

VOTER REGISTRATION, TURNOUT, AND HABITUAL VOTING THEORY: THE CASE FOR SCHOOLS AS MANDATORY REGISTRATION LOCATIONS

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INTRODUCTION

The United States has extraordinarily low voter turnout compared to other liberal democracies.¹ Turnout soared in the 2020 presidential election to its highest point in over 120 years at 66.2%, yet only 56% of the voting age population in the U.S. voted in the 2016 presidential election, and since 2012, still the only democracies U.S. turnout has outpaced are Luxembourg, Slovenia, Poland, Chile, Latvia, and Switzerland.² However, those numbers do not tell the full story. Approximately 86.8% of *registered* American voters went to the ballots for the 2016 election, which places the United States at fourth in the world in registered voters actually showing up to vote.³ Furthermore, political scientist Dayna L. Cunningham noted in her 1991 article on voter registration that “studies show that when voters in [the United States] become registered, they turn out at about the same rate as voters in other Western countries.”⁴ Therefore, the disparity between the United States’ turnout of voting age population and those of the majority of

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1. The American Presidency Project, *Voter Turnout in Presidential Elections*, U.C. SANTA BARBARA (Jan. 22, 2021), <https://www.presidency.ucsb.edu/statistics/data/voter-turnout-in-presidential-elections> [https://perma.cc/CK8Q-BE5K]; Drew DeSilver, *Turnout Soared in 2020 as Nearly Two-thirds of Eligible U.S. Voters Cast Ballots for President*, PEW RESEARCH CENTER (Jan. 28, 2021), <https://www.pewresearch.org/fact-tank/2021/01/28/turnout-soared-in-2020-as-nearly-two-thirds-of-eligible-u-s-voters-cast-ballots-for-president/> [https://perma.cc/P56P-AULF]. Please note this article’s title is misleading. As I explain in the next several sentences, voting age population is not the same as voting eligible population. As such, this title should read “voting age” rather than “eligible U.S. voters.” Drew DeSilver, *In Past Elections, U.S. Trailed Most Developed Countries in Voter Turnout*, PEW RESEARCH CENTER (Nov. 3, 2020), <https://www.pewresearch.org/fact-tank/2020/11/03/in-past-elections-u-s-trailed-most-developed-countries-in-voter-turnout/> [https://perma.cc/N9A7-HB23].

2. DeSilver, *Turnout Soared*, *supra* note 1; DeSilver, *In Past Elections*, *supra* note 1.

3. DeSilver, *In Past Elections*, *supra* note 1.

4. Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL’Y REV. 370, 372 (1991).

liberal democracies can be largely attributed to lower voter registration rates in America.⁵ Other liberal democracies generally boast higher levels of voter registration than the United States in part because in other countries the government initiates voter registration, whereas the United States requires individual citizens to initiate and complete the registration process.⁶ With that burden in place, Americans registered to vote in 2016 at a paltry 70.3% or 157.6 million, which was actually up from 153.16 million in 2012 and 146.31 million in 2008.⁷

But is increased turnout a desirable goal? Evidence suggests that those who do not vote are less politically attuned or are more apathetic about politics, suggesting that increasing turnout could lead to a less informed electorate and one that may vote against their own interests.⁸ This inference, however, is flawed because it assumes too much—it assumes that the portion of the electorate that does not vote is representative of the portion that does vote.⁹ Wealthier, older and Caucasian Americans register and vote far more often than minorities and people of lower socioeconomic status.¹⁰ Cunningham notes that the skew towards older, wealthy whites is a

5. See generally *id.*; Mary N. Stone, *Voter Registration: Context and Results*, 17 URB. LAW. 519, 520–21 (1985) (noting that when registered citizens (eligible) is used as the denominator rather than voting age population, the difference in turnout internationally dissipates); S. REP. NO. 103-6, at 2 (1993) (“The most common excuse given by individuals for not voting is that they are not registered.”).

6. See DeSilver, *In Past Elections*, *supra* note 1; Cunningham, *supra* note 1; Stone, *supra* note 5. All three note the burden that the United States uniquely places upon the individual. See DeSilver, *In past elections*, *supra* note 1; Cunningham, *supra* note 4; Stone, *supra* note 5.

7. U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2016 (2017), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html> [<https://perma.cc/NKL5-R52A>] (click on “table 1” for the relevant data spread sheet); Erin Duffin, *Number of Registered Voters in the United States from 1996 to 2020*, STATISTA (June 28, 2021), <https://www.statista.com/statistics/273743/number-of-registered-voters-in-the-united-states/> [<https://perma.cc/T6ZW-YAYR>].

8. Russell J. Dalton, *Citizenship Norms and Political Participation in America: The Good News Is . . . the Bad News Is Wrong*, CTR. FOR THE STUDY OF DEMOCRACY 6 (2006) (“Empirical research consistently shows that better educated Americans vote more, are more active in their community, are more knowledgeable about politics, and more politically tolerant.”).

9. Ben Saunders, *The Democratic Turnout ‘Problem’*, 60 POL. STUDIES 306, 316–18 (2012).

10. See Cunningham, *supra* note 4, at 372 (“In the United States, people who register and vote tend to be more educated and wealthy than those who do not. Whites are more likely to be registered than minorities.”); Jason Marisam, *Voter Turnout: From Cost to Cooperation*, 21 ST. THOMAS L. REV. 190, 191 (2009) (“[L]ower voting rates for minorities and socio-economically disadvantaged groups persist.”); Michael McDonald, *Voter Turnout Demographics*, UNITED STATES ELECTIONS PROJECT, <http://www.electproject.org/home/voter-turnout/demographics> [<https://perma.cc/HU8Y-Z66F>].

prominent American characteristic.¹¹ The slant towards one group and not others means that younger, less affluent people of color lack representation and influence, which means fewer people are voting for these groups' interests, giving those groups less influence than they otherwise would have over their "representatives."¹² Therefore, even if these groups were "uninformed" and acted against their own interests, it would not be necessarily worse as their interests are not currently being promoted. In addition to providing due representation and influence to minority and disadvantaged groups, increased turnout also legitimizes the political system.¹³ As such, policy representation and democratic legitimacy support an inquiry into increasing voter turnout, particularly among those historically least likely to vote.¹⁴

This Note proposes amending the National Voter Registration Act of 1993¹⁵ to change the status of public schools from a discretionary voter registration location to a mandatory voter registration location. In Part I, this Note details the history of the right to vote in the United States, explaining voter registration laws in their historical context as a classist and racist mechanism to deter "undesirable" citizens from exercising the franchise.

11. See Cunningham, *supra* note 4. For a graphic representation of the relationship between socioeconomic status and turnout internationally, see Kimuli Kasara & Pavithra Suryanarayan, *When Do the Rich Vote Less Than the Poor and Why? Explaining Turnout Inequality across the World* 59 AM. J. POL. SCIENCE 613, 614 (2015).

12. See Marisam, *supra* note 10, at 193; *but see* Benjamin Highton & Raymond E. Wolfinger, *The Political Implications of Higher Turnout* 9–23 (Inst. of Gov't Stud., Working Paper No. 99-5, 1999). Highton and Wolfinger argue that there are few differences in policy preferences between voters and non-voters. *Id.* The largest policy difference is wealth distribution; however, the authors acknowledge difficulties in interpreting whether non-voters' preferences would change once if they become voters. *Id.*

13. See Marisam, *supra* note 10, at 193; Lisa Hill, *Low Voter Turnout in the United States: Is Compulsory Voting a Viable Solution?*, 18 J. THEORETICAL POL. 207, 209 (2006). Hill argues that in addition to potential policy preference differences between voters and non-voters, low turnout significantly damages the government's legitimacy because democracies are governed by majorities and low turnout elections cast doubt on whether an election has actually been decided by a majority of citizens. *Id.*; Jan E. Leighley & Jonathan Nagler, *Who Votes Now? And Does it Matter?*, Presentation at 2007 Annual Meeting of the Midwest Political Science Association, Chicago, Illinois (Mar. 7, 2007) at 18 ("[A]fter 1972, voters and non-voters differ significantly on most issues relating to the role of government in redistributive policies."); *but see* Kimmo Grönlund & Maija Setälä, *Low Electoral Turnout: An Indication of a Legitimacy Deficit?*, Presentation at the ECPR Joint Sessions of Workshops, Uppsala (2004) at 19–20 (noting the empirical study of European Parliamentary Republics was unable to establish correlation between governmental trust, legitimacy, and turnout).

14. See Marisam, *supra* note 10, at 193.

15. National Voter Registration Act of 1993, 52 U.S.C.A. §§ 20501-20511 (West) [hereinafter "NVRA"].

Next, this Part explores attempted legislation from the Fifteenth Amendment¹⁶ to the Voting Rights Act of 1965¹⁷ to the NVRA of 1993.¹⁸ Part II provides a brief synopsis of the current proposals to increase voter turnout as well as a description of behavioral voter theory.¹⁹ Part III utilizes past failings and disenfranchisement to illustrate the need for congressional action to increase turnout among marginalized communities. This Part then articulates and defends this Note's NVRA amendment proposal and explains the shortcomings of the alternative turnout driving proposals.

I. HISTORY

A. *The Constitutional Right to Vote*

Suffrage and enfranchisement in the United States has infamously been a long and arduous process, requiring nearly 150 years to allow, at least constitutionally, citizens of all races and genders to be able to vote.²⁰ Given the population diversity of the revolutionary United States, the Framers were intentionally vague in determining who “the people” were to participate in popular sovereignty, and left the nuts-and-bolts decisions to the states.²¹ Almost uniformly, states determined that only white men with either real property or, in some states, minimum net worth alternatives, had initial suffrage.²²

Property ownership as a voting requirement was justified on two principles.²³ First, owning property meant that the owner had a vested interest in how the community was run.²⁴ Second, it was thought that those with property were wealthy enough to be disinterested voters whereas poor

16. U.S. CONST. amend. XV.

17. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 [hereinafter “VRA”].

18. NVRA, 52 U.S.C.A. §§ 20501-20511 (West).

19. Eric Plutzer, *Becoming a Habitual Voter: Inertia, Resources, and Growth in Young Adulthood*, 96 AM. POL. SCIENCE REV. 41, 41-42 (2002). Habitual voting is a theory of voter behavior that contends that citizens form habits starting from the first time they vote, or do not vote, that will carry on through subsequent elections, meaning those who vote the first time they are able to will be more likely to vote moving forward. *Id.*

20. See generally Jacob Katz Cogan, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 YALE L. J. 473 (1997).

21. *Id.* at 475-76.

22. *Id.* at 476-77, 482-492.

23. *Id.* at 476-77.

24. *Id.* at 477.

people would lack independent judgment on the good of the community.²⁵ These paradoxical moral justifications were short lived, however, because with the turn of the eighteenth century came industrialization and the market economy.²⁶ As the economic structure of the nation changed, so did its ethos-fueled assumptions about those who owned real property.²⁷ From 1800 to 1830, opponents of the property requirement grew, while its proponents, who wielded the levers of power, further entrenched themselves.²⁸ The implicit motive of the property holders was fear; they were scared if those without property were able to have political power, they would “invade” the property holders’ interests.²⁹ But slowly, enough public dissent built up and property requirements were done away with.³⁰

The next explicitly restricted group to obtain the right to vote were African-Americans. Like the property requirements, racial requirements were left to the states.³¹ Some states did not enact legislation restricting Black men from voting until the mid-1830’s; however, only Rhode Island never formally denied Black men suffrage.³² Arguments against Black suffrage were remarkably similar to those made against granting suffrage to non-property owners; specifically, some argued that Black men, like non-property owners, lacked the qualities necessary to exercise reasoned, independent judgment.³³ That is not to say that there were not those who argued vehemently for the enfranchisement of Black men.³⁴ Eventually, following the Civil War, Black men were enfranchised³⁵ through the

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 477–79.

29. *Id.* at 479.

30. *Id.* at 481–84.

31. *Id.* at 489 (“Many states had such qualifications already, but North Carolina, whose constitution dated back to 1776, did not, and the few free black men who met the general suffrage criteria voted.”).

32. *Id.* at 489–90.

33. *Id.* at 490 (“White male suffrage advocates argued that black men had none of the qualities that entitled them to the franchise Others made similar claims, arguing that [Black people] were ‘a peculiar people, incapable . . . of exercising [the] privilege [of voting] with any sort of discretion, prudence, or independence.’”).

34. *Id.* at 492–93.

35. In this context, I use the term “enfranchised” to represent the *legal* right of Black men to vote, yet I do not mean it in a practical sense, only theoretically. Black men were technically granted franchise through the Fifteenth Amendment, yet, as we will explore in the next section, practical franchise would not be enjoyed by Black people until the mid-1960’s. One reason being the Supreme

Fifteenth Amendment.³⁶ The Fifteenth Amendment is composed of two sections. The first section provides: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”³⁷ The second section, the Enforcement Clause, expressly grants Congress the power to pass legislation that would enforce Section 1.³⁸ Coupled with Northern troops subjecting the post-confederacy South to martial law, the Fifteenth Amendment granted Black men both theoretical and practical enfranchisement for the first time.³⁹ The practical franchise evaporated following the Hayes-Tilden Compromise,⁴⁰ leaving Black men with only theoretical franchise from the Fifteenth Amendment.⁴¹

Women suffered from the last of the facially-discriminatory disenfranchisement laws. Unlike Black disenfranchisement, the argument against female enfranchisement stemmed from antiquated notions of marriage and feminism called coverture.⁴² The belief was once a woman is married, she forfeited her civil rights and became legally one person with

Court’s refusal to strike down any law under a Fifteenth Amendment challenge from its passage in 1870 to 1910. See Arthur W. Machen, Jr., *Is the Fifteenth Amendment Void?*, 23 HARV. L. REV. 169 (1910).

36. *Id.* at 177.

37. U.S. CONST. amend. XV, § 1.

38. *Id.* § 2

39. See Cunningham, *supra* note 4, at 375–76.

40. The Hayes-Tilden Compromise of 1877 concluded the hotly contested 1876 presidential election between Rutherford B. Hayes and Samuel J. Tilden. Walker Lewis, *The Hayes-Tilden Election Contest*, 47 A.B.A. J. 36 (1961). Despite Tilden, the Democrat, besting Hayes by over 250,000 votes, Republicans rallied around Hayes to change the results in some states and call the results into question in others. *Id.* at 36–38. The Democrats controlled the House, so Tilden was confident they would count his electors; however, the Republicans who controlled the Senate, under their belief that the Senate President would decide the vote, announced they would only count electors for Hayes. *Id.* at 38. In response to growing concerns of violence, President Grant pressured Republican Senators behind the scenes to support an Election Commission composed of 5 Republican Senators, 5 Democratic Representatives, 2 Republican Justices, 2 Democratic Justices, and 1 swing voter, Justice Bradley. *Id.* at 38–40. It was rumored at the time and is generally accepted now that members of the commission agreed to give Hayes the White House in return for ending Reconstruction in the South. *Id.* at 238; *Compromise of 1877*, HISTORY (Nov. 27, 2019), <https://www.history.com/topics/us-presidents/compromise-of-1877> [<https://perma.cc/U2D8-CLWZ>] (“The Compromise of 1877 was an informal agreement between southern Democrats and allies of [Hayes] to settle the result of the 1876 [election] and marked the end of the Reconstruction era.”).

41. *Id.* See *infra* Part I.B.

42. See Cogan, *supra* note 20, at 485.

her husband, therefore, only he should have the right to vote.⁴³ However, this legal concept failed to account for unmarried women; this discrepancy was resolved by some lawmakers by arguing that enfranchisement for unmarried women was an inconvenience and others by asserting that women would have no interest in voting or were too politically incompetent.⁴⁴ Beginning in the 1860's and through the 1890's, states and territories began granting rights to vote to certain women in certain elections, and those incremental gains culminated in Wyoming granting full enfranchisement in 1890.⁴⁵ The next round of advancements came in the early 1910's with several other states granting women full suffrage rights.⁴⁶ Despite rampant activism, the suffrage movement seemingly stalled in the late 1910's due to the difficult and sporadic nature of amending state constitutions.⁴⁷ Powerful popular support and female contributions to the war effort led to the passage of the Nineteenth Amendment to the federal constitution in 1920, granting women full suffrage across the United States and thereby knocking down the last vestige of facially discriminatory laws denying franchise rights to large demographics.⁴⁸

B. Voter Registration and Other Informal Barriers

Prior to 1800, there was no voter registration in the United States; rather, eligible voters simply showed up at the polls on election day.⁴⁹ In 1800, Massachusetts became the first state to adopt a voter registration

43. *Id.* Cogan quotes one contemporary source as saying married women “conferred [sic] upon their husbands, by contract, all their civil rights: not absolutely . . . but on condition, that the husband will make use of his power to promote their happiness . . .” *Id.*

44. *Id.* at 485–86.

45. P. Orman Ray, *The World-Wide Woman Suffrage Movement*, 1 J. COMP. LEGIS. & INT’L L. 3d. ser. 220, 222–30 (1919).

46. *Id.* at 234–35.

47. *Id.* at 237.

48. U.S. CONST. amend. XIX; Anna Howard Shaw, *Testimony to Congressional Committee, in WORLD WAR I: A HISTORY IN DOCUMENTS 78–79* (Marilyn Shevin-Coetzee & Frans Coetzee eds., 2011). Dr. Shaw vehemently advocated for women’s suffrage, utilizing female driven efforts on the home front during WW1 to ensure troops were fully supplied and equipped. *Id.*; President Woodrow Wilson, *Speech to Congress September 20, 1918, in WORLD WAR I, supra*, at 78. Wilson, speaking on women’s suffrage and war efforts, stated: “We have made partners of the women in this war. Shall we admit them only to a partnership of suffering and sacrifice and toil and not to a partnership of privilege and right?” *Id.*

49. See Cunningham, *supra* note 4, at 373.

law.⁵⁰ Registration laws slowly began to spread from New England to cities across the northeast.⁵¹ From the beginning, voter registration laws have been aimed at disenfranchising minorities and impoverished communities under the guise of election security and integrity measures.⁵² Prior to the post-Reconstruction era, voter registration laws were relatively rare; however, following the Hayes-Tilden Compromise and the end of martial law in the South, wealthy white Southerners immediately began erecting barriers to vote for recently freed Black men.⁵³ At first, Southern Democrats focused on leveraging informal and vigilante methods to disenfranchise Black men.⁵⁴ Southern Whites during this period feared Northern reprisals for disenfranchising freedmen, and initially used threats of violence to scare Black people from the polls.⁵⁵ Soon after, Southern states amended their constitutions to impose what came to be known as the Southern System.⁵⁶

The Southern System consisted of the following five facially neutral registration restrictions: residency restrictions, temporally regular registration, poll taxes, literacy tests, and disqualification provisions.⁵⁷ These provisions greatly reduced turnout of both freedmen and, as collateral damage, poor white Southerners.⁵⁸ For example, in Alabama, May was the only month in which farmers could register.⁵⁹ May happened to be harvest season, the busiest month for farmers, making it difficult for them to find time to register.⁶⁰ Louisiana was able to slash the Black electorate by 90% through the use of periodic voter registration.⁶¹ South Carolina used literacy

50. John Seven, *The Exclusionary History of Voter Registration Dates to 1800*, HISTORY (Oct. 22, 2018), <https://www.history.com/news/voter-registration-elections-president-midterms> [https://perma.cc/T6GJ-59P5].

51. *Id.*

52. See Cunningham, *supra* note 4, at 373.

53. *Compromise of 1877*, *supra* note 40.

54. Cunningham, *supra* note 4, at 376–77.

55. *Id.*

56. *Id.* at 377.

57. *Id.* (discussing how numerous Southern states codified disenfranchisement); see, e.g., Stone, *supra* note 5, at 522 (“Other voting regulations were residency requirements, literacy tests and, in southern states, poll taxes and other measures to limit black participation.”).

58. *Id.* at 522; see Marisam, *supra* note 10, at 198. “After Reconstruction, black male turnout was high, with a majority voting in all but two Southern states. However, after the turn of the century, black turnout in the South dropped steeply. Southern officials abused the trend of tighter regulations to disenfranchise minority voters . . .” *Id.*

59. Cunningham, *supra* note 4, at 378.

60. *Id.*

61. See *id.*

tests to cut Black voters by over 75% due to the fact that Black education was only recently legalized.⁶² As the years went on, the Department of Justice noticed these Southern tactics and began prosecuting local election officials; in response, Southern officials began misplacing and purging Black voter rolls.⁶³ Voter registration requirements were wielded as a mighty sword in the South to officially disenfranchise Black citizens for nearly one hundred years.

However, the South was not alone, as the Northern states also used voter registration laws to disenfranchise impoverished Anglo-Saxons as well as new immigrants from southern and central Europe around the turn of the century.⁶⁴ At the turn of the century, the North was divided between locally organized working class party machines and nativist reformers.⁶⁵ The reformers strongly opposed Northern Democrats' party machines because they saw the large numbers of poorly educated voters as an example of "widespread manipulation and corruption."⁶⁶ Party bosses and captains ran the local parties and trained their lesser educated ranks to vote across entire party slates while essentially demonizing independent voter decisions.⁶⁷ It is still unclear whether or not fraud was actually widespread in the North among party machines or whether it was merely occasional.⁶⁸ Fraud notwithstanding, the Reformist elites viewed high turnout of illiterate immigrants and working class peoples as corrupt, in that widespread suffrage was a "mobocracy."⁶⁹ As such, the Reformists sought to limit turnout, primarily through registration reforms, including the adoption of personal registration.⁷⁰ Many of the newer requirements shared similarities with Southern requirements, such as appearing periodically at local election offices to confirm eligibility or suspiciously restrictive registration time

62. *Id.*

63. Marisam, *supra* note 10, at 198.

64. *See generally* Cunningham, *supra* note 4, at 380–85; Marisam, *supra* note 10, at 198.

65. Cunningham, *supra* note 4, at 381.

66. *Id.* at 382; *see generally* Stone, *supra* note 5, at 523.

67. *See* Cunningham, *supra* note 4, at 381–82.

68. *Id.* at 382.

69. *See id.* at 383–84.

70. *See id.* at 384. The reforms admitted that the new registration restrictions would be ineffective against fraud, implicitly conceding that the purpose of personal registration was to depress turnout among working class immigrants. *Id.*

frames.⁷¹ For example, one New York registration law only allowed for registration during Yom Kippur and on the Sabbath.⁷²

At this point in time, the only hope for potentially disenfranchised voters was the courts. In *Daggett v. Hudson*, the Supreme Court of Ohio struck down an Ohio statute which required voters to register during a given seven-day period.⁷³ Yet according to *Daggett*, the restriction had to be so great as to be proscribing new qualifications or restricting current ones to be considered unconstitutional when the state constitution is silent on voter registration.⁷⁴ Given the high standard imposed in *Daggett* and subsequently followed in other jurisdictions, Congress chose to address the issue of restrictive voter registration practices head on in the Voting Rights Act of 1965 and the National Voter Registration Act of 1993.⁷⁵

C. Dual Reform: VRA & NVRA

Congress failed to pass any legislation protecting voting rights between the passage of the Fifteenth Amendment, its accompanying Enforcement Act of 1870, and the Civil Rights Act of 1957.⁷⁶ The Fifteenth Amendment and the Enforcement Act of 1870 had very little impact on minority voting rights in practice, because no federal court struck down a voting regulation in the forty years following their passage.⁷⁷ Additionally, the Enforcement Act of 1870 had its teeth pulled in 1894 when Congress repealed the

71. *Id.*

72. *See* Seven, *supra* note 50.

73. *Id.*; *Daggett v. Hudson*, 43 Ohio St. 548, 565–66 (1885) (holding this registration law is far too restrictive on the right to vote). For an explanation as to why court remedies were generally ineffective at addressing voter suppression, see Warren M. Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 1 STAN. L. REV. 1, 3 (1965).

74. 43 Ohio St. at 557–58 (“[W]e are satisfied that it is within the constitutional province of the legislature to enact a wise registration law, that, without in any way abridging the rights of qualified electors, or adding any unlawful qualifications to the voter . . . to be a reasonable regulation of the mode of exercising a constitutional right.”)

75. VRA, Pub. L. No. 89-110, 79 Stat. 437; NVRA, 52 U.S.C.A. §§ 20501-20511 (West through Pub. L. No. 117-42); Christopher, *supra* note 73; *see, e.g.*, *State v. Conner*, 22 Neb. 265 (Neb. 1887); *Littlejohn v. People ex rel. Desch*, 52 Colo. 217 (Colo. 1912).

76. *See* Christopher, *supra* note 73, at 2–4; U.S. CONST. amend. XV; Act of May 31, 1870, ch. 114, 16 Stat. 140 (amended 1894) (enforcing the Fifteenth Amendment’s guarantee of the right to vote by making violations of state law a federal crime as well as creating a federal system of election supervisors); Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 637.

77. *See* Machen Jr., *supra* note 35.

requirement of federal supervision over election practices.⁷⁸ Without federal supervision, provisions allowing civil liability for state officials became practically unenforceable because Black individuals were fearful of retribution if they privately brought action; furthermore, the provisions for federal enforcement that did survive, such as criminal penalties brought by the Attorney General, were rarely if ever used.⁷⁹ The Civil Rights Act of 1957 made a significant alteration to the enforcement of voter rights by allowing the Attorney General to bring suits for injunctive relief to prevent discriminatory acts.⁸⁰ However, this provision still proved ineffective at increasing Black voter turnout because the suit could be terminated if the official resigned.⁸¹ These problems were generally remedied through the Civil Rights Act of 1960, which allowed the Attorney General to obtain injunctive relief by showing that patterns of discrimination existed.⁸² Yet these new laws did little to substantially increase Black voter turnout in the South.⁸³ For example, in the early 1960's after the passage of the Civil Rights Act of 1957, only 6.7% of African-Americans were registered to vote in Mississippi.⁸⁴

In response to rampant voter suppression and insidious registration laws coupled with enforcement failures of current laws, Congress passed the Voting Rights Act of 1965 (“VRA”).⁸⁵ The VRA affirmed a commitment to the enforcement of the Fifteenth Amendment by requiring jurisdictions with a history of discriminatory practices to seek approval from the federal government prior to altering their election laws.⁸⁶ Additionally, the VRA temporarily suspended literacy tests and other similar requirements.⁸⁷ In the

78. See Christopher, *supra* note 73, at 1–2.

79. *Id.* at 2–4.

80. *Id.* at 4.

81. See *id.*

82. See *id.* at 5; Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 90.

83. See Christopher, *supra* note 73, at 6.

84. Kathryn Healy Hester, *Mississippi and the Voting Rights Act: 1965-1982*, 52 Miss. L.J. 803 (1982) (“[T]he percentage of black Mississippians registered to vote increased from 6.7% in the early 1960's . . .”).

85. See *id.* at 805; Marisam, *supra* note 10, at 198; *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966) (noting enforcement failures of previous efforts to increase Black turnout in Southern states).

86. Hester, *supra* note 84, at 807–09. Eventually in *Shelby Cnty. v. Holder*, the Supreme Court held it was no longer necessary for jurisdictions to receive clearance prior to altering election laws because there had not been discriminatory suppression efforts in a number of years. 570 U.S. 529, 557 (2013).

87. See Christopher, *supra* note 73, at 9–10.

years after the VRA passed, Black voter registration and turnout increased greatly;⁸⁸ in Mississippi, Black voter registration increased over 65% between the early 1960's and 1980.⁸⁹

However, in the decades following the VRA, overall turnout declined, and Congress sought to further reduce the costs of registering to vote.⁹⁰ Pursuant to the Fourteenth Amendment and the Elections Clause, Congress passed the National Voter Registration Act of 1993 ("NVRA").⁹¹ Congress made the following three findings for the NVRA: first, voting is a fundamental right; second, federal, state, and local levels of government have an affirmative duty to promote that right; and third, unfair registration laws can directly damage voter turnout in federal elections and disproportionately harm particular groups including racial minorities.⁹² Additionally, the NVRA had four purposes: first, establishing procedures to increase the amount of eligible citizens who register to vote in federal elections; second, limiting difficulty in implementation of the NVRA in a way that increases turnout; third, protecting the integrity of federal elections; and fourth, ensuring accurate voter rolls are maintained.⁹³

The NVRA created a uniform federal registration system through several different measures. First, the NVRA required states to allow citizens to apply for voter registration at any state motor vehicle driver's license office.⁹⁴ Second, citizens must be allowed to apply for voter registration by

88. Cunningham, *supra* note 4, at 388. "Indeed, following the passage of the Act, many thousands of illiterate and semi-literate voters were registered with the assistance of federal examiners. Prior to 1965, African-American voter registration rates hovered at a low 29% on average, compared with 73% for Whites. By 1981, in many states covered by section 5 of the [VRA] over 50% of eligible African-Americans were registered to vote." *Id.*

89. Hester, *supra* note 84 ("[T]he percentage of black Mississippians registered to vote has increased from 6.7% in the early 1960's to 72.2% in 1980")

90. See Stone, *supra* note 5, at 520 (noting that turnout declined 10% from 1960 to 1985); Marisam, *supra* note 10, at 191 ("The second generation reforms were designed to reduce structural and administrative costs of voting, primarily by reforming voter registration laws"); See generally, S. REP. NO. 103-6, at 3 (1993) ("It must be remembered that the purpose of our election process is not to test the fortitude and determination of the voter, but to discern the will of the majority.")

91. S. REP. NO. 103-6, at 3 (1993); NVRA, 52 U.S.C.A. §§ 20501-20511 (West through Pub. L. No. 117-42); U.S. CONST. amend. XIV, § 3. The Elections Clause provides, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time make or alter such Regulations, except as to the Place of chusing [sic] Senators." U.S. CONST. art. 1, § 4, cl. 1.

92. § 20501; S. REP. NO. 103-6, at 2 (1993).

93. § 20501.

94. § 20504.

mail, and if it is the first time a citizen is registering to vote, then they must vote in person should they use a mail in registration application.⁹⁵ Third, states must designate offices which provide public assistance, as well as state funded offices that are primarily engaged in providing services to people with disabilities, as voter registration agencies.⁹⁶ Fourth, states may choose to designate various state and local government offices not covered in the preceding sentence as voter registration agencies as well, including but not limited to “public libraries, public schools, offices of city and county clerks, fishing and hunting license bureaus, government revenue offices, unemployment compensation offices . . . [and] Federal and non-governmental offices, with the agreement of such offices.”⁹⁷ Fifth, the NVRA requires states to designate a state officer as the chief state election official who is responsible for ensuring their state meets the requirements of the Act.⁹⁸ Sixth, the Attorney General or an aggrieved private party may bring a civil suit seeking declaratory judgment, and the victor is entitled to reasonable attorney’s fees and litigation costs.⁹⁹ Seventh, the NVRA creates criminal liability for voter intimidation and voter fraud.¹⁰⁰ Lastly, states which do not require voter registration or which allow election day registration at polling stations are not bound by the NVRA’s obligations.¹⁰¹

The NVRA has been the subject of much litigation following its passage in 1993.¹⁰² States and local officials regularly challenged the act on Tenth Amendment grounds¹⁰³ and on Election Clause grounds.¹⁰⁴ Courts have resoundingly rejected challenges to the constitutionality of the NVRA.¹⁰⁵

95. § 20505(a), § 20505(c).

96. § 20506(a)-(a)(2).

97. § 20506(a)(3).

98. § 20509.

99. § 20510.

100. § 20511.

101. § 20503(b).

102. Kurtis A. Kemper, *Validity, Construction, and Application of National Voter Registration Act*, 42 U.S.C.A. §§ 1973gg et seq., 185 A.L.R. FED. 155 (2003) (listing, describing, and analyzing challenges to the NVRA).

103. U.S. CONST. amend. X.

104. Kemper, *supra* note 102, at Part II (A).

105. *Id. See, e.g.,* Ass’n of Cmty. Org’s for Reform Now v. Ridge, 1995 WL 136913 (E.D. Pa. Mar. 30, 1995) (holding the registration system under the NRVA is a proper manner regulation which the Election Clause allows); Ass’n of Cmty. Org’s for Reform Now v. Miller, 912 F. Supp. 976 (W.D. Mich. 1995) (holding that restricting states from purging voters solely by reason of not voting is not a regulation of the qualifications of voters but rather a proper restriction on the manner of elections); *and*

For cases involving challenges under the Elections Clause, courts have looked at *Smiley v. Holm* for guidance.¹⁰⁶ *Smiley* is a 1932 U.S. Supreme Court case involving the apportionment of congressional districts, in which the Governor of Minnesota attempted to veto the districting plan that had been passed solely by the Minnesota state house and senate.¹⁰⁷ However, *Smiley*'s relevancy comes from its dicta; in reference to the scope of the Elections Clause, the Court said: "It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices [and] registration."¹⁰⁸

The District Court for Eastern Pennsylvania used similar reasoning to *Smiley*'s dicta in holding that a challenge to the NVRA on Election Clause grounds was flawed because the NVRA regulates only the means by which a voter registers for a federal election.¹⁰⁹ In *Condon*, the District Court for South Carolina reached a similar conclusion following *Smiley* by holding that the NVRA was a valid exercise of regulating the manner in which elections are held.¹¹⁰

Courts have disposed Tenth Amendment challenges with similar ferocity as the Election Clause cases involving the Fourteenth and Fifteenth Amendments.¹¹¹ In *Association of Community Organizations for Reform Now v. Ridge*, the Pennsylvania argued that the cost of implementing the NVRA was too high and Congress had allocated no funding for implementation, thereby violating the Tenth Amendment; however, the court dismissed the contention by holding that the cost the state would be forced to bear did not rise to the level of constitutional concern.¹¹² However, in *Condon*, the court rejected a Tenth Amendment argument by holding that the Fourteenth and Fifteenth Amendments explicitly granted Congress the

Condon v. Reno, 913 F. Supp. 946 (D.S.C. 1995) (holding the Tenth Amendment inapplicable because the power to regulate federal elections is granted through the Fourteenth and Fifteenth Amendments).

106. Kemper, *supra* note 102; *Smiley v. Holm*, 285 U.S. 355 (1932).

107. *Smiley*, 285 U.S. 355.

108. *Id.* at 366.

109. *Ridge*, 1995 WL 136913 at *6.

110. *Condon*, 913 F. Supp at 961.

111. Kemper, *supra* note 102.

112. *Ridge*, 1995 WL 136913 at *8 ("We note in passing that recent 'unfunded mandate' legislation, in any event, has a much higher monetary threshold than what the state alleges it will have to bear in this case.") The state had alleged that they would bear around \$6 million to implement NVRA requirements. *Id.* at *5-6.

power to regulate federal elections, finding that the Tenth Amendment is inapplicable because that power was therefore not reserved.¹¹³

II. TURNOUT PROPOSALS AND HABITUAL VOTER THEORY

Despite the repeatedly affirmed constitutionality of the NVRA, it has not been as effective as previously hoped at increasing turnout, particularly among Black and lesser educated citizens.¹¹⁴ One argument for why turnout has not increased is because enforcement of the NVRA was never sustained and voter registration rolls were not properly maintained.¹¹⁵ Other political scientists argue that the “costs” of registering to vote were already lowered significantly by the VRA, so the NVRA confronted the problem of diminishing returns.¹¹⁶ As a result of these competing arguments, there are a variety of proposals to increase voter turnout.

A. Current Proposals to Increase Turnout

i. A Cooperative Based Model

A recent proposal from Harvard research fellow Jason Marisam offers a community driven norms approach to increasing voter turnout, and in so doing he attempts to discard earlier economic-based turnout proposals that emphasize lowering barriers (or costs).¹¹⁷ Marisam argues that costs to voting were already sufficiently lowered through the VRA, NVRA, and various state driven policies like expanded mail-in voting, so lowering the barriers to voting even further will have diminishing returns and fail to

113. *Condon*, 913 F. Supp at 963 (“The Tenth Amendment provides no protection for South Carolina because of the powers granted to Congress under the provisions of the Fourteenth and Fifteenth Amendments.”).

114. See McDonald, *supra* note 10. McDonald graphed the turnout percentage based on age, race, and education level from 1984 to 2016, and while the vote share of non-Hispanic whites has decreased, better educated, older whites still turnout at similarly higher rates as they did prior to the passage of NVRA. *Id.*

115. Estelle H. Rogers, *The National Voter Registration Act Reconsidered*, AM. CONST. SOC’Y FOR L. & POL’Y 1, 90–93 (2011).

116. Marisam, *supra* note 10, at 191.

117. See Marisam, *supra* note 10.

improve voter turnout in the United States.¹¹⁸ Furthermore, he reasons that minority turnout has not risen to the level of white turnout because past barriers prevented minority communities from fostering voting norms.¹¹⁹ The implication is clear: the cost of voting can be nil, but without some community expectation of formal participation in the political sphere, these communities will continue to trail affluent white voters in turnout.¹²⁰ As such, Marisam seeks to utilize state-sponsored community voter drives to create the norms necessary for self-perpetuating high levels of voter turnout.¹²¹ This proposal will surely gain popularity in the upcoming years given the success of partisan efforts of Democratic turnout field organizers in both the 2020 Georgia General Election and the 2021 Georgia Special Senate election.¹²²

ii. Compulsory Voting

As an alternative to Marisam's norm-driven proposal, compulsory voting would utilize criminal law to coerce citizens to turn out in droves as a solution to low turnout.¹²³ A conceptual difference between the two proposals is that while Marisam focuses on changing the turnout framework away from a cost analysis, compulsory voting uses criminal law to disregard costs.¹²⁴ Political scientist Sarah Birch aptly defines compulsory voting as "the legal obligation to attend the polls at election time and perform whatever duties are required there of electors."¹²⁵ Compulsory voting has been highly successful in several countries, most notably Australia and

118. *Id.* at 197–204.

119. *Id.* at 194 ("Past state-imposed barriers to voting that hit disadvantaged groups hardest . . . may have not just prevented voting at the time, but also stunted voting norms in communities.").

120. *See id.* ("Therefore, even after the state removes these barriers, an underdeveloped community voting norm remains.").

121. *Id.* at 225–30.

122. *See generally* Travis Waldron, *Georgia's Blue Shift Is a Lesson for Progressive Organizers Across the South*, HUFF. POST (Nov. 16, 2020), [https://www.theguardian.com/us-news/2021/jan/14/fight-to-vote-us-election-georgia-runoffs \[https://perma.cc/6PHB-7ANA\].](https://www.huffpost.com/entry/stacey-abrams-joe-biden-georgia-blue-2020_n_5faeffc0c5b6d05e86e6dcfd? [https://perma.cc/2WDB-JSWE]; Sam Levine, Fight to Vote: The Georgia Organizers Who Helped Mobilize Voters</i>, GUARDIAN (Jan. 14, 2021) <a href=)

123. Sean Matsler, *Compulsory Voting in America*, 76 S. CAL. L. REV. 953, 961 (2003).

124. *Compare* Marisam, *supra* note 10, at 190–91, *with* Matsler, *supra* note 123, at 955.

125. SARAH BIRCH, FULL PARTICIPATION: A COMPARATIVE STUDY OF COMPULSORY VOTING 2 (2016).

Belgium.¹²⁶ These laws require that citizens vote or face a minor penalty, normally a fine.¹²⁷ Enforcement of these penalties varies significantly between countries, with some researchers going so far as to formally categorize compulsory voting countries based on their penalty enforcement level.¹²⁸

The only U.S. state to ever impose penalties for not voting is Illinois, and it did so rather informally by placing nonvoters at the top of the jury duty selection pool.¹²⁹ However, compulsory voting has been contemplated by numerous scholars as a possible alternative to the electoral model used in the United States.¹³⁰ An attractive feature of compulsory voting is its effectiveness in maintaining remarkably high levels of turnout.¹³¹ For example, Australia consistently boasts turnout of their voting age population in the ninety percent range.¹³² More importantly, compulsory voting in Belgium has been shown to close the turnout gap significantly between voters between higher and lower socioeconomic statuses.¹³³ As such, compulsory voting empirically has shown the ability to address the problems prompting this Note; however, compulsory voting gives rise to some constitutional and ethical problems that outweigh its benefits, as discussed in Part II.A.

126. See Matsler, *supra* note 123 at 963–67. This section describes the successes both countries have experienced since switching to a compulsory system.

127. Tracey Rychter, *How Compulsory Voting Works: Australians Explain*, N.Y. TIMES (Oct. 22, 2018) <https://www.nytimes.com/2018/10/22/world/australia/compulsory-voting.html> [<https://perma.cc/GH7H-YURW>].

128. See BIRCH, *supra* note 125, at 5 (“Where voting is legally mandatory, a distinction is sometimes made between states that enforce the legal obligation to participate in elections strictly or weakly.”).

129. *Id.*

130. See, e.g., Matsler, *supra* note 123, at 955; BIRCH, *supra* note 125; Hill, *supra* note 13, at 207–208.

131. Matsler, *supra* note 123, at 965.

132. Australian Electoral Commission, *Voter Turnout-Previous Events*, AUSTRALIAN ELECTORAL COMMISSION (Dec. 10, 2019), https://www.aec.gov.au/Elections/federal_elections/voter-turnout.htm [<https://perma.cc/3853-TLTH>].

133. Hill, *supra* note 13, at 212–13 (“In Belgium socio-economic status is ‘effectively erased’ as a variable for non-voting under a system of compulsion. . . . Because of its capacity to close the SES gap, Arend Lijphart has advocated the introduction of compulsion in the American context.”).

iii. Automatic Voter Registration

Automatic Voter Registration (“AVR”) is a more traditional proposal for increasing turnout. As noted above, the United States is the only liberal democracy in the world in which the government does not register its citizens without the citizen initiating the process.¹³⁴ AVR requires that the government determine voter eligibility and automatically place eligible citizens on a registered voter list.¹³⁵ AVR has significant momentum in parts of the United States, as Oregon automatically registers qualified citizens whenever they visit a DMV and New York recently passed a law that automatically registers all eligible citizens.¹³⁶ While seemingly effective in other countries, it is far too soon to tell if the laws in Oregon and New York have been effective at increasing voter turnout.

B. Habitual Behavior Voting

With the current proposals to increase voter turnout in mind, a brief explanation of the leading theory on voting behavior is in order. Habitual voting or inertia voting explains voting behavior as a habit rather than as a rational choice.¹³⁷ The theory holds that those who vote once are far more likely to vote again, while at the same time, those who do not vote in their first couple of elections are far less likely to ever vote.¹³⁸ Furthermore, habitual voting theory argues that young people vote less because “the costs

134. See DeSilver, *In Past Elections*, *supra* note 1; Cunningham, *supra* note 4; Stone, *supra* note 5 at 520–21.

135. *Federal Voter Registration: A Proposal to Increase Voter Participation*, 8 COLUM. J.L. & SOC. PROBS. 225, 247 (1972) (“[I]t would be the responsibility of the government to determine who is eligible and to automatically place their names on a registration list.”).

136. Gavin Rynard, *How to Unlock the Voting Block: Oregon’s Sweeping Solution to Poor Turnout: Automatic Registration*, 24 U. MIAMI INT’L & COMP. L. REV. 517, 519 (2017); OR. REV. STAT. § 247.017 (2015); Press Release, New York State, Governor Cuomo Signs New York Automatic Voter Registration Act of 2020 into Law (Dec. 22, 2020), <https://www.governor.ny.gov/news/governor-cuomo-signs-new-york-automatic-voter-registration-act-2020-law> [<https://perma.cc/VDR7-EBEU>]; New York Automatic Voter Registration Act of 2020 (S.8806 / A.8280C).

137. Compare Plutzer, *supra* note 19 (proposing habitual voting as a working theoretical framework), with Timothy J. Feddersen, *Rational Choice Theory and the Paradox of Not Voting*, 18 J. ECON. PERSPECTIVES 99 (2004). Feddersen, while critiquing Rational Choice Theory, aptly describes the theory: “In a large election, the probability that an individual vote might change the election outcome is vanishingly small. If each person only votes for the purpose of influencing the election outcome, then even a small cost to vote . . . should dissuade anyone from voting.” *Id.*

138. Plutzer, *supra* note 19, at 42.

of voting are magnified,” “[y]oung people also lack many of the resources that can promote participation,” and “their peer group consists almost entirely of other nonvoters.”¹³⁹ Thus, when placed within the framework that voting is a habitual activity, these young voters are less likely to turnout in subsequent elections.¹⁴⁰ However, Plutzer notes that inertia for nonvoters is much weaker than that of voters, meaning that once a nonvoter crosses the threshold to vote once, they will have a very high propensity to vote moving forward.¹⁴¹ A central theme to Plutzer’s study is that while the costs associated with voting at a young age significantly deter first time voters, these costs can be abated with adequate resources.¹⁴²

III. ANALYSIS AND PROPOSAL

There is a complex and at times troubling history of voting rights and turnout in U.S. elections, moving forward, Congress should work to bring turnout closer to that of our international counterparts. High voter turnout among the voting age population is a worthy goal, particularly given our country’s difficult past with racist and classist voting barriers.¹⁴³ Amending the NVRA to require public schools to function as mandatory voter registration locations will serve to increase voter turnout among young adults generally as well as poor and minority young adults specifically.¹⁴⁴ Furthermore, this proposal will succeed at increasing the overall turnout significantly despite the failure of the NVRA to do so.¹⁴⁵ While there are potential issues of constitutionality which must be addressed, alternate proposals are either ethically flawed or will fail to increase turnout.

139. *Id.*

140. *Id.* at 43 (“In contrast, of the 57 respondents who reported missing two consecutive elections . . . more than two-thirds did not vote in the next election.”).

141. *Id.* Plutzer cites the following reasons why many nonvoters eventually outgrow the habit and become voters later in life: 1. Financial resources accrue as young adults age, making the costs of voting less burdensome, 2. Cognitive resources such as political knowledge generally increases with age minimizing intellectual costs of voting, 3. Life events that increase ties to community are likely to increase political participation including voting, and 4. Community based life habits such as church may introduce individuals to political activities. *Id.*

142. *Id.* at 42 (“[Young citizens] have a latent probability of voting resulting from parental, demographic, and personal factors.”).

143. *See generally* Part I.A.

144. *See generally* Part II.B.

145. *Id.*

*A. The Need for Congressional
Action in Promoting Marginalized Turnout*

Currently, the U.S. relies on particularly contentious elections in order to turnout large numbers of citizens, and even when our turnout surges, it is still well below our international peers.¹⁴⁶ Thus, to create turnout levels rivaling our international counterparts, congressional action is necessary. Furthermore, increasing turnout is a good policy goal for several reasons. First, low turnout is detrimental to a democracy's legitimacy and ability to effectively govern.¹⁴⁷ Second, the preferences of voters are not identical to the preferences of nonvoters, so nonvoters may be governed by laws they disagree with or in the creation of which they lacked meaningful participation.¹⁴⁸ Third, depressed turnout in these oppressed groups can in large part be traced to previous formal barriers to their enfranchisement; as such, congressional action is needed to account for these previous wrongs.¹⁴⁹ Therefore, low turnout is more than a feature of American democracy—it is a crisis in need of governmental intervention.

The first reason why congressional action is needed to promote turnout is the purpose of legitimizing democracy.¹⁵⁰ High turnout and legitimacy being intertwined is self-apparent because popular sovereignty is a foundational piece of any democratic system; popular sovereignty in the U.S. must be considered troubled because, on average, only 56% of the voting age population votes.¹⁵¹ Furthermore, elected leaders claim to be leading pursuant to a popular mandate, yet without complete information from the electorate, that mandate is put into question.¹⁵² Additionally, there is a further legitimacy issue given the differences in demographics of

146. See DeSilver, *In Past Elections*, *supra* note 1.

147. Hill, *supra* note 13; Dalton, *supra* note 8, at 10–11; *but see* Grönland & Setälä, *supra* note 13.

148. See Marisam, *supra* note 10, at 193; Leighley & Nagler, *supra* note 13; *but see* Highton & Wolfinger, *supra* note 12.

149. See Marisam, *supra* note 10, at 194; *see, e.g.*, Cogan, *supra* note 20, at 475–77, 482–92; Hill, *supra* note 13, at 238; *Compromise of 1877*, *supra* note 40; Seven, *supra* note 50.

150. Hill, *supra* note 13; Dalton, *supra* note 8, at 10–11; *but see* Grönland & Setälä, *supra* note 13.

151. Hill, *supra* note 13 (“Low turnout impugns a number of fundamental democratic values such as popular sovereignty . . .”); U.S. CENSUS BUREAU, *supra* note 7.

152. Hill, *supra* note 13.

voters.¹⁵³ While many of the most discriminatory racial or class-based barriers no longer exist, the difference in turnout between wealthier white Americans and less affluent minority groups means that those less privileged groups lack representation, and this political inequality damages election legitimacy.¹⁵⁴ Taking these issues together, the United States is facing a grave legitimacy problem. Thus, increasing turnout, particularly for those of lower socioeconomic status and people of color, is not only moral but a necessity for the health and survival of our democracy.

People of color and people of lower socioeconomic status vote significantly less than more affluent and white citizens.¹⁵⁵ As mentioned, a significant problem posed by the demographics of nonvoters is that their policy preferences are not represented in the government.¹⁵⁶ While it is true that significant empirical research has shown there is substantial agreement on the majority of policy issues between voters and nonvoters, the two groups still differ significantly on economic issues and redistributive policies.¹⁵⁷ As such, there are significant minority and disadvantaged groups who are now governed by laws with which they may disagree while also lacking a voice to change said laws.¹⁵⁸

In this situation, there are both ethical and practical arguments for expanding turnout. First, in a nation governed by popular sovereignty, it is unethical to govern absent voices from sizable communities within that society. Second, when entire groups of citizens both lack meaningful political voices and are disgruntled with laws passed, there is an increased risk of civil unrest, meaning it is incumbent upon Congress to address our turnout issue to reduce this risk. The third reason that necessitates congressional action to address this problem is the need to right past wrongs uniformly. As Part I demonstrates, enfranchisement for minorities and the

153. *Id.*; Cunningham, *supra* note 4; Marisam, *supra* note 10; McDonald, *supra* note 10.

154. See Hill, *supra* note 13 (“Because there are strong correlations between turnout and socioeconomic status, turnout levels provide an indirect indicator of political equality. . . . The United States exhibits an unusually strong relationship between socioeconomic status and voter turnout.”).

155. Hill, *supra* note 13; Cunningham, *supra* note 4; Marisam, *supra* note 10; McDonald, *supra* note 10.

156. See Marisam, *supra* note 10, at 193; Leighley & Nagler, *supra* note 13; *but see* Highton & Wolfinger, *supra* note 12.

157. Leighley & Nagler, *supra* note 13. Highton and Wolfinger found that economic policy was the one difference between voters and non-voters; however, their study minimized those differences. Highton & Wolfinger, *supra* note 12.

158. See generally *id.*; Cunningham, *supra* note 4; Marisam, *supra* note 10; McDonald, *supra* note 10; U.S. CENSUS BUREAU, *supra* note 7.

indigent has been an ongoing struggle since the nation's creation.¹⁵⁹ While many barriers, such as poll taxes and literacy tests, have been done away with, the effect of those barriers maintain their momentum by continuing to limit turnout among targeted communities.¹⁶⁰ For example, if not for the fallout of the Hayes-Tilden Compromise, there is a fair chance that voting norms would have been created within Black communities just as they have been within White communities.¹⁶¹ Based on those persistent failures to address turnout disparities, it is incumbent upon our government to actively work to expand practical enfranchisement for disadvantaged groups.

*B. Public Schools as Mandatory Registration Locations:
An Incubator for Lifelong Voting*

This Note proposes that Congress amend the NVRA to include public high schools, as defined by state legislature, to be recategorized as mandatory voter registration locations as opposed to their current designation as a discretionary registration offices.¹⁶² The change in designation would grant registration access to every eighteen year old attending public high schools. While the NVRA has so far been ineffective at increasing turnout, this proposal should be successful for three reasons.¹⁶³ First, while lowering costs of voting generally may not be effective at increasing turnout, lowering the costs for where and for whom they are greatest will boost turnout among groups with the lowest turnout.¹⁶⁴ Second, the young adults who can take advantage of the lowered costs and vote once are demonstrably more likely to continue to vote through their life, thereby increasing turnout across the board.¹⁶⁵ Lastly, the NVRA has consistently

159. See *supra* Part I.A–B; Seven, *supra* note 20.

160. See Marisam, *supra* note 10, at 194. “However, even after the state has removed improper or onerous barriers to voting, situational forces remain that depress turnout. These negative forces are particularly acute among socio-economically disadvantaged groups.” *Id.*; see generally Cunningham, *supra* note 4, at 377–85 (discussing barriers to voting for Black and poor white citizens); Christopher, *supra* note 73 (explaining the difficulties of enforcing court ordered remedies before 1965); see, e.g., VRA, Pub. L. 89-110, 79 Stat. 437; NVRA, 52 U.S.C.A. §§ 20501-20511 (1993) (West).

161. *Compromise of 1877*, *supra* note 40. For a detailed history and discussion of the Hayes-Tilden Contest, see Lewis, *supra* note 40.

162. See § 20506(a)(3); see generally §§ 20501-20511; DEP’T OF EDUC., STATE REGULATION OF PRIVATE SCHOOLS (2009).

163. See McDonald, *supra* note 10; Rogers, *supra* note 114.

164. See Plutzer, *supra* note 19, at 42–43; see generally Marisam, *supra* note 10, at 190.

165. See Plutzer, *supra* note 19, at 42–43.

been upheld by courts against a variety of legal challenges, meaning that while the amendment may not immediately induce higher turnout it will at least have solid precedents to rely upon if challenged.¹⁶⁶

Requiring public schools to function as mandatory voter registration locations would increase turnout because it lowers the burdens of voting for the populations which generally have the highest costs associated with voting,¹⁶⁷ which Plutzer argues is one of the leading causes for low youth turnout.¹⁶⁸ Additionally, a 1993 Senate Committee report found that, “[t]he most common excuse given by individuals for not voting is that they are not registered.”¹⁶⁹ While Marisam argues that the costs are already reduced to the point that further broad reductions would result in little to no tangible benefit, a targeted approach focusing on those who face the highest costs would likely result in increased turnout overall and specifically turnout of disadvantaged Americans.¹⁷⁰ Given the 1965 VRA’s remarkable success at increasing Black turnout, it stands to reason that further highly targeted cost reduction reforms would increase voter turnout.¹⁷¹ Furthermore, the already-high costs for citizens in their first year of eligibility are exacerbated even further when they are members of minority groups or from less affluent families.¹⁷² The reasons for which nonvoters eventually become voters is largely resource-driven, so if the state can make the cost of registering for the first time very low, then the impact of resource scarcity can be reduced.¹⁷³ So while the designation change for public schools would increase turnout generally, the largest increase would be for first-time-eligible Black and less affluent citizens.

In addition to targeting those who are least likely to vote, this proposal would also turn citizens who likely never would have voted into lifelong voters. Utilizing the habitual voter model, if these young citizens start early,

166. See Kemper, *supra* note 102, at 14–21; see *supra* note 105.

167. See Plutzer, *supra* note 19.

168. *Id.* at 42.

169. S. REP. NO. 103-6, at 2 (1993).

170. See Marisam, *supra* note 10, at 190.

171. See Cunningham, *supra* note 4, at 388. “Prior to 1965, African-American voter registration rates hovered at a low 29% By 1981, in many states covered by section 5 of the [VRA] over 50% of eligible African-Americans were registered to vote.” *Id.*; see generally Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.

172. See generally Plutzer, *supra* note 19, at 42. “[Young citizens have] a latent probability of voting resulting from parental, demographic, and personal factors.” *Id.*

173. *Id.* at 43.

there is a strong probability that they will continue to vote throughout their life.¹⁷⁴ Plutzer's study found that while nonvoting is also habitual, habitual voting is a habit far more likely to stay intact.¹⁷⁵ As such, the effect of this reform will continue to build, injecting more and more voting citizens into the electorate. The building effect would increase turnout overall while also evening out the voter demographics, thereby lending legitimacy to our democracy through political equality.¹⁷⁶ Therefore, when this proposal is viewed through the lens of the habitual voter model, it has both short term and long-term benefits which would help the overall health of the U.S.'s democracy.

C. Constitutional Challenges

For an election reform to be effective, it needs to be able to pass constitutional muster when it is inevitably challenged. Courts have consistently reaffirmed the constitutionality of the NVRA, which makes working within its statutory scheme attractive.¹⁷⁷ State or local governments that bring suit against the proposed hypothetical amendment would bring their claims on the same grounds as when the NRVA was initially challenged, namely, either under the Elections Clause or the Tenth Amendment.¹⁷⁸ A court confronting an Election Clause challenge would likely adopt *Ridge*'s reasoning in applying *Smiley* to dispatch the challenge, holding that alterations to the processes of voter registration merely alter the manner and means of elections rather than the qualifications of voters.¹⁷⁹ *Ridge* should be directly on point for any claims against the proposed amendment because it only affects registration procedures and therefore falls within the purview of Congress under the Elections Clause.¹⁸⁰

However, a challenge on Tenth Amendment grounds would be more likely to succeed. While the court adjudicating *Condon* dispatched a Tenth Amendment challenge to the NVRA, which had argued that the manner and

174. See Plutzer, *supra* note 19, at 42.

175. *Id.* ("The stability of habitual nonvoting is one that most citizens 'outgrow' and is, therefore, weaker.").

176. See Hill, *supra* note 13, at 209.

177. See *supra* note 105.

178. See generally *id.*; U.S. CONST. amend. X; U.S. CONST. art. 1, § 4, cl. 1.

179. *Ridge*, 1995 WL 136913 at *6; *Smiley*, 285 U.S. at 366.

180. *Ridge*, 1995 WL 136913 at *6.

means of running federal elections is a power expressly granted to Congress, and therefore not reserved, *Ridge* left open the possibility that the costs of implementing the NVRA could rise to the level of an unconstitutional, unfunded mandate.¹⁸¹ The cost of this proposal is hard to predict, and a full investigation is outside the scope of this Note; however, public schools are severely underfunded, and this proposal would in all likelihood impose a significant monetary burden upon state education budgets. *Ridge* mentions no precedent in support of the “unfunded mandate” issue, so while the contours of said mandates remain undefined, it is worth noting some risk associated with burdening public school budgets.¹⁸² Notwithstanding a novel “unfunded mandate” ruling, *Ridge* and *Condon* provide strong opinions rejecting reserved power challenges to Congressional action dictating voter registration processes, and these decisions give the proposal firm footing in the face of Tenth Amendment challenges.¹⁸³

D. Problems with Current Approaches

Taking the proposed NVRA amendment into account, the proposals explained in Part II are either insufficient or undesirable as a means of increasing turnout generally and turnout of marginalized groups specifically.¹⁸⁴ A cooperative voter model may be an effective practical framework at increasing the inertia of habitual voting; however, it is unlikely on its own to meaningfully increase turnout.¹⁸⁵ Compulsory voting, an alternative, violates the Fifteenth Amendment, and even if compulsory voting is constitutional, it would disproportionately harm those of lower socioeconomic status.¹⁸⁶ Third, automatic voter registration would fail to get nonvoters sufficiently invested in the political process to become active participants.¹⁸⁷

181. *Condon*, 913 F. Supp. at 961; *Ridge*, 1995 WL 136913 at *6 (“We note in passing that recent ‘unfunded mandate’ legislation, in any event, has a much higher monetary threshold than what the state alleges it will have to bear . . .”).

182. *Id.*

183. *Id.*; *Condon*, 913 F. Supp. 946.

184. See Kemper, *supra* note 102, at 21–25.

185. See generally Marisam, *supra* note 10; Plutzer, *supra* note 19, at 43.

186. See Matsler, *supra* note 123, at 972–73. Matsler likens compulsory voting to the First Amendment which protects against compelled speech. *Id.*

187. See generally *Federal Voter Registration*, *supra* note 135.

Marisam's cooperative approach allows for community specific initiatives and voter drives to increase voter turnout; however, it suffers from three prominent defects.¹⁸⁸ First, communities differ wildly, and in communities with lower political participation, finding volunteers to even run the voter drives, as Marisam suggests, might be challenging.¹⁸⁹ Second, even if all communities had sufficient volunteers to run the voter drive, these volunteers may be uninterested in helping those likely to support candidates or parties that they disagree with; furthermore, assuming these volunteers can aside their biases, a potential partisan perception could still persist, which would damage the program's legitimacy and ultimate effect of the voter drive.¹⁹⁰ Marisam's own article notes the famed "dictator" studies which consistently found that Democrat supporters are unlikely to gift lottery tickets to random Republican supporters and vice versa, so it may be unrealistic to expect party members who volunteer in these voter drives to act against their own electoral interests in an altruistic manner.¹⁹¹ Third, assuming that there is no shortage of altruistic, nonpartisan volunteers, the cooperative model will still struggle to get new voters to turnout because it does nothing to lower the costs of first time voters, which has been identified as a leading reason nonvoters do not turnout.¹⁹² As such, despite the admirable goal of an altruistic community driven "get out the vote" machine, Marisam's cooperative model fails under scrutiny.

Similar to the cooperative model, compulsory voting also fails to pass muster, albeit for different reasons. Unlike the cooperative model, compulsory voting does have a strong international track record.¹⁹³ However, compulsory voting would likely be unconstitutional, since Matsler aptly recognizes that First Amendment jurisprudence prevents compelled speech,¹⁹⁴ and that same reasoning could be easily applied to the Fifteenth Amendment, which enshrines voting as a similar fundamental right.¹⁹⁵ Simply put, the right to vote includes the right to *not* vote. Matsler

188. Marisam, *supra* note 10, at 225–30.

189. *See generally id.* at 227 (“[C]ommunities could rely on volunteers to perform nonpartisan door-to-door canvassing and phone banks, instead of paying for this work.”).

190. *See id.* at 229; Levine, *supra* note 122.

191. Marisam, *supra* note 10, at 212–13.

192. *See* Plutzer, *supra* note 19, at 42–43; S. REP. NO. 103-6, at 2 (1993).

193. *See* Matsler, *supra* note 123, at 963–67; *see generally* BIRCH, *supra* note 125; *see, e.g.*, Rychter, *supra* note 126.

194. Matsler, *supra* note 123, at 969.

195. U.S. CONST. amend. XV.

tries to salvage his proposal with the inclusion of a “none of the above” option at the ballot box, yet that still requires individuals to exercise their right to vote or not to vote.¹⁹⁶ Even if we assume that this proposal is within the realm of constitutionality, compulsory voting is bad policy. If the related criminal penalties are enforced, then poor Americans will be disproportionately burdened by the new laws; which is precisely the demographics that this Note’s proposal is aimed at helping. If the criminal penalties are not enforced, then the policy would be unlikely to sufficiently boost turnout.¹⁹⁷ As such, compulsory voting is an ineffectual policy at best, and at worst is another state-sponsored burden on disadvantaged populations.

Similar to compulsory voting, AVR suffers from a constitutional defect. Courts have previously rejected Tenth Amendment challenges to the NVRA specifically because they did not affect the qualifications of a voter in a state; however, a federally-enacted AVR program would require the federal government to determine the qualifications of voters.¹⁹⁸ As such, courts would likely strike down AVR as a Tenth Amendment violation. However, it may well be a very effective state policy. With New York and Oregon having implemented versions of AVR, we should pay attention to the effects it has on turnout in those states, and if it proves effective, then more states should consider enacting AVR, which would avoid constitutionality concerns and eliminate their requirements under the NVRA.¹⁹⁹

E. Shortcomings and Limitations of Schools as Mandatory Registration Locations

Similar to other proposals, requiring schools to function as mandatory registration locations has its own limitations and drawbacks. First, lack of enforcement has been cited as a reason why the NVRA has yet to meaningfully increase voter turnout.²⁰⁰ Considering public education

196. Matsler, *supra* note 123, at 955.

197. See generally BIRCH, *supra* note 125, at 5. Birch notes that penalties for nonvoters are not always enforced. *Id.*

198. Smiley v. Holm, 285 U.S. 355, 366 (1932); Ass’n of Cmty Org’s for Reform Now v. Miller, 912 F. Supp. 976 (W.D. Mich. 1995).

199. See, e.g., New York Automatic Voter Registration Act of 2020 (S. 8806/ A.8280C); OR. REV. STAT. § 247.017 (2015); NVRA, 52 U.S.C.A. § 20503(b) (West).

200. Rogers, *supra* note 114, at 90–93.

budgetary concerns, this Note's proposal could face significant compliance issues if the enforcement regime is not strengthened. Second, while the proposal lowers the economic costs of young adults registering to vote, the political literacy of young adults remains an issue, and this is a leading indicator of voter behavior.²⁰¹ As such, coupling a civic education program would have the beneficial effect of creating more informed voters.²⁰² Third, this proposal alone does nothing to boost turnout among Americans who are already out of the public education system, limiting its immediate effect on turnout.

Enforcement of compliance has floundered under the NVRA.²⁰³ Particularly, the mandatory agencies under the NVRA other than DMV's have failed to comply in numerous states, and despite their failures the Department of Justice has not sought enforcement in most cases.²⁰⁴ The lack of enforcement led to a 79% drop in newly registered voters between 1996 and 2005.²⁰⁵ Lack of compliance would torpedo any positive effects that this proposal would have on turnout. Fortunately, the NVRA's statutory scheme is comprehensive and provides for judicial enforcement mechanisms, so rather than requiring additional amendments, compliance with the totality of the proposed new NVRA would only require a renewed commitment to enforcement.²⁰⁶ Therefore, while potential noncompliance is a serious problem, it is not a reason to reject public schools as mandatory registration locations.

Secondly, economic cost is just one important factor in voting. The proposed amendment lowers economic costs for those least likely to have the resources (or time) to get to a voter registration location; however, there are still non-tangible costs of voting.²⁰⁷ Voting is an intellectual endeavor in which one must invest time and effort in order to effectively cast one's

201. Theresa O'Toole et al., *Political Literacy Cuts Both Ways: The Politics of Non-participation among Young People*, 74 POL. Q. 349 (2003).

202. Plutzer, *supra* note 19, at 43; Stone, *supra* note 5, at 519. Stone identifies interest in an election as a turnout factor and political literacy can easily be linked to whether one is interested in a political event. *Id.*; Mark Winston, *Diversity: The Importance of Access to Information and Political Literacy* 25 J. INFORM. ETHICS 84, 87 (2016). See generally Carol A. Cassel & Celia C. Lo, *Theories of Political Literacy*, 19 POL. BEHAVIOR 317, 318–20 (1997).

203. Rogers, *supra* note 114.

204. *Id.* at 91–92; see generally § 20506(a)(2) (requiring certain offices to be mandatory voter locations); and § 20510 (creating mechanisms for enforcement).

205. Rogers, *supra* note 114, at 91.

206. § 20510.

207. Plutzer, *supra* note 19, at 42–43.

vote.²⁰⁸ As such, future proposals should focus on lowering these intellectual costs, perhaps through a federally-funded mandatory civics course. However, a comprehensive discussion of such a limitation is outside the scope of this Note.

The last limitation of this proposal is that in the immediate period, it does little to help Americans currently outside the public school system. Over time, through the habitual voter model, the proposal will boost turnout across ages and demographics; however, it cannot do so right away.²⁰⁹ Therefore, the 20% registration gap between the wealthiest Americans and the poorest Americans will likely remain for the first several years after implementation.²¹⁰ This is a fair criticism; however, the timeline for increasing turnout will probably be shorter than expected, because as more young voters disperse to various communities, they bring with them their voting habits which can contribute to community norms in that area.²¹¹

CONCLUSION

Turnout of the voting age population in U.S. elections is infamously low.²¹² In no small part, our low turnout stems from the tug of war between voter suppression and voter liberation throughout our history. One mechanism of successful voter suppression is citizen-initiated voter registration.²¹³ To correct this failure, this Note proposed that Congress recategorize public schools as mandatory registration locations rather than discretionary ones. It is a targeted approach that will lower the economic costs of registering to vote significantly for those currently facing the highest costs of voting. Furthermore, the habitual voter model theorizes that if these young nonvoters can be enticed into voting early on, they will vote consistently throughout the remainder of their adulthood. Working within the established NVRA framework provides the additional benefit of proven constitutionality. Therefore, Congress must revitalize American democracy

208. *Id.*; Marisam, *supra* note 10, at 194 (“For example . . . high rates of newspaper readership are all significantly and positively correlated with high turnout.”).

209. *See generally* Plutzer, *supra* note 19, at 42.

210. Rogers, *supra* note 114, at 92.

211. Marisam, *supra* note 10, at 194 (“Another key situational determinant of voting behavior is community voting norms.”).

212. *See* DeSliver, *supra* note 1.

213. S. REP. NO. 103-6, at 2 (1993).

through amending the NVRA to require public schools to function as mandatory voter registration locations.