing or write-in candidate, and those who submitted blank ballots).¹³⁷ Scenario B represents an election where the simple majority minimum turnout requirement is just barely met. And Scenario C represents an election where the minimum turnout requirement has not been satisfied. Turnout at anything below a simple majority, would be insufficient under this model. Part III.C of this Comment explores potential penalties for failing to meet the turnout requirement.

2. A Margin of Victory-Based Turnout Requirement

While striving for at least minimal representativeness is a laudable goal, the simple majority turnout requirement may not be demanding enough. It does not aim for universal turnout, and it allows jurisdictions to scrape by with far less than full participation. Thus, setting the minimum turnout requirement to a simple majority compromises the expectation that a democratic government should reflect the preferences of the entire electorate.

As an alternative, jurisdictions could adopt a context-dependent turnout requirement, where the level of turnout required could be ascertained only after the election has been conducted. Rather than requiring a fixed percentage of voters to participate, this threshold could be based on the

137. There is an important distinction between people who do not turn out to vote at all and those who turn out to vote but cast a blank ballot. Both sets of people can be said to have abstained from voting. As explained in Part II.C, a failure to turn out to vote may not be purposeful and cannot be interpreted to mean that the nonvoter had no preference between the candidates in the race. On the other hand, when an individual casts a blank ballot, she is clearly indicating that she is dissatisfied with both candidates or that she wishes to dissent in some way. This latter method of abstention expresses a preference, while the former does not. For this reason, this Comment refrains from using the term *abstention* to describe a simple, possibly unintentional, failure to vote.

margin of victory. A candidate's margin of victory is the amount (usually reported as a percentage) by which she beat out her competitors.

A dynamic, margin of victory-based turnout threshold could be calculated by determining the total number of votes cast, the number of nonvoters,¹³⁸ and the number of votes by which the victor won the race. Any time the nonvoters could have swung the election by participating, the margin of victory-based turnout requirement would not be met. For example:

Table 2: Satisfying the Margin of Victory-Based Minimum Turnout Requirement

Size of the Electorate	Number of Voters	Number of Nonvoters	Margin of Victory ¹³⁹	Is the Turnout Requirement Satisfied?
100	60	40	30 votes	No (had they voted, the nonvoters could have swung the election).
100	70	30	30 votes	Yes (had they voted, the nonvoters could have, at best, tied the election).
100	80	20	30 votes	Yes (had nonvoters voted, the results would have been the same).

A margin of victory-based turnout requirement is thus more responsive to variations in electoral competitiveness than a simple majority turnout requirement. However, a margin of victory-based turnout requirement could effectively penalize jurisdictions that do not achieve universal turnout in extremely competitive races, where the margin of victory may be only a handful of votes. For example, as shown below, say a polity has 100,000 eligible voters and 99,000 of them voted in a recent election. That means only 1 percent of the electorate (1000 people) did not vote. If the margin of victory had been smaller than the negligible number of nonvoters, a margin of victory-based minimum turnout requirement would not be met because technically, that election could have turned out differently had turnout rates been even higher.

138. Again, as used here, the term *nonvoters* denotes eligible voters who did not participate in the election.

139. Throughout this Comment, the margin of victory is calculated in terms of the absolute number of votes rather than as a percentage.

Table 3: The Margin of Victory-Based Minimum Turnout Requirement in an Extremely High Turnout Race

Size of Electorate	Number of Voters	Number of Nonvoters	Margin of Victory	Is the Turnout Requirement Satisfied?
100,000	99,000	1000	1000 (or more) votes	Yes (had nonvoters voted, the results would have been the same).
100,000	99,000	1000	999 (or fewer votes)	No (if nonvoters had voted, the election results could have been different).

In the case illustrated above, a jurisdiction with 99 percent turnout would be penalized simply for not achieving *perfect* turnout. Because the permissible number of nonvoters must be smaller than the (largely unpredictable) margin of victory, such a system would provide little guidance on what efforts jurisdictions should make to comply with the turnout requirement. Therefore, a minimum turnout based purely on the competitiveness of a given race would not function as intended.

3. A Hybrid Turnout Requirement

A third option would be to combine features of the easily administrable simple majority turnout requirement with those of the more dynamic margin of victory-based requirement. A simple majority could be the baseline required turnout level for all elections in all jurisdictions. Additionally, jurisdictions could be required to achieve higher than 50+% turnout, to a reasonable limit, in competitive races. For purposes of stipulating a maximum required turnout threshold, 90 percent may be a salient benchmark. Given that many countries with higher turnout rates than the United States cannot consistently achieve 90 percent turnout,¹⁴⁰ it may be

140. From the International IDEA Database, here is a sampling of the voter turnout rate (based on registered voters) in other countries:

Ethiopia: 93.22% (2015 – parliamentary)

Sweden: 87.18% (2018 – parliamentary)

Brazil: 79.50% (2018 – parliamentary), 79.67% (2018 – presidential)

impractical to require jurisdictions to improve voter turnout beyond this level. Had the United States achieved 90 percent voter turnout in the most recent midterm election, there would have been nearly 100 million more voters in that election.¹⁴¹

The hybrid turnout requirement could be structured to account for the margin of victory only in elections where turnout levels exceed a simple majority but fall below 90 percent. Put differently, if turnout is below a simple majority in a jurisdiction, it automatically fails the hybrid turnout requirement. Conversely, if turnout reaches 90 percent of eligible voters, the hybrid turnout requirement is automatically satisfied. When turnout falls in the range between 50+ percent and 90 percent, the hybrid turnout requirement is satisfied when the number of votes making up margin of victory is less than the number of nonvoters.

Here is how a hybrid turnout requirement could operate in several scenarios:

A: 100 people are eligible to vote for a particular race. 94 of them vote.

B: 100 people are eligible to vote for a particular race. 34 of them vote.

C: 100 people are eligible to vote for a particular race. 64 of them vote.

Scenario A represents high voter turnout. When turnout is at or above 90 percent, the hybrid turnout requirement is always met. Effectively, up to 10 percent of the electorate could fail to vote without triggering any penalties.

Scenario B represents very low voter turnout. Not even a simple majority of voters participated, so the hybrid turnout requirement would not be met. Thus, some consequence (discussed in III.C, below), must be levied.

United States: 58.64% (2018 – congressional), 65.44% (2016 – presidential)

Mongolia: 60.67% (2017 – presidential).

Voter Turnout By Election Type: Ethiopia, INT'L IDEA, <https://www.idea.int/data-tools/country-view/104/40>; *Voter Turnout By Election Type: Sweden*, INT'L IDEA, <https://www.idea.int/data-tools/country-view/261/40>; *Voter Turnout By Election Type: Brazil*, INT'L IDEA, <https://www.idea.int/data-tools/country-view/68/40>; *Voter Turnout By Election Type: United States*, INT'L IDEA, <https://www.idea.int/data-tools/country-view/295/40>; *Voter Turnout By Election Type: Mongolia*, INT'L IDEA, available at <https://www.idea.int/data-tools/country-view/210/40>.

141. According to estimates from the United States Election Project, just about 50 percent of the citizen voting eligible population participated in the 2018 midterms, accounting for 120 million votes cast. *2018 November General Election Turnout Rates*, UNITED STATES ELECTION PROJECT (Dec. 14, 2018), <http://www.electproject.org/2018g> [<https://perma.cc/4QTQ-PSMK>]. Projecting from these numbers, had 90 percent of the electorate had turned out, there would have been 216 million voters in 2018.

Scenario C may or may not meet the hybrid turnout requirement, depending on the margin of victory for the race. The key is to assess whether the losing candidate could have won, had all of the nonvoters voted for her. To see how a margin of victory (measured in terms of total number of votes) would affect whether the minimum turnout requirement would have been met in Scenario C, consider the following table:

Table 4: Satisfying the Hybrid Minimum Turnout Requirement

Size of Electorate	Number of Voters	Number of Nonvoters	Margin of Victory	Could the Nonvoters Have Swung the Election?	Was the Minimum Turnout Requirement Met?
100	64	36	37	No	Yes
100	64	36	36	No	Yes
100	64	36	35	Yes	No

In a case where the margin of victory equals the number of nonvoters, if all nonvoters had voted for the second-highest vote-getter, the best possible outcome for that candidate would have been tying for first place. Since a tie would not have swung the election results definitively in favor of the losing candidate, the minimum turnout requirement would be met. So, whenever turnout is under 90 percent, the number of nonvoters must be equal to or smaller than the margin of victory for the hybrid minimum turnout requirement to be satisfied.

C. Consequences for Failing to Meet the Turnout Requirement

Once a minimum turnout level is set, it would need to be enforced. Jurisdictions subject to a minimum turnout requirement would need to begin keeping track of voter turnout rates¹⁴² to assess their compliance. If election officials begin sharing voter turnout rates when they report electoral results, that practice itself would be an improvement in election administration which could in turn, create an impetus for jurisdictions to improve voter turnout.

Some consequence would also need to be levied once it is determined that the minimum turnout requirement has not been met. Determining a fair

142. These turnout numbers should be calculated based on the size of the total electorate, not just from the number of registered voters.

and effective penalty is challenging because few potential consequences seem reasonable to impose upon local election administrators, voters, nonvoters, and candidates. One solution would be to allow polls to remain open until the minimum turnout level is reached, but allowing an election to continue beyond its scheduled timeframe could create more work for election officials and could encourage voters to procrastinate going to the polls or discourage them from voting altogether. Moreover, at some point the election must end so that the winning candidate can be sworn into office to begin fulfilling her public duties. A second potential solution would be to invalidate the election and require the jurisdiction to hold a costly special election, potentially frustrating the voters who had previously turned out. This could effectively penalize the minority of citizens who *did* vote. Another option would be to require candidates to pay some portion of the cost of administering an election they won without meeting the minimum turnout requirement, but this could burden candidates and discourage low income voters from seeking elected office. Yet another solution would be to shorten the terms of any officials elected without meeting the minimum, but this could constrain their ability to fulfill their duties and still cause the jurisdiction to shoulder a costly special election.

The consequences for failing to meet the minimum turnout threshold should reinforce the purposes of adopting such a requirement. The central aims of this proposal are to incentivize government officials to improve voter turnout and for voter turnout to actually increase. Thus, it would be appropriate for the penalties for failing to achieve high voter turnout to fall on the election administration apparatus rather than on individuals who are involved in that election, either as candidates or as voters. An effective consequence for failure to meet the minimum turnout requirement would spur greater voter turnout in the following election, without exacerbating the aforementioned inequities in our electoral system or creating new hurdles for communities that are already politically marginalized.

The penalty for not achieving high enough voter turnout would ideally be a requirement that a jurisdiction take action to improve voter turnout. This Comment proposes that whenever the minimum turnout requirement is not met, the non-compliant county and state must fund non-partisan get-out-the-vote (GOTV) programs, increase voter education efforts, and implement democracy reforms designed to improve ballot access. While jurisdictions should largely have a choice of which reforms to fund and implement, the types of reforms that are likely to be most effective are provided in the list below.

Example, Non-Exhaustive List of Prescribed Reform Measures

- Allow for election day voter registration.
- Provide accessible online voter registration options.¹⁴³
- Assist citizens in obtaining (and paying for) voter identification.¹⁴⁴
- Increase the number and accessibility of polling places available.
- Ensure that electoral resources (including polling places, poll workers, and written materials) are equitably distributed.¹⁴⁵
- Adopt a democracy voucher program.¹⁴⁶
- Mail sample ballots to every eligible voter.
- Implement ranked-choice voting.
- Improve the readability and accessibility of election-related notices and materials, whether produced electronically or in print.¹⁴⁷

143. As of 2015, only one of the twenty states that offered online voter registration had made that process fully accessible for individuals with disabilities. See Susan Mizner & Eric Smith, *Access Denied: Barriers to Online Voter Registration for Citizens with Disabilities*, THE CTR. FOR ACCESSIBLE TECH. & ACLU (Feb. 2015) <https://www.aclu.org/report/access-denied-barriers-online-voter-registration-citizens-disabilities> [<https://perma.cc/6KKU-ABK4>]. Nearly twice as many states now offer online voter registration, but not all have invested in making those sites fully accessible.

144. If some citizens do not have legally-acceptable voter identification, the government could help citizens obtain and pay for underlying documentation (such as naturalization records or birth certificates) that are required to obtain voter identification. *Voter ID*, BRENNAN CTR. FOR JUSTICE (Oct. 15, 2012), <https://www.brennancenter.org/analysis/voter-id> [<https://perma.cc/BQ9N-JHPK>]. For instance, every citizen could be issued (free of charge) a passport or a state identification card, to ensure that they can prove their identity at the polls. Showing a Social Security Number would be insufficient because permanent residents and other visa holders with only temporary status can be issued SSN's. Furthermore, voters would need an additional form of identification to prove the voting age requirement is met.

145. See Cantoni *supra* note 106 at 84 (“[A] hypothetical benchmark policy that eliminated distance to the polling place would increase average turnout by 1.6–4 percentage points and narrow the turnout gap between low- and high-minority areas in non-presidential elections by as much as 11–13 percent.”).

146. Seattle, Washington, has pioneered a Democracy Voucher program, which affords every registered voter the opportunity to donate to local campaigns. Each registered voter receives four vouchers worth \$25 each. *Democracy Voucher Program*, SEATTLE.GOV, <http://www.seattle.gov/democracyvoucher> [<https://perma.cc/W84M-8V5X>].

147. Election websites and electronic communications from election administrators about voting should conform to, at minimum, Level AA of the Web Content Accessibility

- Make bilingual election materials and assistance more available to voters.
- Create a hotline to answer voter questions.
- Improve poll worker and election administrator trainings.
- Hire more poll workers.
- Set up a rides-to-the-polls program.

Enacting this proposal would result in the implementation of a variety of democracy reforms that have been proven to increase voter turnout, such as education efforts¹⁴⁸ or election day registration. It could even spur governments to test experimental reforms that could boost voter registration, engagement, and satisfaction, like ranked choice voting.

D. Methods of Implementation

A minimum turnout requirement could be implemented in several ways.

1. Voluntary Adoption

State and local governments could voluntarily adopt a minimum turnout requirement. However, officials are unlikely to voluntarily adopt reforms that would require allocation of more staff-time or funding for elections. Moreover, if a jurisdiction were to voluntarily adopt the minimum turnout requirement, the same officials who chose to adopt it could easily choose to abandon that requirement whenever compliance becomes burdensome.

2. Voter-Led Efforts

Alternatively, voters could advocate for a minimum turnout requirement, either through ballot measures or via federal or state constitutional amendments. The ballot measure approach could have, at best, limited success because the United States, unlike many democracies,

Guidelines 2.0 published by the World Wide Web Consortium. See, e.g., Accessible Voting Act of 2020, S. 3206, 116th Cong. § 304 (2020).

148. See generally Jan Leighley & Jonathan Nagler, *Increase Turnout by Informing Voters About Policy Differences*, STAN. SOC. INNOVATION REV. (Mar. 14, 2016), https://ssir.org/articles/entry/increase_turnout_by_informing_voters_about_policy_differences# [<https://perma.cc/R5BQ-P6YD>].

does not have a mechanism for initiating ballot measures at a national level¹⁴⁹ and because several states do not allow citizens to initiate ballot measures.¹⁵⁰ Changing the U.S. Constitution is difficult,¹⁵¹ though it is much simpler, generally, to amend state constitutions.¹⁵²

3. Federal Legislation

Congress could pass a statute imposing a minimum turnout requirement for all federal elections under its Elections Clause authority.¹⁵³ This clause provides:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.¹⁵⁴

This clause provides a broad delegation of power to Congress.¹⁵⁵

149. ELECTION LAW, *supra* note 90, at 350.

150. *Constitutions: Amend With Care*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Sept. 1, 2015), <http://www.ncsl.org/research/elections-and-campaigns/constitution-amend-with-care.aspx> [<https://perma.cc/E7VG-DREN>]. In some states, the legislature is the only group that can place questions on the ballot. *What are Ballot Propositions, Initiatives, and Referendums?*, INITIATIVE & REFERENDUM INST., <http://www.iandrinstitute.org/quick-facts.cfm> [<https://perma.cc/V6VY-E9GH>].

151. The most recent constitutional amendment was adopted in 1992, over 200 years after it was originally proposed. See U.S. CONST. amend. XXVII; *Constitutional: Congress and Citizens*, THE WASH. POST. (Sep. 25, 2017) (downloaded using iTunes). Interestingly, nine of the sixteen amendments to the United States Constitution following the Bill of Rights expanded voting rights or changed election rules. See U.S. CONST. amend. XII, XIV, XV, XVII, XIX, XXII, XXIII, XXIV, and XXVI. Two others (XX and XXV) involve the presidential line of succession. See U.S. CONST. amend. XX, XXV. The Constitution can be amended in two ways: through a constitutional convention or a two-thirds vote by both houses of Congress. The second step for both processes is ratification by three-fourths of the states. *Constitutional Amendment Process*, NAT'L ARCHIVES, <https://www.archives.gov/federal-register/constitution> [<https://perma.cc/QL74-UR9E>] (last visited Oct. 9, 2019).

152. See *Constitutions: Amend With Care*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Sept. 1, 2015), <http://www.ncsl.org/research/elections-and-campaigns/constitution-amend-with-care.aspx> [<https://perma.cc/E7VG-DREN>] (describing the ways that state constitutions can typically be amended, including via popular vote, ballot initiatives, and state constitutional conventions). In some states, citizens cannot directly amend their constitutions without legislative action. *What are Ballot Propositions, Initiatives, and Referendums?*, INITIATIVE & REFERENDUM INST., *supra* note 150.

153. U.S. CONST. art. I, § 4.

154. U.S. CONST. art. I, § 4, cl. 1.

155. U.S. GEN. ACCT. OFF., ELECTIONS: THE SCOPE OF CONGRESSIONAL AUTHORITY IN ELECTION ADMINISTRATION 1–2, 4 (2001), <https://www.gao.gov/new.items/d01470.pdf> [<https://perma.cc/MES7-KU99>]. Following *City of Boerne v. Flores*, Congress is

Congress could ensure compliance with a minimum turnout requirement on the state and local level through several means.¹⁵⁶ First, it could provide a one-time grant to be used towards improving turnout in federal elections to a specific level, with penalties for not meeting that goal.¹⁵⁷ However, states which do not wish to comply could simply decline this funding, and could likely do so without impacting their finances. Second, Congress could provide continuous funding for jurisdictions that improve turnout or those that implement measures designed to increase voter turnout. This would provide a positive financial incentive for jurisdictions to improve voter turnout by reaching specific benchmarks, but it would fail to punish those that make no attempt to do so. And again, states could decline the funding.¹⁵⁸ Third, it could simply require that states increase turnout and exact penalties when jurisdictions fail to meet specific benchmarks for improvement.¹⁵⁹ This third method could be structured in various ways.

unlikely to be able to invoke its enforcement power under § 5 of the Fourteenth Amendment to impose a national minimum turnout requirement because to do so would be to define a new legal right, rather than providing a remedy to enforce an existing constitutional right. See Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores*, 32 IND. L. REV. 163, 180 (1998).

156. Though the Elections Clause only gives Congress authority to regulate federal elections, jurisdictions have largely complied with statutes like the NVRA because they generally find it cumbersome to maintain separate systems for administering local and federal elections. Rebekah Evenson, *Motor Voter in the States: Approaching the Goal of Universal Enfranchisement*, FAIRVOTE, <http://archive.fairvote.org/reports/1995/chp6/evenson.html> [<https://perma.cc/G3QX-ULAS>] (last visited Sept. 10, 2019). When three states challenged the NVRA on Tenth Amendment grounds, arguing that Congress could not directly commandeer the states into enacting and enforcing federal regulations, courts held that the Elections Clause, unlike the Commerce Clause, allows Congress to impose such burdens on states. U.S. GEN. ACCT. OFF., *supra* note 155, at 6. Some scholars have argued that the Elections Clause should not confer upon Congress more power relative to the states than the Commerce Clause does. See Paul E. McGreal, *Unconstitutional Politics*, 76 NOTRE DAME L. REV. 519, 553–34 (2001).
157. The federal government spends a significant portion of its budget on grants to states and local governments. In 2011 alone, it gave \$607 billion in such grants, largely for Medicaid. CONG. BUDGET OFF., *FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS 1* (Mar. 5, 2013), <https://www.cbo.gov/publication/43967#section0> [<https://perma.cc/3Y9C-98HV>].
158. Congress already uses its power of the purse to coax states into improving election administration. Pursuant to the Help America Vote Act of 2003, the U.S. Election Assistance Commission has distributed, as of 2018, \$3.6 billion in funding to the states. U.S. ELECTION ASSISTANCE COMM'N, *GRANT EXPENDITURE REPORT FISCAL YEAR 2018*, at 2 (2019), <https://www.eac.gov/assets/1/6/FY2018HAVAGrantsExpenditureReport.pdf> [<https://perma.cc/VV4V-NR3W>].
159. Notably, the original coverage formula in the Voting Rights Act was based on 1964 turnout levels. VOTING RIGHTS ACT § 4(b) (“The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney

Congress could exact a penalty on noncompliant states by withholding existing financial support for election administration, with graduated penalties based on level of turnout, as exemplified below:

Table 5: Example Schedule of Penalties

Percent Turnout ¹⁶⁰	Possible Financial Penalty
0–10%	10% of election aid grant
10+ – 20% ¹⁶¹	9% of election aid grant
20+ – 30%	8% of election aid grant
30+ – 40%	7% of election aid grant
40+ – 50%	6% of election aid grant
50+ – 60%	5% of election aid grant
60+ – 70%	4% of election aid grant
70+ – 80%	3% of election aid grant
80+ – 90%	2% of election aid grant

If needed, Congress could simply choose to not specify whether or how much money states must earmark towards improving turnout. It could direct states and counties to comply in whatever way they see fit. Alternatively, Congress could require states to implement specific democracy reforms proscribed by experts. Jurisdictions could be given leeway in determining which reforms to implement, or Congress could mandate specific reforms, such as those listed above in III.C, based on how jurisdictions have structured their elections and the level of turnout they have been able to consistently achieve.

General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 percentum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 percentum of such persons voted in the presidential election of November 1964.”). In other words, jurisdictions that maintained discriminatory electoral procedures would be subject to the preclearance requirement only if they had also failed to achieve at least a minimum voter registration level or voter turnout level in the 1964 general election.

160. In places where the turnout level exceeds 50 percent, penalties would only be assessed under the more demanding turnout requirement.

161. 10+ indicates any level of turnout higher than 10 percent (e.g., 10.1 percent).

Still, there may be insufficient political willpower to enact a minimum turnout requirement at the federal level. States and localities are more likely to voluntarily adopt a minimum turnout requirement of their own accord.

IV. ALTERNATIVES

The closest existing analogue to the solution proposed here is compulsory voting. Compulsory voting can improve voter turnout generally, in addition to ensuring that a broader cross-section of society is represented at the ballot box.¹⁶² A study of voting rates and wealth distribution in ninety-one countries from 1960 to 2000 found that strictly enforced compulsory voting reduces income inequality.¹⁶³ Compulsory voting compels otherwise underrepresented, economically marginalized people to vote and thus increases turnout. Because people with median and low incomes generally support policies that result in greater redistribution of wealth and resources, their increased participation results in policies that better reflect the will of the electorate as a whole.¹⁶⁴

A. Traditional Compulsory Voting

Twenty-seven countries require their citizens to vote.¹⁶⁵ Though "[c]ompelling anything feels vaguely un-American,"¹⁶⁶ several vibrant democracies have instituted this practice, including Belgium, which initially adopted compulsory voting for male citizens in the 1890s.¹⁶⁷ Countries with compulsory voting have, on average, a 7.3 percent higher voter turnout rate.¹⁶⁸ Australia instituted compulsory voting in 1924 and enjoys turnout

162. See Emilee Booth Chapman, *supra* note 69.

163. Chong, *supra* note 86 at 5.

164. *Id.* at 12–17; see McElwee, *supra* note 87 at 5–13.

165. *Compulsory Voting*, *supra* note 117. Since 1980, voter turnout has declined across the world, even in countries with compulsory voting. See *id.*

166. Ruth Marcus, *A Case for Compulsory Voting*, THE WASH. POST (Nov. 4, 2014) https://www.washingtonpost.com/opinions/ruth-marcus-a-case-for-compulsory-voting/2014/11/04/9b486afe-6463-11e4-836c-83bc4f26eb67_story.html [<https://perma.cc/J7W9-5W9R>] (Also declaring, “[t]he country has far more too fear from too few voters than from too many.”)

167. *Id.*; Elliot Frankal, *Compulsory Voting Around the World*, GUARDIAN (Jul. 4, 2005 8:08 AM), <https://www.theguardian.com/politics/2005/jul/04/voterapathy.uk> [<https://perma.cc/4974-NKEH>].

168. *Compulsory Voting*, *supra* note 136.

rates of greater than 90 percent of registered voters.¹⁶⁹ By implementing compulsory voting, the United States¹⁷⁰ would likely achieve much higher voter turnout. But compulsory voting is an inequitable solution for two reasons: (1) it disproportionately burdens low-income voters; and (2) it fails to incentivize the government to improve turnout.

Without some sort of penalty, it would be challenging to generate compliance with the compulsory voting requirement. For example, under Australia's national electoral system, individuals who do not vote (and do not subsequently provide a "valid and sufficient reason" for failing to vote) can be fined \$20 to \$50.¹⁷¹ But levying fines on individuals who fail to vote is neither a fair nor an encouraging way to civically engage potential voters. Poor Americans already turn out to vote at lower rates than their higher-income peers,¹⁷² and the same is true for minority voters.¹⁷³ Thus, a penalty for not voting would disproportionately harm low-income and minority Americans. Nonvoters should not have to provide an explanation to avoid a financial penalty, especially considering the United States' history of oppressing voters of color.¹⁷⁴ Under a compulsory voting scheme,

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169. *Australia Voter Turnout*, INT'L IDEA: INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, <https://www.idea.int/data-tools/country-view/54/40> [https://perma.cc/49TA-EK2C] (last visited Oct. 11, 2019). When calculated based on the voting age population (which may include people not eligible to vote), the Australian voter turnout rate frequently exceeds 80 percent. *Id.* Indigenous Australians were not required to vote under the nation's compulsory voting system until 1984; in fact, they were not even permitted to vote in Australian federal elections prior to 1962. Sylvia Varnham O'Regan, *Why Does Australia Have Compulsory Voting?*, SBS NEWS (May 18, 2019) <https://www.sbs.com.au/news/why-does-australia-have-compulsory-voting> [https://perma.cc/AHR9-H444].
170. To survive invalidation for unconstitutionally compelling speech in contravention of the First Amendment, a compulsory voting scheme in the United States would have to be narrowly tailored and may need to include an exemption for conscientious objectors. Note, *The Case for Compulsory Voting in the United States*, 121 HARV. L. REV. 151 (2007).
171. *Failure to Vote*, W. AUSTL. ELECTORAL COMMISSION, <https://www.elections.wa.gov.au/vote/failure-vote> [https://perma.cc/9BMG-R8B4]. Though Australia has one of the strictest enforcement policies among regimes with compulsory voting, only 1 in 4 Australian nonvoters is fined. Chapman, *supra* note 69.
172. *Income 1948–2016*, ANES: AM. NTL. ELECTION STUD., <http://www.electionstudies.org/resources/anes-guide/top-tables/?id=9> [https://perma.cc/8M56-GJFC] (last visited Oct. 28, 2019).
173. *Race 1948–2016*, ANES: AM. NTL. ELECTION STUD., <http://www.electionstudies.org/resources/anes-guide/top-tables/?id=3> [https://perma.cc/5WCK-GVC6] (last visited Oct. 28, 2019).
174. See generally BERMAN, *supra* note 28.

under-represented communities could become even more financially insecure while continuing to wield less political power relative to other populations.¹⁷⁵

A more abstract problem with instituting compulsory voting is that it may not provide a robust incentive for government actors to make it easier for eligible citizens to vote. If only 1 percent of Australians turned out to vote, the only penalty would be that the remaining 99 percent are fined for noncompliance. The unrepresentative election results would still stand despite extremely low turnout, and the government would face no negative consequences. In fact, the government would collect money from every single person who did not vote; a corrupt regime might view such consequences as a net positive.¹⁷⁶

B. Poll Rebate System

A compulsory voting system need not penalize nonvoters; it could reward them instead. Instead of levying fines on nonvoters, compulsory voting systems could provide some sort of tax incentive (hereinafter, a poll rebate) for those who do vote. This would especially encourage low-income communities to participate.¹⁷⁷

A poll rebate program could be structured in several ways. First, a jurisdiction could directly pay eligible citizens in exchange for voting. This practice would likely be very effective at encouraging underrepresented, economically-marginalized populations to get to the ballot box. However, vote-buying to increase turnout commodifies voting, encouraging citizens to

175. In some countries that strictly enforce compulsory voting, fines are not the only types of penalties levied. In Ecuador, for example, citizens must show their most recent voter card (proving that they had voted in the most recent election) in order to participate in a whole host of activities, from pursuing higher education, to obtaining employment, to obtaining a marriage license. Interview with Local Voter, in Quito, Ecuador. (Aug. 20, 2019) (on file with the author). See also, *Compulsory Voting*, INT'L IDEA *supra* note 136, at note 4 (“In Bolivia the voter is given a card when he/she has voted so that he/she can proof [sic] the participation. The voter would not be able to receive his/her salary from the bank if he/she cannot show the proof of voting during three months after the election.”).

176. Fines levied by Australia’s Electoral Commission are directed into the government’s general coffers. *Resource Management Glossary—Consolidated Revenue Fund (CRF)*, AUSTL GOV’T DEP’T OF FIN., <https://www.finance.gov.au/resource-management/pgpa-glossary/consolidated-revenue-fund> [https://perma.cc/65Z8-GBA5] (last updated Nov. 8, 2017).

177. See Richard L. Hasen, *Vote Buying*, 88 CALIF. L. REV. 1323, 1357 (2000) (“Payments for voting would increase voting by the poor (who tend to be disproportionately from minority groups). Incentives to increase turnout like payment for voting promote political equality by making sure that elections represent the views of rich and poor voters alike (as well as the views of minority voters).”).

make decisions based on private gain rather than for the public benefit.¹⁷⁸ Paying citizens to vote may also undermine the widely-held belief that voting is a civic duty. Moreover, it would be challenging to calculate the appropriate amount of money for the government to offer in exchange for each citizen's vote. If too low, this may not be an effective incentive that actually generates greater turnout. If set too high, a poll rebate program could quickly become too cost-prohibitive to operate. Either way, jurisdictions would have to provide enough money to actually incentivize low-propensity or nonvoters to vote, though that would need to be capped at some reasonable limit.

Under a refund system, every eligible voter could be taxed at a certain rate and then receive a refund upon casting her ballot. This tax could be fixed (\$X per voter), or it could be graduated based on income. To avoid penalizing poverty, this tax penalty could be applied exclusively to citizens of voting age who are above a specified income bracket. Alternatively, a tax refund could be awarded to every voter below that income bracket. No matter how such a system were structured, however, it would still commodify voting while depleting government revenue.

Yet another option would be to structure the rebate in the form of a lottery system, with prizes awarded only when the minimum turnout requirement is met. The state of Arizona and the city of Los Angeles have both recently considered incentivizing voting through a lottery system.¹⁷⁹ Rather than buying a ticket, a citizen would enter the lottery by casting her ballot. Depending on the number and size of these prizes, a lottery system could end up being less expensive than a refund-based one.

Finally, a poll rebate program could be structured to generate enough revenue to be self-sustaining. Instead of imposing additional tax liability on the average American, the costs could fall on those who already pour money into elections.¹⁸⁰ Jurisdictions could introduce a 5 or 10 percent tax on big-

178. *Id.* at 1325, 1357–58.

179. In Arizona, voters overwhelmingly voted against a proposition to give away unclaimed lottery winnings as a \$1,000,000 cash prize to a voter who participated in the state's primary or general elections. *Arizona Voter Reward, Proposition 200 (2006)*, BALLOTEDIA, [https://ballotpedia.org/Arizona_Voter_Reward,_Proposition_200_\(2006\)](https://ballotpedia.org/Arizona_Voter_Reward,_Proposition_200_(2006)) [<https://perma.cc/5K8S-G5VF>] (last visited Sept. 8, 2019). In 2014 in Los Angeles, the Ethics Commission voted to ask the City Council to consider offering cash prizes to voters. David Zahniser, *Panel Wants L.A. to Look at Using Prizes to Boost Voter Turnout*, L.A. TIMES (Aug. 14, 2014, 5:50 PM), <http://www.latimes.com/local/lanow/la-me-ln-panel-prizes-voters-20140814-story.html> [<https://perma.cc/UL2G-YKZ6>].

180. See generally David S. Gamage, *Taxing Political Donations: The Case for Corrective Taxes in Campaign Finance*, 113 YALE L.J. 1283, 1322–26 (2004) (suggesting imposition of a tax on campaign contributions and reasoning that such a tax would likely be found

dollar election contributions.¹⁸¹ In 2016 alone, \$6.5 billion was poured into U.S. presidential and congressional races.¹⁸²

While it could be structured to be financially fair to all parties involved, a poll rebate model of compulsory voting still presents three major issues: (1) exacerbating inequities caused by lack of access to voting; (2) potentially establishing a system that exacts greater penalties for mistaken voting by those who are ineligible; and (3) creating a financial incentive for the government to discourage voting.

It would be unfair to monetarily reward voters while some eligible citizens face barriers to voting. The accessibility of the electoral process would come under heightened public scrutiny if citizens were to reap a direct financial benefit from voting. Jurisdictions would face greater pressure to allocate sufficient resources towards election administration and to ensure that all eligible voters can readily participate in the electoral process.¹⁸³

Care must also be taken to ensure that only eligible voters receive a poll rebate. The perception that noncitizens are getting paid to vote illegally would likely result in harsher penalties for mistaken voting by noncitizens, even though those penalties are already excessively severe.¹⁸⁴

constitutional if justified by a compelling state interest and tailored narrowly enough to protect donors' First Amendment rights).

181. Following *Citizens United v. Fed. Elec. Comm'n*, it is unlikely the Supreme Court would uphold a tax on independent political expenditures by political action committees (PACs) and SuperPACs. See Melanie Mason, LOS ANGELES TIMES, *California lawmaker seeks tax on independent political spending* (Mar. 2, 2015) <https://www.latimes.com/local/political/la-me-pc-outside-spending-tax-20150302-story.html> [<https://perma.cc/HF2Z-9BJG>] (noting that such a tax may be interpreted to unconstitutionally restrict free speech).
182. Niall McCarthy, *The 2016 Election Had a \$6.5 Billion Price Tag*, FORBES (Apr. 18, 2017, 8:28 AM), <https://www.forbes.com/sites/niallmccarthy/2017/04/18/the-2016-election-had-a-6-5-billion-dollar-price-tag-infographic/#4acf7a3c1544> [<https://perma.cc/DJ5F-HMJ8>].
183. This would entail, at minimum, creating a system in which all eligible voters can meaningfully exercise their right to vote, such that every voting-eligible citizen has: (1) acceptable voter ID; (2) relatively unimpeded access to the polls; (3) a steady stream of political information; and (4) a way to reliably receive their financial reward (especially for people who do not have bank accounts and those who vote by mail).
184. Sam Levine, *They Didn't Know They Were Ineligible to Vote. A Prosecutor Went After Them Anyway.*, THE HUFFINGTON POST (Aug. 13, 2018) https://www.huffpost.com/entry/alamance-county-felon-voting_n_5b71f4d8e4b0530743cca87d [<https://perma.cc/R277-CYNN>] (describing how a Texas permanent resident was sentenced to 8 years in prison for voting, though she genuinely believed she was an eligible voter). She is likely to face deportation after serving her sentence. Michael Wines, *Illegal Voting Gets Texas Woman 8 Years in Prison, and Certain Deportation*, N.Y. TIMES (Feb. 10, 2017), <https://www.nytimes.com/2017/02/10/us/illegal-voting-gets-texas-woman-8-years-in-prison-and-certain-deportation.html> [<https://perma.cc/FX7F-8HXT>].

An additional problem presented by such a system is that it could create a new incentive for the government to discourage voting: to reduce its operating expenses associated with elections. Under a poll rebate system, there would be a strong financial incentive for the government to reduce the number of people who are eligible to receive the tax incentive. In this respect, a poll rebate could result in fewer people voting rather than holding the government accountable for increasing voter turnout.

In terms of reducing, rather than exacerbating, societal inequities at the ballot box, the solution proposed in this Comment is superior to the alternatives explored above. A compulsory voting scheme could penalize innocent nonvoters. Moreover, both a traditional or poll rebate compulsory voting scheme would result in the government either receiving or retaining money when turnout is low. A minimum turnout requirement, by contrast, provides a direct monetary incentive for the government to *increase* voter turnout, because it allows the government to save money when turnout is high. Under the proposal outlined in Part III, penalties would fall on the government, not on voters, when a certain level of turnout is not met.

V. SHORTCOMINGS

For a number of reasons, this proposal is not ideal. First, increasing turnout generally may not meaningfully reduce disparities in our electoral process or generate electoral outcomes that better represent the preferences of diverse segments of the electorate. Further, administering a minimum turnout requirement in a nonpartisan way could give rise to disputes. Lastly, a jurisdiction could repeatedly fail to improve turnout with relative impunity, even under the proposed system.

A. Would Increasing Turnout Substantively Increase Minority Representation?

To the extent that low turnout is somewhat a race-based problem (as it is in the United States, particularly in places where voter suppression efforts have largely targeted Black¹⁸⁵ and Latinx communities),¹⁸⁶ then simply

185. See Camila Domonoske, *Supreme Court Declines Republican Bid to Revive North Carolina Voter ID Law*, NAT'L PUB. RADIO (May 15, 2017, 11:57 AM) <https://www.npr.org/sections/thetwo-way/2017/05/15/528457693/supreme-court-declines-republican-bid-to-revive-north-carolina-voter-id-law> [<https://perma.cc/7QBK-KQUG>] (“The U.S. Supreme Court has once again declined to reinstate North Carolina’s strict voter ID law,

mandating higher turnout will not necessarily give minorities more of a voice. Indeed, it may even drown out their voices. If 70 percent of a town's population is white, a simple majority of voters that satisfies the minimum turnout requirement for a close city council election could easily include only white people. In that event, the minimum turnout requirement could be met even if no voters of color turned out to vote. Such a stark disparity is extremely unlikely, but it is possible that minority voices could be proportionately underrepresented even in an electoral system where a minimum turnout level is specified.

One way to address this problem could be to tie the turnout requirement partly to the demographics and voting patterns of the population.¹⁸⁷ If a given minority group comprises half of the electorate, some percentage of votes could be required to come from that group. Alternatively, the turnout requirement could be specifically tailored to turn out demographic groups with consistently low voter turnout. However, it would be very difficult to determine which demographic groups should be given priority assistance through a special turnout requirement. Asian American voters, for instance, may not see themselves as a voting bloc such that voters of Pakistani, Indian, Chinese, or Korean descent may each want their own special turnout category. Minorities from the LGBTQ+ and disability communities may ask for them as well.

Trying to explicitly remedy existing inequities in the electoral process could greatly complicate this proposal. At minimum, however, imposition of a minimum turnout requirement could help reduce current inequities,

which was struck down last year after a court ruled it was intentionally designed to stop African-Americans from voting.”).

186. Latinx communities are a primary target for noncitizen voting charges. The Brennan Center has published a searchable appendix to the Heritage Foundation's list of alleged “voter fraud” convictions which shows that a disproportionate number of voters with Spanish surnames have been prosecuted for non-citizen voting. <https://docs.google.com/spreadsheets/d/1etA8PFq-n4GylmfRQQXeN4Q9tOus90XYEDITDYftdN8/edit>. These charges tend to be punished very harshly, and even noncitizens with legal documents face the prospect of deportation. Sam Levine & Ryan J. Reilly, *Trump Prosecutor Gets First Illegal Voting Conviction. The Penalty is \$200 And Possible Deportation.*, THE HUFFINGTON POST (Oct. 11, 2018), https://www.huffingtonpost.com/entry/voter-fraud-doj-north-carolina_us_5bbf7393e4b040bb4e7ffe54 [<https://perma.cc/5U7Q-UZ9H>] (“The defendant was here legally for 33 years, committed no crime, got married, raised 2 kids and substantially complied with the naturalization process. But for getting fingerprinted and being sworn in he would have been a U.S. Citizen.”).
187. Demographically-tailored turnout requirements would be vulnerable to constitutional challenge. A race-based requirement would be subject to strict scrutiny.

especially if jurisdictions specifically allocate funding towards turning out low-income and minority voters.

B. Can GOTV Be Performed in a Nonpartisan Manner?

There could be disagreement about what counts as nonpartisan voter outreach. Some would argue that general GOTV does not exist and that by turning out marginal voters, a jurisdiction will be increasing the Democratic Party's chances of success because marginal voters in the United States tend to vote for a Democrat.¹⁸⁸

While general GOTV efforts may necessarily boost participation by some segments of the population more than others, to the extent they do, that would merely help make up for the under-representation of those communities. State and local governments can stimulate higher voter turnout and greater voter satisfaction in a number of ways, as outlined in Part III.D. If there are other practices that researchers believe can improve turnout rates, the jurisdiction could use some of the set aside funds to adopt those specific practices.

Like any legislative fix to a political problem, there is a danger that the actors who implement the minimum turnout requirement would do so in a nefarious way, thereby subverting its original intent. To minimize that potential, organizers would need to build popular understanding of and support for the minimum turnout requirement. Citizen watchdog groups would need to monitor elections and local budgets to verify that jurisdictions allocate appropriate funding towards GOTV following an election where the minimum turnout level was not met. These groups must also ensure that the general GOTV fund is spent in a fair, nonpartisan manner.

C. What If a Jurisdiction Repeatedly Fails to Improve Its Turnout?

Unless it is assessed some further penalty for failing to improve turnout, a polity could theoretically continuously contribute money and resources toward ineffective GOTV measures and never actually improve voter turnout. One potential approach to address this situation would be to allow

188. See, e.g., Anthony Fowler, *Marginal Voters Are Much More Likely to Vote Democratic, and to Stay at Home on Off-year Elections*, LSE: USCENTER, http://eprints.lse.ac.uk/60412/1/blogs.lse.ac.uk-Marginal_voters_are_much_more_likely_to_vote_Democratic_and_to_stay_at_home_on_offyear_elections%5B1%5D.pdf [https://perma.cc/4C77-L65R].

outside groups to intervene if it appears that election administration is being mismanaged. Legislation adopting a minimum turnout requirement could provide for a private right of action by concerned citizens in jurisdictions where turnout is perennially low, and a statutory remedy could be the appointment of a special master to direct the jurisdiction's adoption of research-backed methods to improve turnout. As a political remedy, members of the electorate could utilize other methods of civic engagement (such as protests, lobbying, and initiating ballot measures) to push for changes in how local elections are administered. And if enough concerned citizens are able to turn out to the polls, they could vote out county- or state-level election officials who have not properly administered elections.

A shortcoming of the proposal outlined here is that it would have to be largely self-effectuating. There must be enough political will, coming from the electorate, or from elected officials themselves, to adopt such a system and to make it work. Due to this limitation, a jurisdiction that voluntarily adopts a minimum turnout requirement may not be principled enough to impose strict penalties on itself to ensure that the requirement is consistently met. When this is the case, there may be little recourse for frustrated citizens who would like the government to more deeply invest in boosting the engagement of underrepresented communities. Moreover, a local government could earnestly attempt to boost voter turnout to the requisite level but fail to do so through no fault of its own.

However, simply by adopting a minimum turnout requirement, a jurisdiction can cultivate a social expectation that every member of the electorate be informed, invested, and involved in the electoral process. Even if a jurisdiction does not adopt a minimum turnout requirement, at the very least, it could begin reporting voter turnout rates alongside electoral results. By acknowledging the problem of low voter turnout, election administrators can thus help foster a social and political discourse amenable to solving it.

CONCLUSION

Elections legitimate a republican form of government. Thus, when turnout is low because many eligible citizens do not or cannot vote for their representatives, a representative democracy's legitimacy is at risk. When legal, social, and historical realities result in lower turnout among minority groups, the tally of votes cast does not adequately reflect the preferences of the electorate as a whole. Unless more Americans participate in the electoral process, our society cannot meaningfully claim to be a democracy.

While the right to vote is an individual one, the government should bear greater responsibility for the functions (and dysfunctions) of democracy. By adopting a minimum turnout requirement, jurisdictions may be able to increase voter turnout, thereby improving political representation. This Comment has presented an array of considerations for adopting, implementing, and enforcing such a system. While it reframes the problem of low voter turnout in hopes of inspiring other creative interventions, any effective solution would incorporate these fundamental features of the proposal offered here:

- (1) government actors should be incentivized to help increase voter turnout;
- (2) no group or candidate should gain any unfair political advantage; and
- (3) communities that are already underrepresented should not be financially penalized or burdened in other ways.

However it is structured, a minimum turnout requirement would represent an improvement to our current system where the majority rules regardless of how small that “majority” actually is.