

Chapter Four: The *D* Term and the Duty to Vote

“Belief in a duty to vote is the opiate of democratic masses.”
–Loren Lomasky & Geoffrey Brennan (2000, 86)

“[A]n action from duty has its moral worth not *in the aim* that is supposed to be attained by it, but rather in the maxim in accordance with which it is resolved upon...”
–Immanuel Kant (2002 [1785], 15)

1) INTRODUCTION

It is by now clear that citizens participate in democratic elections for many different reasons, and that the context of elections, including the institutions that structure them, can have varying effects on individual motivations for turning out to vote. In discussing the instrumental benefits of voting, the possibility was raised of an ethical duty to participate for instrumental reasons associated with the outcome (Chapter 2, Section 3b); however, is there—or should there ever be—a duty to vote irrespective of any expected effect on the electoral outcome? Many citizens believe that voting is their civic duty, and they will insist on participating even when it seems instrumentally useless. Elections are in an important sense constitutive of democracy as “government by the people,” and thus citizens may desire or feel obliged to vote for reasons that having nothing to do with the electoral outcome. How should these reasons be viewed as a matter of normative theory and constitutional design? Should voting be encouraged through the design and implementation of institutions such as compulsory voting so that citizens will participate even absent perceptions of instrumental benefits, or might it perhaps be preferable to discourage participation for non-instrumental reasons? These are some of the questions that are addressed in this chapter.

The *D* term in the rational choice calculus of turnout—which represents the expressive or otherwise non-instrumental benefits of voting—originated as a solution to problem of pivotal voting theory and the so-called paradox of turnout, as discussed in Chapter 1 (Section 2). However, even if the alleged paradox of turnout were resolved so that the expected instrumental benefits of voting in a large—but competitive—election were not always statistically equivalent to zero, there would remain a need for an account of non-instrumental benefits in order to fully explain the motivations of turnout. For one thing, a theory of non-instrumental benefits is necessary to explain motivations for voting in clearly non-competitive elections. Furthermore, there may also be expectations of negative utility in the act voting—such as in the perceptions of alienated citizens who do not wish to participate in what they see as an illegitimate democratic process. This form of expressive disutility modeled in the *D* term must then be weighed against any perceived instrumental benefits.¹ Perhaps most importantly, the propensity to vote may be affected by various types of external pressures and incentives, both social and institutional, all of which can provide non-instrumental motivations for voting. Finally, there may be deeper reasons for voting that transcend the assessments of individual or social utility symbolized by the calculus, for if voting is viewed as a civic duty, citizens may come to see their participation as fulfilling a greater obligation in some sense.

This chapter will proceed as follows: Section 2 reviews some of the existing literature on the *D* term of the calculus and discusses both theoretical constructs and empirical evidence of non-instrumental motivations for voting. Section 3 begins to focus on the constitutional-level issue of whether voting should be structured as a voluntary

¹ See Chapter 2, Section 3b. Negative utility from the act of voting might also be framed as part of the *C* term, or the costs of voting, but *C* conventionally represents logistical or informational costs that must be paid before participating (as entry costs). This chapter will focus mostly on representing positive benefits in *D*.

choice or as a duty of citizenship, and it then reviews some administrative implementations of the duty to vote cross-nationally, as well as and some empirical studies analyzing the effects of these institutions. Section 4, which takes up the bulk of the chapter, elaborates the normative arguments concerning whether voting should be a civic duty or a voluntary decision. This section first outlines an argument for a constitutional duty to vote based on Rawlsian principles of justice. It then responds to some of the main arguments against the duty to vote, and it concludes by exploring possible limits on the duty, both in principle and in the practice of compulsory voting. Section 5 discusses implications for election law and policy that follow from this analysis of the duty to vote, with a focus on the U.S. Constitution and the administration of American elections, and briefly discusses the prospects for some form of compulsory voting in this country. Section 6 concludes with a general discussion of the overall argument of this chapter: namely, that recognition of a civic duty to vote supplies the missing normative foundation for broadly participatory theory and practice under modern conditions of liberal democracy.

2) MODELING THE *D* TERM

As indicated, the *D* term in the rational choice calculus of voting represents the value attached to any expressive or otherwise non-instrumental benefit of participation, including the perception of a civic duty to participate in elections. *D* has also been described as representing the consumption—as opposed to investment—benefits of voting (Ferejohn & Fiorina 1974, 526). The foundation for adding this term to the voting calculus lies in Anthony Downs' original solution to the apparent paradox of voter turnout, in which he suggests that notwithstanding the negligible possibility of being

pivotal, a rational citizen might nevertheless decide to vote after considering that democracy itself would be imperiled if no one participated (Downs 1957a, 266-271). Downs refers to this as the “long-run participation value” of voting (270). Of course, Downs’ solution that individuals will decide to vote in order to save democracy runs into the same collective action problem that he originally described, since individuals might still reason that their one vote is highly unlikely to be pivotal to saving democracy (Fiorina 1976, 392). In their formalization of the *D* term in the calculus, Riker and Ordeshook confront the paradox more directly by defining *D* in explicitly ethical, or social-psychological terms. They thus list several different types of “positive satisfactions” that a citizen might receive from the act of voting, even indicating that some of what are generally considered to be costs of voting might be perceived by some individuals as benefits (Riker & Ordeshook 1968, 28).

The *D*-term solution to the paradox was criticized early on for offering a tautological and non-predictive model of the voting decision (Barry 1970, 13; but see Riker and Ordeshook 1968, 26-27, n. 7). If the intrinsic or consumption benefits of participation are essentially responsible for all of the “action” in the calculus (Fiorina 1976, 393), the rational choice explanation of voting seems reduced to simply: citizens vote because they like voting (Aldrich 1993, 258). This raises some difficult theoretical problems having to do with the nature and definition of rationality and whether expressive motivations for voting properly belong in a rational choice model of turnout (see e.g. Goldfarb and Sigelman 2010). Nevertheless, surveys generally confirm that the individual sense of a civic duty to participate in elections irrespective of any effect on the outcome is a major factor in reported reasons for voting, even where participation is formally a completely voluntary decision (Blais 2000, 92-114; Blais et al. 2000, 190;

Bowler and Donovan 2013, 266; Smets and van Ham 2013, 352; Elliot 2017, 660).² Similarly, social pressure to participate, which represents another source of expressive or non-instrumental motivations, has also been found to exert a significant effect on the propensity to vote (Kenny 1992; Gerber et al. 2008; Funk 2010; Davenport et al. 2010). Therefore, to the extent that there may in fact be both instrumental and expressive motivations for voting, the *D* term is an important addition to the calculus, as it allows at least formal specification of these two components of the turnout decision (Fiorina 1976, 393). However, separating out these motivations in practice, or attempting to show that expressive motivations predominate, turns out to be a difficult problem.

Several empirical studies have looked for evidence of primarily expressive motivations in voting, but this literature appears inconclusive and troubled by methodological difficulties. Building on the assumption that expressive motivations are expected increasingly to dominate as the chance of being pivotal decreases, some experimental studies confirm that varying the probability of being pivotal leads to changes in preferences that seem to reflect the dominance of expressive motivations (Carter and Guerette 1992, Fischer 1996, Feddersen et al. 2009). But these are relatively small-scale laboratory experiments that may have external validity problems when

² In 2010, the American National Election Studies (ANES) began directly asking whether respondents believed voting to be a duty or a choice, with just over 50 percent of respondents saying it was a duty, and over 35 percent of those reporting a strong sense of duty (Achen 2012, 1). Results were similar when the question was asked in the 2012 presidential-year study, with just under 50 percent reporting that voting is a duty (ANES 2015a, 358). Several previous versions of the ANES between 1952-1992 asked for agreement or disagreement with the statement, “one shouldn’t vote if one doesn’t care about the outcome,” which garnered on average about 50% disagreement (ANES 2015b). Comparatively, the United States appears to fall on the low end of a reported duty to vote, with about 75% of British respondents agreeing that voting in parliamentary elections is a civic duty (Bowler and Donovan 2013, 269), and upwards of 80% of respondents holding this view in Canadian surveys (Blais 2000, 95). Elliot cites 25 years of survey evidence (from Pew Research Center) consistently showing that about 90 percent of Americans either completely or mostly agree with the statement, “I have a duty to always vote,” but he also notes polls showing much less agreement with the duty to vote when respondents are given a choice between categorizing voting as a duty or a right (Elliot 2017, 660).

applied to large electorates under real political conditions, and moreover, other experimental studies have failed to confirm these findings (Tyran 2005, Morton and Tyran 2012). Additional studies have found at least implicit evidence of expressive motivations in survey data (Guttman et al. 1994, Copeland and Laband 2002, Jones and Dawson 2007, Bäck et al. 2011). However, it is theoretically difficult to distinguish instrumental from expressive motivations with certainty based on these data, since almost any apparently expressive behavior or opinion could potentially be explained in subjectively instrumental terms (Toka 2009, 277; see also Fischer 1996, 172).³

Similarly, some of the apparent evidence for instrumental motivations, such as the well-documented relationship between turnout and the expected closeness of an election (see Blais 2000, 60; Blais 2006, 119), or observations of strategic voting in favor of a less-preferred candidate (Cox 1997), could also be explained in non-instrumental terms (see Aldrich 1993, 266-269; Toka 2009, 277).⁴ Motivations may also be characterized as instrumental without relating directly to the outcome of the election at hand; for example, one might vote to contribute to the political “mandate” of one’s preferred candidate or party (Guerrero 2010; Mackie 2014).⁵ There is also a related conceptual problem in distinguishing between motivations for turnout, conventionally assumed to be expressive, and motivations for vote choice, which have generally been assumed to be instrumental, although some argue this latter assumption is unwarranted (Schuessler 2000, 89; Toka

³ For example, Guttman et al. (1994) argue that abstention due to alienation (as opposed to indifference) is evidence of expressive motivation, but as discussed in Chapter 2 (Section 3b), abstention due to alienation can also be modeled in terms of instrumental utility when it leads to functional indifference.

⁴ Aldrich suggests that turnout effects for close elections and strategic voting can both be explained by the influence of campaign mobilization, while Toka suggests they can be explained by individuals seeking a “thrill” of voting in a close election, or escaping an “uncomfortable feeling” of not voting strategically (see also Guttman et al. 1994, 204).

⁵ This motivation should formally be part of the *D* term, since any expected utility from adding to a mandate is independent of the given electoral outcome. Note that such explanations presumably remain subject to the alleged paradox of turnout, as individuals could reason that their one vote would make no appreciable difference in the value of any political mandate.

2009, 273). Morris Fiorina (1976, 395) in fact adds an additional term to the calculus to denote the expressive value of voting in line with one's party identification, and Aldrich (1997, 385) goes on to suggest that the value of this expressive utility is simply equal to the instrumental net benefit, or the value of B in the calculus.⁶ Gábor Tóka (2009, 273) likewise disputes what he cites as the rational choice orthodoxy that vote choice is primarily instrumentally motivated, suggesting that expressive motives may dominate vote choice as much as the turnout decision. Tóka assumes *a priori* that turnout decisions must be purely expressive (due to a miniscule p value), and he therefore uses observations on turnout as a benchmark to measure motivations of vote choice (277). However, if p is interpreted as significantly higher (at least in relatively close elections), and thus turnout decisions might be instrumentally motivated (at least to some extent), it becomes more difficult to distinguish between instrumental and expressive motivations. Nevertheless, it seems clear that there may certainly be expressive components to the turnout decision, and in some cases (as in non-competitive elections), it may well be that expressive motivations come to predominate.

This idea that the motivation for voting may be primarily characterized by non-instrumental benefits has been seen to raise a difficult normative problem that goes beyond the question of whether a D -term solution of the turnout paradox is theoretically satisfying. In critiquing a dominantly expressive motivation for turning out to vote, Brennan and Buchanan (1984) were perhaps the first to introduce the analogy of voting to watching a sports competition. Despite knowing that one's vote can exert no meaningful effect whatsoever on the outcome, Brennan and Buchanan claim that citizens vote for their preferred candidates in much the same way that sports fans cheer for their favorite

⁶ The calculus thus effectively becomes: $pB-C+D+B$. Formally, this added expressive benefit is perhaps better modeled as part of the D term, but the salient point is that vote choice, which would seem to follow an instrumental motivation (represented by B), can also be an expressive factor in the turnout decision.

teams (186). However, they argue that the absence of any direct concern for an instrumental effect on the outcome opens the way for “electoral irrationality of the most basic kind” (199). Brennan and Lomasky (1985, 204) expand on this normative problem, suggesting that expressive voting could lead citizens to vote for “morally unsavory” policies that they would not choose if they thought their vote might really matter. Brennan and Hamlin (1998, 166) further point out that expressive motivations provide more room for candidates’ “rhetorical or presentational skills” to influence vote choices, prompting the question of whether outcomes motivated by expressive considerations will ever “serve the interests of the citizens.” Jones and Dawson (2007, 108) more generally suggest that when voting is based on non-instrumental considerations, “appraisal of democratic processes proves far more difficult.”

These arguments again rely on the assumption that turnout can never be instrumentally motivated, due to the alleged paradox of turnout, and they also seem related to arguments that high information costs make well-reasoned voting extremely difficult, with the result that irrational preferences are likely to prevail in vote choices (e.g. Somin 1998, Caplan 2007). As discussed in previous chapters, both these assumptions may be unwarranted, but even without making them, there indeed does seem to be a need for a better-developed normative framework for understanding and evaluating non-instrumental motivations for turning out to vote. Keith Dowding has thus criticized the expressive *D*-term solution to the turnout paradox for failing to satisfy the “desire for deeper reasons” about why citizens vote or abstain (Dowding 2005, 453). However, other scholars studying turnout motivations have in fact offered explanations that provide deeper reasons for non-instrumental voting. Alexander Schuessler outlines the normative foundations for such reasons in his insightful theory of expressive motivations, which he associates with a phenomenology of “being” rather than “doing”

(Schuessler 2000, 90). Schuessler thus ties expressive voting to the construction of identity through the association of individuals within larger social groups (92). In contrast to Brennan and Buchanan's critical view bemoaning the irrationality of expressively-based decisions, Schuessler actually defends the prevalence of ambiguity and abstract symbolism in democratic discourse, indicating that such "multiplicity of meaning" is necessary to the development of shared cultural understanding (94).

Schuessler's insight into the social construction of identity through voting decisions may provide the foundations for another set of *D*-term solutions to the turnout paradox, which frame the decision to vote as consistent with a concept of "group rationality." Carole Uhlaner (1989) was among the first to formalize this approach in a decision-theoretic context, pointing out that even if one assumes that individual votes are never instrumentally effective, an increase in turnout among members of a sizable group could indeed have a pivotal effect on the outcome of a large election. Voting could thus be instrumentally rational from the perspective of group leaders, who might therefore provide group members with selective incentives in the form of expressive or consumption benefits in order to motivate their participation (Uhlaner 1989, 392). Rebecca Morton further elaborates on the group rationality approach, clarifying how this represents a *D*-term solution to the paradox, since the incentives provided by group leaders to motivate turnout are not directly dependent on the outcome of the election (Morton 1991, 761). In a game-theoretic context, Schram and van Winden explain how group members may be induced to vote by "producers of social pressure," in a model they describe as endogenizing the sense of civic duty represented by the *D* term (Schram and van Winden 1991, 596). Shachar and Nalebuff likewise detail a "pivotal leader" strategic model of turnout, which has group members responding to social pressure

without directly considering whether their individual votes will have any effect on the outcome (Shachar and Nalebuff 1999, 535).⁷

Digging deeper beyond these act-utilitarian approaches that rely on selective incentives and social pressure begins to unearth the broader importance of ethical motivations within the rational choice calculus. John Harsanyi explicitly makes this connection between ethics and rational choice when he declares that “moral behavior...is a special form of rational behavior” (Harsanyi 1977, 625; see also Harsanyi 1986, 83).⁸ Harsanyi provides the formal foundations for a strategic/ethical model of voter turnout in an important paper on rule utilitarianism, in which he indicates that the voting paradox can be resolved by a “*rational commitment* to a comprehensive joint strategy” (Harsanyi 1980, 129, emphasis in original). Harsanyi thus explains how it can be perfectly rational to ask the Kantian-type question, “What would happen if people like me did not vote?” (130). Feddersen and Sandroni (2006a) derive a formal model of turnout based on Harsanyi’s rule utilitarian approach, with ethical agents receiving utility for taking the normatively “right” action, determined according to an optimizing rule of voting cost cut-offs based on the expected closeness of the election. Feddersen and Sandroni also elaborate the theory behind their rule utilitarian model, emphasizing the need for consistent preferences among group members and strong group identity in order to motivate optimal levels of turnout (Feddersen and Sandroni 2006b, 8). Coate and Conlin (2004) apply this model to empirical turnout data, finding that the rule utilitarian

⁷ Dowding (2005, 445) classifies social pressure to vote as a type of *C*-term solution, in that it increases the costs of *not* voting. This is formally no different from a *D*-term classification, but conceptually, social pressure is perhaps better framed positively as a benefit, rather than negatively as a cost.

⁸ Riker and Ordeshook may be alluding to a similar notion when they state: “[T]he paradox of participation is solved by the construction of an ideology of obligation” (Riker and Ordeshook 1973, 60). Even Downs, at least in his later work, appears to lend support to an ethical approach in his discussion of the two basic social values of democracy, one of which is the “duty of mutual cooperation with others” (Downs 1991, 156).

approach provides more explanatory power than a basic model of expressive voting. Justin Valasek (2012) further extends this strategic model to provide a welfare analysis of different electoral rules aimed at increasing turnout. Overall, these ethical approaches to the voting paradox provide a much richer perspective on the *D* term than that suggested by the initial critics of expressive motivation in their comparison of voting to simply cheering on a sports team.

Yet some go even further to argue that the sense of obligation represented by *D* is not even coherently represented by the conventional calculus, at least among those citizens who acknowledge a strongly felt sense of a civic duty to vote. Blais and Achen accordingly suggest that the duty to vote is not properly viewed as satisfying a consumption or expressive benefit that must be weighed against other factors, such as instrumental benefits and costs, because for a “morally motivated voter... there is no real choice if she wants to do what is right” (Blais and Achen 2010, 5). They thus model the turnout decision through what they term a lexicographic model, in which the costs and instrumental benefits of voting are considered only after giving prior consideration to ethically-based motivations associated with a sense of duty (6).⁹ One might indeed go even further and insist that a deep sense of duty transcends any utilitarian calculus. Along these lines, Yanis Varoufakis (1991) explains the distinction between the approaches of

⁹ Blais and Achen’s lexicographic model is similar in some ways to Ruth Chang’s “hierarchical voluntarism” discussed in Chapter 2 (Section 3c). There might appear to be some conflict between the two approaches, as Chang’s theory was said to imply that instrumental benefits—as *given* reasons—should take precedence over non-instrumental, *voluntaristic* motivations, while in Blais and Achen’s model non-instrumental motivations are considered first. Notably, Blais and Achen’s model is not normative but purely empirical, and they make no arguments about its moral correctness (Blais and Achen 2010, 5, n. 9). Note also that Blais and Achen define instrumental benefits (which they measure through reported strength of preference for a certain outcome) as “non-ethical,” but the application of Chang’s theory in the previous chapter suggests that instrumental benefits can in fact have important ethical implications. Nevertheless, Blais and Achen are presumably right that a strong sense of a “higher” duty (whether to vote or to abstain) could be an ethical motivation that comes closer to what Chang would describe as a given reason, rather than a voluntaristic (or expressive) motivation.

David Hume and Immanuel Kant to the understanding of duty as a normative motivation: The Humean approach sees duty as just another internal motivation that—like all preferences—can be reduced to an assessment of expected utility, while the Kantian approach sees duty as an external reason that exists separate from and above any utilitarian expectations, a motivation that may reach beyond conventional notions of rationality. The Humean thus sees norms as “relevant only to the extent that individuals derive utility from respecting them” (Varoufakis 1991, 253), whereas under a Kantian approach, “duty bears a weight which must be qualitatively different to that of selfish interest” (254).

Given the enormity of the potential motivations for the decision to vote represented by *D*, this aspect of the calculus emerges as the potential source of a powerful policy lever in efforts to increase electoral participation. It is thus natural to wonder whether anything can be done to increase the sense of a civic duty to vote, or otherwise to introduce non-instrumental incentives for participation. This leads to legal and policy questions of whether a civic duty of voting should be institutionalized via election laws and administrative procedures. In broadest terms, the question is one of fundamental constitutional design: Should participation in mass democratic elections be framed as a purely voluntary act, or as a civic obligation? (Levinson 2012, 116-117; see also Birch 2009, 14).

3) THE CONSTITUTIONAL DUTY TO VOTE AND COMPULSORY VOTING

The question of whether voting in elections should be conceived simply as a formal right of the democratic citizenry, or whether it should be seen as a civic duty as well, is an important question of constitutional design with significant implications for

election law and policy, as will be discussed further below. Moreover, this is an issue that is—or arguably should be—of great importance in political theory and ethics, not to mention being a matter of practical political concern. There is essentially universal agreement in established democracies that electoral participation should be an enforceable civil right as a matter of both theory and practice,¹⁰ but there is far less consensus on whether the decision to vote should be left as a purely voluntary matter, or whether participation should be formally considered—and perhaps also implemented and enforced—as a general obligation of all (or almost all) democratic citizens. In political theory, the question of a duty to vote has generally received fairly limited attention, although it does seem to be generating increased scholarly discussion and debate over recent years. Participatory democratic theorists (e.g. Pateman 1970) and those in the civic republican and communitarian traditions (e.g. Barber 1984; Bellah 1995), as well as more recent deliberative theorists (Fishkin 2009), have all tended to focus on forms of participation and civic engagement that are more intensive than voting, which may be understandable given their critical view of representative democratic forms in general. More traditionally liberal democratic theorists, on the other hand, have commonly assumed that compulsory voting laws violate liberal norms of non-coercion and self-expression, often claiming that the right to vote implies a concomitant right to abstain from voting as well (e.g. Abraham 1955, 6-7).

Although the notion of a duty to participate in elections may initially seem foreign to American political development, the pre-independence colonies of Virginia, Maryland, and Delaware, as well as the state of Georgia in its first constitution in 1777, all had

¹⁰ There are of course many disputes and differences of opinion, however, regarding the particulars of how voting rights should be protected and enforced.

compulsory voting laws with fines for non-voting (see Birch 2009, 20).¹¹ Although the practice appears mostly absent during the early history of the United States, proposals to make voting mandatory had a resurgence in the late nineteenth and early twentieth centuries, with constitutional amendments on this matter passed in North Dakota (1897), Massachusetts (1918), and Oregon (1919), although the Oregon amendment was rejected at a subsequent referendum, and the other amendments were never implemented or enforced (see Abraham 1952, 346-347; Birch 2009, 20-21;).¹² Compulsory voting was also enforced for a short time beginning in 1889 in the municipality of Kansas City until it was declared unconstitutional under the Missouri state constitution (see Abraham 1952, 347).¹³ Thus, the American tradition of electoral participation as a voluntary choice and not a civic duty, which might seem like a deeply entrenched part of American political culture (see e.g. Hasen 1996, 2174), was clearly not a matter that has been always taken for granted.

Comparatively, the constitutional duty to vote and compulsory voting practices have been more common. In Europe, virtually everywhere other than Great Britain and the Scandinavian states has had some experience with compulsory voting during the twentieth century (Birch 2009, 23-24; Malkopouplou 2015, 5-6).¹⁴ The civic obligation of

¹¹ The Plymouth Colony itself instituted a fine for non-participation in 1636, as did several towns in Massachusetts in following years. As Birch indicates, the American colonies may in fact have originated the very practice of compulsory voting in modern democratic elections (Birch 2009, 20). Abraham (1952, 346) also mentions the existence of compulsory voting in the pre-independence colony of North Carolina.

¹² According to Abraham, there were 57 compulsory voting bills introduced in nine different state legislatures between 1888 and 1952 (Abraham 1952, 346-7; see also Keyssar 2000, 128).

¹³ The Missouri Supreme Court in *Kansas City v. Whipple* 136 Mo. 475 (1896) held that a fine for failure to vote amounted to “partial and discriminatory taxation” and an “invasion of [the] sovereign right of suffrage” (484).

¹⁴ Compulsory voting laws are reportedly still enforced with some type of sanction in Belgium, Lichtenstein, Luxembourg, and the canton of Schaffhausen in Switzerland, while the constitutional duty to vote has remained formally unenforced in Greece since 2000, and in Italy since 1993 (IDEA 2016; see Constitution of Greece 1975 (amended to 2008), Article 51; Constitution of Italy 1947 (amended through 2012), Article 48 (constitutions available at ConstituteProject.org). Although Portugal is not generally listed among countries with compulsory voting, Article 49 of its current constitution provides that voting is

electoral participation is even more prevalent throughout South and Central America, where a duty to vote was included in almost all constitutions enacted beginning in the late 1900s through the mid-twentieth century (Birch 2009, 24-25). In fact, every Latin American nation existing today appears to have recognized a civic duty to vote at some point in its history, and only Chile, Cuba, Nicaragua, and Venezuela appear to lack any formal recognition of such a duty at the present time.¹⁵ The few countries in Asia and the Pacific that have recognized a duty to vote are generally not well-developed democracies;¹⁶ however, the foremost example of an established democracy with a compulsory voting regime is Australia, where legal enforcement of the duty to vote began in 1924 and continues to this day (Birch 2009, 32). A 2004 study of established democracies worldwide found that just over one-fourth had some form of compulsory voting laws (Massicotte et al. 2004, 35), although that figure today is probably at most

a civic duty (Constitution of Portugal 1976 (amended to 2005)). Other major European states that practiced compulsory voting in the twentieth century include the Netherlands (until 1967), other cantons in Switzerland (until 1974), Austria (gradually abolished between 1982-2004), and Spain (1907-1923) (IDEA 2016, Birch 2009, 22-23). In the near-European region, both Cyprus and Turkey are currently reported as practicing compulsory voting with some enforcement (IDEA 2016); but see Malkopoulou (2015, 4, 6) reporting an absence of current enforcement in these two countries.

¹⁵ Chile moved in 2012 from a system of compulsory voting with voluntary registration to voluntary voting with automatic registration (Barnes and Rangel 2014, 573). Nicaragua recognized a constitutional duty to vote until the 1979 Sandinista revolution, as did Cuba until the revolution of 1959 (Birch 2009, 24). Venezuela removed legal sanctions for abstention in 1993 and constitutionally abolished the duty to vote in 1999 (Carey and Horiuchi 2017, 7). Although neither Colombia nor El Salvador is listed as having compulsory voting by IDEA (2016) or Barnes and Rangel (2014, 575), Article 258 of Colombia's current constitution does state that voting is a civic duty (Constitution of Colombia 1991 (amended to 2013)), as does Article 73 of El Salvador's constitution (Constitution of El Salvador 1983 (amended to 2014)). Fornos et al. (2004, 936) include El Salvador as having a duty to vote, but not Colombia. The only countries in all of Central and South America that appear never to have formally recognized a duty to vote are Belize, Guyana, and Suriname—countries that are not generally identified as Latin American (but rather as Anglophone and Dutch).

¹⁶ The duty to vote is currently recognized in Singapore, Thailand, and Laos, as well as in the Pacific island of Nauru. In Fiji, compulsory voting was practiced between 1992 and 2004, and the duty to vote was formally abolished in 2014 (IDEA 2016; Birch 2009, 36). The few reported examples of compulsory voting in Africa include Egypt, where the duty to vote—although unenforced—apparently continues to this day, as well as Gabon, and what is now the Democratic Republic of Congo, both of which briefly instituted compulsory voting after their independence in the early 1960s (Birch 2009, 26; IDEA 2016).

about 20 percent.¹⁷ Thus, while construing electoral participation as a civic obligation as well as a civil right may be currently characterized as a minority practice among established democracies, it is by no means a radical or fringe view concerning the structure of the franchise, and it clearly has a strong historical provenance.

It is important to emphasize that the practice of what is usually called compulsory voting—or sometimes mandatory, or obligatory voting—is extremely varied empirically, reflecting a wide range of different approaches to implementation and enforcement of the duty to vote. The institution of compulsory voting should thus be broadly understood to encompass a spectrum of approaches, ranging from a constitutional exhortation accompanied by no attempt at legal enforcement, to a comprehensive administrative system for tracking all nonvoters and implementing sanctions for unexcused abstention (see IDEA 2016). In Australia, for example, both registration (or “enrollment”) and voting are mandated by law for all citizens aged 18 and over, with only limited exceptions for those deemed mentally incompetent, certain convicted criminals, and some citizens outside the mainland (AEC 2014). Following each election, the Australian Electoral Commission compiles a list of all apparent nonvoters and sends to each a notice that demands either an explanation of the individual’s excuse for failing to vote, or payment of 20 Australian Dollars.¹⁸ A representative of the Commission reviews the excuses provided by nonvoters to determine whether they constitute “valid and sufficient reasons” for failing to vote, and provides another opportunity to pay the fine for all those

¹⁷ The Massicotte et al. study, which includes all countries with a Freedom House score of 1 or 2 (on a scale of 1 to 7) in political rights for 1996, found compulsory voting in 18 out of 63 countries (Massicotte et al. 2004, 11); however, the study excludes the United States and Switzerland (for methodological reasons), so the figure is really 18 out of 65, or about 28 percent. Of the 85 countries with a Freedom House score of 1 or 2 in political rights for 2015, 15 countries (including Switzerland) currently appear to recognize a civic duty to vote in some form, or about 18 percent of the total (see Freedom House 2017; IDEA 2016). If countries with a score of 3 in political rights are also included, the proportion is about 19 percent.

¹⁸ \$20 AUD is equivalent to about \$16 USD at the time of this writing.

whose excuses fail to meet this legal threshold.¹⁹ A citizen who fails to pay the fine at this point may be prosecuted for an offense with a maximum penalty of \$180 AUD, plus court costs. Failure to pay the fine imposed after conviction may result in a short jail sentence, although such cases appear to be relatively rare (AEC 2014).²⁰

At the other extreme, to the extent that a country like Greece can still be included in lists of countries that practice compulsory voting today, it is simply by virtue of the constitutional provision indicating that voting is a civic duty, for since the year 2000 there has reportedly been no enforcement of that duty (IDEA 2016). In other places where a duty to vote is mentioned in the constitution there may be no formal administrative enforcement, but abstention can still be associated with informal sanctions, as appears to have been the case in Italy prior to 1993.²¹ Enforcement of compulsory voting can also occur by way of sanctions other than a monetary fine, including the possibility of bans on public employment or obtaining certain government services, as

¹⁹ The AEC does not define exactly what constitutes a “valid and sufficient” reason for abstaining, but rather states that the administrative decision should be based on “the merits of each individual case, in accordance with the law as previously interpreted by the courts” (AEC 2014). It then cites a statute indicating that a perceived religious duty to abstain is a valid and sufficient reason, and it lists several court decisions holding that sickness, accident, or emergency are generally good excuses, but that political objections to the government or lack of a preference regarding any of the candidates on the ballot are not considered valid and sufficient reasons for abstaining.

²⁰ In the 1993 national elections, for example, at least 43 nonvoters were reportedly sentenced to one or two days in jail (Bennett 2008, 7). Out of a total of 11,385,638 registered voters in those elections, the Electoral Commission investigated 490,230 cases of nonvoting, of which 462,588 appear to have provided a valid excuse, 23,230 paid the \$20 fine, and 4,412 reportedly went to court (Mackerras and McAllister 1999, 224). In the 2004 elections, there were 458,952 notices issued, with 52,796 fines of \$20 paid by nonvoters (a number indicated as significantly higher than previous years due to introduction of an online payment system), and final convictions entered in at least 22 cases (Bennett 2008, 27-28). It is unclear how many of the 22 convictions in 2004 resulted in jail sentences; the Electoral Commission indicates that court orders of community service or seizure of property are other options in cases of conviction (AEC 2014). Lisa Hill indicates that imposition of a jail sentence for non-payment of fines “no longer seems to happen” (Hill 2014, 115)

²¹ According to IDEA (2016), the sanctions for abstention in Italy were termed “innocuous,” and might have included the possibility of difficulty in finding daycare for a child. Prior to 1993, Italian law also required lists of nonvoters to be publicly posted in municipal buildings (Birch 2009, 8). Mexico is another country where reportedly there could be “arbitrary or social sanctions” associated with abstention (IDEA 2016).

appears to be the case in some Latin American countries, including Argentina, Bolivia, and Brazil (Birch 2009, 9). In Belgium, habitual shirkers of the duty to vote can actually be deprived of their associated civil right, as they may be removed from the electoral register for a period of ten years after failing to vote in four national elections (Birch 2009, 8). Furthermore, in addition to the various types of negative sanctions, some governments may provide positive incentives for fulfilling the duty to vote, such as in Colombia, where voters by law receive preference over any equally qualified abstainers for acceptance at universities, government employment, and other state benefit programs, in addition to discounts on university tuition and fees for various government services.²² Finally, beyond the wide variation in the content or existence of sanctions associated with the duty to vote, there may also be significant differences in the level of enforcement of any sanctions, either due to a deliberate decision in favor of lax enforcement—as reportedly is the case in Belgium—or due to deficiencies in administrative capacity, as appears to be the case in many Latin American countries (Birch 2009, 6).

This extensive variation in the institutions of compulsory voting makes it difficult to empirically evaluate any causal effects associated with establishing voting as a civic duty in addition to a civil right. Studies that analyze cross-national variation generally seek to differentiate between countries with strong, weak, or no enforcement of the duty to vote (e.g. Chong and Olivera 2008), and they may also account for differences in the severity of any applied sanctions (e.g. Panagopoulos 2008); however, this modeling approach may still fail to fully capture the wide range of institutional variation, and the

²² Colombian Law 403 of 1997, Article 2. Article 4 of the law allows for nonvoters to receive the same incentives if they demonstrate to authorities that their abstention was excusable due to *force majeure* or accident. Interestingly, the Constitutional Court of Colombia declared the provision of incentives to voters unconstitutional with respect to voting in constitutional referendums or any other elections having a minimum turnout requirement, reasoning that in such cases abstention could be viewed as instrumentally effective, and it must therefore be a legally protected right with no adverse consequences (Judgment C-041 of 2004).

data sources employed do not necessarily allow for a more fine-grained analysis.²³ Other studies look at changes or differences in compulsory voting rules within a country (e.g. Hirczy 1994; Bechtel et al. 2015; Carey and Houichi 2017), but these analyses may lack external validity when applied to other legal/administrative contexts. Moreover, beyond these methodological problems, the substantive results of these empirical analyses are somewhat mixed, and it is therefore difficult to draw general conclusions based on the literature as it stands to date.

The strongest finding—albeit one that is probably unsurprising—is that strict enforcement of compulsory voting, particularly when accompanied by relatively severe sanctions, tends to significantly increase voter turnout (Panagopoulos 2008; Birch 2009, 93-94; Singh 2011; Quintelier et al. 2011).²⁴ This finding is confirmed by analyzing the turnout effects of geographic and historical variation in compulsory voting rules within certain countries (Hirczy 1994), as well as by counterfactual analysis of the hypothesized effect of abolishing compulsory voting in Australia (Jackman 1999; Louth and Hill 2005). Sarah Birch in fact concludes that compulsory voting is the strongest institutional variable impacting turnout, with an effect that ranges anywhere between six and twenty percentage points (Birch 2009, 91).²⁵ However, there are of course many other factors that contribute to determining turnout levels, including socioeconomic, political, and

²³ Most of the cross-national analyses rely on data provided by IDEA (2016), which provides only general information on compulsory voting in countries around the world and does not provide detailed sources for its data collection.

²⁴ Norris (2004, 169) finds that compulsory voting increases turnout in established democracies, but that it might actually be associated with decreased turnout in other political systems; however, several other studies have found that compulsory voting increases turnout generally in all countries (Jackman 1987, 415; Blais 2000, 27; Fornos et al. 2004, 927; Geys 2006a, 652; Karp and Banducci 2008, 329; but see Yeret 1995). Quintelier et al. (2011) find that compulsory voting is less effective at increasing turnout among younger citizens. Jaitman (2013) finds that the increase in turnout under compulsory voting in Argentina is twice as great among unskilled as opposed to skilled workers.

²⁵ Birch also finds, however, that a constitutional duty to vote without any accompanying administrative sanctions has no measurable effect on turnout (Birch 2009, 94).

other institutional variables (see e.g. Geys 2006a), and it is clear that countries can have high turnout in national elections without compulsory voting, as is the case in Malta and (to a lesser extent) the Scandinavian countries (see Hirczy 1994; 1995). In addition, social norms of voting may exist separate from any legal standards (see Hasen 1996), and general factors such as the political salience of elections may also be important in determining turnout levels (Franklin 1999).

Findings are somewhat murkier with respect to other potential effects of compulsory voting. In a counterfactual study of how abolishing compulsory voting would affect the composition of the electorate in Belgium, Hooghe and Pelleriaux (1998) find that socioeconomic inequality in turnout would significantly increase, a finding confirmed by De Winter and Ackaert (1998). Likewise, Zachary Elkins (2000) finds in a study of Brazil that compulsory voting appears to at least modestly increase the electoral participation of conventionally underrepresented demographic groups, and Laura Jaitman (2013) finds even stronger effects in Argentina. These general findings are confirmed in a cross-national analysis by Aina Gallego, but she finds that the reduction in turnout inequality under compulsory voting is an indirect result of turnout levels moving closer toward universal participation, rather than a direct effect of increasing the propensity to vote within lower socioeconomic demographics (Gallego 2010, 246).²⁶ On the other hand, Cepaluni and Hidalgo's (2016) study of compulsory voting in Brazil finds that the practice actually tends to *increase* inequality in turnout, which they argue is a result of non-monetary sanctions for abstention being more effectively enforced against middle and upper class citizens. Regarding economic effects, Crain and Leonard (1993) find an overall reduction in government spending in countries with compulsory voting, which

²⁶ But see Singh (2015), finding that turnout inequality is reduced under compulsory voting specifically because the propensity to vote increases among those who would otherwise be less likely to participate.

they theorize is tied to a reduction in the influence of special interest groups under these voting rules. O'Toole and Strobl (1995) question this result on methodological grounds, and they instead find that government expenditures on health as well as housing and transfer payments appear higher under compulsory voting rules, although they confirm that expenditures on defense and economic services are indeed lower. Chong and Olivera (2008) find that enforcement of compulsory voting reduces levels of income inequality cross-nationally, and Carey and Horiuchi (2016) confirm this finding in a study of Venezuela; however, Birch initially finds no such cross-national effect, although she does confirm the finding of reduced income inequality when considering only countries in Latin America and Western Europe (Birch 2009, 130-131).

The question of the potential consequences of compulsory voting for the political system is closely tied to the complex issue of whether and how electoral outcomes might change under higher voter turnout, an empirical question that has generated substantial debate, particularly with regard to elections in the United States.²⁷ The relatively few studies that have looked more specifically for political effects associated with the institutions of compulsory voting have also generated mixed results. In a study of political outcomes in Australia, Mackerras and McAllister (1999) find that compulsory voting decreases support for right-wing parties while increasing support for the political left and for minor parties in general. Jensen and Spoon (2011) confirm and explain the increased support for minor parties under compulsory voting through a cross-national analysis showing that compulsory voting laws spread out the distribution of vote choice, leading to a greater number of political parties represented in legislatures and a wider

²⁷ See Chapter 3, Section 2 for a discussion of this issue.

ideological range in governments.²⁸ Similarly, Bechtel et al. (2015) confirm an increase in support for “leftist” policies in their study of compulsory versus voluntary voting in Swiss referendums. However, Birch finds no increase in support for either small or left-leaning parties in her cross-national analysis, and she finds that enforcement of compulsory voting in Belgium actually appears to increase support for the political right (Birch 2009, 123-128).²⁹

Birch finds that compulsory voting tends to significantly increase perceptions of democratic legitimacy—at least outside of Latin America, where satisfaction with democracy is in general relatively low—and interestingly, she finds that this effect is not dependent upon the enforcement of sanctions for nonvoting (Birch 2009, 113).³⁰ Her analysis also indicates that enforcement of compulsory voting is associated with at least a slight increase in the likelihood of political participation more generally, with a more significant increase in the likelihood of engaging in protests or demonstrations (Birch 2009, 70-72).³¹ On the other hand, Birch finds that enforced compulsory voting is associated with decreased perceptions of political efficacy, which she indicates could provide evidence of increased levels of “democratic disaffection” (Birch 2009, 68). Krister Lundell (2012) generally confirms Birch’s finding that even unsanctioned compulsory voting tends to increase reported levels of trust in government, but Lundell also finds that the duty to vote—again whether enforced or not—has an overall negative

²⁸ Jensen and Spoon emphasize that their findings regarding the effects of compulsory voting are distinct from the effects of increasing turnout alone, which leads them to theorize that the institution of compulsory voting is qualitatively different from high turnout achieved by other means (Jensen and Spoon 2011, 708). They also note that their findings on the effects of compulsory voting are strongest when the duty to vote is mentioned in the constitution (709).

²⁹ Birch also finds that sanctioned compulsory voting results in lower levels of perceived governmental corruption (Birch 2009, 132).

³⁰ Birch finds weaker evidence of a positive effect of compulsory voting on perceptions of the quality of democratic representation (Birch 2009, 114).

³¹ See also Yates (2008), finding that compulsory voting increases the propensity to engage in non-electoral forms of democratic participation.

effect on engagement in other types of democratic participation, an effect she attributes to “societal disillusion and an antipathetic attitude” engendered by this institution (Lundell 2012, 226). Accordingly, Singh (2016) finds that compulsory voting—particularly when enforced—is associated with increases in anti-government attitudes and reports of dissatisfaction with the democratic system.³²

Studies of the effects of compulsory voting on the acquisition and use of political information have also generated mixed results. Jill Sheppard’s cross-national study finds that enforcing a duty to vote leads to noticeable increases in the political knowledge levels of citizens (Sheppard 2015), and Gordon and Segura likewise find a significant positive effect on political sophistication in countries with compulsory voting (Gordon and Segura 1997, 140). Studies by Caitlin Milazzo also confirm that the duty to vote can make citizens more likely to engage in political discussion, both cross-nationally (2008), and in Swiss national elections (2009). On the other hand, Selb and Lachat’s (2009) study of Belgian elections finds that compulsory voting induces unmotivated voters to make choices that are more likely to be inconsistent with their expressed preferences, implying a clear lack of informational sophistication. Similarly, an experimental study by Loewen et al. (2008) found no increase in information acquisition among Canadian university students who were required to vote in a provincial election in order to receive payment for participation in the study. Singh et al. (2016) find comparable results in an Australian experiment in which individuals who reported they would not vote unless compelled to do so are generally less likely to seek out political information. Birch also finds that

³² According to Singh, “forced participation inflates the tendency of those with negative orientations towards democracy to see the democratic system as illegitimate, and to be dissatisfied with democracy” (Singh 2016, 1). This is also tied to the observation that compulsory voting leads to a greater number of invalid ballots (Singh 2017). However, a study of several Australian elections by Hill and Young concludes that the “vast majority” of invalid ballots—known in Australia as “informal” votes—are unintentional results of the complexity of the preferential electoral system, rather than expressions of dissatisfaction or protest (Hill and Young 2007, 521; see also Mackerras and McAllister 1999, 226).

compulsory voting has no significant effect on either acquisition of information or on the propensity to engage in political discussion (Birch 2009, 66-69). However, an experimental study by Victoria Shineman (2016) found that providing a financial incentive for voting in a San Francisco municipal election did in fact lead subjects to become more politically informed, and Shineman's (2012b) comparative study of Austrian provinces likewise concludes that compulsory voting increases the propensity to acquire political information.

The issue of information is also prominent in the mixed findings of game theoretic analyses of compulsory versus voluntary voting. Some of these studies assume the existence of an objectively correct decision corresponding with some "true" state of the world, and thus voters who are uninformed about this state of the world should strategically abstain from voting in order to allow informed voters to determine the outcome (Feddersen and Pesendorfer 1996).³³ Thus, voluntary voting may be claimed as superior to compulsory voting, as the majority decision is more likely to reflect the "correct" outcome when abstention is allowed (Krishna and Morgan 2012). Similarly, Jackee and Sun (2006) show that random choices by disinterested voters under compulsory voting creates uncertainty regarding the electoral outcome and may prevent that outcome from accurately reflecting the preference of the majority. However, the assumption of an objectively correct decision based upon a true state of the world, often called an assumption of "common values" (e.g. Krishna and Morgan 2012, 2086), is surely open to doubt in the context of political decision-making. Borgers (2004)

³³ See also Austen-Smith and Banks (1996), showing that if abstention is not allowed, it is theoretically irrational for all voters to vote "sincerely" in accordance with their beliefs about the true state of the world. Also see Bhattacharya et al. (2014), confirming this theory in an experimental study comparing compulsory versus voluntary voting rules. But see Shineman (2012a) for a decision-theoretic model showing that compulsory rules as applied in practice tend to increase informed voting consistent with the true state of the world, a result that she generally confirms experimentally.

abandons this assumption in favor of a “private values” model and argues that voluntary voting is still superior to compulsory voting, but his analysis relies on the conventional rational choice expectation that individuals will not participate unless they have a substantial probability of being pivotal to the outcome, and he thus admits that his model cannot account for the behavior of voters in large elections (Borgers 2004, 57). In fact, in a private values model of a large electorate, Krasa and Polborn (2009) show that compulsory voting with fines for abstention actually makes it more likely that the outcome will accurately reflect the majority preference.³⁴

In sum, although the duty to vote and compulsory voting laws are fairly common, there is a clear lack of consensus regarding most of the empirical effects of these institutions. It may be that more definitive causal findings will never be realized due to the relatively small universe of cases available for analysis and the wide variation in administrative implementations of the duty to vote, in addition to the difficulty in controlling for confounding variables and proving external validity given the complexity of sociopolitical processes in different countries. The challenges to formal models of compulsory versus voluntary voting are also apparent, but the prominence of informational assumptions in these studies is notable, as it is apparent that fundamental ideas about the meaning and function of voting in modern democratic theory are extremely important for assessing these institutions. The bigger normative questions associated with the duty to vote and compulsory voting seem to have flown somewhat under the radar of conventional scholarship in political theory, but more recently there has emerged a fairly rich literature addressing these questions, with some interesting and enlightening debates. A closer look at these debates can assist in achieving a better

³⁴ See also Ghosal and Lockwood (2009), who model the voting decision as a mixture between private and common values and find that compulsory voting may be superior to voluntary voting when the weight attributed to the common values component is higher.

understanding of these institutions and in formulating new arguments about whether electoral participation in a liberal democracy should be construed and administered as a general civic duty or as a voluntary choice of democratic citizens.

4) SHOULD THERE BE A CONSTITUTIONAL CIVIC DUTY TO VOTE?

As discussed in the previous section, formal recognition of a constitutional duty to vote does not necessarily imply the existence of enforced compulsory voting laws, and there indeed may be other important policy implications for voting rules and procedures that follow from recognizing a duty to vote, as will be discussed further below. However, the broad normative question of whether there is—or should be—such a duty in the first place must be addressed.

Conventional scholarly opinion in political theory has generally expressed skepticism concerning both the duty to vote and the practice of compulsory voting. Early treatments by Henry Abraham (1952) and H. B. Mayo (1959) argue strenuously against compulsory voting, citing various reasons why electoral participation by all citizens would be undesirable. However, it must be acknowledged that the intellectual environment surrounding voting—at least in the United States—was somewhat different in the days prior to the civil rights era, when this country arguably suffered from major democratic deficits given the denial of effective voting rights to many of its citizens. Accordingly, Abraham’s first argument against compulsory voting is that the franchise is not even a civil right, but rather only a “privilege, bestowed by the government” (Abraham 1952, 347),³⁵ an opinion that presumably few would adhere to today. Although

³⁵ In Wesley Hohfeld’s classic formulation of legal relations, “a privilege is the opposite of a duty” (Hohfeld 1913, 32); thus, if voting is a privilege rather than a right, there is by definition no duty to vote (see Hill 2014, 169).

it remains true that the U.S. Constitution does not explicitly confer the right to vote, and the constitutional status of that right is indeed somewhat ambiguous, in practice it is fairly clear that the right to vote is considered “fundamental” in American jurisprudence, and that it cannot be denied, at least to adult citizens, barring a lawful reason such as criminal conduct or mental incapacity.³⁶

Early arguments also focus on the argument that a right to abstain from voting is required for free exercise of the right to vote (Abraham 1952, 348), an argument that echoes the 1896 opinion of the Missouri Supreme Court, which stated, “How can a citizen be said to enjoy *the free* exercise of the right of suffrage who is constrained to such exercise, whether he will or not, by a penalty?”³⁷ Some have thus suggested that the establishment of voting as a civic duty is inconsistent with liberal democratic norms and practices, and even that the duty to vote has totalitarian connotations (Abraham 1955, 33; Jones 1954, 25). While the notion that compulsory voting is fundamentally undemocratic seems largely untenable given the examples of established democracies employing this practice, nevertheless, the argument that a duty to vote is somehow illiberal does continue to resonate today. Along these lines, some of the more recent normative scholarship argues that the right to vote in a liberal democracy must also include a right to abstain from voting (Karlson 1994, 1458; Blomberg 1995; Katz 1997, 244; Hanna 2009; Lever 2010). Jeffrey Blomberg goes so far as to argue that the right to abstain “logically

³⁶ The Constitution does not explicitly grant a right to vote, although it prohibits some discriminatory voting practices (see Gerken 2014, 11). The U.S. Supreme Court first delineated the textual origin of the right to vote in *Baker v. Carr* 369 U.S. 186 (1962), in which the Court interpreted this right as implied by the Equal Protection Clause of the Fourteenth Amendment (see Douglas 2014, 97). Subsequent decisions and the passage of the Voting Rights Act of 1965, along with its later amendments, further strengthened the status of voting as a fundamental civil right. Nevertheless, there remains doctrinal confusion about the constitutional status of the right to vote, and particularly whether that right is actually treated as fundamental by judicial decisions (see Gardner 1997, 894; Douglas 2008, 145). This confusion and uncertainty can be seen as reflected in the ongoing disputes regarding the form and content of voting rights protections in this country.

³⁷ *Kansas City v. Whipple* 136 Mo. 475, 484 (1896) (emphasis in original).

follows” from the right to vote (Blomberg 1995, 1020; see also Ciccone 2002, 347-348).³⁸ However, there does not appear to be any logical contradiction in formally conceptualizing voting as both a right and a duty. Even some strong critics of compulsory voting admit this (Lever 2010, 905) and do not necessarily claim that a duty to vote is fundamentally inconsistent with liberal democratic norms (Brennan 2014, 13). While it is true that certain liberal rights—such as rights to religious expression or to bear arms—include an “inverse right,” or a right to waive the right, there are other rights that cannot be inverted or waived—such as rights to workplace safety or to a minimum wage (HLR 2007, 599; Hill 2014, 161). As Lisa Hill explains, there are many rights that encompass concurrent duties, which she terms *duty-rights*—such as the duty-right of a police officer to arrest a criminal, or the duty-right to repay one’s debts (Hill 2014, 170).

The reason some rights do not include an inverse right and cannot be waived is because rights may serve to protect not only the interests of individuals, but public interests as well (HLR 2007, 599; Hill 2014, 162). Defenders of the duty to vote as consistent with liberal democratic norms thus emphasize the collective—or structural—interest served by protection of voting rights, in addition to the individual interest in electoral participation. As Lisa Hill writes, “The right to vote is not just an individual right; it also exists for the purpose of constituting and perpetuating representative democracy, which is a collective benefit” (Hill 2014, 162; see also HLR 2007, 600; Lacroix 2007, 194; Engelen 2009, 221). Similarly, Heather Lardy rejects a right to

³⁸ Blomberg argues that a right to abstain is constitutionally fundamental and should be subject to strict judicial scrutiny in the context of purging registration lists, a practice that he argues substantially burdens the right to abstain. Although Blomberg admits that this specific argument was rejected by a U.S. Circuit Court of Appeals in *Hoffman v. Maryland* 928 F.2d 646 (4th Cir. 1991), he explains that the *Hoffman* decision affirmed the lower court’s ruling regarding the existence of a right to abstain, but declined to rule on the level of constitutional protection required (Blomberg 1995, 1028). He also cites a Fifth Circuit case from 1974, and a 1972 decision of the Michigan Supreme Court, both holding that there is a right to abstain, as well as a 1993 Senate subcommittee report arguing for protection of the right not to vote (1020).

abstain as founded upon a mistaken assumption that the right to vote is associated primarily with protection of freedom or liberty in “the ‘negative’ sense” (Berlin 1969, 121), or the ability to remain free from government interference (Lardy 2004, 309; see also Schäfer 2011, 15). Instead, according to Lardy, the right to vote “is about ascribing democratic authority to electors; about declaring their formal equal standing as qualified participants” (Lardy 2004, 310). This recognition of the collective interest served by voting rights may also lead toward a civic republican argument in favor of the duty to vote, such as Phillip Pettit’s endorsement of compulsory voting on the basis that the purpose of elections is to provide for the common interest (Pettit 2000, 135; see also Pettit 2012, 201, n. 26). As Armin Schäfer explains, “republicans see liberty as inescapably bound up with sharing in self-government” (Schäfer 2011, 17); the duty to vote may accordingly be justified in the name of “realizing an inclusive democracy” (21).

Nevertheless, the right to free speech arguably also serves a public interest, yet it nevertheless does generally include an inverse right to remain silent (HLR 2004, 601). The question thus becomes, is voting a form of speech? To the extent that voting is comparable to speech, a right to abstain could be required, and citizens should not be forced to “speak” by voting (Karlan 1994, 1458). The U.S. Supreme Court has in fact held that voting does not legally qualify for the full protections of free speech under the First Amendment, because it is not primarily as an outlet for personal expression, but rather serves the more instrumental purpose of selecting government officials (HLR 2004, 601).³⁹ Furthermore, a compulsion to speak by voting would be a “viewpoint-

³⁹ Hasen thus argues that a compulsory voting law should not be seen as violating the First Amendment—particularly if it allowed for abstention in practice, as discussed below (Hasen 1996, 2176, n. 163). The High Court of Australia appears never to have directly addressed this question, but at least one Australian scholar has argued that compulsory voting is an unconstitutional violation of the freedom of political communication (Gray 2012). A 1972 decision by the European Court of Human Rights held that Austria’s compulsory voting law did not infringe on protected freedoms of conscience and expression (ECHR 1972).

neutral” regulation of speech as long as one is not required to vote for any specific candidate or party, and such regulations are subject to a lower level of scrutiny under U.S. Supreme Court jurisprudence (HLR 2004, 602). Judicial doctrine on these matters is of course not necessarily dispositive of the normative question at hand, and as discussed in Section 2 above, there presumably are significant expressive motivations for voting.⁴⁰ Yet it must also be admitted that where the specific public interest at stake is considered important enough, even actual compulsion of speech can sometimes be acceptable in a liberal democracy—such as the power of courts to compel testimony (at least to the extent it is not self-incriminating). The question is thus whether the public interest served by a duty to vote is significant enough to override any individual right to remain silent by abstaining.

In addition to the significance of the collective interest weighing against any expressive right to remain silent, a further issue would be to inquire into the nature and degree of government coercion involved in a particular compulsory voting regime. This requires an assessment of how the law is implemented in practice, which is related to the legal question of whether the regulation of speech is “narrowly tailored” to achieve the public interest served by the law (see HLR 2004, 602). As indicated previously, there is a great deal of cross-national variation in enforcement of the constitutional duty to vote. Where this duty remains completely unenforced, there would of course be no violation of any right to remain silent; however, the fact is that even the strictest implementations of the duty to vote through strong enforcement of compulsory voting do allow citizens to abstain from voting as a practical matter. This is due to the now universal norm of the secret ballot in liberal democracies, which in practice means that one is always free to

⁴⁰ See also the opinion of Justice Alito in *Nevada Commission of Ethics v. Carrigan* 131 S. Ct. 2343, 2354 (2011) stating, “Voting has an expressive component in and of itself.”

cast a blank ballot, or to intentionally spoil one's ballot (see Lijphart 1997, 2; Birch 2009, 2; Hill 2014, 116).⁴¹ This practical feature of compulsory voting is generally recognized even by opponents of compulsory voting (e.g. Abraham 1952, 349; Sheehy 2002, 48-49; Saunders 2010, 74).⁴² In fact, some proponents of the practice object to use of the term "compulsory voting," preferring instead "compulsory *turnout*," which is said to reflect the reality that what is actually required is only appearance at the polls (Keaney and Rogers 2006, 26; Machin 2011, 104).⁴³

Others have suggested that providing a "no preference" or "none of the above" option on the ballot would ameliorate the coercive effect of compulsory voting (Feely 1974, 242; Orr 2002, 578; Elliot 2017, 658),⁴⁴ or that conscientious objector status could be provided to allow for principled abstention (Hill 2002a, 443; HLR 2004, 603). These practical options for allowing citizens to refrain from casting a valid vote serve to limit the actual coercion involved in compulsory voting and to minimize any violation of free

⁴¹ The European Court of Human Rights specifically referred to the option of casting a blank or invalid ballot in finding that Austria's compulsory voting law did not infringe on protected freedoms (ECHR 1972). Australian law appears to be somewhat unclear on this particular point, as strict interpretation of the relevant statutes could suggest that recording a valid vote may actually be required (see Hill 2002a, 448; Orr 1997, 292; Saunders 2010, 75). There does not seem to be any dispute about the fact that in practice Australian citizens are currently free to vote "informally" by casting invalid ballots; however, some have suggested that electronic voting could someday be designed in such a way as to require casting a formal vote while still preserving ballot secrecy (Chong et al. 2005, 13).

⁴² Opponents of compulsory voting generally argue that a duty to simply turn out without voting is normatively problematic, or even incoherent (Saunders 2010, 75; Lever 2010, 911; see also John 2015, 432). Malkopoulou thus indicates that while casting a blank ballot may always be possible in practice, the question of whether in principle actual voting may be required remains a matter of fundamental debate (Malkopoulou 2015, 7). These arguments are addressed below in the discussion of limitations on the duty to vote (Section 4c).

⁴³ When compulsory voting was practiced in the Netherlands prior to 1970, it was in fact referred to as *opkomstplicht*, which translates as "obligatory attendance" (Hill 2014, 116). In the case of absentee or postal voting, compulsory turnout would presumably require actual submission of a ballot, but individuals are of course still free to cast a blank or spoiled ballot.

⁴⁴ The state of Nevada provides this ballot option, as apparently do the countries of France, Spain, Ukraine, some Latin American countries, and Russia before 2006 (see Damore et al. 2012, 895, n. 1). The option has also been available since 2013 in India, when the Indian Supreme Court mandated that it be included on all ballots (BBC 2013).

speech engendered by enforcement of a duty to vote. In fact, some argue that requiring citizens to proactively register their dissatisfaction in one of these ways would actually serve the interest of free speech by providing a better outlet for expression than abstention, which arguably does not clearly express anything, since it can be interpreted in so many different ways (Wertheimer 1975, 293; Lardy 2004, 318; Hill 2014, 144). Furthermore, compulsory voting laws do not preclude opportunities for expression through civil disobedience, accompanied of course by acceptance of the penalty for not voting (Thompson 2002, 36).⁴⁵ Nevertheless, protection of the right to free speech admittedly should require that individuals be free to choose their own modes of expression, and as one opponent of compulsory voting writes, even a “garbled” form of communication may still be deserving of protection (Gray 2012, 596). Even allowing for the options to spoil one’s ballot, to vote for none of the above, or to claim conscientious objector status, some will nevertheless continue to object to any enforcement regime connected to a civic duty to vote (Lardy 2004, 306). At root, the problem thus remains one of balancing any individual right to remain silent against the proposed public interest served by a civic duty to vote. But what exactly is the nature of that public interest, and how compelling is it? In order to answer this question, it is necessary to discuss the primary normative argument in support of compulsory voting.

a) A Rawlsian Argument for the Duty to Vote

Perhaps the most notable scholarly argument for establishing and enforcing a civic duty to vote was made by Arendt Lijphart in his 1996 presidential address to the American Political Science Association, entitled “Unequal Participation: Democracy’s

⁴⁵ Hill provides some examples of this type of civil disobedience taking place in Australia, including public advocacy of informal voting and abstention (Hill 2002a, 439-440, 444-445). However, she indicates that a substantial majority of Australians do approve of compulsory voting (Hill 2010, 427).

Unresolved Dilemma” (Lijphart 1997). As reflected in that title, Lijphart’s primary motive in advocating compulsory voting in the United States is to reduce political inequality by increasing voter turnout and reducing the demographic bias of the electorate. Similarly, Lisa Hill—who may well be compulsory voting’s most vigorous and prolific contemporary defender—emphasizes the value of “substantive political equality” (Hill 2014, 112), and particularly equality in the composition of turnout (153), as the strongest motivation for enforcing a duty to vote.⁴⁶ However, actual applications of the value of equality are of course highly contested, and the meaning of political equality in practice can be difficult to pin down in contexts of its implementation in specific liberal democratic institutions (Beitz 1989, 3-4). It nevertheless remains an imperative question of constitutional design, as indicated, whether principles of equality should require that electoral participation be conceived only as a formal right of the democratic citizenry, or whether voting should also be framed as a generally applicable civic duty in a liberal democracy. Charles Beitz writes that “a theory of political equality should... explain what must be true of the terms of democratic participation if they can be said to reflect the equal public status of democratic citizens” (Beitz, 1989, 17).⁴⁷ According to Beitz, interpretations of equality in democratic institutions should explain why one design approach to setting the terms of participation yields more *fairness*—and correspondingly more *justice*—than another approach (17-19). The main argument presented here will thus be that framing electoral participation as a civic duty, in addition to a civil right, is

⁴⁶ Lijphart and Hill also make other arguments for compulsory voting, but their primary arguments center on the issue of equality.

⁴⁷ Beitz does not address the question of compulsory versus voluntary voting, instead focusing his attention on the implications of principles of equality for electoral systems, legislative districting, ballot access, and campaign finance.

arguably required by principles of equality under John Rawls' conception of "justice as fairness" (Rawls 1999).

Again, the constitutional design question is whether principles of democratic equality require only equal *opportunity* to participate in elections, or whether equal *actual* participation should also be required—or at least aspired to—under the Rawlsian conception of justice as fairness. Rawls himself seems clearly to suggest that only the opportunity to participate is required for justice. His first principle of justice, the principle of "equal liberty," translates in constitutional design into what he calls "the principle of (equal) participation," which is said to require that "all citizens are to have an equal *right* to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply" (Rawls 1999, 194, emphasis added). With regard to democratic elections, Rawls states that the principle of participation requires that, "[a]ll sane adults, with certain generally recognized exceptions, have the *right* to take part in political affairs, and the precept one elector one vote is honored as far as possible" (195, emphasis added).

The fact that Rawls conceives of electoral participation as a civil right only, and not as a civic duty as well, is also fairly clear when he later indicates that "it should be kept in mind that the principle of participation... does not define an ideal of citizenship; nor does it lay down a duty requiring all to take an active part in political affairs" (200). He continues this idea and concludes his chapter on the basic requirements of the principle of participation with the following significant qualification:

In a well-governed state only a small fraction of persons may devote much of their time to politics.... But this fraction, whatever its size, will most likely be drawn more or less equally from all sectors of society. The many communities of

interests and centers of political life will have their active members who look after their concerns (200).⁴⁸

Here Rawls tellingly assumes that political participation—of which voting is of course the most prominent form—will be “more or less” unbiased with respect to the socioeconomic demographics of the citizenry. This presumably implies that if voter turnout were not more or less unbiased, the principle of (equal) participation would not be satisfied. This implication is fully consistent with Rawls’ understanding of the purpose of the principle of participation, which he says, “compels those in authority to be responsive to the felt interests of the electorate” (199). However, it is of course well established empirically that voter turnout in the United States is generally biased significantly in favor of the more privileged socioeconomic demographics, and there is substantial—though admittedly not unchallenged—evidence that this bias in turnout has significant political consequences (see Chapter 3, Section 2; see also Hill 2014, 137-140; Malkopouplou 2015, 29-30).

It is not entirely clear how Rawls is able so casually to assume to that those who vote will likely “be drawn more or less equally from all sectors of society.”⁴⁹ Certainly the possibility of significant bias in the electorate arising from the process of self-selection into the electorate under voluntary voting is a real possibility worth considering. The only reliable way to avoid the possibility of bias—while providing an equal right to vote—is for the electorate to consist of not just a sample, but rather of the whole population of eligible voters. Of course the closer the electorate comes to universal

⁴⁸ In fact, as discussed below, Rawls goes even further in outlining (without fully endorsing) a justification of J. S. Mill’s well-known advocacy of “plural voting,” with extra weight given to the votes of citizens (viz. “men”) who “can be identified as having superior wisdom and judgment” (Rawls 1999, 205).

⁴⁹ It seems quite unlikely Rawls would be unaware of the substantial research to the contrary on this point, even in his original work of 1971, which contains the same concluding paragraph (see Rawls 1971, 227-228), much less at the time of his revision published in 1999.

participation the smaller the possibility of bias creeping in, and so it is surely relevant that turnout in American elections is relatively low, at least in comparison to other democracies (see Chapter 3, Section 2). More to the point, however, the relevant question for Rawls' theory is not so much one of empirical statistics, but rather the question of whether someone behind the conceptual "veil of ignorance" of the "original position" (Rawls 1999, 118) would choose to make voting a civil right only or a civic duty as well, and whether purely voluntary voting could vitiate the principle of participation by increasing the likelihood of bias in the composition of the electorate.

Perhaps in ignoring the possibility of bias in turnout Rawls simply means to indicate that someone in the original position could assume that participation would be more or less equal? But the definition of the veil of ignorance does not appear to support this:

[Parties in the original position] understand political affairs and the principles of economic theory; they know the basis of social organization and the laws of human psychology. Indeed, the parties are presumed to know whatever general facts affect the choice of the principles of justice. There are no limitations on general information, that is, on general laws and theories, since conceptions of justice must be adjusted to the characteristics of the systems of social cooperation which they are to regulate, and there is no reason to rule out these facts (119).

It thus seems clear that someone in the original position would at least have to recognize the possibility of bias in turnout under a system of purely voluntary voting, particularly given the calculus of voting, which postulates at a basic level that the costs and benefits of voting are subject to varying assessments and impacts among various individuals and groups in the population. In fact, someone behind the veil of ignorance might well be concerned with the possibility of being part of a poorer and less educated societal group

whose members are less likely to vote voluntarily, and might therefore conclude that a democratic constitution should actively encourage everyone to vote in order to help ensure that the interests and welfare of such groups are better addressed by the political process.

It does not seem that anyone has made this particular argument;⁵⁰ rather, Rawls' evident support for voluntary voting appears to have been taken at face value. For example, in a thought-provoking article entitled "Voters as Fiduciaries," Edward Foley engages the Rawlsian theory to evaluate the electoral rules and procedures that would be chosen in the original position (Foley 2015). Foley conceptualizes voting as a public office in which "voters owe a fiduciary duty to act on behalf of all inhabitants of the polity, rather than to advance their own self-interests," and he consequently emphasizes not just voting rights but also voting "responsibilities" (154). He actually compares the act of voting to service on a jury, but oddly, he ignores the fact that such service is institutionalized not just a civil right but as a civic duty as well (157).⁵¹ Foley echoes Rawls' general concern with avoiding bias in turnout, stating that in the original position

⁵⁰ Lisa Hill does make a similar argument that the equal opportunity to vote without equality in actual voter turnout reduces democratic legitimacy, however she bases her argument not on Rawls but rather on Robert Dahl's conceptions of equality, participation, and inclusiveness (Hill 2014, 127-137).

⁵¹ Foley states that just as citizens have a "right to exercise the responsibility of being a juror, so too they have a right to exercise responsibility of voting," and he further refers to "the *opportunity* for jury service" (emphasis added) comparing it to "the opportunity to serve as a member of the electorate" (Foley 2015, 158). He also compares the fiduciary office of voting to military service, stating that there is an equal right to vote just as there is "an equal right to serve in the military" (159), but again he fails to mention the possibility of compulsory service if a war necessitates a general draft. In personal correspondence, he further confirmed the military analogy, suggesting that it makes sense to treat voting like military service, which is currently voluntary. However, if high turnout is indeed viewed as a basic requirement of equal justice in a democracy, for the reasons discussed above, then perhaps voting is actually more comparable to military service during a war when conscription may be required to ensure full participation of all those eligible. Obviously, a duty to serve in the armed forces asks far more of individuals than a duty to vote, and compulsory military service is perhaps only justifiable during a war for national survival. Whether compulsory voting might ask too much of individuals is addressed below in discussing the limits of the duty to vote, but the analogous argument here is that this duty may be necessary to ensure the "survival" of equal justice in a constitutional democracy.

one would prefer “as broad an electorate as is feasible,” in order to avoid the danger that elected representatives might “serve the interests of only a portion of society, rather than serving society as a whole” (178). He further declares that the best procedure from the perspective of the original position would be to “crowdsource” the function of voting, “so that any biases that inadvertently creep into the process tend to cancel each other out” (180).

However, in discussing the specific implications of the original position for electoral rules and procedures, Foley asserts that under Rawls’ theory, “there would be less concern about maximizing voter turnout, as long as all citizens (regardless of race or other social circumstances) have equal and ample opportunities to cast a ballot” (Foley 2015, 185).⁵² He continues, again echoing Rawls: “A citizen must have an equal and fair opportunity to participate in the fiduciary responsibility of electing society's lawmakers. But if a citizen chooses not to take advantage of this opportunity... then the task will be performed by those who choose to do so” (185). Foley then goes even further than Rawls in explaining why voluntary voting is preferable to compulsory voting:⁵³

From a Rawlsian perspective, society does not need every citizen to participate in the service of selecting the lawmakers. Rather, society needs those who choose to participate to do so from the perspective of endeavoring to elect lawmakers most likely to act in the public interest, and society needs that there be no barriers to participation in this form of public service (185-186).

⁵² Strikingly, Foley here seems to suggest that under the Rawlsian approach there should actually be *less* concern about low voter turnout than there is currently.

⁵³ Foley notes that compulsory voting is practiced in Australia, but states that it is “unlikely to take hold” in the United States (185, n. 66). However, the pertinent question here is not whether the institution of compulsory voting along the Australian model is viable in the American context, but rather whether, based on the Rawlsian original position, voting should be constitutionally structured as a voluntary right or as a civic duty as well.

However, this once again begs the critical question of why someone in the original position should not be concerned about the potential for the emergence of significant bias in turnout under a system of voluntary voting, particularly if such bias might undermine democratic equal justice, as both Rawls and Foley appear to admit.⁵⁴

Foley apparently assumes that under voluntary voting, those who decide to vote rather than abstain will be more likely to cast their vote in a manner consistent with a fiduciary duty to advance the public interest, as opposed to their own self-interest. But he offers no real argument or evidence on this point, and it could well be that many of those who vote voluntarily do so to gain personal advantage, while many who would vote if induced by civic duty or sanction would do so “in good faith, on behalf of their sincere view of the public interest,” as Foley’s theory demands (Foley 2015, 186, n. 67).⁵⁵ Foley further assumes that those who abstain from voting do so by deliberate choice because they are simply unwilling to participate. He thus states, “If some citizens decide that they cannot be bothered to participate, then the fiduciary duty will be better performed by those who take the responsibility seriously” (185).⁵⁶ In fact, however, many nonvoting

⁵⁴ Such ambivalence about equal participation and apparent disregard for the implications of bias in electoral turnout is not unique to Rawlsian analysis. For example, Chad Flanders admits that “[i]n modern democracies, it is thought that participation should be *equally* distributed, or at least as close to equally distributed as is legally and practically possible.” Yet he continues, “I do not think that the value of participation *requires* participation be equal.... Democracy only requires that some of the people, in some capacity, have the ability to choose their leaders” (Flanders 2013, 60, emphases in original).

⁵⁵ In a lengthy footnote, Foley contrasts advocacy of a duty to vote with the approach to voting ethics of Jason Brennan, who argues that individuals have a duty to abstain from voting if they are not well enough informed to competently discern the public interest (Brennan 2011a). Foley characterizes his preference for keeping voting voluntary as a “neutral” approach that represents a middle position between a duty to vote and Brennan’s alleged duty to abstain (Foley 2015, 186, n. 67). Brennan’s theory was initially discussed in Chapter 2, where it was suggested that Brennan’s position, which implies that individuals may knowingly voting “wrongly” or incompetently, may be conceptually incoherent, in addition to being normatively problematic (see Chapter 2, Section 3b, n. 15). Brennan’s epistemic argument for implementing voter competency exams to ensure minimally informed voting is also addressed in Chapter 3 (see Sections 4a and Conclusion). The relevance of epistemic voting theory to the question at hand is discussed further below.

⁵⁶ Foley asserts that once citizens voluntarily decide to participate, they must exercise their fiduciary duty on behalf of all those who are unable to participate, including developmentally disabled citizens who are deemed incompetent to vote (160), and even on behalf of future generations not yet in existence (161-162).

citizens are likely to abstain not so much by deliberate choice, but rather because they may be deterred by the costs of voting in the calculus, which as indicated, are distributed unequally among different individuals and groups.⁵⁷ According to Foley, Rawlsian equal justice simply requires that there be “no barriers to participation” (186), but again, the presence or absence of a barrier can be a matter of subjective perception.⁵⁸ Furthermore, the basic voting calculus—which, as indicated, would be known in the original position—includes benefits as well, the perception of which may be equally (if not more) subjective.

There is thus a strong argument that someone behind the Rawlsian veil of ignorance would recognize the necessity of adding to the calculus a non-instrumental benefit in the form of fulfilling a duty to vote—which is of course formally equal to avoiding a cost associated with abstaining—in order to prevent unequal distribution of costs and benefits from resulting in an electorate that comprises a significantly biased sample of the population.⁵⁹ Simply put, if allowing individuals to refuse, or to neglect, to participate in elections might put democratic equal justice at risk, then it seems prudent at

Presumably, Foley would likewise assert that those who choose to participate must consider the interests of all the (supposedly) voluntary nonvoters. However, those who are legally ineligible to vote, or those who are not yet in existence, necessarily must rely on those who can vote, while eligible abstainers could in fact vote for themselves. Note that the issue of who should be eligible to vote is conceptually distinct from the current question, as in theory, the question of whether voting should be only a right or a duty as well could also arise with respect to a non-democratic (by modern standards) electorate that excluded some citizens.

⁵⁷ See also Hill (2014, 147-152), arguing that higher rates of abstention among socioeconomically disadvantaged groups cannot generally be attributed to a “positive choice” to abstain, but are rather more likely to result from the unequal distribution of voting costs. Hill also argues that disadvantaged individuals are subject to a collective action problem that results from the unequal distribution of the social norm of voting, a consideration that further echoes the voting calculus.

⁵⁸ Flanders goes even further than Foley in minimizing the significance of unequally distributed voting costs, stating, “Someone who is subject to inconvenience or delay is not being denied his right to vote; he still has the ability to participate.... [A]t some point, he or she is just choosing not to” (Flanders 2013, 65).

⁵⁹ Hill similarly argues that compulsory voting counteracts the unequal distribution of voting costs and resolves the collective action problem noted above (Hill 2014, 150-151). See also Feely (1974, 239-240), arguing that compulsory voting is justified because “selective benefits and voting costs are apt to be associated with prevailing divisions of labor, income, education, and membership in social groupings, such that certain groups of people are more likely than others to receive them.”

least to *ask* all citizens to participate—if not actually to compel them—by declaring that voting is a constitutional civic duty and not merely a civil right.⁶⁰ It may be fair to assert, as Foley does, that citizens have a fiduciary duty to consider the public interest over their own selfish interests when voting. However, it does not seem in accord with Rawlsian principles of justice to institute voluntary voting at the constitutional level as a means for eliciting an electorate that will presumably be more collectively concerned with this fiduciary duty. As a matter of fact, most voters already do appear to cast their vote with the intention of supporting public over private interests (see e.g. Brennan 2011a, 162, 196; Brennan 2014, 40-41),⁶¹ and there is no reason to assume that among current nonvoters a larger proportion would consider only their own selfish interests if they were actually to vote.⁶²

Additionally, beyond the dictates of justice for pursuing equality in electoral participation, there is a further argument for a constitutional duty to vote under Rawls' theory. In addition to political rights, justice as fairness also implies certain political duties and obligations for individuals living under a constitutional framework (Rawls 1999, 293).⁶³ Rawls thus states that everyone has a “fundamental natural duty... to support and to comply with just institutions,” explaining that “if the basic structure of

⁶⁰ The question of how exactly such a constitutional duty to vote should be implemented and enforced is addressed below in the section on policy implications.

⁶¹ Brennan cites several studies on this point and treats it as an established fact that voters generally consider the “national interest” over their own private interests when voting. He opposes the duty to vote, however, because he believes that most citizens are incompetent to discern and vote for the true national interest. See also Caplan (2007, 149), who admits unequivocally that voters are not “selfishly motivated,” although he too believes that most citizens are incompetent to vote well or correctly.

⁶² Furthermore, the concept of voting in the public interest is inherently vague and difficult to define, as discussed in the following subsection.

⁶³ Rawls distinguishes between “natural duties,” which are said to apply to all “equal moral persons” without regard to any “voluntary acts, performative or otherwise” (98-99), and “obligations,” which arise because one has “voluntarily accepted the benefits of the arrangement or taken advantage of opportunities it offers” (96). Natural duties are said to apply “unconditionally” because they would be acknowledged by anyone in the original position (99-100).

society is just, or as just as it is reasonable to expect in the circumstances, everyone has a natural duty to do [one's] part in the existing scheme" (99). He explains this duty as having two parts, both of which seem conceivably related to a civic duty to vote: "[F]irst, we are to comply with and to do our share in just institutions when they exist and apply to us; and second, we are to assist in the establishment of just arrangements when they do not exist, at least when this can be done with little cost to ourselves" (293-294). Rawls never mentions voting as a possible means fulfillment of this natural duty, and as discussed previously, it is fairly clear that he conceives of voting as a voluntary—and hence supererogatory—act. Others, however, have drawn the conclusion that the Rawlsian duty to "do our share" in support of just institutions should in fact imply a duty to vote in democratic elections. For example, Carole Pateman states that "the most obvious interpretation of Rawls' argument is that, because all adults occupy the formally equal status of citizen... then all, necessarily, have certain political duties, including the duty to vote" (Pateman 1985, 121).⁶⁴ There is thus a strong argument from Rawlsian theory that voting should be a civic duty, not only in order to help ensure equal participation, but also because supporting political institutions by voting is a fundamental duty of citizens of a liberal constitutional democracy that meets the basic requirements of justice.⁶⁵

⁶⁴ Pateman further states, "[Rawls] argues that everyone has a natural duty to 'support' just, or nearly just, institutions, but he gives no indication of what kinds of actions constitute such support; it would be reasonable, however, that in the case of political institutions the support is given by citizens fulfilling their duty to vote" (Pateman 1985, 125). She also notes Rawls' apparent ambivalence regarding mass electoral participation, as follows: "Rawls has remarkably little to say about voting and its relationship to the liberty and equality of democratic citizenship on which he places so much emphasis.... Rawls says that 'the fair value for all of the equal political liberties' must be preserved, but he also toys with the ideal of plural voting [citation deleted]" (126). See also Blais and Achen (2010, 3): "Rawls seems not to have explicitly endorsed a duty to vote, but in its absence [sic.], it is difficult to make sense of his strictures that democratic citizens are ethically obligated to 'do what they can to hold government officials' to public reason, and other similar remarks [citations deleted]." Also see Hill (2014, 172).

⁶⁵ Pateman in fact questions whether Rawlsian institutions meet the fundamental requirements of justice (118), arguing that Rawlsian liberal democracy is essentially unjust—and unworthy of the duty of support,

The preceding demonstrates that the public interests served by a constitutional duty to vote—namely, preserving equal justice and supporting democratic institutions—are arguably compelling enough to justify intruding on any expressive right to remain silent and abstain, particularly if the constitutional duty is implemented in a manner that is narrowly tailored, for example by permitting formal and/or informal conscientious objection and abstention. However, all this might still be insufficient if there is a correspondingly compelling public interest that weighs against a constitutional duty to vote and in favor of framing participation as strictly voluntary. What then are the principal arguments against the duty to vote, which might reinforce any right to remain silent and potentially outweigh these proffered public interests in treating voting as a civic duty?

b) Responding to Arguments Against the Duty to Vote

Jason Brennan is perhaps the most outspoken contemporary critic of the notion of a civic duty to vote and the institution of compulsory voting. In a recent work on the subject, Brennan begins by asserting that voluntary voting should be the default position under liberal democratic norms, and advocates of compulsory voting therefore have the higher burden of proof (Brennan 2014, 6-7). He bases this on the assertion that compulsory voting involves a “controversial positive claim” in need of defense (7), and that it by definition involves coercion, which always requires justification in a liberal democracy (8-9). To assert that voting should be strictly voluntary, however, may also be

through voting or otherwise—to the extent that it permits (under Rawls’ second principle of justice; see Rawls 1999, 53-55) significant socioeconomic inequality, and distinguishes too strictly between political and private spheres of society (see Pateman 1985, 122-132). Pateman is conceivably correct insofar as one who believes the liberal democratic state is unjust may have no individual-level civic duty to vote, nor any moral obligation to comply with a compulsory voting law (or perhaps even to obey other duly enacted laws), as discussed below in the section on limitations of the duty to vote, but that is a separate matter from the current question of whether voting should be constitutionally framed as a civic duty, assuming the existence of (reasonably) just institutions.

viewed as a positive claim that needs defending,⁶⁶ and the question of coercion can be conceptually separated from the constitutional design question of whether voting should be a right only or a duty as well.⁶⁷

Furthermore, while implementing or enforcing a duty to vote in almost any manner is admittedly likely to involve some level of coercion, there are many different degrees of coerciveness, which may be more or less justified in theory and in practice.⁶⁸ Assessing administrative fines for unexcused nonparticipation—as in Australia—obviously involves economic coercion and possibly even loss of personal liberty if fines go unpaid.⁶⁹ Even a positive incentive, such as perhaps a tax credit for voting, would still involve some coercion insofar as taxation is backed by the coercive power of the state; however, a tax credit is clearly much less coercive than a fine, and it may be easier to justify. Moreover, as discussed previously—and as the case of Australia arguably demonstrates—even implementing compulsory voting through a coercive administrative

⁶⁶ See *supra* n. 2 and accompanying text, indicating that even in the United States, at least half of survey respondents perceive voting as a duty rather than a choice, with higher percentages in other democracies. Brennan himself states that “the overwhelming majority of citizens... believe they have a moral duty to vote,” citing the 1990 American Citizen Participation Study showing that 96 percent of respondents reported that “doing my duty as a citizen” was a very or somewhat important motivation for voting (Brennan 2014, 47); see also Elliot (2017, 660).

⁶⁷ In his 2014 work cited here, Brennan is arguing mainly against the institution of compulsory voting, which he asserts is unjustified even if one assumes there is a civic duty to vote (62-82). Nevertheless, he clearly opposes the notion of voting as a civic duty, for epistemic reasons he discusses later in this work, and which he elaborates upon in his 2011 book, *The Ethics of Voting*.

⁶⁸ Brennan admits that there are more and less coercive means of enforcing compulsory voting ((Brennan 2014, 16-19), and he even mentions a method that involves no actual coercion—publicizing the names of nonvoters in an effort to shame them into participation (18; see also *supra* n. 21 on such a practice previously in Italy). He further states that the less coercion one advocates, the lower the burden of justification, but he perhaps wrongly asserts that the more one believes compulsory voting to be justified, the more coercion one should advocate (19). While this might make some sense in the abstract, having a strong belief in the importance of the civic duty to vote does not preclude a decision to institutionalize a relatively non-coercive means of enforcement, or even choosing no active enforcement, as discussed in the following sections. Brennan eventually asserts that even the “pettiest violations” (20) of liberty in service of a duty to vote are unjustified, because he thinks that there are “noncoercive (or less coercive) means of achieving the same goals” as compulsory voting (22), as discussed further below.

⁶⁹ See *supra* n. 20.

regime of strictly enforced fines should not be viewed as undemocratic or beyond the pale of liberal norms.⁷⁰ As Rawls recognizes, some fundamental individual liberties may justly be sacrificed to facilitate greater systemic liberty for all (see e.g. Rawls 1999, 179), and given that voting contributes to the foundation for all civil liberties—liberal democratic government itself—the freedom not to participate in elections may be a liberty that is worth sacrificing, at least in principle.

Indeed, to the extent that voting may be viewed as participation in a collective act of popular sovereignty that mirrors the formation of the original democratic social contract, it may make sense to associate it with some actual sacrifice of liberty, signifying how one gives up of the individual freedom of the state of nature in order to take part in civil society. In this vein, in his recent book *The Sleeping Sovereign*, Richard Tuck associates the early democratic sovereignty theorists, most prominently Hobbes and Rousseau, with the radical—and according to Tuck, still somewhat controversial—idea that “a sovereign people can act like a monarchical sovereign through the process of majority voting” (Tuck 2015, 257). Tuck explains that both Hobbes and Rousseau understood the act of democratic voting to represent the subsuming of individual wills within the general will, as revealed through the will of the majority (128-129), and he thus concludes that “the democratic sovereignty theorists believed that only an organised democracy in which we participate has any authority over us” (277). Although Tuck is specifically discussing voting on matters of constitutional ratification or amendment (as are Hobbes and Rousseau in Tuck’s account), voting for representatives can arguably also be seen as a constitutional-level act of popular sovereignty, given that voting

⁷⁰ Brennan himself states, “I will readily admit that compulsory voting is consistent with democracy.”

determines the substantive content of constitutional offices—namely, who will hold them for the specified term.⁷¹

Related to this notion of voting as an expression of popular sovereignty reflecting the original social contract, Peter Singer suggests that compulsory voting could prevent the act of participation from implying consent to the outcome of the democratic process, and from thus yielding a moral obligation to obey the laws of the government, because true consent can only be obtained voluntarily (Singer 1973, 55-56).⁷² However, Pateman counters Singer's argument by asserting that voting for representatives in a liberal democracy does not in fact imply consent to be governed, and would be a weak and normatively inadequate basis for justifying an obligation of obedience to the law (Pateman 1985, 87-90, 128).⁷³ The problem of political obligation is a complex issue beyond the current scope, but Pateman is probably correct in concluding that individuals should feel free to vote and yet still consider themselves morally unbound by what they regard as unjust laws.⁷⁴ Returning to the earlier point, the argument here is not that voting

⁷¹ Tuck briefly discusses “the modern disinclination” to the idea of popular sovereignty expressed through majority voting (Tuck 2015, 257), but he does not address the broader normative problems for a theory of popular sovereignty through representative democracy, of which there may be many (see e.g. Levinson 2014). On the radical nature of an “individualist theory of popular sovereignty” more generally, see Barnett (2007). For an interesting discussion of the roots of ideals of popular sovereignty in relation to the individual, see Gilmartin (2012). Gilmartin historically frames the 19th century conception of popular sovereignty as an “enchantment” of the individual in response to the “disenchantment” of the world, with individual voters coming to be seen as “capable of exercising autonomy as sovereignty’s enchanted essence” (Gilmartin 2012, 412).

⁷² Singer argues that participating in an election is not actual consent, but rather a form of “quasi-consent” that creates “an obligation to act as if there were consent” (49). He later argues that the act of voting gives rise to political obligation regardless of the voter’s intentions (125). Singer adds that there may be “other factors” relevant to whether compulsory voting is justified (56), and in fact more recently he has written in favor of compulsory voting and endorsed the Australian model for other countries “worried about low voter turnout” (Singer 2007).

⁷³ Pateman gives several reasons for doubting that voting implies consent, but her most fundamental objection seems to be that citizens must be able to understand “what kind of commitment” they are making, yet it is “virtually impossible for them to do this in liberal democratic elections since the consequences of voting are so difficult to determine” (88).

⁷⁴ Furthermore, even if Singer were correct that voting (voluntarily) implies consent to be governed, this could be seen as an argument in favor of compulsory voting, which would free individuals to participate

actually embodies the democratic social contract, but rather that voting—as an expression of popular sovereignty—signifies and symbolically reflects that contract in an important sense.

In fact, denying that the act of voting has any such deep meaning and significance seems effectively essential to arguing against a civic duty to vote. In their seminal article, entitled “Is there a Duty to Vote?” Loren Lomasky and Geoffrey Brennan (2000) methodically devalue the act of voting, and it is quite clear they do not see it as an expression of popular sovereignty, or indeed an expression of much at all. In their view, “The mere act of showing up at the polls every several years and grabbing some levers is palpably inadequate to qualify as a significant act of political expression” (82). They minimize not only the expressive value of voting—the *D* term of the calculus—and deny the duty to vote; they also deny that voting can have any real instrumental value, and they further assert that the costs of voting—or of voting correctly—are prohibitively high.

Their argument begins by introducing a formal model equivalent to the rational choice calculus, and they proceed by interpreting its terms in a manner aimed at proving there can be no civic duty to vote. First they recount the well known problem of *p*, dismissing what they term “the prudential argument” for a duty to vote by affirming the near impossibility of one vote could ever affecting the outcome of a large election (66). They continue with what they call “the argument from act-consequentialism,” contending that the instrumental benefits of voting—or *B* in the calculus—are generally insignificant, since it is only rarely that the “stakes are very high” in an election, and because the informational costs of voting—the *C* term—will generally far outweigh any perceived difference in utility between candidates or parties (67-74). They summarize:

without any implication of consent (Wertheimer 1975, 293). This of course leaves the problem of political obligation unresolved, but as indicated, that problem is well beyond the current scope.

[O]n those occasions when one's vote is most likely to make the sort of difference that stirs the hearts of act-consequentialists, there will rarely be any firm indication concerning for whom it ought to be cast; and when there is unmistakable evidence concerning which is the better candidate or policy, it is almost inconceivable that one's vote will be needed (72).

They continue by arguing that low turnout is not necessarily evidence of any democratic deficiency (78), and that the expressive value of voting is in essence no different from being “a fan of the New York Yankees” (80). They conclude provocatively, evoking Marx’s famous maxim and declaring: “Belief in a duty to vote is the opiate of democratic masses” (86).

Despite all this, Lomasky and Brennan actually admit that there could be a duty to vote for an individual living in a “small community”⁷⁵ that happens to have a tradition of “widespread political involvement in which each citizen plays a roughly equal and complementary part with all others” (Lomasky and Brennan 2000, 64). Under these circumstances, they suggest that abstaining might be an instance of morally offensive “free-riding on the exertions of others,” depending whether or not the individual had sought out the “advantages arising from the pattern of citizen involvement.” They indicate in a footnote that they will later explain why this “does not generalize to usual democratic politics” (n. 4), but they never appear to return directly to the example.

⁷⁵ It is interesting that Lomasky and Brennan suggest this possibility of a duty to vote in the context of a “small community,” seeming to evoke the democracies of antiquity and the traditional idea that only a relatively small polis can be a true (participatory) democracy (see e.g. Dahl and Tufte 1973, 4-5). Tuck’s thesis in *The Sleeping Sovereign*—as reflected in the subtitle, *The Invention of Modern Democracy*—is that seventeenth and eighteenth century theorists of democratic sovereignty—primarily Hobbes and Rousseau—were specifically concerned with demonstrating that electoral institutions could lay the foundation for mass participatory democracy in larger modern states (see Tuck 2015, x, 249). Note that Dahl and Tufte echo the conventional view that Rousseau intended his theory only for small polities along the ancient model (see Dahl and Tufte 1973, 6); however, Tuck argues that this view of Rousseau’s work is incorrect, and that Rousseau actually “believed that ancient democracy was not an appropriate model for modern societies,” and instead envisioned new institutions that involved mass participation in elections (Tuck 2015, x, 2-8).

Instead they discuss the Kantian categorical imperative—or what they call “the argument from generalization”—which requires one to consider the consequences “if everyone were to stay home and not vote,” and they in fact conclude that “the claim that it would be disastrous if no one voted is far from evident” (75). They further argue that free-riding in general is not morally offensive unless the underlying activity is wrongful, and the act of abstaining from voting is ethically closer, in their view, to a “decision to abandon farming in order to take up dentistry,” than to “failing to pay one’s share of taxes” (77-78). Lomasky and Brennan go so far as to argue that abstainers actually confer a *benefit* on those who vote, because each voter’s probability of being pivotal increases as a result of the abstention of others (78). They also conclude that abstainers do not harm democratic functioning in any meaningful way, since low turnout—even at “5 percent participation”—does not necessarily bode ill for democracy (79).

Beyond the question of whether Lomasky and Brennan’s argument by this point strains credulity, they are clearly quite distant from the idea of voting as a fundamentally valuable expression of popular sovereignty that ensures equal justice and fulfills a foundational duty to support just institutions.

Jason Brennan’s more detailed argument against the duty to vote, in his book *The Ethics of Voting* (2011), echoes the critiques of Lomasky and (Geoffrey) Brennan and likewise proceeds by devaluing the decision to vote as reflected in the terms of the calculus. Brennan begins by citing a widely accepted “folk theory of voting ethics” that presumes the existence of a civic duty to vote (Brennan 2011a, 3), but he proceeds to argue against this view and in favor of the assertion that there is nothing morally wrong in abstaining, even for an apparently frivolous reason (4). Although he emphasizes that voting would not be a duty even if the act had “significant instrumental value” (17), he expends significant effort in the attempt to prove that no such value is possible, owing of

course to the pivotal voting problem (18-28). Brennan also addresses and purports to disprove Tuck's theory of the causal effect of individual votes, and Brennan further emphasizes that the costs of voting (*C*), even just in terms of lost opportunities to do relatively unimportant things, will generally make participation irrational (28-34). According to Brennan, if someone holds the goal of seeing a certain candidate elected, but somehow "attaches no special value to... helping to cause [that candidate] to be elected," then it would be perfectly rational behavior if that person simply felt like "watching television and abstaining from voting," even if Tuck's theory happened to be correct (33).⁷⁶

Interestingly, Brennan indicates that in challenging Tuck's theory of causal efficacy in voting, he aims to preempt a future attempt to "use [Tuck's] arguments to show there is a duty to vote" (28). Brennan in fact describes how such an argument could proceed from Tuck's theory based on the notion of "agency" in voting (34-36). This is interesting, because Tuck himself, in his more recent work, mentions how his theory of causation in voting is crucial specifically because it allows "for citizens to *think of themselves as agents*" (Tuck 2015, 261). Indeed, this is why Tuck's resolution of the so-called paradox of turnout is so important: By confirming that voting can be an instrumentally valuable exercise of individual causal agency, Tuck's theory allows for the possibility of voting as an act of popular sovereignty. Admittedly, Tuck doesn't discuss whether voting should be a civic duty or not, although his conception of electoral participation as expressive of popular sovereignty under mass democracy is understood to

⁷⁶ Brennan's arguments against Tuck's theory are more fully addressed in Chapter 1, Section 5.

“make it the default position that everyone within the boundaries should take part in the vote in order to render its outcome authoritative for everyone” (Tuck 2015, 262-263).⁷⁷

However, even if Tuck’s theory of causation in voting happened to be incorrect, and if participating in a large election were indeed always instrumentally irrational, it is still not entirely clear why Brennan (and Lomasky and Brennan) believes this to weigh so heavily against a duty to vote. In fact, viewing the act of voting as irrational arguably strengthens the argument for a duty to vote, and particularly the argument for establishing and implementing the duty in some formal manner, assuming that the production of democracy through elections is viewed as public good. After all, coercion—or some type of “selective incentive”—is in fact the conventional solution to collective action problems involving public goods that might not be produced—or produced at optimal levels—absent some incentive (Olsen 1965). Alan Wertheimer thus writes: “Elections are desirable political mechanisms which we should all help to sustain. Since the rational action for each of us would be ‘free ride’ and allow other citizens to carry the burden, we should force ourselves and our fellow citizens into carrying a fair share of the burden” (Wertheimer 1975, 290; see also Feely 1974). Thus, even if voting is generally viewed as instrumentally irrational from the individual perspective, from the societal perspective it is may still be completely rational—and indeed necessary for democracy. It may therefore make good sense to institutionalize voting—and perhaps also to enforce it—as a generally applicable civic duty. As Lisa Hill explains, compulsory voting responds to the apparent individual-level irrationality of participation by introducing a type of “system rationality” that resolves the collective action problems associated with voting (Hill 2014,

⁷⁷ In this quote, Tuck is discussing the issue of whether non-citizens residing “within the boundaries” of the state can be excluded from the electorate; however, it may be significant that he states everyone “should take part in the vote,” instead of stating that everyone should have the right (or opportunity) to vote.

190-191). In Hill's words, "Compulsion collectivizes and co-ordinates 'irrationalities' of voting, thereby making them disappear" (Hill 2002b, 89).

In addition to the general collective action problem associated with the presumed instrumental irrationality of voting, Hill also discusses a "significant and paralyzing coordination problem" that specifically affects individuals from disadvantaged socioeconomic groups under a voluntary voting system. Since members of such groups are generally known to be less likely to participate, it might seem like an especially irrational choice for any individual in these demographics to decide to vote; under a compulsory voting system, however, Hill explains that "co-ordination among the disadvantaged is assured" (Hill 2013, 461).⁷⁸ This further supports the Rawlsian argument for a duty to vote to ensure equal participation and minimize inequality in turnout. Lomasky and Brennan address this issue only in a footnote late in their argument, where they admit the possibility that demographic bias in the electorate could be viewed as a "*democratic deficit* which one might be thought to have a duty to overcome"; however, they conclude that "even if this constitutes a rationale for voting by the electorally underrepresented, it just as strongly argues for abstention by the over represented" (Lomasky and Brennan 2000, 79, n. 17, emphasis in original). Brennan falls back on the same logic, claiming that arguing for compulsory voting based on a presumed civic duty to vote is inconsistent with arguing for it based on unequal participation, because if equality in participation were truly desirable, "the rich and advantaged could do the poor a favor by abstaining" (Brennan 2014, 74).

However, Brennan's main objection against the argument from unequal participation—or what he calls the representativeness argument—is that there is a "less

⁷⁸ Hill also refers to this as a "prisoner's dilemma" type problem solved by compulsory voting (Hill 2014, 149-150).

expansive, more reliable, equally democratic, *more representative*, noncoercive alternative to compulsory voting” (2014, 35-36, emphasis in original). Namely, Brennan suggests using a “voting lottery” to randomly select a relatively small subset of citizens to serve as voters. This is similar to the argument discussed in Chapter 3 (Section 5a) for utilizing random selection of representatives—or sortition—in place of elections. The response given there—that elections are necessary to satisfy the value of mass participation—applies here as well, and is perhaps now even more clear: Voting lotteries and sortition are insufficiently democratic because they lack the element of participation necessary for voting to be an expression of popular sovereignty.⁷⁹ Tuck essentially makes this precise point in addressing similar arguments for replacing mass elections with a “fair lottery for participation in political decisionmaking.” According to Tuck, given that democratic voting is an act of agency expressive of popular sovereignty, “the lottery ceases to be a plausible alternative, as only a very small subset of the group will actually contribute to the outcome” (Tuck 2015, 261).⁸⁰

In fact, even if Tuck’s theory of causal efficacy and individual agency in voting is assumed to be correct, expectations of instrumental value alone are insufficient to ensure equality in turnout. As mentioned in this chapter’s introduction, and discussed generally

⁷⁹ This is also a response to the argument that some individuals from advantaged groups should abstain in order to offset inequality in turnout; in addition to the practical problems of how such a counterbalancing scheme could be implemented, this suggestion flouts the democratic value of participation.

⁸⁰ It is not entirely clear if Tuck is addressing random selection of eligible voters (as Brennan suggests), or random selection of representatives (sortition), but his argument applies to either case. Note how both these options differ from the suggestion of Akhil Amar for “lottery voting,” in which an election is held, but the winner is determined by random selection of a single ballot (Amar 1984, 1283). This type of system would allow for mass participation, but it would be lacking in (strict) majoritarianism, although a majority choice would have the highest probability of being selected. Tuck states generally that majoritarianism is essential because “it is the only principle that offers both equality and agency”, but he also seems open to super-majoritarian requirements that in effect increase minority power (Tuck 2015, 261). Amar’s system is designed specifically to address the problem of “overweening majoritarianism” by providing additional power to minorities, whose candidates could by sometimes prevail over those with a greater number of votes (Amar 1984, 1286).

in Chapter 2, there are many situations in which individuals will perceive little or no instrumental value in participating, such as when an election seems clearly uncompetitive, or when alienation causes one to discount the significance of any differences between candidates on the ballot. For this reason, the argument set forth here for a duty to vote does not rest on the existence of instrumental utility in voting, but rather is formally modeled in the D term of the calculus.⁸¹ As noted previously, Brennan argues there would be no duty to vote even if voting had instrumental value, because the act could still be considered supererogatory, or it might be “just one way among others of discharging a duty to act beneficently” (Brennan 2011a, 17). Brennan thus spends an entire chapter of his book arguing for a conception of “civic virtue without politics” (43-67), and he concludes that even if there were a civic duty to contribute to the public good of democracy and avoid free-riding, or even a general duty to “exercise civic virtue,” there still would be no duty to vote. According to Brennan, there may simply be a “division of labor” in how citizens fulfill their civic duties: “Some citizens can exercise civic virtue through writing letters to the editor, others through activism, others through political philosophizing, and others through voting” (66). However, while there may indeed be many different ways of exercising civic virtue that are in some sense interchangeable, voting arguably exemplifies a minimum standard of civic virtue that should be generally applicable to all citizens of a democracy, apart from specifically justified exceptions (see Chapman 2014, 22-23). As discussed, this approach is consistent with the normative foundations of Rawlsian justice, as it seems necessary to ensure equal

⁸¹ An argument for a duty to vote based on purely instrumental reasons was outlined in Chapter 2 (Section 3b), but such a duty was explained as applying only when the value of B is perceived as relatively high. As discussed there, even Brennan might be forced to admit the possibility of an instrumentally based duty under such circumstances (see n. 16 and accompanying text). By contrast, the D -term duty advanced here is formulated as generally applicable, although it might not apply under some specific circumstances, as discussed below in the section on limits of the duty to vote.

participation and to mitigate bias in turnout, which Brennan has not adequately addressed.

In his following chapter, entitled “Wrongful Voting” (Brennan 2011a, 68), Brennan clarifies what seems to be his principle reason for assuming voting is not a civic duty even if citizens do have certain obligations of political participation. As clear from the chapter title, Brennan holds strong epistemic premises regarding the purpose and meaning of the act of voting in a democracy, and accordingly he assumes there are objective standards for judging the quality or correctness of voting decisions, as discussed in Chapter 3.⁸² Indeed, fundamental epistemic premises, and the assumption that the information costs of voting “correctly”—or at least “well”—are prohibitively high for most citizens, appear to be at the root of most objections to compulsory voting and the duty to vote. Lomasky and Brennan thus conclude that even if there were a duty to vote, it would not be a duty just to vote but rather “a duty to vote *right*” (Lomasky and Brennan 2000, 74, emphasis in original).⁸³ Although they fail to explain what their standard of right voting entails, it is clear that in their opinion most citizens cannot meet it, and thus if there were a duty to vote, it would not be “a duty of the citizenry at large, but only of the political cognoscenti.”⁸⁴ Brennan provides somewhat more detail regarding his conception of epistemic standards, and it is clear that he too believes many—if not most—citizens will fail to meet those standards.⁸⁵

⁸² Epistemic conceptions of voting are strongly related to deliberative democratic theory, as discussed in Chapter 3 (Section 4). Epistemic premises are also evident in game theoretic studies of compulsory versus voluntary voting that employ a “common values” model assuming an objectively correct decision corresponding with some “true” state of the world, as discussed toward the end of Section 3 above.

⁸³ See *supra* n. 55, and Chapter 2 (n. 15) regarding the coherence of demanding that citizens vote “right” and avoid “wrongful” voting.

⁸⁴ See also Abraham (1952, 349): “We could conceivably enforce voting, but we could hardly enforce informed, intelligent voting. Little would be gained by a mass of uninformed voters in the ballot booth.”

⁸⁵ Brennan gives some examples of what he considers wrongful voting, but declines to expound on his epistemic standards, stating that his argument “rests upon there being such a thing as unjustified political beliefs, but it need not be committed to any particular epistemology” (Brennan 2011a, 70). He later states

As discussed in Chapter 3,⁸⁶ Brennan has argued for implementing voter competency exams to ensure minimally informed voting, going so far as to assert that universal suffrage should be “replaced by a moderate epistocracy, in which suffrage is restricted to citizens of sufficient political competence” (Brennan 2011b, 700). This is an extreme proposal that seems unlikely to gain acceptance under existing democratic norms; however, the idea that an epistemic conception of voting might support some limitations on electoral participation is perhaps a more mainstream view. As discussed previously, Rawls assumes that voting should be a voluntary civil right rather than an obligatory civic duty, and his reliance on strong epistemic premises is clear when he further suggests that limitations on universal suffrage and the principle of “one person one vote” could be justified—at least in theory—if “the inequality of right would be accepted by the less favored in return for the greater protection of their other liberties” (Rawls 1999, 204). He thus outlines a possible justification for J. S. Mill’s proposal for a system of “plural voting,” with extra weight given to the votes of citizens who “can be identified as having superior wisdom and judgment,” because “others are willing to trust them and to concede to their opinion a greater weight.” In principle, Rawls seems to believe such a scheme might actually be justified if not for the fact that a right to equal participation “is bound to have a profound effect on the moral quality of civic life,” and to “enhance the self-esteem and the sense of political competence of the average citizen” (205).

Likewise, in Foley’s treatment of voters as fiduciaries, he notes how Rawls “refuses to condemn” Mill’s scheme of plural voting (Foley 2015, 178, n. 55), and then

that “it is not obvious that my theory implies that only a small percentage of people will be justified in voting,” but he indicates that even if this were the case, it “need not be a problem” and “would not undermine democratic stability” (105).

⁸⁶ See Section 4a and Conclusion.

goes on to discuss the possibility that a Rawlsian original position analysis might support the requirement of a high school diploma for voting. Foley asserts that this is an idea which, “in theory, we cannot rule out entirely” (182), and in fact he seems only to reject it in practice because it might result in the electorate being “disproportionately skewed on the basis of race” (183).⁸⁷ Thus, while Foley’s notion of voters having a fiduciary duty to advance the public interest might not seem like an inherently epistemic conception, epistemic criteria nevertheless creep into his approach, for prospective voters presumably need a certain amount of political knowledge and information just to be able to distinguish between public and private interests in casting their vote. It thus seems clear that Foley views voters in some sense as distinctly epistemic fiduciaries, as evident in his suggestion that a minimum educational requirement for voting could be justified to ensure that “members of the electorate have some degree of education concerning the responsibilities to the public interest” (Foley 2015, 183).⁸⁸

⁸⁷ Foley indicates that literacy tests should be rejected for the same reasons (184). For evidence of the “discriminatory effects of educational requirements and civics test[s]” (183, n. 62), Foley cites Joseph Fishkin’s important article on voting rights equal and citizenship (Fishkin 2011). However, Foley seems perhaps to overlook Fishkin’s argument regarding a “universalist turn” in voting rights, under which “[t]he wrongness of disenfranchisement is not simply the wrongness of race discrimination or other similar group-based exclusion: it is also a violation of a fundamental right of citizens” (Fishkin 2011, 1345). Fishkin also mentions a shift in voting rights jurisprudence away from acceptance of epistemic qualifications to promote informed voting, as in literacy tests, and towards what he calls “the politics of universalism,” with voting understood as “a fundamental right of citizens, closely tied to citizenship itself” (1349). Fishkin does not discuss the question of whether voting should be voluntary or compulsory, although he notes that the “question of compulsory voting” is raised by Bruce Ackerman’s view that “voting is the paradigmatic form of *universal* citizenship participation,” which implies that “a high level of participation in the form of voting is a necessary component of a robust democracy” (1301, n. 41). However, Fishkin also indicates that a citizen’s participatory interest in voting is fulfilled by simply having the right to vote and “does not depend on whether a voter actually *exercises* the right” (1300).

⁸⁸ Foley does explain exactly what he means by “education concerning the responsibilities to the public interest,” and it is admittedly not entirely clear if he is referring just to education concerning the concept of the fiduciary responsibility of voting, or if he also means to include learning enough substantive political information to identify the vote choice consistent with the public interest. If he is not articulating a standard of substantive knowledge, then it is perhaps unclear why a high school diploma would be necessary, as individuals can probably understand the concept of voting for the public interest even without graduating from high school.

The problem is that Foley's concept of voting in the public interest, like Brennan's stronger epistemic conception, is inherently vague and difficult—if not impossible—to define. For example, is a vote intended to benefit one's own social group at the expense of other groups considered voting in the public interest? Or voting for one's preferred political party? Or based on personal religious beliefs? What about voting to benefit one's own state or locality at the possible expense of the national interest? Some might even suggest that voting in the national interest at the expense of the global public interest could involve a violation of fiduciary responsibility. Contrary to Foley's argument, such ambiguities provide reasons for someone in the Rawlsian original position to decide against constitutionally designing an electoral system and implementing voting procedures in a way meant to ensure that voters intend to benefit some conception of the public interest. This point also applies generally to stronger epistemic standards, for even if valid epistemic criteria for correct and incorrect voting decisions did exist (which is certainly debatable), such criteria would likely be impossible to conclusively identify in a manner that “could be accepted by all qualified points of view” (Estlund 2008, 33). Since anyone in the original position would not know if they might be one of those whose views would be identified as incorrect, insufficiently informed, or contrary to the public interest, one would seek to avoid this possibility by avoiding strong epistemic standards in electoral rules and procedures.

Furthermore, if Foley's concern with demographic bias in the electorate weighs so conclusively against requiring a high school diploma to vote, why is he apparently unconcerned, as indicated previously, with the inequality in turnout that results from constitutionally structuring voting as voluntary rather than as a civic duty? In fact, just as Brennan is arguably wrong in his assertion that blocking some citizens from voting will yield “better” decisions that are more consistent with the “true” public interest, so is

Foley arguably mistaken in believing that keeping voting voluntary will tend toward that same goal. The notion that everyone who votes should—ethically speaking—intend to benefit the public interest is not that controversial.⁸⁹ Admittedly, if any subset of citizens could really be trusted always to correctly identify the choice most consistent with the true public interest, it might be acceptable for only that subset to participate, at least in principle. In reality, however, no subset of citizens can be trusted in this way, particularly if one has doubts as to the validity of any particular epistemic or fiduciary standards for good decisions. Therefore, as previously argued, in the original position one would seek to prevent the turnout inequality likely to arise under voluntary voting, and instead encourage everyone—or as close to everyone as possible—in the eligible population to participate, by institutionalizing voting as a general civic duty. Indeed, voluntary voting may only make sense to the extent that one assumes the validity of given standards for good decisions, *and* one believes so strongly in those standards that any resulting demographic bias in the electorate is deemed unimportant. Furthermore, one must of course also believe that a process of voluntary self-selection into the electorate will tend, on the whole at least, to result in the participation of more voters whose choices are consistent with the given standards.

Nevertheless, even granting the dubious existence of unassailable epistemic criteria, there would still be an argument for keeping epistemic democratic theory “in its right place” and excluding such criteria from the constitutional design of electoral

⁸⁹ Foley is perhaps right to suggest that voters have a fiduciary duty to consider the public interest in some sense, and Brennan could even be right that it would be ethically better if those who intended to support their own “selfish” interests at the expense of the public interest—or otherwise intended to knowingly vote “badly”—would simply abstain. However, in terms of constitutional design based on the Rawlsian original position, voting rules and procedures should arguably still be structured under the assumption that individuals are free to vote for their own private interests if they so choose. This is primarily a theoretical point, since voters do generally intend their votes to benefit the public interest, or at least their conception of it (see *supra* n. 61 and accompanying text).

participation.⁹⁰ Returning again to *The Sleeping Sovereign*, Tuck’s approach builds on a fundamental distinction early democratic theorists made between the political spheres of “sovereignty” and “government.” If voting for representatives is viewed as a quintessential expression of democratic popular sovereignty—as Tuck’s theory arguably suggests—then it may be that while the activity of *government* is subject to strong epistemic standards of correctness, the exercise of *sovereignty* in the popular authorization of democratic representatives should remain a matter about which there are no objectively right and wrong answers.

Notably, this perspective on the argument for a civic duty to vote does not depend on the consequentialist issue of whether and how outcomes might change under higher levels of turnout.⁹¹ As Hill argues, the democratic values of “‘equality,’ ‘effective participation,’ and ‘inclusiveness’ aren’t valued and upheld only when they yield particular outcomes; they are valued and upheld *regardless* of the outcome” (Hill 2014, 141). Thus, if full participation—or as close to it as possible—is viewed as an essential element of democratic sovereignty, its effect on outcomes may be largely irrelevant.⁹² From this perspective, regardless of any standards of correctness that might apply in evaluating outcomes within the sphere of government, the sovereign activity of voting to appoint representatives should be an area where such standards are inapplicable.

⁹⁰ See generally Chapter 3 (Section 4c) for a discussion of the “right place” for epistemic democratic theory.

⁹¹ On the relationship between turnout and electoral outcomes generally, see Chapter 3 (Section 2). See also *supra* ns. 27-29 and accompanying text for a discussion of the effects of compulsory voting on political outcomes.

⁹² This is not to say that democratic participation is valued for purely procedural reasons. Hill admits that if full participation began to “routinely produce outcomes that we wouldn’t expect or desire—for example, if high turnout elections started to exacerbate rather than ameliorate bias—the procedures would need to be reevaluated” (Hill 2014, 141, n. 50). Furthermore, as discussed in the concluding section below, democratic legitimacy may require a confidence that outcomes are a “true” expression of popular sovereignty in the sense of accurately reflecting the collective preference of the majority of eligible voters.

In the end, it may be necessary to choose between targeting voting rules and procedures toward improving the *quality* of the electorate, or toward improving *equality* by minimizing the chances for demographic bias in turnout and enhancing popular sovereignty by encouraging full participation. Those who choose the former route must of course be prepared to defend their notion of quality and to explain clearly how their proposed voting rule will improve it. The argument here, however, is that supporting participatory equality through a duty to vote is more consistent with fundamental democratic norms, although admittedly this view appears contested by contemporary treatments of voting in liberal democratic theory and constitutional design.⁹³ Voting rules and procedures provide a ready tool for implementing broadly professed standards of correctness in political decisionmaking. This gives rise to arguments that voting should remain strictly voluntary, as discussed above, and it may likewise support proposals for higher substantive voting costs intended to dissuade “bad” decisionmakers from participating, as discussed in Chapter 3. The argument in that chapter was that strong epistemic standards are not needed for a coherent and comprehensive understanding of the role of voting in a representative democracy, and that mass participatory democratic theory is therefore defensible, in principle at least, without such standards. Here that

⁹³ As an additional example, John Ferejohn has recently asserted that the duty to vote is problematic, because from the standpoint of liberal theorists who believe that “the justification for government is instrumental to private self-rule, it does not seem obvious that the instrumentalities of government inherit any strong priority over private choices” (Ferejohn 2015, 233, n. 8). This assertion perhaps needs further explanation, which Ferejohn does not provide, and arguably he mistakes voting as an instrumentality of *government*, while it is better conceived as an instrumentality of *sovereignty*. Furthermore, the context of Ferejohn’s argument seems to show that he holds epistemic assumptions about voting, as he worries that ballot secrecy prevents the verification of whether citizens have “good” reasons for their electoral choices. Admittedly, Ferejohn may be correct to the extent that private moral obligations can take ethical precedence over publicly owed duties, as discussed in the following subsection. However, this does not mean that voting should not be constitutionalized, and possibly enforced, as a general civic duty; it just means there can and should be exceptions for those who have personal moral objections to participating. Ferejohn also argues that voting should not be a duty because abstaining can itself be a kind of political expression, an argument was discussed previously in connection with the question of a right to abstain (see Section 4 *supra*).

argument is extended, and an affirmative basis for the value of participation is set forth more clearly: The civic duty to vote that follows from conceiving of voting as the quintessential expression of popular sovereignty—effective to the extent that (as close as possible to) everyone participates—supplies the missing foundation for broadly participatory theory and practice under modern conditions of representative democracy.

c) Limitations on the Duty to Vote

Even assuming a constitutional-level civic duty to vote, it is important to acknowledge that such a duty may have its limits. An initial issue concerns the fact that—given the secret ballot—even strictly enforced compulsory voting laws do not compel the actual casting of a valid vote, and in practice individuals can choose to abstain by casting a blank or intentionally spoiled ballot, as discussed previously.⁹⁴ The question thus arises whether a constitutional duty to vote should be formally understood as an obligation actually to *vote*, or as a more limited duty basically just to appear at the polls. In other words, should compulsory voting really be understood, and perhaps even constitutionalized, as compulsory *turnout*, as some proponents of the duty to vote have suggested?⁹⁵

Opponents of compulsory voting have asserted that a duty “simply to *turn out* and tick your name off a list” is not normatively meaningful, and it may indeed even be incoherent to the extent proponents mean to suggest that “it is easier to justify compulsory turnout than compulsory voting” (Lever 2009, 224; see also Saunders 2010, 75). Sarah John thus asserts that admitting that compulsory voting really entails only compulsory turnout “fatally undermines the case that having all people vote, from all social classes, is so important that the state should compel it” (John 2015, 432).

⁹⁴ See *supra* n. 41 and accompanying text.

⁹⁵ See *supra* n. 43 and accompanying text.

Admittedly, such critics may be correct in pointing out that a formal duty simply to appear at the polls does not seem to be very meaningful standing alone.⁹⁶ Any law or administrative procedure that required only turnout would thus presumably rely normatively on a more fundamental duty to actually vote. At the constitutional level, therefore, it is perhaps more correct to speak of a civic duty to vote, and it may also be more accurate to refer to the laws and procedures of “compulsory voting” rather than “compulsory turnout.”⁹⁷ Nevertheless, it is arguably not just coherent but actually quite useful to consider a constitutional duty to vote that is administered in practice as compulsory turnout. Admitting that actual compulsion of valid voting may be neither practically nor normatively desirable in implementing and enforcing a constitutional duty to vote should not mean giving up on the fundamental importance of “having all people vote, from all social classes,” as John suggests.

Nonetheless, it must be admitted that compulsory turnout alone, even without compulsory voting, could still be viewed as unacceptably coercive. As indicated, whether a given level of coercion is justified under liberal norms is an issue that requires weighing the competing interests of the individual and the state, although this can be seen more as a question of administrative implementation and enforcement, rather than an issue of constitutional design. That said, there is certainly an argument that citizens should not be coerced even to appear at the polls and have their names checked off a list, particularly if they have principled objections to doing so. Some of those who are extremely alienated might wish to express their opposition to the political system specifically by not turning

⁹⁶ This is not to say that turnout alone can have no meaning in itself. For one thing, turning out might lead in the future to actual voting, and furthermore, “participating” by casting an invalid vote as an act of protest could also be valued as a form of expression.

⁹⁷ The term “compulsory participation” might also be accurate, and a constitutional provision could set forth a civic duty to “participate” in elections, which perhaps leaves somewhat open the question of whether an actual valid vote is required.

out, and by abstaining completely rather than being seen as participating in the election in any way. This would be consistent with allowing for conscientious objector status, and the constitutional duty to vote could be interpreted and administered so that any objection based on sincerely held personal beliefs would serve as a valid excuse.⁹⁸ Indeed, the competing interests reflected in these two constitutional provisions—the civic duty to vote and the individual right to free expression—are arguably best reconciled in this manner. Presumably, the state would still be within its rights in compelling objectors to formally express their objection in some form, whether before or after the election, but this could be seen as just a general instance of the fact that individuals are not free to completely ignore administrative or judicial process, even in the most liberal of liberal democracies.

Thus, whether structural limitations to compulsory voting were provided by the constitutional text itself, or applied through legal and administrative channels, it would not make the concept of the civic duty to vote incoherent either in theory or in practice. In the end, however, the moral force of a compulsory voting law or constitutional duty to vote would only be as strong as any law or constitutional provision might happen to be, and the general problem of political obligation under liberal democracy, as noted previously, is a complex and difficult one (see Pateman 1985).⁹⁹ While there may be a civic duty to support just institutions, as Rawls states, “The real question is under which circumstances and to what extent we are bound to comply with unjust arrangements”

⁹⁸ This would contrast with enforcement of compulsory voting in Australia, where a political objection to participating appears not to constitute a valid excuse for abstaining, although a religious objection is deemed sufficient (see *supra* n. 19).

⁹⁹ See *supra* ns. 73-74 and accompanying text. Machin argues that a law compelling turnout is normatively coherent simply because citizens have a duty to obey any “democratically made law” (Machin 2011, 104-105). This is debatable, however, so it may be better to conceptualize a constitutional duty or legal obligation that fundamentally demands voting, but which may be implemented and enforced to require only turnout.

(Rawls 1999, 308). Individuals may decide to disobey a compulsory voting law whether it requires actual voting or just turnout, though of course such disobedience—even if it happens to be justified—may have consequences in terms of sanction.¹⁰⁰ It is thus crucial to distinguish conceptually between a purely political obligation founded on a constitutional civic duty to vote, and the more personal moral obligations of individuals, which could indeed engender a duty to abstain based on fundamental objections to the political system (see Hanna 2009).¹⁰¹ As Rawls recognizes, all political obligations have limits, and they “may sometimes be overridden” (Rawls 1999, 309).

Another possible limit on the duty to vote involves the attitude of indifference. As discussed in Chapter 2, individuals can be instrumentally indifferent either through complete lack of information about the options on the ballot, or because they perceive the options as effectively equivalent. Either way, a duty to vote should not be understood to suggest that anyone who is truly indifferent to the outcome of an election should nevertheless cast a vote.¹⁰² In common practice, this means there is no requirement to vote in every election on the ballot, as there may be good reasons to allow indifferent voters to engage in “rolloff” and abstain in down-ballot state and local races, or other

¹⁰⁰ See *supra* n. 45 and accompanying text; see also Rawls’ general discussion of justifications for civil disobedience and “conscientious refusal” (Rawls 1999, 319-335).

¹⁰¹ Hanna argues that given an unjust and fundamentally undemocratic political regime, one may be ethically required to abstain rather than “contributing to the false and harmful appearance of legitimacy” (Hanna 2009, 277). In terms of the calculus, this could be modeled as expressive disutility in the *D* term (see *supra* n. 1 and accompanying text). Notably, Hanna admits the possibility of a moral duty to vote based on purely instrumental motivations in the case of “a close election that poses the threat of a particularly horrible candidate being elected,” which could “outweigh worries about perpetuating unfairness” (282).

¹⁰² This is perhaps another reason for implementing and enforcing the duty to vote in practice as compulsory turnout only, for individuals should arguably be free to abstain if they are truly indifferent. This again contrasts with the enforcement of compulsory voting in Australia, where voting appears to be required even for those with no clear preferences: The Australian Electoral Commission’s website cites the case of *Lubcke v Little* VR 807 (Supreme Court of Victoria, 1970), in which the court ruled that a “subjective incapacity” to form a preference ordering among candidates did not constitute a valid excuse for failing to vote (AEC 2014; see *supra* n. 19).

items on the ballot about which they may have insufficient information to make a choice (see Wattenberg et al. 2000).¹⁰³ There is thus no implication that individuals should vote randomly, or for reasons that they themselves would not regard as meaningful, simply to fulfill their civic duty.¹⁰⁴ Moreover, as discussed in Chapter 3, the voting decision must retain at least minimal epistemic qualities, although this is arguably better understood as a minimum standard of cognitive capacity, rather than a standard of political knowledgability.¹⁰⁵ While citizens ideally should vote in an informed manner, the definition of what exactly that means must be allowed as highly subjective, and no particular conception of informed voting should be implemented or enforced through electoral rules and procedures. In general, the argument from Chapter 3—and continued in this chapter—is that election law and policy should be structured to increase turnout as much as possible. If the duty to vote reflects the value of mass participation as an expression of popular sovereignty, then even though completely indifferent voting is not normatively desirable, strong epistemic conceptions of voting should be rejected, particularly to the extent they may be used to argue for higher substantive costs or limiting electoral participation in any way.

A somewhat harder issue involves whether instituting the duty to vote as a general obligation of citizenship simply requires too much of individuals. In his book *The Limits of Obligation*, James Fishkin asserts that general obligations tend to interfere with “the robust zone of indifference” that must be assured in a liberal democracy (Fishkin 1982,

¹⁰³ As discussed in Chapter 2, informational indifference may be more common in “second-order” elections that receive more limited media attention and often lack partisan affiliation as an informational cue on the ballot, although there may be ways to address such problems (see Chapter 2, Section 4; see also Chapter 3, text accompanying ns. 86-87).

¹⁰⁴ There might arguably even be a duty to abstain in such situations rather than knowingly voting “badly” (see *supra* n. 89).

¹⁰⁵ See Chapter 3, n. 64 and accompanying text.

23).¹⁰⁶ This raises the question: how burdensome are the actual costs that a duty to vote would impose on democratic citizens? Even assuming that the substantive costs of casting a ballot are not prohibitive, the deeper issue comes down to information costs. Proponents of compulsory voting must admit that the duty to vote includes a duty to be at least minimally informed about electoral choices, and not to remain completely indifferent by willful ignorance. Although there is a great deal of free or very low cost information available today—as Downs indicated there was even in his day (see Downs 1957b, 146)—opponents of compulsory voting nevertheless may insist that the information costs of voting in even a minimally responsible manner are prohibitively high for many—if not most—citizens. Epistemic theorists like Brennan obviously believe this, and Fishkin himself appears to agree, as evidenced by his work on deliberative democratic theory discussed in Chapter 3.¹⁰⁷ Assuming that epistemic and deliberative theorists are wrong at least with regard to citizens who have some basic interest in politics, those having no interest in politics whatsoever do pose a more difficult problem. For such individuals, the informational costs of voting might be perceived as simply too high, and so there may be a real question whether asking these citizens to devote some

¹⁰⁶ Fishkin identifies the zone of indifference with Isaiah Berlin's (1969) conception of "negative liberty" (see Fishkin 1982, 20, n. 1). Notably, a civic duty to vote would not technically be considered a general obligation as Fishkin defines it (27), because voting is an example of an act that is "agent specific" (160), since it can only be performed once (legally) in any election. Fishkin does not address whether a duty to vote would go beyond the "limits of obligation," although he mentions an assumption that "any special obligations attached to citizenship" are not overly burdensome (43, n. 8). Nevertheless, Fishkin discusses voting extensively as a typical example of the problem that general obligations pose in large groups given the apparently negligible effects of an individual vote, and he also discusses voting in the context of Kantian generalization arguments (102, 109-110). Interestingly, Fishkin's analysis prefigures Tuck's approach in *Free Riding* with regard to the theory (attributed to David Lyons) that threshold effects offer a possible solution to the problem of negligibility (Fishkin 1982, 111-123). However, Fishkin appears to make the mistake Tuck mentions of not realizing how each contributor can claim responsibility for the entire benefit, not just a proportional share (124-127; see Tuck 2008, 41); see also Chapter 1, Section 5, regarding the same mistake made by Brennan (2011a).

¹⁰⁷ See generally Sections 4a & 4b.

attention to politics, to form an opinion, and to vote, might actually begin to infringe on their protected “zone of indifference.”¹⁰⁸

While there may be no definitive answer to this question, the argument here is that requiring even these completely disinterested citizens to pay attention to politics and incur some information costs around election time does not in principle ask too much, because the standards for informed voting are not very high, as discussed in Chapter 3, and as discussed in this chapter, participation of as many citizens as possible helps to ensure and enhance democratic popular sovereignty.¹⁰⁹ Nevertheless, given the limitations on implementing and enforcing the duty to vote in practice, there will always be opportunities for some citizens to remain blissfully disinterested if they so desire. Moreover, if the civic duty to vote includes a duty to be at least minimally informed, it arguably follows that the state may also have a duty to help facilitate citizens’ acquisition of political information. It would certainly seem like a worthy policy goal to help citizens become more politically informed, whether through support for civic education and other efforts to increase access to information, or by structuring elections in ways that reduce information costs and diminish opportunities for indifference, as discussed in Chapter 2 (Section 4). This approach might also offer support for regulation of political campaigns and the media in the interest of more informed voting, although in the U.S. this of course

¹⁰⁸ See also Elliot (2017, 666) on this general objection. Perhaps another difficult question involves whether it is asking too much to require those who are deeply *ambivalent* about their vote choice to reach a decision by creating identity-defining “voluntarist reasons” for how they vote—as discussed in Chapter 2 (Section 3c). As indicated there, those who are politically ambivalent generally seem self-motivated to reach a decision and vote; however, if one were truly unable to reach a decision it would presumably provide an acceptable excuse for not voting, as the individual would be functionally indifferent.

¹⁰⁹ It is also possible that a duty to vote might lead some of these disinterested citizens to take an interest in politics in the future and become more politically informed and active (see Lijphart 1997, 10), although as discussed in Section 3 *supra*, the results of empirical studies in this area are inconclusive.

raises highly contentious free speech issues under the First Amendment.¹¹⁰ Nonetheless, those who are truly concerned with uninformed voting might consider some of the things the state can do on the supply side of information, rather than focusing exclusively on the demand side of how citizens can (or cannot) acquire more and better political information.

There are other issues to explore regarding possible limits on the duty to vote: For example, one question is whether the duty should apply in all elections, or perhaps it should apply only in “first-order” elections for higher offices, but not in all state and local races or other down-ballot elections. As discussed, second-order elections can pose more difficult informational problems,¹¹¹ but these may also be the types of elections that could benefit most from a duty to vote, since turnout in these races is often so low. Relatedly, there is the question is how *often* citizens can be obliged to vote, which has consequences for whether elections at different levels of government should be consolidated or held separately, as discussed in Chapter 3, as well as possible implications for whether there should be a duty to vote only in general elections or in primaries as well.¹¹² Furthermore, one could wonder whether the duty to vote should apply to direct democracy initiatives, which can implicate more difficult informational issues than voting for representatives.¹¹³

¹¹⁰ In any liberal democracy, the state clearly does not—and indeed should not—have the same control over the information costs of voting as it has over substantive costs; however, this does not mean the state should exercise no control at all over the distribution of information costs.

¹¹¹ See *supra* n. 104.

¹¹² Basic information problems can also arise in primary elections, particularly given the absence of a party cue; however, whether primaries should also be subject to a duty to vote is a more complex question. Higher turnout, at least among partisans, arguably might be needed to assure the “legitimacy” of candidate selection, but the wider issues of normative legitimacy that arise in general elections do not seem as urgent in the context of primaries. Nevertheless, party primaries play a crucial agenda-setting role in a majoritarian system, and any duty to vote should arguably apply also in primaries, as advocated by Mann and Ornstein (see *infra* n. 126). See also Abu El-Haj (2016) on the importance of a “broad and representative” electorate in primaries.

¹¹³ See Chapter 3, n. 38. There is a strong argument that any referendum on a proposed constitutional amendment (or on initial ratification) should be included in a duty to vote, since these concern fundamental matters of popular sovereignty under Tuck’s approach. However, constitutional amendments in some states

However, further discussion of the contours of the duty to vote and its limits must await a work focused more specifically on addressing these questions. Here the objective has been to present an argument that participating in elections should be a constitutional-level civic duty as well as a civil right, to respond to some of the main objections to the duty to vote and compulsory voting, and to briefly discuss some of the limits of the duty in theory and practice. The next section will proceed to consider some of the implications that recognizing a civic duty to vote could have for election law and policy.

5) IMPLICATIONS FOR ELECTION LAW AND POLICY

The objective of encouraging universal participation of all eligible voters emerges from the foregoing analysis and argument, and it is important to recognize that election law and policy is essential in helping to reach this objective. Some opponents of compulsory voting might concede that voting is a social duty, or a moral obligation of some sort, but will nevertheless insist that this duty or obligation should not be legally enforceable in any way (e.g. Abraham 1952, 348).¹¹⁴ In fact, even without any implementation or enforcement, or indeed any changes to election law and policy, the formal recognition of a civic duty to vote could have significant consequences for voting behavior. A compulsory voting law—even if not strictly enforced—might encourage citizens to vote simply by reinforcing a social norm of voting (see Hasen 1996, 2168; see also Birch 2009, 148).¹¹⁵ As Patricia Funk explains, the legal duty to vote may also serve

may be more like ordinary legislation through direct democracy than matters of fundamental constitutional design.

¹¹⁴ According to Abraham, “Voting is not a social duty that should be made a legal duty. It is a moral obligation, a demonstration of responsible citizenship, a worthy endeavor, but not a duty enforceable at law” (Abraham 1952, 348).

¹¹⁵ This could be true notwithstanding the finding that compulsory voting’s effect on turnout is strongest when accompanied by strict enforcement (see e.g. Panagopoulos 2008).

an “expressive” function, reflecting what she calls the “moral message” of legal norms, which can induce individuals to vote independently of any sanctions for noncompliance (Funk 2007, 139).¹¹⁶ Moreover, there is abundant evidence that social motivations in general are important factors for inducing turnout at the individual level (see *supra* Section 2).

Nevertheless, beyond its effect on voting behavior, it is difficult to imagine that formally recognizing a civic duty to vote would not have major implications for election law and policy. Richard Hasen’s seminal article on compulsory voting is entitled “Voting Without Law” (1996), and by voting “*with* law” Hasen essentially means compulsory voting enforced through negative sanctions (2169-2172).¹¹⁷ However, because he believes that this is not a viable option for the United States, Hasen is forced to conclude that for many citizens in this country, voting without law “means simply not voting” (2178). However, Hasen curiously seems to neglect the fact that there is far more to the involvement of law in the motivations for voting beyond the possibility of sanctions for abstention.¹¹⁸ In an important if obvious sense, there can be no such thing as voting “without law,” since rules and regulations are of course necessary to the functioning of elections. In a deeper sense as well though, the laws and administrative procedures of elections fundamentally *structure* the act of voting and may thereby influence the

¹¹⁶ Funk finds that removal of the formal legal obligation to vote in several Swiss cantons led to a significant reduction in turnout, even though sanctions had previously been extremely low and effectively only symbolic (Funk 2007). She theorizes that a compulsory voting law could affect behavior even without any enforcement whatsoever, but that some minimal enforcement might be useful to maintain the strength of the social norm of voting (155).

¹¹⁷ Hasen takes his article’s title from Robert’s Ellickson’s book on social norms, *Order Without Law* (1991).

¹¹⁸ Also, Hasen’s article discusses only the question of whether legal norms can serve as a substitute for social norms, but strangely perhaps, he does not seem to address the possibility that legal norms could also work to strengthen otherwise weak social norms, as could be the case with voting. Although this topic is beyond the current scope, legal and social norms are probably best seen as potentially working together and interacting in complex ways, rather than merely substituting for one another.

individual turnout decision in many different ways. Whether voting is considered a right only or a duty as well should therefore be seen to have major implications—from the highest levels of fundamental law, down to the administrative implementation of electoral policy—all distinct from the issue of whether there is any enforcement mechanism for actively compelling participation.

The highest level legal implication would be the possibility of formally constitutionalizing the duty to vote. Recently there have been recurring calls for an amendment to the U.S. Constitution to explicitly provide for a *right* to vote, coming from politicians (H.J. Res. 25, 114th Cong.), legal scholars and practitioners (Raskin 2004; Nelson 2013; Daniels 2017, 601-604), and policy advocates (Soros & Schmitt 2013; FairVote 2017).¹¹⁹ However, it appears that no one has yet suggested that such an amendment to the Constitution might establish voting as a civic *duty* as well as a civil right. If there is ever to be a new constitutional convention in this country, as some have urged there should be, the question of whether voting should be only a right or a duty as well is surely something worthy of consideration (Levinson 2006; 2012, 116-117).

Before considering the question of whether and how to implement and enforce the duty to vote, the mere recognition of a constitutional-level civic duty could have significant implications for the jurisprudence of voting rights in this country. The most important implications could be for cases alleging that the administrative rules or procedures for voting are so burdensome that they effectively deny the right to vote, or

¹¹⁹ See *supra* n. 36 on the ambiguous status of the right to vote in American constitutional jurisprudence. The most recent bill proposing a constitutional amendment on the right to vote, House Joint Resolution 25, 114th Congress (2015-2016), was introduced by Rep. Mark Pocan (D-WI) and co-sponsored by 40 other Democratic representatives (<https://www.congress.gov/bill/114th-congress/house-joint-resolution/25/text>). There has been some pushback on a voting rights amendment from election law scholars who argue that agreement on the text of an amendment would be extremely difficult, and it would likely fail to resolve many of the most pressing voting rights issues (Gerken 2014; Briffault 2014).

what election law scholars have termed “new vote denial” cases.¹²⁰ If a claim of vote denial were characterized as preventing a citizen from exercising a fundamental civic duty as well as a fundamental civil right, this would certainly provide additional weight to the individual interest when courts perform balancing tests against state interests, as in the controversial voter identification case, *Crawford v. Marion County* (2008). As discussed in Chapter 1 (Section 7),¹²¹ Joseph Fishkin (2011) criticizes the use of “structuralist,” or group-based conceptions of voting rights in such cases, arguing that courts should instead recognize the value of participation for individual citizens. A duty to vote similarly draws attention to the individual interest in normative conceptions of election law. Fishkin argues that this interest should be protected against “dignitary harm” (Fishkin 2011, 1296), and in Chapter 1 it was argued that instrumental motivations provide an even stronger reason for individual-level protection of voting rights; this chapter now provides another strong reason based on the non-instrumental motivation of fulfilling one’s civic duty. Furthermore, recognition of a duty to vote also bolsters the argument, as set forth in Chapter 3, that a strict scrutiny standard of review should apply in judging whether specific impositions of substantive voting costs are constitutional.¹²² If voting were not only a fundamental right, but a fundamental duty as well, the argument is even more forceful that the government should bear the brunt of the costs of administering elections, and it should not be permitted to shift these costs onto individual citizens in a manner that unduly burdens their participation, unless the administrative procedure can be demonstrated as narrowly tailored, and the least restrictive means of fulfilling a compelling interest in electoral efficiency or integrity.

¹²⁰ See Chapter 1, n. 38.

¹²¹ See also Chapter 3, n. 9.

¹²² See Chapter 3, Section 5b.

Establishing a constitutional duty to vote could also have major implications for U.S. electoral policy even without enactment of a compulsory voting law. One example is the system of voluntary registration used in American elections, which is fairly unique among contemporary democracies (see Rosenberg and Chen 2009, 1). If voting were established as a duty as well as a right, it might make more sense for voter lists to be compiled by the government under a system of “automatic” or “universal” voter registration (see Tokaji 2008, 502-503).¹²³ Alternatively, same-day and Election Day registration procedures would receive support from formal recognition of a duty to vote, as it would seem harder to justify imposing an additional burden of prior registration in order to fulfill one’s civic duty. Strict voter identification laws that do not allow for reasonable individualized exceptions could also be more problematic from a policy perspective focused on voting as civic duty. In general, recognition of a duty to vote would entail a very different perspective on the role of the state in administering elections. Under the current system of purely voluntary voting, it stands to reason that the state should essentially just avoid “overburdening” participation, however that is defined. If voting were a duty, however, the state would conceivably have a more affirmative responsibility for ensuring that participation is as easy and accessible as possible, as Hill illustrates in her description of the extensive efforts in the Australian system to ensure that everyone eligible is able to vote (Hill 2014, 122-123).¹²⁴ In general, all this provides

¹²³ If a compulsory voting law were enacted, another possibility would be to make registration compulsory along with voting (see Tokaji 2008, 504).

¹²⁴ Of course the actual enforcement of compulsory voting in Australia makes this argument even stronger. See also Elliot (2017, 659), indicating that policies to minimize substantive voting costs should be implemented along with sanctions for failure to appear at the polls. Elliot indicates that his argument for “mandatory turnout” does not take a position on whether voting should be considered a duty (657). Of course, even if voting is considered a right only and not a duty, the government may still take on a more affirmative responsibility for making voting accessible to all citizens, as appears to be the case in India, for example (see Roy 2012, 174; Mukherji & Anand 2014). See Gilmarin (2012) for a discussion of the emergence of conceptions of popular sovereignty and voting in India. According to Gilmartin, differences

added support to the arguments in Chapter 3 (Section 5) for keeping substantive voting costs as low as possible and strengthening the overall policy mandate for high levels of turnout.

The question then arises as to whether to implement and enforce the constitutional duty to vote, and if so how. Should voting in the United States be compulsory? Hasen's assessment that enforcement of the duty to vote through negative sanctions "has virtually no chance of enactment in the United States" probably still rings true (Hasen 1996, 2173; see also Tokaji 2008, 505).¹²⁵ Nevertheless, there have been some calls for compulsory voting along the Australian model from notable political science and policy scholars, and from at least one very notable politician. As mentioned previously, Arendt Lijphart advocated for this in his APSA presidential address (Lijphart 1997). More recently, in their widely read book, *It's Even Worse Than It Looks*, Thomas Mann and Norman Ornstein feature compulsory voting as one of their most prominent proposals aimed at resolving contemporary crises in American politics (Mann & Ornstein 2012, 140-143).¹²⁶ William

between conceptions of popular sovereignty in the United States and India "can perhaps best be read in ongoing differences in election law—and in processes of voting" (Gilmartin 2012, 420).

¹²⁵ Hasen discusses compulsory voting at the federal level, which he indicates would likely be constitutional, at least insofar as the First Amendment (see *supra* n. 39). The broader question of the constitutionality of compulsory voting enforced at the federal level through fines for unexcused abstention is a complex question beyond the current scope. Presumably there could be strong legal arguments on both sides of this issue, particularly if the 2012 decision on the "individual mandate" associated with the Affordable Care Act offers any insight (*National Federation v. Sebelius*, 567 U.S. ____ (2012)). The possibility of compulsory voting at the state or local level is discussed below.

¹²⁶ Mann and Ornstein argue generally that compulsory voting could reduce political polarization by expanding the centrist base of the electorate and minimizing the need for voter mobilization efforts. On this point, see Malkopoulou's argument—based on an insightful historical study of compulsory voting in Europe—that "political moderation is perhaps the most important effect of compulsory voting" (Malkopoulou 2015, 34). However, Malkopoulou also concludes that compulsory voting "is not very compatible" with a majoritarian electoral system like that of the United States, but rather proportional representation may be necessary "to render any application of compulsory voting meaningful" (172-173). Mann and Ornstein argue for mandatory voting in all federal elections—general and primary, which they admit seems unlikely at present, but they say that could change "after another lengthy period of dominance by political extremes and the divisive discourse, agenda, and outcomes that follow" (Mann and Ornstein 2012, 142). They also argue for other administrative reforms aimed at "expanding the vote" (133-140).

Galston of the Brookings Institution has also been a vocal supporter of this type of reform (Galston 2010, 7; 2011; 2014). In fact, President Obama advanced the possibility of compulsory voting at a town hall meeting, reportedly stating, “If everybody voted it would completely change the political map in this country” (O’Donnell and Arkin 2015).¹²⁷ Legal scholars have perhaps been somewhat more reticent about making voting an enforceable obligation, although Nicholas Stephanopoulos has prominently advocated for compulsory voting with fines for unexcused abstention, suggesting that it could actually have a chance of being enacted if it began first at local levels of government (Stephanopoulos 2015; see also Tokaji 2008, 505).¹²⁸ So perhaps Hasen’s pessimistic assessment of the possibility of compulsory voting in the United States might actually be somewhat less true today?

Nevertheless, it may be that the Australian model of administrative fines for abstention really is not appropriate for the United States, if only due to the particular sensibilities of American political culture, and institutional path dependence (Hasen 1996, 2177).¹²⁹ In fact, while proponents of compulsory voting have focused attention on dispelling the notion that actual *voting* is really required, insisting that in practice only *turnout* is compulsory, the deeper problem perhaps relates to the *compulsory* part of the term, not the *voting* part. For it is the literal prospect of the government *compelling* or

¹²⁷ Obama was also quoted as saying that compulsory voting as practiced in Australia could help “counteract” problems of money in politics. The White House press secretary later reportedly clarified that the President “was not making a specific policy prescription” (Boyer 2015).

¹²⁸ Stephanopoulos does not address the additional informational problems with voting at local levels (see *supra* n. 104), but he points out that locally implemented compulsory voting would lead to voting in higher order races if local elections are held concurrently with federal elections. Tokaji suggests that compulsory voting should start with experimentation at the state level, as does Galston (2010, 7).

¹²⁹ Hasen identifies the main objection to compulsory voting as coming from the American tradition of libertarianism (2176). He writes, “Although the government tells people what to do all the time—file an income tax return, serve on a jury, register in the Selective Service Program, separate trash—hackles rise when compulsory voting is mentioned. I have no good explanation for this phenomenon, especially in a compulsory voting system allowing for abstention” (2176, footnotes deleted).

coercing participation that seems to draw the most ire of opponents of the duty to vote, and this is probably what most threatens to offend American sensibilities. However, even in Australia, the system can accurately be described—more accurately perhaps, at least in strictly economic terms—simply as the government *incentivizing* voting in a manner that happens to be through negative monetary sanction, or fine.¹³⁰ Additionally, as discussed above in Section 3, what is generally referred to as compulsory voting encompasses many different methods of institutionalizing a civic duty to vote, with varying types of positive or negative sanctions, as well as different levels of administrative enforcement. In the American context, policy analysts and advocates might do best first to focus attention on the normative argument for voting as a civic duty, as opposed to a purely voluntary act, and perhaps on introducing this argument into efforts aimed at a constitutional amendment on voting. Then, when it comes to the question of implementing and enforcing this duty, discussion could focus on *enabling* and *encouraging* participation, which presents a more acceptable frame for American sensibilities, though still controversial enough (see Parker 1993, 572).¹³¹

The idea of “nudging” citizens to vote could likewise be useful (Elliot 2017).¹³²

Pamela Karlan has suggested the government might provide some form of financial

¹³⁰ Opponents of compulsory voting might insist on adding that the negative monetary sanction is enforced through the coercive power of the state, but this is generally implicit in any government fine.

¹³¹ Parker promotes what he calls a “Populist sensibility” in American constitutional theory, which looks favorably on the exertion of “political energy” by “ordinary people,” and which is opposed by a more dominant “Anti-Populist” sensibility. When it comes to the implications of this approach, Parker writes, “To favor the exertion of political energy isn’t to require it. Those who don’t participate in political life should not be penalized, since compelled behavior is not exactly a release of energy. Neither, however, should they be insulated in their privacy, protected from exposure to politics. Rather, they should be both *enabled* and *encouraged* to take some part” (Parker 1993, 572). Parker is not discussing voting in particular, but he continues by stating that the “central mission” of this approach should be “to promote majority rule” (573). When he later mentions voting—among other forms of political participation—he suggests a concern for whether rights of participation are “*actually being exercised*” (576).

¹³² Elliot frames compulsory voting—or as he prefers it, “mandatory turnout”—as a precommitment mechanism for those who already have some motivation to vote, and as a nudge for those who would not otherwise participate. Thaler and Sunstein define a nudge as “any aspect of the choice architecture that

compensation for voting in order to boost turnout, comparing this to compensation provided for jury service (Karlan 1994, 1472; see also Saunders 2009).¹³³ The obvious objection is that payments for turnout risk a “commodification” of the franchise, which raises familiar anxieties about citizens voting for the wrong reasons (Hasen 2000, 1358).¹³⁴ Hasen thus expresses a general preference for “sticks over carrots” in increasing turnout, and he suggests that paying citizens for participation might actually be counterproductive to instilling the norm of voting as a civic duty (Hasen 1996, 2172; see also Macmullen 2014, 74).¹³⁵ Karlan acknowledges the “commodification objection” and admits there may be a risk of “devaluing voting by paying for it”, but she considers the value of high turnout to outweigh that risk (Karlan 1994, 1473). More importantly

alters people’s behavior in a predictable way without forbidding any options *or significantly changing their economic incentives*” (Thaler and Sunstein 2008, 6, emphasis added). Admittedly, encouraging turnout through implementation of a duty to vote might require a change in economic incentives, as reflected in the voting calculus, although it seems unclear to what extent such a change would be considered “significant.” Elliot in fact frames mandatory voting as a nudge simply to pay attention to politics, rather than to actually vote (Elliot 2017, 665)

¹³³ As mentioned previously (see *supra* Section 4), Karlan believes that the right to vote must include a right to abstain, and she thus opposes a duty to vote on First Amendment grounds. This might explain why she suggests a positive incentive for voting, rather than a negative one; however, she also notes, without further discussion, that compulsory voting as practiced in Australia is “the functional equivalent” of her suggestion (Karlan 1994, 1472, n. 54). Saunders argues that a policy of payment for voting can increase turnout “without threatening individual liberty” in the manner of compulsory voting (Saunders 2009, 130).

¹³⁴ Hasen argues that “turnout buying” raises normative concerns similar to “core vote buying”—or payments for voting a certain way—in that both compromise the principle of the inalienability of votes (1358), which has the “purpose of promoting public-regarding voting” (1336). Hasen admits this may be less of a concern with payments for turnout, but he states that “the equation of incentives for voting could still have a ‘corrosive effect’ on politics” (1358). Notably perhaps, he focuses mainly on targeted campaign efforts to raise turnout in certain areas, of which he cites examples in California, and he thus indicates that laws allowing payments for turnout are subject to “partisan manipulation” (1355). However, he does not seem to address directly whether a general policy of compensation for voting administered by the government would be subject to the same concerns. Hasen also indicates that payments for turnout are illegal in federal elections, although some states do allow the practice (see Hasen 2000, 1326).

¹³⁵ Hasen states that a compulsory voting law “suggests moral authority or social consensus,” while a positive incentive for voting “inspires an outcome-oriented calculus.” MacMullen indicates more generally that positive incentives “may increase the quantity of civic action at grave cost to its quality.” But see Malkopoulou (2015, 54), indicating that Aristotle himself favored payments for participation in the ancient Greek assembly over fines, which he believed were unfair to poor citizens. Plato, according to Maklopoulou, was opposed to both payments and fines, indicating that participation should be instrumentally motivated by “fear of bad governance” (id.).

perhaps, Karlan suggests that there could be creative ways of designing positive incentives in ways aimed at increasing the “sense of political efficacy” and fostering additional civic participation, such as a policy of providing voters with vouchers for donation to non-profit organizations.¹³⁶

Framing any positive incentive for turnout as a policy intended to *offset the costs* of voting could also be useful in this regard.¹³⁷ One idea for implementing a positive incentive that would fit with this type of framing might be a voter’s tax credit or other tax subsidy, something a few policy scholars have suggested (Hicks 2002; Mann & Ornstein 2012, 142-143).¹³⁸ Notably, this option might be less susceptible to the general critique that paying everyone who turns out is less economically efficient than selectively imposing fines on abstainers (Feely 1974, 241; Hasen 1996, 2172). A positive incentive in the form of a tax credit could be made more economically efficient, particularly if it were enacted as part of a larger tax reform and implemented in a revenue neutral manner (see e.g. Brunk 1980, 561).¹³⁹ Tax incentives could also be targeted toward low-income demographics with the worst turnout rates (Hicks 2002, 67), such as by making any tax credit for voting refundable, similar to the Earned Income Tax Credit (see IRS 2017). Another option some have suggested would be to enter all voters into some form of

¹³⁶ Karlan likens her proposal of “vouchers for voting” to policies that have been suggested (and recently implemented in the city of Seattle) for campaign finance vouchers (Karlan 1994, 1473, n. 58).

¹³⁷ Indeed, Hasen notes that although payments for turnout are illegal under federal law, it is apparently legal to provide compensation aimed at directly reducing substantive voting costs, such as a payment of free gasoline to cover transportation to the polls, which is permissible according to a federal case Hasen cites (Hasen 2000, 1358, n. 185, citing *Dansereau v. Ulmer*, 903 P. 2d 55 (Alaska 1995)).

¹³⁸ Hicks advocates a tax credit for voters in Canadian elections. Mann and Ornstein mention this idea only briefly, attributing it to former Republican congressman Mickey Edwards.

¹³⁹ Brunk suggests simply raising taxes by a certain amount and then refunding it to those who participate in the election; however, there obviously could be more complex ways of providing and paying for any tax incentive for voting.

lottery (see Karlan 1994, 1472, n. 54; Mann and Ornstein 2012, 143).¹⁴⁰ However, such a turnout lottery would arguably detract from an emphasis on electoral participation as an act of individual agency in which all citizens share equally.¹⁴¹ In the end, it would probably be best to allow for experimentation at state and local levels with different policies of positive or negative incentives for turnout, perhaps even used in combination with each other.¹⁴²

Finally, any implementation or enforcement of the duty to vote could also have significant implications for the mobilization efforts of political campaigns. In fact, where compulsory voting is strongly enforced there should essentially be no need to “get out the vote,” and campaigns might instead focus more of their energy and resources on *message* rather than mobilization (Karp et al. 2007, 96).¹⁴³ Interestingly, the issues raised by mobilization efforts seem to cut against the most common argument made by opponents of compulsory voting; namely, that leaving voting voluntary improves the epistemic or

¹⁴⁰ Hasen cites a Mississippi Supreme Court case upholding a turnout lottery run by a political candidate (see Hasen 2000, 1326, n. 11, citing *Naron v. Prestage*, 469 So. 2d 83 (Miss. 1985)). See also Panagopoulos (2012, 266), describing a failed 2006 Arizona ballot initiative that would have established a state-sponsored (revenue-neutral) lottery awarding a million dollars to one lucky voter in every even-year general election.

¹⁴¹ Furthermore, the miniscule chance of winning a lottery seems to echo the so-called paradox of voting and the supposedly negligible probability of casting an instrumentally useful vote in a large election (see e.g. Gelman et al. 2012, 324). Mann and Ornstein indicate that rather than entering voters into a lottery, they “prefer a change that strengthens the civic fabric of society, one with responsibilities and opportunities for citizens” (Mann and Ornstein 2012, 143).

¹⁴² For empirical evidence on the turnout effects of varying monetary incentives, see Panagopoulos (2012). Based on field experiments in actual elections, Panagopoulos estimates that compensation of about \$40 would increase turnout by an average of about 6 percentage points, while \$100 could increase turnout as much as 15 points (277-278). He indicates that incentives in the \$40-50 range have about the same turnout effect observed in studies of social pressure, including door-to-door canvassing (278).

¹⁴³ Karp et al. do find evidence of increased mobilization efforts in marginal districts in Australia, demonstrating that even with strongly enforced compulsory voting, mobilization can still be somewhat important, particularly in close elections. They also fail to find strong evidence of campaigns in Australia focusing on voters who report weaker party identification, which would indicate “conversion” strategies focused more on message (102-103). However, the tendency to emphasize message over mobilization could be more subtle, as Karp et al. acknowledge in their hypothesis that campaign efforts in Australia are “likely to be flavored by attempts at conversion rather than mobilization” (96, emphasis added). A more intensive case study of Australian electoral campaigns would be useful for better evaluating this hypothesis.

deliberative quality of the decision. Indeed, most would probably agree that the resources and efficacy of campaigns in mobilizing supporters should not necessarily be allowed to determine the winner of an election, as there is no reason to assume that candidates with more skilled and well-funded ground campaigns are normatively better in any way. Furthermore, voluntary voting also leaves much more room for political parties and campaigns to pursue strategies of “demobilization” of likely opponents in efforts that may undermine norms of participatory equality (see Piven et al. 2009).¹⁴⁴ Even without active demobilization strategies, the get-out-the-vote efforts that are necessary under voluntary voting can actually exacerbate inequality in turnout, since campaigns largely target individuals from already over-represented demographics (Enos et al. 2014). Thus, an additional policy argument for implementing and enforcing a civic duty to vote is that it could minimize the ability of political campaigns to influence election outcomes in ways that infringe on principles of equal participation and democratic justice.

6) CONCLUSION

This chapter’s argument for the civic duty to vote as an important non-instrumental motivation for voting, represented by the *D* term of the voting calculus, has relied and built upon the arguments of previous chapters. Chapter 1 demonstrated that voting can be instrumentally rational and causally efficacious, while Chapter 2 showed that the instrumental benefits of voting may be perceived to be substantial. Chapter 3 then explained how the informational costs of voting are not necessarily prohibitive for the average citizen, proceeding to outline a normative argument for election laws and

¹⁴⁴ Lijphart also indicates that campaigns under compulsory voting could feature less negative advertising, which is thought to work by demobilizing opponents (Lijphart 1997, 10, citing Ansolabehere & Iyengar 1995; but see Krupnikov 2011).

policies aimed at minimizing substantive costs. With this chapter, the foundations for a coherent and cohesive argument for a civic duty to vote are now complete, and the overall conclusion is as follows: The duty to vote provides an ethically meaningful and rationally coherent normative foundation for broadly participatory theory and practice under modern conditions of liberal democracy. Some implications of this argument for U.S. election law and policy are that a civic duty to vote should be considered for inclusion in efforts for a Constitutional amendment on voting rights, and some form of implementation and enforcement of this duty could be designed in a manner appropriate to political and cultural norms for this country.

An institutionalized addition to the *D* term of the calculus through a constitutional duty to vote is probably only needed where turnout is low, as in the U.S., for if turnout is high, citizens either already recognize the duty as a social norm, or they may have strong instrumental motivations for participating due to the structure of the political system (see Hill 119-120; Hirczy 1995). At the risk of further belaboring readers of this already long chapter, some final comments on the dangers of low turnout may be useful: Rates of turnout are related to an important concern for democratic legitimacy, specifically the confidence that may or may not be justified in the belief that political outcomes—or more specifically, choices of political leadership—are “true” expressions of popular sovereignty, in the sense of accurately reflecting the majority preference of the eligible voting citizenry. This is crucial, because if it were believed that the choice of leadership—and hence political outcomes—might have been different had more citizens voted, it could decrease democratic legitimacy, both empirically and normatively. The force of this point is revealed in the extensive efforts of political scientists to prove as conclusively as possible that the political preferences of American nonvoters are in fact

reasonably close to those of voters, at least in recent history.¹⁴⁵ Yet from a constitutional design perspective, and from the perspective of the Rawlsian original position, if one is truly concerned with minimizing the possibility of a deviation from the “true” democratic outcome, and knowing with more than just a certain statistical confidence that outcomes are legitimate, electoral institutions can and should be structured toward this goal. Instead, there seems to be more concern among democratic theorists with ensuring some sort of substantive epistemic quality in the voting decision, which many believe would actually diminish with higher turnout.

Furthermore, if there were a deviation in popular sovereignty such that the “true” majority’s preferences were contravened, it might not actually be observable in political outcomes. It is possible that a totalitarian dictator could win a democratic election due to low turnout, but more likely the winner would be just another liberal democratic party. The winner would then take the country in a different direction—not necessarily making it substantively less democratic, or moving it to the political left or right—or consistently in any particular direction—but rather just to a *different place* than it would otherwise have gone. Perhaps this helps explain why studies of compulsory voting’s effects have not turned up much conclusive evidence beyond the increase in turnout. More fundamentally, these studies may be misguided to the extent they seek out substantive effects as a means for either defending or criticizing compulsory voting normatively. What arguably makes Australia more democratically legitimate than the U.S. could have nothing to do with the substance of political outcomes in either country, but rather with the fact that in Australia there can be greater confidence that the choice of leadership is an expression of popular sovereignty reflected through the will of the majority. In the

¹⁴⁵ See Chapter 3, Section 2.

U.S., by contrast, one is always somewhat unsure on this point, and so statistical studies are needed to convince. In fact, there may be reasons to believe that many elections in this country would turn out differently if turnout were generally higher. Indeed, the country as a whole might look very different today—and could look very different in the future—if more citizens participated in elections.

Yet the larger argument for a civic duty to vote reaches beyond these outcome-oriented concerns. As discussed in Section 2 above, conceptions of duty can transcend considerations of instrumental aims and even ideas of rational choice, as reflected in a Kantian approach to ethical behavior. The duty to vote has a natural affinity to the notion of religious duty, and voting from a sense of obligation may thus be valued as participation in a shared public ritual that contributes to republican ideals of civic virtue and a communitarian “civil religion” (Bellah 1967).¹⁴⁶ It may thus be understandable that Lomasky and Brennan choose to evoke Marx’s well-known denigration of religion; however, just as Marx was arguably wrong in thinking that the sociological phenomenon of religious belief was an irrational delusion that would eventually die out, so may Lomasky and Brennan be wrong about the duty to vote. Rather than the opiate of democratic masses, the duty to vote may be a vital staple of a healthy democratic diet.

¹⁴⁶ Indeed, Bellah states that “democratic communitarianism is committed to the idea of participation as both a right and a duty” (Bellah 1995, 54), although as discussed in Chapter 2 (Section 2), he and other scholars in these schools of theory appear to attach little value to voting as a form of democratic participation.