

OPT-OUT VOTING

*Michael J. Pitts**

I. INTRODUCTION

Imagine for a moment that you are a registered voter casting a ballot in the U.S. presidential election. What generally happens in such an election today is that you acquire a ballot—either by making the journey to a polling place on election day (or in the days leading up to election day) or receiving a ballot, such as an absentee ballot, by mail just prior to the election.¹ That ballot has the eligible candidates listed on it. You select the candidate you prefer—by filling in an oval, pressing a button on the machine, or some other method of marking the ballot—then cast your vote and proceed with your usual daily routine.²

Now imagine a different type of system. In this system, your local election administrator mails you a ballot. And instead of having to check off a box for a candidate, you already have a candidate randomly pre-selected for you. At this point, you have several options: (1) do nothing and your vote will be cast for your pre-selected candidate; (2) change your vote from the pre-selected candidate to another candidate and mail notice of that change to the local election administrator; or (3) mail to the local election administrator notice of a change in your vote from the pre-selected candidate to the category of “None of the Above.”

This latter system is what I will refer to in this paper as “opt-out voting,” and what opt-out voting accomplishes is to change the default rule for electoral participation. The system currently used in the United

* Associate Professor, Indiana University School of Law–Indianapolis. Thanks to Nicholas Georgakopoulos, Max Huffman, Gerard Magliocca, Antony Page, Dan Tokaji, Steve Willborn, and the participants at a faculty colloquia at Indiana University School of Law–Indianapolis for helpful comments. Also thanks to several commenters on the *Concurring Opinions* blog. Special thanks to Chris Elmendorf whose comments went above and beyond the call of duty.

1. *A Voter's Guide to Federal Elections*, U.S. ELECTION ASSISTANCE COMM'N, http://www.eac.gov/assets/1/AssetManager/2008_VotersGuide_EAC.pdf (last visited Oct. 28, 2011).

2. Ellen Theisen, *Overview of Types of Election Equipment*, VOTERSUNITE.ORG (Apr. 21, 2007), <http://www.votersunite.org/info/typesofelecequip.pdf>.

States operates from a baseline of *non*-participation by a registered voter. To make known a preference at an election, a registered voter must always take some affirmative step—travel to a polling place, request an absentee ballot, etc.³ In stark contrast, opt-out voting operates from a baseline of participation by a registered voter. Once registered, the registered voter knows that she will definitely be casting a ballot in the election in some way, shape, or form.

This Article contends that opt-out voting might present a superior system of casting ballots to the United States's current system of balloting. Opt-out voting holds the promise of being a better system because it might put a significant dent in what represents one of the most pressing problems of democracy in the United States—the low participation⁴ rate of the citizenry in elections. Opt-out voting should increase participation, especially in less high-profile elections (i.e., state and local elections), because it changes the default rule for registered voters from non-participation to participation.

Theoretically, opt-out voting represents a proposal that stems from the literature related to creating default options that will spur positive action on the part of individuals—something commonly known as “libertarian paternalism.”⁵ By changing the baseline from non-participation to participation, opt-out voting is paternalistic in that it nudges registered voters in the direction of casting a ballot. Importantly, though, opt-out voting is libertarian in that it preserves the ability of any citizen to not select a candidate in an election—either by not registering to vote or by casting a ballot for “None of the Above.” For this latter reason, opt-out voting represents something of a compromise between our current system and more draconian proposals of compulsory voting with fines for noncompliance that have been championed by some commentators in recent years as the optimal solution to the United States's turnout problem.⁶

3. *A Voter's Guide to Federal Elections*, *supra* note 1.

4. The term “participation” is used in this Article in the narrow sense as only relating to the act of casting a ballot in an election, as opposed to a broader definition that might include such political activities as donating to candidates or volunteering for a campaign.

5. See Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1160, 1175, 1180-81 (2003).

6. See Christopher W. Carmichael, *Proposals for Reforming the American Electoral System After the 2000 Presidential Election: Universal Voter Registration, Mandatory Voting, and Negative Balloting*, 23 HAMLINE J. PUB. L. & POL'Y 255, 303-05 (2002); Malcolm M. Feeley, *A Solution to the “Voting Dilemma” in Modern Democratic Theory*, 84 ETHICS 235, 241 (1974) (“I am proposing that a system of compulsory voting is a reasonable, although not ideal, solution for overcoming rational abstention and exploitation and would produce policies more closely attuned to citizen preferences.”); Arend Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1, 11 (1997) (“Compulsory voting cannot solve the entire conflict between

While opt-out voting might be a superior system on a theoretical level, several caveats must be made plain at the outset. For starters, because opt-out voting is not to my knowledge used anywhere, no definitive empirical evidence exists to support the theory behind opt-out voting. In other words, while theoretically opt-out voting may be a superior system, absent actual experimentation, it is impossible to prove that opt-out voting would actually be superior in practice. In addition, the likelihood of adopting opt-out voting seems slim. At the moment, opt-out voting just does not comport with traditional notions about elections that I suspect most persons hold near and dear, and there are nuts-and-bolts election administration problems that must be sorted out. Put simply, opt-out voting is more *haute couture* than ready-to-wear.

Yet exploring opt-out voting serves several useful purposes. First, as previously mentioned, opt-out voting amounts to a novel idea that forges something of a compromise between our current system and stronger proposals for compulsory voting that have been advocated elsewhere. Second, explication of a theory of opt-out voting might lead to the experimentation needed to determine whether the theory holds up. Put differently, any new idea will meet with firm resistance, but the first, seemingly impossible proposal may spark a shift in the conversation that will lead to the eventual adoption of the proposal or a related idea. Finally, on a more macro level, opt-out voting represents a type of proposal that shifts the default electoral rules from non-participation to participation. And, to the extent fairly widespread agreement exists regarding the importance of encouraging democratic participation by citizens, describing opt-out voting and the theory behind it might lead commentators to think more about ways that we can create default rules of election administration designed to foster participation.

This Article will describe the basic mechanics of opt-out voting, including an explanation of how opt-out voting comports on some level with the literature on default options in Part II. In Part III, the theoretical benefits of opt-out voting will then be presented with a focus on the

the ideals of participation and equality, but by making voting participation as equal as possible, it is a valuable partial solution.”); Sean Matsler, Note, *Compulsory Voting in America*, 76 S. CAL. L. REV. 953, 955 (2003) (“[V]oting, which in modern history has been treated more like a burden than a privilege, should be made mandatory” (footnote omitted) (internal quotation marks omitted)); William A. Galston, *Economic Growth and Institutional Innovation: Outlines of a Reform Agenda*, BROOKINGS POL’Y BRIEF, June 2010, at 6-7, http://www.brookings.edu/~media/Files/rc/papers/2010/0601_innovation_galston/pb_172.pdf. See also Note, *The Case for Compulsory Voting in the United States*, 121 HARV. L. REV. 591 (2007) (advocating a compulsory voting system for the United States); Norman Ornstein, *Vote—Or Else*, N.Y. TIMES, Aug. 10, 2006, at A23; Peter Singer, *Vote—or Else*, GUARDIAN.CO.UK (Dec. 18, 2007, 8:00 GMT), <http://www.guardian.co.uk/comment/isfree/2007/dec/18/voteorelse>.

potential for opt-out voting to increase participation by the citizenry in elections and why an increase in participation would be positive. Finally, in Part IV, the Article will explore potential objections to opt-out voting.

II. THEORETICAL ROOTS AND THE BASIC PROPOSAL

The proposal to have registered voters opt out of casting ballots for candidates in elections rather than having them “opt in” extends a burgeoning literature that aims to create default rules that encourage individuals to, essentially, “do the right thing.” This Part briefly sketches that literature and explains how this literature already seems to be influencing at least one electoral context—voter registration. After this brief background, a description of the basic nature of the proposal for opt-out voting follows.

A. “Libertarian Paternalism” and its Potential Insights for Voter Registration

The general theory behind opt-out voting starts from the notion that the choices individuals make can be greatly influenced by the context in which they make those choices.⁷ Professors Cass Sunstein and Richard Thaler refer to this as “choice architecture” and provide a simple example of how this works in *Nudge*.⁸ In that book, Professors Sunstein and Thaler describe how the placement of the food in a school cafeteria can influence the choices children will make as to food consumption.⁹ Depending on how the food choices are placed in the buffet line, children can be subtly influenced into choosing healthy foods.¹⁰ Put simply, individuals can be influenced to make certain choices depending on how the choices are framed.¹¹

7. Sunstein & Thaler, *supra* note 5, at 1161 (“[I]n many domains, people lack clear, stable, or well-ordered preferences. What they choose is strongly influenced by details of the context in which they make their choice, for example default rules, framing effects (that is, the wording of possible options), and starting points.”).

8. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 81-100 (2008).

9. *Id.* at 1-3.

10. *Id.* at 1-2 (“[S]chool children, like adults, can be greatly influenced by small changes in the context. The influence can be exercised for better or for worse. For example, [a person] knows that she can increase consumption of healthy foods and decrease consumption of unhealthy ones.”). Yet another example of context influencing decisions can be found in the “ballot-order” effect where the candidate listed at the top of the ballot gets more votes than she would otherwise have received simply by being listed at the top. See generally R. Michael Alvarez et al., *How Much Is Enough? The “Ballot Order Effect” and the Use of Social Science Research in Election Law Disputes*, 5 *ELECTION L.J.* 40, 41-42 (2006) (discussing the ballot order-effect).

11. See THALER & SUNSTEIN, *supra* note 8, at 81-100.

Once it is recognized that context matters to the choices individuals will make then the second aspect of the theory behind opt-out voting kicks in: the context presented should push (but not compel!) individuals toward choices optimal for them and for society.¹² This is what Professors Sunstein and Thaler term “libertarian paternalism.”¹³ The idea is that “in general, people should be free to do what they like—and to opt out of undesirable arrangements if they want to do so.”¹⁴ However, while freedom to choose should be preserved, the context provided by government and private industry for choices should “try to influence people’s behavior in order to make their lives longer, healthier, and better.”¹⁵

Importantly, libertarian paternalism does not absolutely mandate that individuals make the “right” choice because it only tries to subtly move them—“nudge” them—in the direction of the best choice.¹⁶ As Professors Sunstein and Thaler explain:

A nudge . . . is any aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives. To count as a mere nudge, the intervention must be easy and cheap to avoid. Nudges are not mandates. Putting the fruit at eye level counts as a nudge. Banning junk food does not.¹⁷

12. Sunstein & Thaler, *supra* note 5, at 1161 (“We urge that such [legal and organizational] rules should be chosen with the explicit goal of improving the welfare of the people affected by them.”). Admittedly, Sunstein & Thaler seem to focus on how government can nudge an individual to make the best decision for herself. The act of voting, though, may not be the rationally best choice for an individual. ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 274 (1957); see William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 *AM. POL. SCI. REV.* 25, 34 (1968). Thus, it might be a bit controversial to extend libertarian paternalism to nudge an individual to make a choice that may be beneficial to society as a whole, but not to the individual herself. *But see* Pierre Schlag, *Nudge, Choice Architecture, and Libertarian Paternalism*, 108 *MICH. L. REV.* 913, 916 (2010) (reviewing RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS* (2008)) (describing how a potential nudge to make people vote would be to “prime them” to cast ballots by “call[ing] them up the day before and ask[ing] them whether they intend to vote”). However, nudging individuals to vote for the betterment of society might fall into what Sunstein & Thaler call “libertarian benevolence.” Sunstein & Thaler, *supra* note 5, at 1193 (describing libertarian benevolence as “an approach that attempts to promote benevolence . . . without mandating behavior in any way”).

13. See Sunstein & Thaler, *supra* note 5, at 1160-61. Closely related to the concept of libertarian paternalism is what another group of authors refers to as “asymmetric paternalism.” See Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 *U. PA. L. REV.* 1211, 1221-22 (2003).

14. THALER & SUNSTEIN, *supra* note 8, at 5.

15. *Id.*

16. *Id.* at 5-6.

17. *Id.* at 6; see also Sunstein & Thaler, *supra* note 5, at 1161 (“[W]e do not aim to defend any approach that blocks individual choices.”).

With the theory of libertarian paternalism explicated, one then turns to applications of the theory in various contexts. Professors Sunstein and Thaler have spent much of their energy applying their theory to financial matters (i.e., how to encourage retirement savings) and environmental regulation.¹⁸ What may be just as interesting, though, is to think about how default rules might be created to improve democracy in the United States. More specifically, how can default rules be created that will lead to greater electoral participation in the United States without being too heavy-handed?

Voter registration is one area of election administration where libertarian paternalism might apply, and here it is necessary to provide some background on the National Voter Registration Act (“NVRA”).¹⁹ The NVRA represented an effort to expand voter registration opportunities.²⁰ While the NVRA did many things to improve voter registration in the United States, for present purposes the most important aspect of the NVRA involves the requirement that states provide voter registration opportunities at certain government offices.²¹ Most notably, states must provide voter registration at agencies where public assistance is available and at places where driver’s licenses are issued (i.e., offices that are part of a state bureau of motor vehicles).²²

When it comes to the possibility of applying libertarian paternalism to the NVRA’s requirement of voter registration at certain government agencies, it is important to understand what a citizen currently must do to register when she is, say, applying for a driver’s license at the local bureau of motor vehicles: the citizen must opt in.²³ In all states, the applicant for the license must affirmatively check a box in order to register.²⁴ The Commonwealth of Virginia, for example, asks at the top of its driver’s license application form: “Do you want to apply to register

18. See THALER & SUNSTEIN, *supra* note 8, at 107-09, 183-85.

19. See National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg to -10 (2006).

20. *Id.* § 1973gg(b)(1)–(2).

21. See *id.* § 1973gg-5.

22. *Id.* § 1973gg-3(c)(1), gg-5(a)(2).

23. See *id.* § 1973gg-3(a), (c).

24. See Robert Richie, *Leave No Voter Behind: Seeking 100 Percent Voter Registration and Effective Civic Education*, NAT’L CIVIC REV., Fall 2007, at 39, 43 (describing how no state uses opt-out registration procedures at driver’s licensing agencies). In 2009, Minnesota’s legislature passed a bill adopting opt-out voter registration procedures; however, that legislation was vetoed by the governor. Nick Busse, *No Automatic Voter Registration (Vetoed Bill)*, MINN. HOUSE OF REPRESENTATIVES (May 29, 2009), http://www.house.leg.state.mn.us/sessionweekly/art.asp?ls_year=86&issueid_45&storyid=1355&year_2009.

to vote or change your voter registration address?”²⁵ Applicants are then provided with a box to answer “YES” and a box to answer “NO” by writing their initials inside the box.²⁶ Put simply, when a person applies for a driver’s license she must take an affirmative step (must opt in) to have that driver’s license application also serve as an application for voter registration.²⁷

Yet some argue that the procedure used at NVRA registration locations should be shifted to an opt-out system as a means of increasing participation in elections.²⁸ For instance, instead of an applicant for a driver’s license having to take an affirmative step to register to vote, the applicant would be automatically registered at the current address unless the applicant took an affirmative step (i.e., checked a box) to indicate an *unwillingness* to register.²⁹ In theory, this should increase the number of persons who appear on the registration list and, therefore, increase the proportion of ballots cast at elections.³⁰

So it may be possible to increase electoral participation by changing the default option for voter registration at certain government agencies from non-registration to registration. Voter registration, however, does not ensure a citizen will actually cast a ballot.³¹ While the vast majority of registered voters participate in the general presidential election every four years, far fewer registered voters participate in other elections.³² The next step, then, would be to consider whether a default structure could be designed not just for voter registration, but for the actual casting of ballots. Here, opt-out voting might fit the bill.

25. *Driver’s License and Identification Card Application*, VA. DEP’T OF MOTOR VEHICLES, <http://www.dmv.state.va.us/webdoc/pdf/dl1p.pdf> (last visited Oct. 28, 2011).

26. The form states that answering this question is “requested but not required to apply for a driver’s license . . .” *Id.*

27. *See id.*

28. Richie, *supra* note 24, at 43; Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 499 (2008) (noting that one possible voter registration reform is that “citizens [be] automatically registered when they interface with certain governmental entities”); Laura Seago, *Automatic Registration in the United States: The Selective Service Example*, BRENNAN CENTER FOR JUST., 14-15 (2009), http://brennan.3cdn.net/b00a78fefae1c6695e_exm6i2a7f.pdf (advocating an opt-out system of voter registration).

29. *See* Busse, *supra* note 24; *Driver’s License and Identification Card Application*, *supra* note 25.

30. To the best of my knowledge, no research exists that estimates how many more persons would register and participate with the adoption of opt-out voter registration.

31. *Table 1. Reported Voting and Registration, by Sex and Single Years of Age: November 2008*, U.S. CENSUS BUREAU (July 2009), <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/Table%2001.xls>.

32. *See infra* notes 60-62 and accompanying text.

B. *Opt-Out Voting*

Opt-out voting's basic design is relatively simple. (We will deal with major election administration-related complications later.)³³ Opt-out voting would randomly assign a pre-selected candidate to every registered voter and would then allow each voter to opt out of the predetermined selection. In other words, the baseline for a registered voter's participation in an election would be as a participant in the election, and a registered voter would have to choose *not* to select any candidate in an election.³⁴ A simple, concrete hypothetical provides the best tool to demonstrate the system's essentials.

The first step will be to identify the number of registered voters and the number of candidates, and then to randomly assign a candidate to each registered voter so that an even division of votes results between the candidates. For instance, let's say Marge is a registered voter who lives in Springfield, a town with 100 total registered voters. In the upcoming town mayoral election, there are two candidates: Quimby and Winston. Prior to the election, Marge (along with every other registered voter in the town) would have her vote randomly assigned by the local election administrator to either Quimby or Winston—with each of the two candidates receiving exactly half of the registered voters. Thus, at the "start" of the election, Quimby and Winston each have fifty votes.

The next step involves notifying each voter of the pre-selected choice and giving the voter the opportunity to opt out of the pre-selected choice. For example, Marge would receive some sort of notice in the mail that her ballot was currently "cast" for, say, Quimby. Marge would then have a set period of time (perhaps thirty days) to "finalize" her ballot and this ballot finalization could be accomplished in several ways:

- (1) If Marge wanted to vote for her pre-selected choice, Quimby, then Marge would have to do nothing. Put differently, to vote for Quimby, Marge must merely look at the notice and see that it reflects her preference for the mayoral election.
- (2) If Marge wanted to vote differently from her pre-selected choice and cast a ballot for Winston, then Marge would fill out a ballot to switch her preference and mail that ballot back to the local election administrator.³⁵ The local election administrator would then switch Marge's vote from Quimby to Winston.
- (3) If Marge disapproved of both options with which she was

33. See *infra* Part IV.B.

34. While this Article discusses opt-out voting in relation to elections for candidates to office, presumably opt-out voting could also be used for referenda and the like.

35. Presumably, this system could one day be done over the Internet, rather than by paper.

presented, then she would fill out a ballot to indicate “None of the Above.” The local election administrator would then switch Marge’s vote from Quimby to “None of the Above.”³⁶

At this point, let’s leave to the side any benefits, costs, and other objections one might have to the basic concept and focus on why this system meshes to some extent with the libertarian paternalism approach. Libertarian paternalism tries to change the context in which persons make decisions so that they will make the “right” choices,³⁷ and opt-out voting might accomplish this. The context of democracy in the United States as currently framed requires registered voters to opt into electoral participation. Opt-out voting changes the default option from one in which registered voters do not participate to one in which they *do* participate. Opt-out voting shifts the context and, importantly, shifts the context for the better: it is better for registered voters to cast ballots in elections than to not cast ballots in elections (more on this later).

Importantly, though, libertarian paternalism aims to maintain freedom of choice by making it relatively easy for an individual to make what would appear to be the “wrong” choice and, again, on this score opt-out voting complies with libertarian paternalism.³⁸ A registered voter who desires not to cast a ballot in the election can simply fill out a form and mail it back saying that she desires not to cast a ballot for anyone (i.e., choose the “None of the Above” option). Granted, it is not totally costless—nothing is!—but filling out a form and dropping a postage-paid envelope in the mail amounts to a relatively picayune cost. In short, opt-out voting preserves the freedom to choose not to participate in an election.

Opt-out voting does, however, differ a bit from what might be described as the paradigmatic application of libertarian paternalism. Libertarian paternalism often relies on giving individuals default options that they stick with.³⁹ For example, libertarian paternalism desires individuals to participate in retirement programs such as 401(k)’s and, therefore, defaults individuals into participation in such retirement funds

36. In the somewhat unlikely event that “None of the Above” wins the election, then a decision rule will need to be created to deal with that contingency. One option would be to hold a new election. Another option would be to declare the second-place candidate the victor. This latter approach is the one taken by Nevada, which is the only state that has adopted a “None of the Above” option for federal and statewide contests. See Ashley Powers, *‘None’ Could Be the Kingmaker in Nevada Senate Race*, L.A. TIMES, Sept. 22, 2010, available at <http://articles.latimes.com/2010/sep/22/nation/la-na-nevada-none-20100922>.

37. See Sunstein & Thaler, *supra* note 5, at 1185-86.

38. See *id.*

39. See THALER & SUNSTEIN, *supra* note 8, at 108-09; Sunstein & Thaler, *supra* note 5, at 1172-73.

with the goal of having the individual adhere to that choice.⁴⁰ In a bit of contrast, opt-out voting wants individuals to adhere to the choice of participation but does not necessarily desire the voter to stick with the particular candidate selected. The hope is that by creating a default of participation, registered voters will be spurred into thinking about the candidates and into actively (rather than mindlessly) making a choice.

In some ways, then, opt-out voting might amount to a combination of libertarian paternalism with the concept of “penalty defaults.”⁴¹ As Yale’s Ian Ayres has noted, certain default rules in contract law known as “penalty defaults” cause contractors to change their contractual offers so as to avoid the default contractual provision.⁴² The rationale for these penalty defaults is to set the default rule to what a contracting party would not desire as a means to encourage the contracting party to reveal information.⁴³ In the same way, opt-out voting (as will be discussed in more detail in the next Part) hopes to spur voters to act so that they avoid the “penalty” of having a ballot cast for a candidate they do not support. Put differently, opt-out voting defaults registered voters into casting a ballot for some candidate with the hope that this default mechanism causes registered voters to pay attention to their ballot in order to head off the negative outcome of voting for the “wrong” candidate. In essence, this default is intended to force the registered voter to provide information (i.e., the registered voter’s preferred candidate) in the same way a penalty default forces a contracting party to provide information.⁴⁴

Opt-out voting finds theoretical foundation in the literature involving default options. But a theoretical basis in the literature does not mean opt-out voting should be adopted. There must be some benefit to opt-out voting, and it is to the possible benefit to which we now turn.

III. THE BENEFIT OF OPT-OUT VOTING

Opt-out voting could be beneficial for democracy in the United States. The benefit of opt-out voting would come from the increase in

40. THALER & SUNSTEIN, *supra* note 8, at 108-11.

41. See generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (discussing the concept of penalty defaults).

42. Ian Ayres, *Ya-Huh: There Are and Should Be Penalty Defaults*, 33 FLA. ST. U. L. REV. 589, 595 (2006); see also Ayres & Gertner, *supra* note 41, at 91 (“Penalty defaults are designed to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer.”).

43. Ayres & Gertner, *supra* note 41, at 91 (“[P]enalty defaults are purposefully set at what the parties would not want—in order to encourage the parties to reveal information to each other or to third parties (especially the courts).”).

44. See Ayres, *supra* note 42, at 595.

participation by registered voters. Importantly, increasing participation represents an important goal because an increase in participation should lead to a more representative electorate.

A. Increasing Participation

One of the main problems of democracy in the United States is the lack of participation by citizens in elections.⁴⁵ While some elections in the United States have a higher turnout than others, for the most part the citizenry does not participate in elections to the extent many commentators think it should.⁴⁶ As a number of commentators have noted throughout the years, only a little more than half of the eligible population votes in presidential elections, and even fewer eligible voters typically participate in less high-profile contests, such as state and local elections.⁴⁷ These statistics leave the United States toward the bottom of major democracies when it comes to voter turnout.⁴⁸

At first blush, one way opt-out voting theoretically may increase participation is by slightly increasing the value of a registered voter expressing her preference in a typical election. In the current election structure, a registered voter has one vote to give to a candidate. But with

45. Michael G. Colantuono, Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CALIF. L. REV. 1473, 1503 (1987) (“[T]he great wealth of evidence that electoral participation in America is much lower than in other democracies suggests that low voter participation is a significant problem.”).

46. See Ornstein, *supra* note 6, at A23; Jason P.W. Halperin, Note, *A Winner at the Polls: A Proposal for Mandatory Voter Registration*, 3 N.Y.U. J. LEGIS. & PUB. POL’Y 69, 88 (1999).

47. Ornstein, *supra* note 6, at A23.

48. FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS STILL DON’T VOTE AND WHY POLITICIANS WANT IT THAT WAY* 3 (2000) (“Only about half of the eligible population votes in presidential elections, and far fewer vote in off-year elections. As a result, the United States ranks at the bottom in turnout compared with other major democracies.”). Alexander Keyssar suggests that:

The most telling symptom of the malady [of American democracy] is the low level of popular participation in American elections: in recent years, only half of all eligible adults have voted in presidential elections, and fewer than 40 percent generally cast their ballots in other contests. Electoral turnout has declined significantly over the last century, and it is markedly lower in the United States than in most other nations.

ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 320 (2000). See also Lijphart, *supra* note 6, at 5 (“That the United States ranks near the bottom of voting participation in comparative perspective is well-known”); Jason Marisam, *Voter Turnout: From Cost to Cooperation*, 21 ST. THOMAS L. REV. 190, 191 (2009) (“In the U.S., turnout remains low—by historical standards and in comparison to other countries”); Halperin, *supra* note 46, at 70-71 (providing statistics on low voter turnout). To be fair, voter participation in the two most recent presidential elections (2004 and 2008) may have approached sixty percent of the eligible voting population. See *Voter Turnout*, U.S. ELECTIONS PROJECT, http://elections.gmu.edu/voter_turnout.htm (last visited Oct. 28, 2011). Nevertheless, that still means that forty percent of the eligible population is not voting in the election that typically has the highest rate of participation.

opt-out voting, at least some registered voters have the potential to not only give a candidate a vote but also to take a vote away from another candidate. For example, assume as follows: Marge is voting in the mayoral contest between Quimby and Winston; Marge prefers Quimby; Marge's pre-selected ballot is for Winston; and Marge switches her ballot from Winston to Quimby. By switching her ballot, Marge has not only given one vote to Quimby but also removed one vote from Winston. In theory, then, Marge's electoral power has increased.

That said, it seems unlikely that the power of some registered voters to have a dual ability to impact an election will make much of a difference in voting behavior. Commentators have long recognized the irrationality of voting due to the fact that the costs of voting are fairly high, while the likelihood of a single vote making a difference in the outcome of an election is minimal.⁴⁹ And while opt-out voting now creates the potential for some individuals to essentially have the power of a two-vote swing, two votes are also unlikely to make much of a difference in the outcome of most elections.⁵⁰ Thus, the increased likelihood of voting will have to emanate from something other than the slightly increased ability of some individual voters to dictate the outcome of an election.

So if the increased electoral power of some voters will not spur additional participation, what will? For starters, it is important to acknowledge up front that opt-out voting is unlikely to increase participation among two sets of persons who lie at the extremes of voter participation. At one extreme, opt-out voting seems unlikely to increase participation among registered voters who have a strong preference for a particular candidate. Registered voters who have a strong preference for a particular candidate are going to cast a ballot whether they have a candidate pre-selected for them or not. At the other extreme, opt-out voting seems equally unlikely to increase participation among registered voters who absolutely do not care one bit about elections.⁵¹ If a registered voter has absolutely no concern about who wins an election then the registered voter will not care in the slightest about which candidate received her pre-selected vote.

49. See DOWNS, *supra* note 12, at 265-66, 273-74. For a nice, succinct explanation of Downs's theory, see Grant M. Hayden, *Abstention: The Unexpected Power of Withholding Your Vote*, 43 CONN. L. REV. 585, 590 (2010).

50. See DOWNS, *supra* note 12, at 244. It is also worth noting that other registered voters who receive a ballot pre-selected for the candidate they prefer will not have any increased voting power.

51. Of course, a person who has absolutely no concern about who wins an election seems less likely to be registered to vote at all, and, importantly, opt-out voting only targets persons who are already registered.

The category of registered voters who will be nudged into voting should be registered voters who have relatively mild preferences—those who care a little bit about who wins an election, but not so much that they would definitely cast a ballot. More specifically, it will be those voters with relatively mild preferences who have a preference for one of the two leading candidates and have a strong preference against any of the “minor” candidates. In theory, voters with a mild preference for one of the top two candidates seem likely to cast a ballot to prevent their ballot from going to the candidate who they strongly oppose. For example, take the 2008 general election ballot in Colorado. That ballot featured sixteen candidates for President (including, among others, the Prohibition, Socialist, Heartquake, Pacifist, and Objectivist Parties).⁵² If the votes in Colorado get divided up among these sixteen candidates, the odds for most registered voters are that the assigned ballot is going to reflect a “fringe” candidate who they strongly oppose. This then makes it seem likely that they will switch their ballot to the candidate for whom they have a mild preference (which will likely be the Democratic or Republican candidate for president).⁵³

Another possibility as to why opt-out voting will increase turnout is that voters who know they are going to cast a ballot might have more incentive to gather information about the candidates to make sure they do not cast a ballot for a candidate that they abhor. Take, for example, a relatively typical example of a registered voter who regularly casts a ballot at a presidential election but rarely, if ever, casts a ballot at a local election. The registered voter may know next to nothing about the two candidates on the ballot for the local contest. However, to ensure a grave mistake is not made, that registered voter may well seek out information about the candidates. In gathering that information, the registered voter might then come to a conclusion about which candidate was their preference and cast the ballot accordingly.

In some sense, the theory underlying the nudge toward participating because of being worried about voting for the “wrong” candidate relies on registered voters wanting to feel good about themselves.⁵⁴ For a long

52. See Richard Winger, *Colorado Presidential Ballot, with 16 Candidates, Is Most Crowded Ever for President in a General Election*, BALLOT ACCESS NEWS (Oct. 2, 2008), <http://www.ballot-access.org/2008/10/02/colorado-presidential-ballot-with-16-candidates-is-most-crowded-ever-for-president-in-a-general-election/>.

53. To be sure, this could mean the impact of opt-out voting will diminish depending on the number of candidates in the mix. If the contest is only between a Republican and a Democrat, then voters with mild preferences for one or the other candidate may not have much of an increased incentive to participate.

54. See Donald P. Green & Alan S. Gerber, *Introduction to Social Pressure and Voting: New Experimental Evidence*, 32 POL. BEHAV. 331, 331 (2010).

time, scholars have puzzled over the irrationality of voting because the time and effort necessary to cast a ballot makes little sense in relation to the likelihood that a single vote will matter.⁵⁵ One theory is that persons who cast ballots do so because of the intrinsic satisfaction achieved by voting and that the voters feel good about casting ballots.⁵⁶ If that is the case, then perhaps by creating a possibility for individuals to feel bad about themselves by ignoring their pre-selected ballot and casting a ballot for a “wrong” candidate, more registered voters will be spurred to want to feel good about themselves and, therefore, will participate. Another theory is that the approbation of others is an important aspect of individuals casting a ballot—that voters want to win approval rather than disapproval from their neighbors.⁵⁷ If that is the case, then opt-out voting may create more opportunities for social pressure to not cast a ballot for the “wrong” candidate—who would want to admit at a dinner party that she ignored her ballot and voted for the “fringe” candidate?

In short, the main promise of opt-out voting would seem to be an increase in participation by those who are less passionate about their preference at an election, but who would not want to be associated with a “fringe” candidate. The potential for being stuck with a “fringe” candidate might push such registered voters in high-profile contests, such as presidential elections, where the information cost is low, to ensure that their ballot is not cast for the “wrong” person and, in doing so, cast their ballot for the “right” person. The potential for being stuck with the “wrong” candidate might also push registered voters in low-profile contests (such as city council elections) where information costs are higher, to do some investigation of the candidates to ensure their ballot is not cast for the “wrong” person and, in doing so, cast their ballot for the “right” person.

Before moving on, though, it is important to make clear that I am seeking to explore the potential for increased participation based on the pre-selection of a candidate aspect of opt-out voting. In recent years, some jurisdictions, most notably Oregon, have moved to all mail-ballot elections, and it is possible that mailing a ballot to every voter rather than using polling places would in and of itself increase participation.⁵⁸

55. See DOWNS, *supra* note 12, at 244-45.

56. Green & Gerber, *supra* note 54, at 331 (“One hypothesis is that people derive intrinsic satisfaction from casting their ballots. They either enjoy the act of voting per se or feel good about themselves for advancing a partisan cause or honoring a civic obligation.”).

57. *Id.* (“In electoral systems where bribes and other material inducements are rare, incentives are thought to be social in nature: voters are rewarded by the approbation of others, while nonvoters are criticized or shunned.”).

58. In theory, the fact that a registered voter receives a ballot by mail might increase participation in and of itself, although the political science research is mixed on this question. See

But that is not the point of this Article—the point is that the knowledge of a pre-selected candidate will provide registered voters with an extra nudge to cast ballots.

While opt-out voting has the potential to increase participation among at least some voters, it is impossible to estimate the amount of increase in participation without further experimentation. It is, however, possible to do some basic theorizing about how much opt-out voting might change the level of participation at both high-profile and low-profile elections.

Starting with the highest profile election in the United States—the general presidential election—it is possible that opt-out voting would cause some increase in participation at this election. For example, in the 2008 general presidential election—an election that featured one of the highest turnouts of the eligible voting population in recent years⁵⁹—the U.S. Census Bureau Reports noted that a little more than fifteen million registered voters did not turn out.⁶⁰ Presumably, then, some portion of those fifteen million registered voters might have participated in an opt-out voting system, although it is admittedly uncertain exactly how many of these registered voters would be spurred to participate through a system of opt-out voting.

Lower-profile elections, though, would seem to be the arena in which opt-out voting would probably have the greatest impact on increasing turnout. For example, participation in primary elections tends to be lower than in the general elections.⁶¹ In addition, the farther one proceeds down the ladder of electoral contests, the lower the turnout

generally Thad Kousser & Megan Mullin, *Will Vote-by-Mail Elections Increase Participation?: Evidence from California Counties*, U.C. SAN DIEGO, <http://weber.ucsd.edu/~tkousser/Will%20Vote-by-Mail%20Elections%20Increase%20Turnout.pdf> (last visited Oct. 28, 2011) (noting that studies of Oregon's vote-by-mail system might be flawed because "[i]t is difficult to determine whether observed increases in [voter] turnout should be attributed to the shift to mail ballot elections or to the changes in political context and other aspects of election administration that occurred at the same time").

59. Marisam, *supra* note 48.

60. *Table 1. Reported Voting and Registration, by Sex and Single Years of Age: November 2008*, U.S. CENSUS BUREAU, <http://www.census.gov/population/socdemo/voting/cps2008/Table%2001.xls> (last visited Oct. 28, 2011). The number of registered voters who did not participate in the 2004 general presidential election are similar. See KELLY HOLDER, U.S. CENSUS BUREAU, *VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004*, 3 fig.1 (Mar. 2006), <http://www.census.gov/prod/2006pubs/p20-556.pdf> (showing that a little more than sixteen million registered voters did not participate in the November 2004 election).

61. For an example of the general phenomenon of lower turnout in primaries than in general elections, see generally Ferrel Guillory, *Primary Turnout Data: Findings*, N.C. DATA-NET (Apr. 2008), <http://southnow.org/southnow-publications/nc-datanet/DataNet%20April08.pdf> (discussing and providing tables of turnout for primary and general elections in North Carolina).

typically tends to be.⁶² When it comes to other elections—congressional, state legislative, and local—turnout tends to become quite small.⁶³ Thus, these elections have an even greater pool of current non-participants who might be nudged into participating through a system of opt-out voting.

While opt-out voting has the promise of increasing participation—particularly in lower-profile contests—it is important to recognize that opt-out voting is not going to result in anything near 100 percent participation in U.S. elections. In order to preserve an individual's freedom to choose not to participate, opt-out voting is not tethered to any sort of system of mandatory voter registration. Without mandatory registration, it is not expected that turnout at elections among the voting eligible population would reach levels upward of ninety percent.⁶⁴ Moreover, the vast majority of registered voters already participate in the highest profile election in the United States—the general presidential election.⁶⁵

And even just within the pool of registered voters, opt-out voting will not cause all registered voters to participate and, indeed, might cause some registered voters who are currently participating to do otherwise. For one thing, a certain amount of registered voters who currently do not participate would likely just tune out all elections. Some of them will take their pre-selected ballots and just throw them out like they are another piece of junk mail. Moreover, some of those registered voters who are already casting ballots may just ignore their ballots because they do not have to perform any work. Put differently, it is at least possible that opt-out voting could induce laziness on the part of currently active participants. While this seems counter-intuitive—after all, if you are currently going through the effort of casting a ballot, why would making it easier to register your preferences cause you to participate less?—it is at least a possibility that must be considered.

In the end, though, opt-out voting seems like a plausible way to increase participation. Of course, opt-out voting is not the only way

62. Zoltan L. Hajnal & Paul G. Lewis, *Municipal Institutions and Voter Turnout in Local Elections*, 38 URB. AFF. REV. 645, 645-46 (2003).

63. See ZOLTAN L. HAJNAL ET AL., MUNICIPAL ELECTIONS IN CALIFORNIA: TURNOUT, TIMING, AND COMPETITION 16 (2002) [hereinafter MUNICIPAL ELECTIONS IN CALIFORNIA] (finding that on average only about thirty percent of the voting age population turns out in local elections in California); Hajnal & Lewis, *supra* note 62 (“Nowhere is the turnout problem worse than at the local level.”).

64. Participation reaches ninety percent in places such as Australia that have universal voter registration combined with compulsory voting. See Katherine M. Swenson, Note, *Sticks, Carrots, Donkey Votes, and True Choice: A Rationale for Abolishing Compulsory Voting in Australia*, 16 MINN. J. INT'L. L. 525, 528 (2007).

65. Halperin, *supra* note 46, at 72 (providing statistics on the turnout of registered voters at general presidential elections).

participation might be increased and there is one proposal for increasing turnout that merits substantial discussion here: compulsory voting.⁶⁶

B. *Increasing Participation Without Being Too Heavy-Handed*

There is a more sure-fire proposal to increase participation and to (probably) not lose current participants: adopt a system of compulsory voting that forces every voting eligible citizen to participate.⁶⁷ Approximately a few dozen democracies employ some type of compulsory voting system.⁶⁸ For instance, Australia requires every citizen eighteen-years-of-age or older to register to vote and to cast a ballot at each election.⁶⁹ After the election, persons who have not voted must either provide a valid reason for not voting or pay a fine of twenty dollars.⁷⁰ Indeed, some commentators have trumpeted compulsory voting as a solution to the United States's turnout problem.⁷¹

Despite an inability to create the possibly dramatic difference in turnout that compulsory voting would bring, opt-out voting might be a superior system to compulsory voting on a number of levels. First, to the extent that one argument against compulsory voting is that citizens are deprived of the choice *not* to vote,⁷² opt-out voting solves this dilemma by not making voting *entirely* compulsory. A ballot would still only be issued to those voters who had chosen to register—a group of citizens who had already expressed some interest in democratic participation.

66. See Note, *supra* note 6, at 596-98 (discussing the benefits of compulsory voting).

67. Certainly there may be other ways to increase participation. For instance, expanding registration opportunities might help in this regard. See generally Tokaji, *supra* note 28 (discussing possible reforms to increase voter registration). And these proposals may well be a good idea. I have chosen to compare opt-out voting to compulsory voting because opt-out voting seems most similar to compulsory voting and would serve as a substitute to compulsory voting.

68. *Compulsory Voting*, INT'L IDEA, http://www.idea.int/vt/compulsory_voting.cfm (last visited Oct. 28, 2011) (listing countries that have some form of compulsory voting).

69. *Electoral Backgrounder: Compulsory Voting*, AUSTRALIAN ELECTORAL COMM'N, 1 (Apr. 2010), http://www.aec.gov.au/About_AEC/Publications/backgrounders/files/2010-eb-compulsory-voting.pdf. There are some limited exceptions to the requirement to register and vote. For instance, persons serving a prison sentence of three years or longer are not allowed to register or vote. *Id.* at 2.

70. *Id.* at 3. Valid reasons for not voting include religious objection and physical sickness. *Id.* at 3-4. For a more complete description of the Australian system, see Swenson, *supra* note 64, at 533-36.

71. See Lijphart, *supra* note 6, at 10.

72. Anthony Ciccone, *The Constitutional Right to Vote is Not a Duty*, 23 HAMLINE J. PUB. L. & POL'Y 325, 348 (2002) ("The right to choose not to vote is a choice in and of itself. A nonvoter should not be punished for abstaining from voting."); H. B. Mayo, *A Note on the Alleged Duty to Vote*, 21 J. POL. 319, 320 (1959) ("[T]he right *not* to vote is often admitted to be legitimate . . ."); Note, *supra* note 6, at 598 ("One of the chief objections to any compulsory voting law is that it violates a purported right *not* to vote.")

Second, opt-out voting is not even compulsory for registered voters. While registered voters would have an automatic preference generated for them, registered voters could still opt out of choosing a candidate by selecting “None of the Above.”⁷³ In short, to the extent that arguments against compulsory voting invoke notions of the freedom,⁷⁴ liberty,⁷⁵ and, perhaps, a constitutional right *not* to vote⁷⁶—opt-out voting does not raise those concerns because it still gives individuals the ability to remain on the sidelines.⁷⁷

Compulsory voting has also been criticized as having the potential to introduce into the electorate a pool of uninterested and uninformed voters,⁷⁸ but opt-out voting should mitigate this problem for several reasons. For starters, because opt-out voting would only involve voters who have already registered, then presumably opt-out voting only includes those citizens who have at least some interest in electoral participation. In addition, opt-out voting, like compulsory voting, might provide the necessary nudge for voters to educate themselves. Individuals might have a different reason to gather information about the candidates if they know they *will* be voting rather than if they know they

73. Presumably, another strategy for non-participation would be to intentionally “spoil” the ballot by, for example, casting a vote for both candidates in a head-to-head contest.

74. Lijphart, *supra* note 6, at 11 (“Probably the most serious objection to compulsory voting is normative in nature: compulsory voting may be an attractive partial solution to the conflict between the democratic ideals of participation and equality, but it is often said to violate a third democratic ideal, that of individual freedom.”); Colantuono, *supra* note 45, at 1503 (“Compulsory voting is fundamentally inconsistent with the individualism of American political culture”); Swenson, *supra* note 64, at 536 (“[C]ompelling a person to cast a ballot is antithetical to the democratic value of individual freedom.”).

75. Carmichael, *supra* note 6, at 310 (“It is likely that some people will oppose this proposal [of mandatory voting] because they believe that it interferes with their liberty not to vote.”); Heather Lardy, *Is There a Right Not to Vote?*, 24 OXFORD J. LEGAL STUD. 303, 307 (2004) (discussing how the right not to vote includes an argument about “preserving individual liberty”); Matsler, *supra* note 6, at 966 (noting the argument that “compulsory voting violates the ethic of personal volition which is said to be at the heart of a democratic government”).

76. Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2176 n.163 (1996) (“[O]ne might raise First Amendment objections: Forcing someone to vote arguably is tantamount to requiring speech.”); Halperin, *supra* note 46, at 103 (“[T]he Supreme Court would most likely strike down a compulsory voting system as unconstitutional—and rightly so.”); Matsler, *supra* note 6, at 969 (“Domestic critics of compulsory voting will almost surely bring a challenge based upon the First Amendment to the United States Constitution.”); Note, *supra* note 6, at 601-03 (discussing an argument that compulsory voting violates the First Amendment right to free speech); Jonas Lerman, *Voting Rites: Deliberative Democracy and Compulsory Voting in the United States* 28 (June 1, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1600929> (arguing compulsory voting may violate the Fifth Amendment’s substantive due process protections).

77. See Matsler, *supra* note 6, at 973-74 (noting that allowing a person to opt out of government compelled speech should help lead to a finding that no First Amendment violation exists).

78. Note, *supra* note 6, at 607-08.

might be voting. Put simply, opt-out voting might weed out the persons who truly do not care substantively about an election in a way that compulsory voting might not.⁷⁹

Yet compulsory voting does have something going for it that opt-out voting does not: simplicity. Compulsory voting is easy to understand and, at least at first blush, appears to do less violence to the United States's existing system of balloting.⁸⁰ In contrast, opt-out voting involves more nuance and complexity, and seems to fundamentally alter the mechanism of balloting. In essence, there is likely to be even more "instinctive" opposition to opt-out voting than to compulsory voting. For this reason, compulsory voting may well be superior to opt-out voting because compulsory voting may represent a more pragmatic solution to the United States's turnout problem.

That said, to the extent that opt-out voting does not force anyone to vote and seems less likely to introduce a pool of totally disinterested persons casting ballots, *over the long haul* it might turn into a more pragmatic solution than compulsory voting. One of the general objections to compulsory voting is that it is not "sellable" to the

79. Opt-out voting may also solve some of the principal administrative problems with compulsory voting. For instance, compulsory voting may require a costly enforcement scheme. *Id.* at 609 ("One of the major costs would be enforcement of the compulsory voting laws."). For example, in Australia, election officials have to perform a post-election investigation and assess fines against voters who do not have a valid excuse for not voting. *See supra* notes 69-70 and accompanying text. However, because opt-out voting does not legally require participation, no costly enforcement mechanism is required. *But see* Patricia Funk, *Is There An Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines*, 9 AM. L. & ECON. REV. 135, 138, 155 (2007) (theorizing, but not necessarily proving definitively, that monetary penalties had no impact on turnout in relation to Switzerland's compulsory voting laws).

Opt-out voting may also solve another administrative problem with compulsory voting—persons who have absolutely no interest in voting influencing the election by merely choosing the candidate at the top of the ballot. This is the so-called "ballot-order effect." *See Alvarez et al., supra* note 10, at 41-42. What can happen is that a person who has no interest in voting but is compelled to do so may just go into the voting booth and punch all the names at the top of the list of candidates. *See id.* In Australia, a very vivid term has been used to describe "apathetic voters who attended the polls dutifully, but blindly numbered their ballots from top to bottom, down the traditional, alphabetically ordered card"—donkey voters. Graeme Orr, *Ballot Order: Donkey Voting in Australia*, 1 ELECTION L.J. 573, 573 (2002).

While it is not feasible to claim that absolutely no "donkey voting" will occur with opt-out voting, the effects should be minimal. Instead of affirmatively selecting the candidate at the top of the ballot, registered voters who receive a ballot will just do nothing. With the random assignment of candidates to registered voters, apathetic voters who do not care might just cancel each other out. At the very least, there would seem to be much less of an inherent advantage to being the top name on the ballot. Additionally, another safeguard against donkey voting would include printing ballots that randomly moved the placement of candidates from top to bottom.

Admittedly, though, while opt-out voting may solve some of the administrative problems with compulsory voting, opt-out voting may create other administrative problems that will be considered in more detail later. *See supra* Part IV.

80. *See Swenson, supra* note 64, at 527-29.

American public, in part because of a generally libertarian bent related to governmental interference in the individual choice to cast a ballot.⁸¹ Opt-out voting, however, preserves America's libertarian culture by preserving the choice to not vote. Therefore, opt-out voting might ultimately be more sellable and in some sense represent a compromise position between compulsory voting and the current system of participation in the United States. Put differently, while it is true that opt-out voting, like compulsory voting, is not pragmatic at this precise moment, it could morph into the more pragmatic option.

Regardless of whether opt-out voting could ever be adopted, it theoretically represents a significant step toward improving voter turnout in the United States, particularly in contests below the general presidential election. Moreover, opt-out voting might well be superior to the leading alternative proposal to increase turnout: a system of compulsory voting. But to assert that opt-out voting will increase participation in a manner superior to compulsory voting begs an important question as to whether we should seek to increase participation and, if so, why?

C. *Why Increase Participation?*

There is an almost instinctive intuition that high voter turnout is better for democracy. Indeed, it is relatively rare to hear anyone publicly suggesting that the United States should have lower turnout. Even if certain proposals in the realm of election administration seem to have as one of the goals limiting the ability of registered voters to cast ballots, such as proposals to require voters to present photo identification at the polls, it is rare to hear anyone publicly endorse such a proposal on these grounds. Rather, such proposals will be championed in the name of fraud prevention or to achieve other non-disfranchising goals.⁸² In some

81. Hasen, *supra* note 76, at 2138 (“Enactment of a compulsory voting law in the United States, even if desirable as a method of overcoming collective action problems, and even if proven effective as a means of increasing turnout in other states, is unlikely to occur because of a widely held libertarian belief against government interference in the decision to vote.”). *Cf.* RUY A. TEIXEIRA, *THE DISAPPEARING AMERICAN VOTER* 154 (1992) (describing compulsory voting as “antithetical to American values . . .”); Marisam, *supra* note 48, at 207 (noting that compulsory voting “is not politically feasible in this country”); Tokaji, *supra* note 28, at 505 (“Despite the advantages of compulsory registration and voting, it seems highly unlikely that there will be a national mandate for it anytime soon.”); Colantuono, *supra* note 45, at 1503 (“[I]t seems doubtful that Americans would accept such a plan [of compulsory voting.]”); Matsler, *supra* note 6, at 976 (“[T]here remains a nearly common sense belief that compulsory voting simply will not happen in the United States.”).

82. *See generally* Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631 (2007) (describing arguments for photo identification laws).

ways, publicly advocating for fewer voters participating would be akin to questioning the Supreme Court's decisions that created the doctrine of one person, one vote; it is just not done without being subjected to criticism that such a view lies far outside the mainstream.⁸³

Yet beyond the generalized sentiment that increased voter participation is generally healthy for democracy, perhaps the best reason for increasing participation is to create a more representative electorate.⁸⁴ In the United States, low voter participation appears to generally create a less representative electorate—especially when it comes to local elections.⁸⁵ In essence, turnout in the United States skews toward greater participation by those who are more educated and wealthy, and lower participation by the poor and the less educated (which often correlates with racial and ethnic minority status).⁸⁶

83. See, e.g., Adam Cohen, *Question for Judge Alito: What About One Person One Vote?*, N.Y. TIMES, Jan. 3, 2006, at A16 (“Rejecting the one-person-one-vote principle is a radical position.”); Linda Greenhouse, *Legal Establishment Divided Over Bork Nomination*, N.Y. TIMES, Sept. 26, 1987, at 33 (noting how Supreme Court nominee Robert Bork was pilloried for his criticism of one person, one vote).

84. It is also possible that increasing participation will make government more legitimate in the eyes of the citizenry. Swenson, *supra* note 64, at 527 (recognizing the argument that “low voter turnouts undermine the legitimacy of a democratic government, while large voter turnouts enhance it”); see also Hajnal & Lewis, *supra* note 62, at 646 (“The fact that so few citizens participate in local elections is likely to be at least a contributing factor to the decreasing levels of trust in government, political efficacy, and sense of civic duty that have alarmed so many observers of American politics.”); Lijphart, *supra* note 6, at 2 n.2 (“Of course, another crucially important reason to aim for maximum turnout is democratic legitimacy.”); Marisam, *supra* note 48, at 193 (“The essence of the argument for why high voter turnout matters starts with the premise that democracy depends on some level of self-determination and governmental legitimacy. High turnout is one legitimating factor.”); Note, *supra* note 6, at 594 (“There are serious questions about how legitimate a government is when the vast majority of citizens have not elected it.”).

85. J. Eric Oliver & Shang E. Ha, *Vote Choice in Suburban Elections*, 101 AM. POL. SCI. REV. 393, 395 (2007) (“Electoral turnout is significantly lower in local elections, particularly when they are nonconcurrent with presidential or congressional election cycles. Voters in off-cycle elections are less representative of the general population and are more likely to be those ‘stakeholders’ within their communities, that is, parents of school-age children and older, home-owning, long-term residents.” (internal citations omitted)).

86. KEYSSAR, *supra* note 48, at 320 (“[T]urnout is lowest among the poor, minorities, and the less well-educated.”); PIVEN & CLOWARD, *supra* note 48, at 3 (“[T]hose who vote are different in politically important respects from those who do not. Voters are better off and better educated, and nonvoters are poorer and less well educated. . . . In sum, the active American electorate overrepresents those who have more and under-represents those who have less.” (footnote omitted)); Zoltan Hajnal & Jessica Trounstein, *Where Turnout Matters: The Consequences of Uneven Turnout in City Politics*, 67 J. POL. 515, 515 (2005) (“Study after study of American elections has found that individuals with ample resources vote much more regularly than those with few resources—the poor, racial, and ethnic minorities and the less educated.”); Hasen, *supra* note 76, at 2165 (“Wealthier, better-educated whites are more likely to vote than other groups in society.”); Lijphart, *supra* note 6, at 2 (“[L]ow voter turnout means unequal and socioeconomically biased turnout. This pattern is so clear, strong, and well known in the United States that it does not need to be belabored further.”); Marisam, *supra* note 48, at 193 (noting the existence of consistently

This lower participation by certain segments of society can have negative consequences. For instance, one commentator has noted how lower participation by certain groups can “grievously compromise the inclusiveness of the resulting democracy.”⁸⁷ If certain groups do not vote, or vote at a lesser rate, government officials are less likely to pay attention to their needs.⁸⁸ Put differently, if the composition of the electorate differs from the make-up of the citizenry in general, then government policy may be unfairly skewed toward those who actually cast ballots.⁸⁹

Some question exists, though, as to whether lower participation among certain groups in American society makes a difference in electoral outcomes and government policies.⁹⁰ Some political science studies have concluded that voters and non-voters in the United States do not have substantially different views.⁹¹ Relatedly, a number of studies have also concluded that outcomes of elections would not be different if turnout increased.⁹² A review of these studies might lead to the conclusion that it does not make sense to increase turnout with the goal of making government more responsive to the citizenry.

Yet context may make a difference in terms of representativeness and election outcomes. The University of San Diego’s Zoltan Hajnal and Princeton’s Jessica Trounstine have noted that most of the studies that discount the impact of low turnout on the results of elections and governmental policies focus on high-profile national elections, such as

lower voter participation among socio-economically disadvantaged groups).

87. FREDERIC CHARLES SCHAFFER, *THE HIDDEN COSTS OF CLEAN ELECTION REFORM* 9 (2008).

88. V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 527 (1984) (“The blunt truth is that politicians and officials are under no compulsion to pay much heed to classes and groups of citizens that do not vote.”).

89. See Hajnal & Trounstine, *supra* note 86, at 515.

90. See Lijphart, *supra* note 6, at 4-5 (describing this debate).

91. See Benjamin Highton & Raymond E. Wolfinger, *The Political Implications of Higher Turnout*, 31 *BRIT. J. POL. SCI.* 179, 192 (2001) (“Taken as a whole, non-voters appear well represented by those who vote.”); see also Michael M. Gant & William Lyons, *Democratic Theory, Nonvoting, and Public Policy: The 1972-1988 Presidential Elections*, 21 *AM. POL. Q.* 185, 199 (1993) (“Our analysis has indicated that voters and nonvoters differ on a few policy positions over the years, but not by much, and in fact do not differ on most issues.”).

92. See Highton & Wolfinger, *supra* note 91, at 179 (“Simply put, voters’ preferences differ minimally from those of all citizens; outcomes would not change if everyone voted.”); see also Christopher R. Berry & Jacob E. Gersen, *Voters, Non-Voters and the Implications of Election Timing for Public Policy* 3 (Chi. John M. Olin Law & Econ., Working Paper No. 536, 2010), available at <http://www.law.uchicago.edu/files/file/536-324-jg-voters.pdf> (concluding that “substantial increases in voter participation would not substantially alter the outcomes of the democratic process”). *But see* Jack Citrin et al., *What if Everyone Voted? Simulating the Impact of Increased Turnout in Senate Elections*, 47 *AM. J. POL. SCI.* 75, 83 (2003) (finding that full turnout would change a few electoral outcomes for U.S. Senate).

for president and Congress.⁹³ They found that skewed turnout does matter in some elections; namely, local elections.⁹⁴ As they wrote: “By shifting the focus of attention to local contests, we find that turnout matters. Changes in the percentage of voters who turn out can and do alter mayoral election outcomes and racial representation on city councils.”⁹⁵

Low turnout in local races might also shift policy outcomes.⁹⁶ In one study, a comparison was done between school districts in Texas that held their elections in conjunction with national elections and those school districts that did not—with the former districts differing from the latter because a higher turnout of voters occurs when local elections are held in conjunction with national elections.⁹⁷ The study hypothesized that certain interest groups—namely teachers—would be advantaged by the lower voter turnout and that this advantage would translate into better policy outcomes for teachers from the school boards elected at a time that did not coincide with a national election.⁹⁸ Indeed, this seemed to be true as the study found that on average, teacher salary growth was a little more than one percent higher in school districts with low turnout elections.⁹⁹

In short, while some question exists as to whether an increase in turnout would make a difference to election outcomes and government policies on the national level; the evidence suggests that an increase in turnout would make a difference to election outcomes and government policies on the local level.¹⁰⁰ For this reason, opt-out voting—to the extent it increases participation, especially on the local level—should be supported because it helps increase the representativeness of the electorate.

93. Hajnal & Trounstine, *supra* note 86, at 517 (“[T]he nonimpact of a skewed electorate stems in part from the narrow focus of the existing empirical research. Nearly every study that looks at the effect of voter turnout on electoral outcomes focuses on the national electorate in presidential and Congressional elections.”).

94. *Id.* at 530-32.

95. *Id.* at 518.

96. See ZOLTAN J. HAJNAL, AMERICA’S UNEVEN DEMOCRACY: RACE, TURNOUT, AND REPRESENTATION IN CITY POLITICS 175 (2010) (“[T]here is evidence that turnout is closely linked to the policies that governments pursue. Municipalities with higher turnout spend more on welfare and other redistributive programs favored by minorities and less on areas favored by more advantaged white interests.”).

97. See generally Sarah F. Anzia, The Election Timing Effect: Evidence from a Policy Intervention in Texas (Jan. 5, 2011) (unpublished manuscript), available at http://www.stanford.edu/~sanzia/Anzia_Texas_1_5_11.pdf (analyzing a study on off-cycle and on-cycle elections).

98. *Id.* at 8-9.

99. *Id.* at 28-29.

100. See HAJNAL, *supra* note 96, at 175.

It is also possible that increasing turnout will increase the representativeness of the electorate in another way that might help put a dent in one of the major ills of the current political discourse in America: polarization.¹⁰¹ The electorate and the parties have become more polarized—some might say hyper-polarized—by playing more and more to the extremes and crowding out the center.¹⁰² This has a negative impact on political discourse and can serve to diminish participation by those citizens who have less extreme views.¹⁰³ Importantly, the citizens who are currently being left out of the mix in terms of political participation tend to be less connected to the two major political parties.¹⁰⁴ Put another way, the citizens who are most engaged in politics and turn out to vote also tend to be the most extremist in terms of political outlook.

Opt-out voting might bring additional centrist voters into the mix for at least several reasons. First, as previously explicated, it should nudge persons with less strong preferences—those less solidly connected to the two major political parties—to participate. Second, opt-out voting should nudge the political parties and political elites in a different direction that might cause them to refocus their efforts in a manner more positive for American politics. Because the baseline has changed from non-participation to participation for voters with mild preferences, political elites might become incentivized to attract those voters.¹⁰⁵ And, if in order to attract less extreme voters, parties and political elites need to change their policies and tactics, then the American political discourse might become less polarized. Third, opt-out voting might push political parties away from strategies aimed at decreasing voter participation. Currently, one potential strategy for winning an election is to drive down turnout among the electorate through tactics such as negative

101. Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 275 (2011) (“American democracy over the last generation has had one defining attribute: extreme partisan polarization.”).

102. *See id.* at 276-78, 281.

103. *See* Galston, *supra* note 6, at 6-7.

104. *Id.* at 7 (“[L]ess partisan citizens . . . tend to be more weakly connected to the political system . . .”); Marisam, *supra* note 48, at 213 (“Election after election, those who self-identify as strong partisans vote at higher rates than those who consider themselves weak partisans or nonpartisans.”); Pildes, *supra* note 101, at 279 (“Non-voters . . . tend to clump toward the middle of the liberal-conservative spectrum—liberal on some issues, conservative on others. More generally, it is the least informed, least politically active, and least engaged citizens who are the most centrist.” (footnote omitted)); Matsler, *supra* note 6, at 956 (“In 2000, American nonvoters were most likely younger, less educated, poorer, and *less connected to either of the two major political parties than their voting counterparts.*” (emphasis added)).

105. *Cf.* SARAH BIRCH, FULL PARTICIPATION 59 (2009) (noting that the “most obvious impact of compulsory voting on campaign activities is the fact that institutionally-enforced universal participation shifts the main aim of political parties from mobilization to conversion”).

advertising.¹⁰⁶ With opt-out voting, there is a stronger possibility for all registered voters¹⁰⁷ to turn out, thus reducing the incentive for political actors to depress turnout.¹⁰⁸

It is important, though, to not be naïve or oversell the potential of opt-out voting. Opt-out voting is unlikely to completely change political polarization as we know it. There are other aspects of the electoral system, such as redistricting by incumbent politicians¹⁰⁹ and campaign finance laws,¹¹⁰ which might also cause centrist voters to abandon politics. Put differently, in evaluating opt-out voting, one should recognize it is not a cure-all for every ill of our electoral politics, but it might help salve some of the existing wounds. Moreover, it is also theoretically possible that opt-out voting could increase political polarization at the state and local level. The promise of increasing the percentage of ballots cast by the electorate is greatest in state and local elections because that is where turnout is lowest.¹¹¹ However, it is possible that the additional persons spurred to vote in state and local elections would be the most partisan persons who are currently participating in federal elections.

In the final analysis, opt-out voting seems likely to enhance participation among the electorate. This enhancement of participation would likely be most marked when it comes to electoral contests below the level of a general presidential election, and enhanced participation alone would be a positive for American democracy by making the electorate more representative and perhaps decreasing political polarization. However, a system of opt-out voting might not be entirely positive, and it is to the possible downsides and objections to opt-out voting to which we now turn.

106. See STEPHEN ANSOLABEHRE & SHANTO IYENGAR, *GOING NEGATIVE: HOW ATTACK ADS SHRINK AND POLARIZE THE ELECTORATE* 48-51 (1995).

107. Of course, it would be important to be vigilant to ensure that political parties do not engage in other tactics, such as more restrictive voter registration procedures, in an effort to limit participation.

108. It is possible a political party or candidate would try to channel registered voters who are potentially going to vote against their candidate into ignoring their ballots. It is also possible that a political party or candidate would try to channel registered voters who are potentially going to vote against their candidate into casting a ballot for "None of the Above." But these would be tricky strategies for at least a couple of reasons. First, it would be odd to send the direct message to not vote or to vote for no one. Second, to the extent one could create a more implicit campaign targeted at one's potential opponents, it could easily backfire and lead to one's own mild supporters to do the same.

109. See Pildes, *supra* note 101, at 311.

110. See *id.* at 324-25.

111. See Hajnal & Lewis, *supra* note 62, at 646.

IV. DRAWBACKS AND BARRIERS TO OPT-OUT VOTING

If it is a mistake to oversell opt-out voting as a magic pill to solve all of the United States's political ills, it would be an even greater mistake to pretend opt-out voting might not have any downsides. And it would be the greatest mistake of all to think that opt-out voting could easily be introduced at an election held tomorrow. This Part tackles many of the problems opt-out voting presents, beginning with theoretical objections to opt-out voting and then moving to more concrete objections related to actually administering such a system on the ground. Of course, in presenting these potential objections, I also discuss possible counter-responses in defense of opt-out voting.

A. Theoretical Objections to Opt-Out Voting

The theoretical objections to opt-out voting can very roughly be demarcated in two ways. The first line of objections relate to how opt-out voting might change the character of the electorate on a very general level. Here, the problem mainly focuses on the debate about whether low turnout represents a problem at all and whether efforts should be made to make voting more convenient. The second line of objections relates to how opt-out voting might impact individual voters and elections in very specific contests.

1. Concerns About Changing the Electorate Generally

The most obvious theoretical objection that might be brought against opt-out voting would take issue with the premise that low turnout at elections represents any problem at all.¹¹² Citizens may not be casting ballots because they are satisfied with the status quo—who needs to go to the polls when life is copacetic?¹¹³ Citizens may also not be turning out because they are indifferent to the results of the elections. If government does not seem meaningful in my life, then what does it matter who my president, senator, or local dog-catcher is?¹¹⁴ Essentially,

112. Mayo, *supra* note 72, at 321 (“Instead, therefore, of preaching the duty to act as a political animal to those who have no inclination that way and would do it badly if compelled, it may well be wiser to leave them to cultivate their private gardens, and to rely merely upon the experience of democracies that there is always in fact a wide enough interest in politics and voting to work the political machinery.”).

113. Robert W. Jackman, *Political Institutions and Voter Turnout in the Industrial Democracies*, 81 AM. POL. SCI. REV. 405, 406 (1987) (“[T]here is a venerable literature claiming that low participation may testify to satisfaction, and that high turnout is undesirable.”).

114. Some might object that high turnout can lead to terrible results. The infamous example is the last years of the Weimar Republic that eventually led to Nazi control. HERBERT TINGSTEN, *POLITICAL BEHAVIOR: STUDIES IN ELECTION STATISTICS* 225 (1975); *see also* Mayo, *supra* note 72,

low turnout may not be a problem that needs to be addressed because those who do not vote are either happy or indifferent.¹¹⁵

Assuming the accuracy of this somewhat contestable premise of happiness/indifference,¹¹⁶ opt-out voting should do little harm on this score. Citizens who are satisfied with the status quo will have a very easy way in which to register their satisfaction: some of them will be assigned the incumbent and need to do nothing; those who are assigned to a non-incumbent will merely have to switch their ballot to the incumbent. Voters who think elections have no meaning can simply cast their ballot for “None of the Above.”¹¹⁷ Put simply, opt-out voting should not create significant issues for registered voters who are satisfied with government or who do not care about government—registered voters in these categories should have no more difficulty with opt-out voting than they have with the current system of balloting in the United States.

Of course, registered voters who do not turn out could well be unhappy and alienated. Even so, low turnout may be desirable (and any higher turnout created by opt-out voting undesirable) because those who participate are the best-informed voters and increasing participation by less informed voters might dilute the voting talent pool.¹¹⁸ As John Stuart Mill once said “[a] man who does not care whether he votes is not likely to care much which way he votes; and he who is in that state of mind has no moral right to vote at all”¹¹⁹ Or, as a slightly more recent commentator has put it: “an unwilling or indifferent vote is a

at 321 n.4 (“My own impression is that . . . there has always been wide, almost feverish public interest in politics and voting in countries where democracy collapsed, *e.g.*, in the Weimar Republic; and that democracy has been lost not through voter apathy, but because it has been overthrown by non-democratic parties, *e.g.*, by Nazis in Germany”). However, research indicates that “[t]he data favor the theorists who believe that citizen involvement enhances legitimacy’ instead of producing democratic breakdown.” Lijphart, *supra* note 6, at 10 (quoting G. BINGHAM POWELL, JR., CONTEMPORARY DEMOCRACIES: PARTICIPATION, STABILITY, AND VIOLENCE 206 (1982)).

115. See Jackman, *supra* note 113, at 406.

116. As Piven and Cloward have written: “Of course, no one has offered an adequate explanation of why this ‘politics of happiness’ is consistently concentrated among the least well off.” PIVEN & CLOWARD, *supra* note 48, at 3 (footnote omitted).

117. One of the potential promises of opt-out voting would be to lower the number of citizens who think the government is not meaningful by providing an incentive for these citizens to gather some knowledge that could lead them to conclude that government and elections can be meaningful. Cf. HAJNAL, *supra* note 96, at 179 (“The act of voting provides citizens with an extra incentive to engage in information gathering. Indeed, research suggests that active participation encourages citizens to learn more about the functioning of government and the issues that are currently under debate.”).

118. See JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 165 (Currin V. Shields ed., 1958).

119. *Id.*

thoughtless one”¹²⁰ By making it more difficult to vote, we perhaps get a “better” electorate in terms of more politically informed voters.¹²¹ In this way, it is positive to have some barriers to casting a ballot and opt-out voting may break down too many of those barriers.

Indeed, some empirical research lends support to the argument that higher turnout at elections may just lead to additional voters casting uninformed votes. For instance, one pair of researchers found that in suburban elections—where voter turnout tends to be low—those who cast ballots were generally well-informed voters.¹²² Another study of compulsory voting compared voters who were compelled to vote with voters who would not have voted absent the compulsory voting regime.¹²³ That study determined that those forced to cast ballots by compulsory voting were “less inclined to make their decisions in a way that coherently reflects their issue preferences” and that this increases the likelihood that an election outcome “will not accurately reflect the distribution of voter preferences.”¹²⁴ In addition, less informed voters might be more likely to cast ballots in favor of incumbents merely because of name recognition, or might be more likely to cast a ballot based solely upon the racial identity of the candidates.¹²⁵ In essence, there are some plausible reasons to think that higher turnout could result in a less informed electorate and less accurate elections.¹²⁶

120. HENRY J. ABRAHAM, *COMPULSORY VOTING* 21 (1955).

121. Cf. Hasen, *supra* note 76, at 2174 (“Perhaps the strongest instrumental argument against compulsory voting is that it would lead to poorer decisionmaking by the electorate . . . [because] [a]lthough the law would mandate casting a ballot, it would not mandate becoming an informed voter before doing so.”).

122. Oliver & Ha, *supra* note 85, at 404 (“[S]uburban voters exhibit very high levels of interest and involvement in local affairs. Among this group of active participants, vote choice is driven more by specific issue concerns than either subjective impressions of candidates or knee-jerk adherence to party positions.”). Importantly, though, the authors of this study recognize the downside to low turnout in suburban elections. *Id.* (“Suburbanization may empower one element of the population . . . but further disenfranchise the already most marginalized portions of the citizenry.”). Cf. Gant & Lyons, *supra* note 91, at 190, 199 (finding that voters are more likely than non-voters to base their votes on policy preferences rather than other factors such as the personalities of the candidates and partisanship).

123. Peter Selb & Romain Lachat, *The More the Better? Counterfactual Evidence on the Effect of Compulsory Voting on the Consistency of Party Choice*, 48 EUR. J. POL. RES. 573, 577-78 (2009).

124. *Id.* at 589, 591.

125. Ned Augenblick & Scott Nicholson, *Ballot Position, Choice Fatigue, and Voter Behavior* 7 (July 2011) (unpublished manuscript), http://faculty.haas.berkeley.edu/ned/Choice_Fatigue.pdf.

126. Cf. Keith Jakee & Guang-Zhen Sun, *Is Compulsory Voting More Democratic?*, 129 PUB. CHOICE 61, 69 (2006). Jakee and Sun argue:

[A]n increase in electoral turnout alone does not necessarily lead to a superior aggregate electoral outcome. From our perspective, the decision to vote is a function of the intensity of the individual’s preferences over the very act of voting itself and the extent to which the individual is confident in her understanding of the world and the particular electoral context. We therefore argue that the unexamined assumption that forcing

There are at least a few of general rejoinders to the argument that voting should not be too easy because we only want to encourage those with the most information to vote. For starters, it is possible that the greater the turnout, the more legitimate the democratic government.¹²⁷ As Emory's Michael Kang has noted, "research suggests that the process of voting itself invests voters with a sense of commitment to the fairness of the process and greater support for the winning candidates."¹²⁸ Moreover, the United States as a society has eliminated all barriers to voting involving education (banning literacy tests)¹²⁹ and done much to assist even those who are illiterate in casting a ballot.¹³⁰ Thus, the culture of the United States is one that has already expressed a firm legal commitment to bringing the vote to the least formally educated segments of the populace. In addition, leaving voting to those with the most intense interests and preferences may cause a more polarizing politics.¹³¹ These general rejoinders, though, tend to restate the argument for opt-out voting without directly engaging the potential problem of bringing less informed voters into the mix.

Beyond the general rejoinders, opt-out voting should not harm the capabilities of the electorate and might even encourage registered voters to become more educated. First, as one political scientist has noted, "[i]t is not clear . . . that new voters would be much less capable than existing voters."¹³² Second, opt-out voting is unlikely to produce a "worse" electorate because, unlike more strict compulsory voting systems, opt-out voting only brings into the electorate persons who are *already registered*. Presumably, this brings into the electorate persons who already have a tendency to, at the very least, care a little about politics and theoretically might be interested in educating themselves about the

citizens to vote will make them unambiguously more interested in, and informed about, the political process is, at least at present, untenable.

Id.

127. MUNICIPAL ELECTIONS IN CALIFORNIA, *supra* note 63, at 2 ("First, [low turnout] raises questions about the legitimacy of democratic government. . . . If a small minority of the population elects city, state, and national leaders, political institutions and elected officials may lack the broad support and confidence necessary to govern effectively."); Hasen, *supra* note 76, at 2137 ("[S]ociety is better off if all (or at least many) people vote because a large turnout legitimates democratic government, which is itself a public good.").

128. Michael S. Kang, *Voting As Veto*, 108 MICH. L. REV. 1221, 1254 (2010) (citing Richard Nadeau & André Blais, *Accepting the Election Outcome: The Effect of Participation on Losers' Consent*, 23 BRIT. J. POL. SCI. 553, 560 (1993)).

129. National Voter Registration Act of 1993, 42 U.S.C. § 1973aa (2006) (imposing a nationwide ban on literacy tests).

130. *Id.* § 1973aa-6 (allowing, with very minimal exceptions, illiterate voters to receive any assistance they desire at the polling place).

131. See *supra* notes 101-04 and accompanying text.

132. HAJNAL, *supra* note 96, at 178.

candidates and issues.¹³³ Third, opt-out voting should give political actors the incentive to spend money on educating voters rather than turning them out to the polls.¹³⁴ Fourth, there may be ways in which elections can be structured to make it simpler for voters to acquire information. For instance, local elections that are currently nonpartisan could be shifted to partisan contests.¹³⁵ Finally, because a registered voter can always cast a ballot for “None of the Above,” those voters who think they are uninformed can always employ this “fail-safe” opt-out.¹³⁶ In short, to the extent one accepts the premise that only certain types of persons should cast ballots (i.e., those who are the most informed), opt-out voting seems to address most of these concerns.

On the opposite side of the spectrum from the concern that easier voting somehow “dilutes” the electorate would be the concern that opt-out voting might fail to fulfill its promise of changing the character of the electorate so that it is more representative of the citizenry as a whole. As previously noted, the citizens who do not cast ballots in elections tend to be less educated and less wealthy than their voting counterparts.¹³⁷ Because opt-out voting does not mandate universal registration and does not compel everyone to participate, the new participants brought into the election by opt-out voting might just mirror the current electorate. Indeed, it is theoretically possible that opt-out voting could make the electorate even less representative if the citizens who it brings into the mix are more educated and more wealthy than the average current voter.¹³⁸

It seems likely, though, that if opt-out voting increases turnout among registered voters that it will make the electorate more representative. From a statistical standpoint, this makes sense. Political scientists have noted that as turnout increases, the electorate is likely to be more representative of society as a whole.¹³⁹ Moreover, this should

133. Cf. Lijphart, *supra* note 6, at 10 (arguing that compulsory voting “may serve as an incentive [for citizens] to become better informed”).

134. *Id.* (arguing that with compulsory voting “parties and candidates have a strong incentive to pay more attention and work harder to get information to previous non-voters”).

135. See Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance and Election Law 5-6* (unpublished manuscript) (on file with author).

136. Cf. Hasen, *supra* note 76, at 2175 (“This problem of ignorance could be ameliorated by a compulsory voting law that allows ignorant voters to abstain once at the polls.”).

137. See *supra* notes 85-86 and accompanying text.

138. See Adam J. Berinsky, *The Perverse Consequences of Electoral Reform in the United States*, 33 AM. POL. RES. 471, 473 (2005) (“[R]eforms designed to make the act of voting easier increase the socioeconomic bias of the electorate. Rather than stimulating the unengaged, . . . these reforms retain engaged voters—those who are rich in politically relevant resources.”).

139. Lijphart, *supra* note 6, at 3 (“In countries with higher turnout, as expected, the link between socioeconomic status and turnout tends to be less strong, often not strong enough to be

especially be the case at the local level where turnout tends to be a very small percentage of the eligible electorate.¹⁴⁰ In short, if opt-out voting increases turnout, it seems likely to increase the representativeness of the electorate.

2. Concerns About the Impact on Individual Voters and Specific Elections

Perhaps the biggest issue with opt-out voting is the potential for opt-out voting to fail in its mission of increasing turnout and, perhaps, to do more harm than good in relation to registered voter participation.¹⁴¹ The theory behind opt-out voting is that a default rule of participation combined with the potential penalty of voting for the “wrong” candidate will lead voters to pay attention to their ballot and to participate. It is possible, though, that this theory is all wrong.

The theory may be wrong because opt-out voting might cause some persons who might have voted to become complacent. The theoretical problem can easily be explained with a simple hypothetical example. Assume an election for mayor between Winston and Quimby in which Marge has been assigned to cast her ballot for Winston but where Marge actually prefers Quimby. However, because individuals are more likely to stick with default options,¹⁴² Marge does not switch her vote. Here, the benefit of opt-out voting’s provision of a default rule for

statistically significant and sometimes even negative.”). And the more persons added to the mix, the more representative the electorate should be. *See id.* at 3-4 n.5.

140. *See* Hajnal & Lewis, *supra* note 62, at 646.

141. A related issue is: How will we know if opt-out voting increases turnout? One answer would be to total up the number of returned ballots that register a preference for a candidate. But that seems likely to undercount participation because it does not include those voters who received a ballot and were satisfied with their choice. Presumably, one might attempt a post-election survey to calculate the number of voters who intentionally stuck with their assigned candidate rather than just defaulting to the assigned candidate. However, surveys of voting behavior tend to be unreliable. *See* Richard Sobel, *Voter-ID Issues in Politics and Political Science*, 42 PS: POL. SCI. & POL. 81, 83 (2009) (“[P]eople do not always accurately report voting or their complete reasons for failing [to vote] . . .”).

One might also argue that gauging participation by those ballots returned that include a vote for a candidate fails to capture those who participated by voting for “None of the Above.” The question then is whether a vote for “None of the Above” amounts to participation? The problem is that a vote for “None of the Above” is ambiguous: it could represent a thinking-person’s decision after gathering information that none of the candidates merits the registered voter’s support; yet it could also represent laziness on the part of the registered voter. *See generally* David F. Damore et al., Nevada’s “None of the Above” Voting (unpublished manuscript) (on file with author). Presumably, one could also use a post-election survey to separate these types of voters as well.

142. *See* Camerer et al., *supra* note 13, at 1224 (“People are much more likely to stick with existing policies, consumption bundles, legislators, and so on than normative theories would predict, even when the costs of switching are very low.”).

participation has been cancelled out because it leads to Marge casting the “wrong” vote.¹⁴³

It seems unlikely, though, that someone who would have otherwise cast a ballot will not vote due to the opt-out system.¹⁴⁴ As many political scientists have come to think, the benefit of voting tends to be expressive.¹⁴⁵ As one pair of commentators put it: “[C]itizens vote for reasons other than the anticipated net (instrumental) benefits derived from the electoral outcome; they vote to show support, or solidarity, or simply to ‘participate’ in one of democracy’s great civic opportunities.”¹⁴⁶ In the language of the hypothetical, if the value of Marge voting was Marge’s ability to express herself, it seems unlikely that the pre-selection of a candidate will reduce Marge’s willingness to express herself by casting a ballot for a candidate.

The other possibility is that even if opt-out voting does not have the unintended consequence of reducing voter turnout, opt-out voting will do nothing to increase turnout. Registered voters who would not participate under the existing system might be just as likely to not participate under opt-out voting. They might ignore their ballot entirely, resulting in random votes for the pre-selected candidates. They also might just vote “None of the Above” because they do not want to take the time to gather information about the candidates. Put differently, the nudge to cast a ballot will not be strong enough.

There is some reason to believe, though, that “if you build it, they will come” works for stimulating the casting of ballots. For instance, one strategy for increasing turnout at local elections is to move those elections from “off-years” so that local elections coincide with high profile, national elections.¹⁴⁷ One might think, though, that voters might just show up to vote for the top-of-the-ticket elections, such as president, and then “roll off” by not casting ballots for the local contests. Yet, at least one study has concluded that municipal elections held in conjunction with presidential elections increase voter turnout by about twenty-seven percent, even accounting for those voters who “rolled

143. Note that, in this instance, I am positing that Marge has made a mistake rather than just ignored her ballot entirely. The problem of a registered voter who entirely ignores the opt-out ballot will be taken up in just a moment.

144. It is possible, though, that opt-out voting could decrease voter registration. For example, if citizens know that voter registration will automatically lead to them receiving a ballot at every election, citizens might choose to not register in order to avoid their outcomes.

145. See Jakee & Sun, *supra* note 126, at 69.

146. *Id.* at 62.

147. MUNICIPAL ELECTIONS IN CALIFORNIA, *supra* note 63, at 63-64.

off.”¹⁴⁸ In short, there is reason to think that once a registered voter starts a ballot, the voter does not stop.

There is no way to know whether the opt-out nudge to increase participation will work as well as moving local elections to coincide with national elections, but there is at least a plausible reason to think the nudge will be strong enough. For starters, if persons cast ballots mostly because it makes them feel good (rather than because it makes a difference to the outcome of any particular election) then registered voters who do not cast ballots do not need the expressive benefit that comes from voting. However, registered voters who did not cast ballots in an opt-out system would not only fail to gain the expressive benefit by not participating. Instead, their lack of participation might lead them to feel an expressive negative because they know they may have cast a “wrong” vote by not paying attention to their ballot.

Moreover, there may be ways to make the nudge of opt-out stronger by increasing the “social pressure” on registered voters.¹⁴⁹ In one study, registered voters were sent a mailing just prior to an election that showed whether they and their neighbors had voted in the past.¹⁵⁰ The mailing also told voters that they would receive another mailing after the election that updated the voting records of them and their neighbors.¹⁵¹ Households who received this mailing turned out at much higher rates than households who did not receive this mailing.¹⁵² Thus, one might combine opt-out voting with disclosure of those persons who did not return their ballot with any changes.

Yet, even if opt-out voting increases turnout, it is guaranteed that some voters will totally ignore their ballots and this could lead to the problem of an election being determined by the non-voters. To understand how this might possibly happen, take again the hypothetical mayoral election between Quimby and Winston. Assume there are one-hundred registered voters and that fifty registered voters are initially assigned to each Quimby and Winston. Assume that only fifty registered voters want to affirmatively cast their ballots and that fifty registered voters will totally ignore their ballots. Assume that of the fifty voters

148. See Neal Caren, *Big City, Big Turnout? Electoral Participation in American Cities*, 29 J. URB. AFF. 31, 41 (2007).

149. Green & Gerber, *supra* note 54, at 332-33.

150. *Id.*

151. Alan S. Gerber et al., *Social Pressure and Voter Turnout: Evidence from a Large-Scale Field Experiment*, 102 AM. POL. SCI. REV. 33, 38, 46 (2008); Green & Gerber, *supra* note 54, at 332-33.

152. Gerber et al., *supra* note 151, at 38 (“Even more dramatic is the effect of showing households both their own voting records and the voting records of their neighbors. Turnout in this experimental group is 37.8%, which implies a remarkable 8.1 percentage-point treatment effect.”).

who desire to register a preference between the two candidates, that twenty-six voters want to cast their ballots for Quimby and twenty-four voters want to cast their ballots for Winston. Assume, however, that the voters who totally ignored their ballots broke thirty for Winston and twenty for Quimby. In this hypothetical, then, Winston will undeservedly win the election by a margin of fifty-four to forty-six.

Of course, one can surmise that the number of elections in which registered voters who totally ignore their ballots decide the outcome will be quite small. For starters, in a large electorate, the voters who totally ignore their ballots are likely to be distributed about evenly. Second, even if ballots that are totally ignored are slightly non-randomly distributed, most elections are not that closely decided.¹⁵³ Thus, even if there is a non-random distribution between the candidates of voters who totally ignore their ballot, the non-random distribution is not likely to determine the outcome. In other words, it is not likely the difference in the random distribution among ballots between the first- and second-place candidates will exceed the margin of victory for the candidate who won among those registered voters who actively participated.¹⁵⁴

Yet, it is still possible that opt-out voting would cause some elections to be wrongly decided by those who totally ignored their ballot; however, our current voting system already creates the possibility of a “wrong outcome.” Elections are imperfect, and when it comes to a very close election, it is not entirely clear that the candidate preferred by most of the electorate actually is the one that gets sworn in.¹⁵⁵ To take what is perhaps the highest profile example available, following the disputed 2000 presidential election between George W. Bush and Al Gore, a study by the media found that Gore would have won the election if both overvotes and undervotes had been recounted.¹⁵⁶ Put more starkly, there is already a certain amount of randomness in determining the winner when it comes to deciding close elections using our current system of balloting.

153. Michael J. Pitts, Essay, *Heads or Tails?: A Modest Proposal for Deciding Close Elections*, 39 CONN. L. REV. 739, 745 (2006) (“The vast majority of elections are not nail-biters”); see also Stephen Ansolabehere & Andrew Reeves, *Using Recounts to Measure the Accuracy of Vote Tabulations: Evidence from New Hampshire Elections 1946-2002*, at 1-8 (CalTech/MIT Voting Tech. Project Working Paper No. 11, 2004), available at http://www.vote.caltech.edu/drupal/files/working_paper/vtp_wp11.pdf.

154. See Ansolabehere & Reeves, *supra* note 153, at 8.

155. Pitts, *supra* note 153, at 745 (“[E]lections won by small margins pretty much amount to a draw.”).

156. See Dan Keating & Dan Balz, *Florida Recounts Would Have Favored Bush: But Study Finds Gore Might Have Won Statewide Tally of All Uncounted Ballots*, WASH. POST, Nov. 12, 2001, at A1. Indeed, this study did not even account for Palm Beach County’s infamous butterfly ballot. *Id.* at A10.

Lastly, the hope is that opt-out voting will nudge registered voters to not ignore their ballots. When it comes to those who are, say, too busy to vote, the hope would be that opt-out voting incentivizes those registered voters to cast their ballots for the candidate they truly prefer or, at the very least, to vote “None of the Above.” When it comes to those who truly do not care, the hope is that these persons will either be incentivized to learn more about the candidates and cast a vote, or again, at the very least, return their ballots to indicate “None of the Above.” Of course, to make this hope a reality, there would undoubtedly need to be lots of voter education to channel these registered voters to take the appropriate action.

One final problem that could be an issue involves the complexity of opt-out voting. It is possible that registered voters will find the system confusing. If they find the system confusing, they might just give up. Confusion could also lead to unintentional mistakes by voters. For this reason, any switch to opt-out voting would likely need to be accompanied by a well-designed voter education campaign (a monetary cost).

At the end of the day, opt-out voting holds theoretical promise but also theoretical pitfalls that will need further exploration and experimentation in order to more precisely calibrate the costs and benefits of such a system.

B. Election Administration Objections to Opt-Out Voting

Opt-out voting is relatively simple in design but a number of important barriers exist from a pragmatic election administration standpoint. At this point, it bears emphasizing that the idea of opt-out voting could not be implemented with any sort of ease tomorrow absent some sort of Harry Potter-like wizardry. Here, what I want to note are some of the main existing barriers to opt-out voting from an election administration standpoint and why I think that in coming years, the system of election administration could change in such a way as to make this manner of elections possible. Currently, the most substantial election administration issues related to opt-out voting would seem to involve faulty voter registration rolls, possible breaches of ballot secrecy, and the sheer complexity of implementing the system.

The most obvious difficulty with regard to opt-out voting is that voter registration lists are currently a mess.¹⁵⁷ Ample evidence exists to

157. See Stephen Ansolabehere et al., *Voter Registration List Quality Pilot Studies: Report on Detailed Results 5-9* (June 8, 2010) (unpublished manuscript), available at http://www.pewcenteronthestates.org/uploadedFiles/voter_registration_list_results.pdf?n=7473.

think that there are many names on voter registration lists that should not be there.¹⁵⁸ Poor voter registration list maintenance exists despite the fact that in the past two decades we have witnessed the enactment of two federal statutes aimed at prodding state and local officials to clean up their voting rolls.¹⁵⁹ Indeed, the U.S. Attorney General has brought several lawsuits against jurisdictions that appear to be doing a poor job of maintaining their registration lists.¹⁶⁰ While these lawsuits were somewhat controversial and possibly motivated by partisan goals, it would seem that widespread agreement exists that voter registration lists are not models of good government.¹⁶¹ The problem with opt-out voting and poor registration list maintenance is that votes could be pre-assigned to registered voters who do not exist.

Messy voter registration rolls are certainly a current barrier to opt-out voting, but there is reason for optimism that voter registration rolls may someday be accurate enough so that any errors in the rolls are negligible to nonexistent. Part of the reason for optimism on this account is that there does appear to be some bipartisan support for modernizing America's voter registration system.¹⁶² While any modernization of voter registration will undoubtedly take years to perfect, it is almost certain that any modernization program would include, as part of its package of reforms, steps that would lead to much greater accuracy in the registration rolls.¹⁶³ Moreover, this is a similar problem to voters who totally ignore their ballots deciding the election and, as previously discussed, it would seem that there are good reasons to think that such

158. *See id.* at 8.

159. *See* National Voter Registration Act of 1993, Pub. L. No. 103-31, § 2, 107 Stat. 77 (1993) (codified as amended at 42 U.S.C. § 1973gg (2006)); Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002) (codified as amended at 42 U.S.C. §§ 15301-15545 (2006)).

160. *See, e.g.*, United States v. Missouri, No. 05-4391-CV-C-NKL, 2006 WL 144356, at *8 (W.D. Mo. May 25, 2006); Complaint at 1, 4, United States v. Missouri, No. 05-4391-CV-C-NKL, 2005 WL 3683710 (W.D. Mo. May 25, 2006).

161. *See* Tokaji, *supra* note 28, at 480-81. To the extent there is disagreement, the dividing line typically revolves around whether ghost names on the rolls have any detrimental impact on elections, most notably by allowing for voter impersonation fraud. *See* LORI MINNITE & DAVID CALLAHAN, SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD 29-30 (2003), available at http://www.michiganelectionreformalliance.org/EDR_Securing_the_Vote.pdf.

162. For example, the Committee to Modernize Voter Registration is a bipartisan group working to modernize voter registration. Their website is available at *Different Sides of the Aisle—Same Perspective*, COMMITTEE TO MODERNIZE VOTER REGISTRATION, <http://www.modernizeregistration.org/> (last visited Oct. 28, 2011).

163. *The Problem with Paper*, COMMITTEE TO MODERNIZE VOTER REGISTRATION, <http://www.modernizeregistration.org/the-case/the-problem-with-paper/> (last visited Oct. 28, 2011) (mentioning fake names like “Mickey Mouse” and “Dick Tracy” as part of the problem with the current registration system).

“voters” would be randomly distributed and not determine the outcome of most elections.¹⁶⁴

Apart from messy registration rolls, ballot secrecy (or potential lack thereof) could be a problem. The primary ballot secrecy problem implicated by opt-out voting lies in the tracking of votes in that seemingly there needs to be some record somewhere of how each person voted. For instance, if Marge has been pre-selected to vote for Quimby and changes her vote to Winston, there would seem to be the need for an election administrator somewhere to switch Marge’s vote from Quimby to Winston. If this is the case, then the election administrator, whoever he or she might be, has the possibility of knowing the exact choice Marge made when she cast her ballot.

While it would be nice and convenient to say that in the future there will be a technological development that will obviate this problem, it seems doubtful the problem could be totally eliminated. It is possible that some mechanism could be developed similar to which has been developed to preserve anonymity when it comes to law school exams. For example, where I teach at Indiana University School of Law-Indianapolis, the students are given an examination number and I grade the examination not knowing which student is assigned to which number. After I turn in my grades, I receive a master list that provides the name assigned to each number. What this means for opt-out voting is that, presumably, a registered voter’s ballot can be turned into a number and the person recording the change to a ballot could only have a numerical identifier. The problem, though, is that somewhere, someone will still have to have the “master list” that matches names and numbers, and the list could fall into the wrong hands.

It would seem that any sort of opt-out system is going to leave some sort of paper trail that could lead to a possible breach in the secret ballot. From a historical perspective, one could argue that the secret ballot is not as ingrained in the American experience as one might think and actually has some not so savory origins.¹⁶⁵ From a more modern, pragmatic perspective, one could argue that the possibility of tracing the numeric identifiers back to a specific individual, if done with appropriate concern for security, makes the possibility of a breach in ballot secrecy slight. On this score, though, one might have concerns that election

164. See *supra* notes 153-54 and accompanying text.

165. ALEC C. EWALD, *THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE* 64-65 (2009) (“Not until the period between 1888 and 1896 did states require votes to be secret, marked on ballots produced by the state or local government.”); SCHAFFER, *supra* note 87, at 22 (2008) (describing how in Arkansas and in the South more generally the secret ballot was “one of many measures adopted by Democrats to disenfranchise black voters”).

administrators, like any large government or private organization, are not trustworthy enough to be given the keys to run such a system. After all, one could be concerned that if a list of voter choices existed, government actors might use those lists to engage in nefarious, big-brother, pay-to-play conduct. Or, more likely, one might be concerned that government officials might lack the competence to keep data from being breached. Thus, opt-out voting theoretically provides less protection for ballot secrecy than the current system.

Finally, implementation of opt-out voting could be somewhat complex when it comes to a lengthy ballot and this complexity could create trouble. For instance, when a ballot features one or two contests—a mayoral contest and the city council—opt-out voting would seemingly be rather simple to implement. However, when a ballot features dozens of contests and referendum questions, then the system becomes far more complex to administer. This complexity can have costs. Complex operations may lead to more mistakes both in the random assignments of candidates to voters and in the switching of voter preferences from one candidate to another. Relatedly, this complexity could lead to delays in tabulation and higher financial costs in the conduct of the election. In the end, opt-out voting would have to be designed in a way to efficiently and accurately allow for ballot changes.¹⁶⁶

In the end, there are undoubtedly possible concerns with opt-out voting. Some of the concerns are theoretical, relate to whether opt-out voting would actually increase voter turnout, and probably can only be addressed by empirical experimentation. Other concerns center more on the current system of election administration that the United States employs. These election administration concerns, though, are probably more easily addressed if the theoretical promise of opt-out voting proves accurate.

166. One issue that can arise in administering opt-out voting occurs when the number of registered voters does not divide evenly amongst the candidates. For instance, in the simple hypothetical presented earlier in this Article with the mayoral race between Quimby and Winston that included 100 registered voters and two candidates for office, each candidate could be assigned the exact same number of registered voters. But what if we had two candidates and 101 registered voters? We cannot divide a vote in half, so it is possible one candidate would get the extra voter, which would not seem fair.

But the problem of having a number of registered voters that does not divide evenly amongst the candidates is not much of a barrier. For starters, in an election with thousands of votes, one vote will almost never make a difference. Nevertheless, in smaller electorates, one vote can make or break an election for a candidate. Thus, to solve the problem, the registered voters could be randomly divided as evenly as possible between the candidates and any remaining voters (likely a handful at most) would have their ballot assigned to “None of the Above.”

V. CONCLUSION

Obviously, opt-out voting represents a unique, cutting-edge idea that holds some promise for increasing voter turnout but might create other difficulties as well. Indeed, at the end of the day, opt-out voting might be a net positive for elections in the United States or it might not be. My hope is that penning this Article does at least a couple of things.

First, it would be a positive if this Article spurred more commentators to think about ideas that might be described as default nudges in the context of electoral participation. Default nudges have crept into the dialogue regarding voter registration, but it may be possible to take the concept further—further, but perhaps not as far as it was taken here. Moreover, on the converse side, I hope that a vigorous counter-offensive is embarked upon by those who think default nudges have little or no place in the electoral context—for it is only through critique that ideas improve.

Second, it would be wonderful if a few jurisdictions in the United States experimented with this idea within the next few years. One of the issues with election reform is that ideas are often put into motion without adequate experimentation—that one problem often is solved only to create potential additional problems. In this context, consider the post-2000 election reforms that replaced punch-card machines with electronic voting mechanisms.¹⁶⁷ Punch-cards were certainly a problem, but perhaps too hasty a decision was made about what to replace punch-card machines with.¹⁶⁸ In addition, empirical data on the operation of such a system on a small scale, and then a slightly bigger scale, and then a slightly bigger scale, should probably be an absolute requirement before implementation of any new electoral system. Perhaps through such experimentation, the voting future could be quite different.

167. See Help America Vote Act of 2002, Pub. L. No. 107-252, § 102, 116 Stat. 1666 (2002) (codified as amended at 42 U.S.C. § 15302 (2006)).

168. See Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 *FORDHAM L. REV.* 1711, 1773-80 (2005) (discussing concerns raised by electronic voting).