

FIXING UNITED STATES ELECTIONS: INCREASING VOTER TURNOUT AND ENSURING REPRESENTATIVE DEMOCRACY

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ABSTRACT

In the United States, the Democrats and the Republicans are the dominant political parties. When Election Day comes around, voters must choose between one of these parties. Under the first-past-the-post voting system, which nearly all states use, the winner typically has the support of less than a majority of voters. This dearth in viable choices and winner-take-all voting method leaves many voters feeling dejected. They feel that their votes do not matter and that their voices are not being heard. As a result, voter turnout decreases and, consequently, democracy suffers. When this happens, the United States ceases to be a truly representative democracy, and many voters are left with their fundamental rights to vote and associate abridged. Therefore, it is imperative that the United States shift to a multi-party system, and that states enact laws to adopt single transferable vote/instant runoff voting systems. These voting systems allow voters the opportunity to rank candidates, with their vote automatically going to the candidate who stands the best chance of winning. Only then will the United States have a truly representative democracy, increased voter turnout, and guaranteed fundamental rights for voters.

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INTRODUCTION

It is Election Day. After listening intently to every campaign and every debate, you do not feel comfortable with either the Democratic or Republican nominee for President of the United States. In fact, neither candidate truly represents all of your interests and beliefs. The candidate who best represents you runs as the Green Party nominee, but has not polled higher than 2% nationally.¹ You feel that a vote for that candidate, no matter how much you support him or her, is wasted. Perhaps worse,

1. See Tessa Berenson, *Jill Stein: "We Have Crossed the Rubicon in This Election"*, TIME (Nov. 7, 2016) <http://time.com/4561508/jill-stein-green-party-election-day/>.

you would be essentially giving a vote advantage to the party and the candidate you despise the most. What do you do? Do you forgo voting for who you truly believe is the best candidate just so you can feel like your vote mattered? Or do you not even bother voting? In the United States, voter turnout in elections is pitifully low.² The struggle to generate consistently high voter turnout can be attributed to the current two-party system³ and first-past-the-post⁴ voting that is employed in nearly all U.S. elections. These two aspects of American democracy contribute to voters' feelings of apathy and loss of political voice.⁵

America has always been a diverse nation. Because of the level of diversity, it is almost impossible for two political parties to represent every voter's ideals.⁶ As a result, "[m]any Americans feel disillusioned about the choices they are offered at the polls. They have trouble finding candidates they really believe in and feel that they are often forced to vote for the lesser of two evils."⁷ Further, voters are faced with two parties whose political ideals have shifted further and further from the center.⁸ For example, in 1970, it was estimated that "moderates constituted 41% of the Senate; [by 2011] that proportion [was] 5%."⁹

In a 1995 CNN and USA Today poll asking voters about their thoughts on political parties, "43% of the respondents thought it 'not too important' or 'not at all important' for the president

2. See *infra* Section I.A.1.

3. See *infra* Section I.B.1.

4. See *infra* Section I.B.2.

5. See *infra* Sections I.B.1.–2.

6. In a Gallup poll that asked respondents whether they considered themselves a Republican or a Democrat, 40% responded that they viewed themselves as an Independent. *Party Affiliation*, GALLUP, <http://www.gallup.com/poll/15370/party-affiliation.aspx> (last visited Nov. 21, 2017).

7. DOUGLAS J. AMY, *BEHIND THE BALLOT BOX: A CITIZEN'S GUIDE TO VOTING SYSTEMS* 3 (2000).

8. Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 *YALE L.J.* 804, 818 (2014) ("It is well-known that our era of governance is constituted by what I have called 'hyperpolarized political parties.' By all conventional measures, the parties in government are more polarized than at any time since the late nineteenth century.").

9. Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 *CAL. L. REV.* 273, 277 (2011).

to be from one of the two major parties.”¹⁰ Further, polls from the late 1990s and early 2000s demonstrated that one-third to one-half of Americans wanted to see the Democrats and Republicans challenged by a third party.¹¹ Yet, to this day, the American people have not gotten their wish. Voters are still left with only two viable choices when they go to the polls. Despite their political views, or a combination of views, voters must choose to side with whichever major party they feel most closely represents them if they want to feel like their vote is not wasted on a third party.¹²

The first-past-the-post voting system, which is used by the majority of states, further exacerbates this dilemma and adds to the problem of voter turnout. This voting system is a winner-take-all system in which the candidate who receives at least a plurality¹³ of votes wins the election. It is argued that first-past-the-post voting helps maintain the status quo by sustaining the power of the two main political parties to the detriment of third parties.¹⁴ Further, first-past-the-post denies majority rule by only requiring a mere plurality to declare a victor.¹⁵

In essence, the current electoral system suffers from a distinct absence of viable candidates outside of those nominated by the two established political parties and provides little opportunity to change this traditional electoral custom. As a result, voters become cynical and bitter, resulting in decreased voter turnout.¹⁶ This is a threat to the idea of democracy and to voters’

10. AMY, *supra* note 7, at 4.

11. *See id.*

12. For many, voting for a minor party candidate is inconceivable. It is an extraordinary act for Americans to vote for a third party candidate. Loyalty to the two-party system is a central feature of their political being. To vote for a third party, citizens must repudiate much of what they have learned and grown to accept as appropriate political behavior, they must often endure ridicule and harassment from neighbors and friends, they must pay steep costs to gather information on more obscure candidates, and they must accept that their candidate has no hope of winning. STEVEN J. ROSENSTONE ET AL., *THIRD PARTIES IN AMERICA* 3 (1984).

13. In elections, a plurality is “a number of votes cast for a candidate in a contest of more than two candidates that is greater than the number cast for any other candidate but not more than half the total votes cast.” *Definition of Plurality*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/plurality> (last visited Nov. 21, 2017).

14. *See infra* Section I.B.2.

15. *See infra* Section I.B.2.

16. Kimberly C. Delk, Comment, *What Will It Take to Produce Greater American Voter*

constitutional rights.¹⁷ Under the United States Constitution, the First and Fourteenth Amendments guarantee the right to “associate with others for the common advancement of political beliefs.”¹⁸ Furthermore, voters are guaranteed the right to vote through various provisions in the Constitution.¹⁹

In *Wesberry v. Sanders*, the Supreme Court heard a case challenging a Georgia statute proscribing congressional districts.²⁰ Georgia was split into ten districts;²¹ “[t]he average population of the ten districts [was] 394,312.”²² The Fifth Congressional District, however, had a population estimated to be around 823,680, more than twice the average.²³ Voters from the Fifth Congressional District brought suit, claiming that this drastic difference in populations among the districts deprived members of the Fifth District a “right under the Federal Constitution to have their votes for Congressmen given the same weight as the votes of other Georgians.”²⁴ Holding that the grossly disproportioned districts discriminated against the voters of the Fifth Congressional District, Justice Hugo Black stated, “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”²⁵ Justice Black concluded by quoting James Madison in *Federalist No. 57*:

Who are to be the electors of the Federal
Representatives? Not the rich more than the poor;

Participation? Does Anyone Really Know?, 2 LOY. J. PUB. INT. L. 133, 135 (2001) (“[M]any attribute low voter turnout to pure apathy, and claim a strong reason for voter indifference in the United States is that people do not think that their vote makes a significant difference.”).

17. Voting is a fundamental right because it is preservative of all other rights. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008); *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 12 (Tex. 2011).

18. *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973).

19. See U.S. CONST. art. I, § 2; see also U.S. CONST. amends. XV, XIX, XXIV, XXVI.

20. 376 U.S. 1, 2-3 (1964).

21. *Id.* at 2.

22. *Id.*

23. *Id.*

24. *Id.* at 3.

25. *Id.* at 17.

not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.²⁶

Justice Black noted that this could fairly be understood as standing for the proposition of "one person, one vote";²⁷ it is also fair to say that this stands for the proposition that all voices must be heard. In order for the democratic process to function effectively, the citizens of the United States, as the electors, must be heard.

In the same year the Supreme Court decided *Wesberry*, it granted certiorari to another case in which it once again stated the importance of the right to vote. In *Reynolds v. Sims*,²⁸ the Court heard a challenge to Alabama's legislative apportionment law and proposed plans.²⁹ Representation in Alabama's legislature was based on population, and the voters who brought suit alleged that certain counties were victims of severe discrimination with respect to legislative representation due to the use of outdated census records.³⁰ The Court not only reaffirmed the constitutional right to vote, but went further by stating:

The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effec-

26. *Id.* (quoting THE FEDERALIST NO. 57, at 385 (James Madison) (Cooke ed. 1961)).

27. *Id.*

28. 377 U.S. 533, 533 (1964).

29. *Id.* at 536-37.

30. *Id.* at 538-40.

tively as by wholly prohibiting the free exercise of the franchise.³¹

The Court, echoing a principle advanced by Justice William O. Douglas in an earlier case,³² again upheld the right to vote, and to vote freely, as a cornerstone of democracy.³³ The Court, however, went further than just affirming “one person, one vote,” by noting the great importance of the voters’ ability to vote for the candidate of their choice.³⁴ It is easy to see why the Court would do this. In a representative democracy, the leaders must actually represent the people, something that would be impossible if the people were unable to truly vote for the candidate of their choice. The inability to vote for the candidate of one’s choice, however, is not the only attack on representative democracy. If voters are dissuaded from voting for a particular candidate because they believe that candidate has no chance of winning, even though they may not necessarily be restricted from doing so, then their right to choose is still being stifled to the detriment of democracy.

It is not just the right to vote that the Supreme Court has exalted. The right to association has also been held as a cornerstone of the democratic system. In *Anderson v. Celebrezze*,³⁵ the Supreme Court heard a challenge to Ohio’s early filing deadline from independent presidential candidate John Anderson.³⁶ Anderson and his supporters met the requirements to have Anderson appear on the ballot in all fifty states and the District of Columbia for the 1980 presidential election.³⁷ Due to Ohio’s

31. *Id.* at 555.

32. *See South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting) (citations omitted) (“There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted It also includes the right to have the vote counted at full value without dilution or discount That federally protected right suffers substantial dilution . . . [where a] favored group has full voting strength . . . [and] [t]he groups not in favor have their votes discounted.”).

33. *See Reynolds*, 377 U.S. at 555.

34. *See id.*

35. 460 U.S. 780, 780 (1983).

36. *Id.* at 782.

37. *Id.*

early filing deadline, however, Anderson was denied a spot on the ballot.³⁸ The Court began its discussion by stating, it “is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”³⁹ In addition to individuals’ rights to associate for the advancement of political beliefs, the Court also underlined an equally important right, the “right of qualified voters, regardless of their political persuasion, to cast their votes effectively.”⁴⁰ To carry out these two fundamental rights, voters must find candidates or parties who, hopefully, reflect the voters’ ideals.⁴¹ There are, however, roadblocks to these rights. As the Court noted:

The right to vote is “heavily burdened” if that vote may be cast only for major-party candidates at a time when other parties or other candidates are “clamoring for a place on the ballot.” The exclusion of candidates also burdens voters’ freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens.⁴²

The Court examined the important role minor parties have historically played when it determined that Ohio’s early filing deadline placed a burden on independent voters.⁴³ Minor parties have contributed new ideas and programs that challenged the status quo and were eventually adopted into the mainstream.⁴⁴ Limiting the opportunities of parties outside of the

38. *Id.*

39. *Id.* at 787 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)).

40. *Id.* (quoting *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968)).

41. *Id.*

42. *Id.* at 787–88 (quoting *Rhodes*, 393 U.S. at 31).

43. *See id.* at 794.

44. *See id.*

major two presents a threat to diversity and competition.⁴⁵ The Court stated, “the primary values protected by the First Amendment—‘a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,’—are served when election campaigns are not monopolized by the existing political parties.”⁴⁶

If these constitutional rights to assemble and vote are to mean anything, shouldn’t it mean that the voters’ voice is to count and be heard? Further, if a system effectively stifles the voters’ ability to count and to be heard, does that not violate these rights?

This Note argues that the United States, through the individual States, must adopt a multi-party system and single transferable vote/instant runoff voting (STV/IRV) in order to fix this decline in voter turnout, create a true representative democracy, and better ensure the fundamental rights to vote and associate. Part I of this Note looks at voter turnout in U.S. national elections, then examines how the United States fares as compared to other democratic nations, and then discusses two of the key reasons behind low voter turnout in national elections. Part II briefly introduces various forms of alternative voting systems that are employed around the world and which may serve as replacements to first-past-the-post. Finally, Part III argues that a multi-party system and STV/IRV are better suited for these rights and analyzes these proposed changes under the Supreme Court’s *Anderson* test to determine constitutionality.

I. DEMOCRATIC CRISIS IN AMERICA: LOW VOTER TURNOUT

“Every election is determined by the people who show up.”⁴⁷ It is a simple proposition, but one that seems all too forgotten. America prides itself on being a democracy—a government by and for the people.⁴⁸ When its citizens fail to show up at the

45. *See id.*

46. *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

47. LARRY J. SABATO, *PENDULUM SWING* 29 (2011).

48. *See* Abraham Lincoln, President of the United States, *The Gettysburg Address*, (Nov. 19, 1863), <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm> (stating that

polls, however, that elected government's legitimacy is called into question.⁴⁹ The tradition of democracy and self-governance is predicated equally on procedure and substance.⁵⁰ When that procedure is flawed, democracy suffers.

A. *The Problem of Low Voter Turnout*

Low voter participation can have tangible effects on the nation. Assuming that the presidential winner received every vote cast, the winner would have still been selected by a fraction of the population because less than 60%, and in many years less than 50%,⁵¹ of the voting age population actually cast a vote. In the 2000 presidential election, for example, voter turnout was barely over 50%.⁵² President George W. Bush lost the popular vote, yet won the Electoral College.⁵³ This meant that President Bush was elected by roughly "twenty-four percent of all eligible voters."⁵⁴ In the 2012 presidential election, it was estimated that there were approximately 219 million eligible voters, but only 126 million people cast ballots.⁵⁵ This means that 93 million, or 42.5%, of eligible voters did not vote.⁵⁶ With so many voters ab-

it was the task of citizens to ensure that a "government of the people, by the people, for the people, shall not perish from the earth.").

49. Notes, *The Case for Compulsory Voting in the United States*, 121 HARV. L. REV. 591, 594 (2007).

50. *Id.* at 594–95. The note goes on to point out an interesting observation: "the level of voter turnout as a percentage of eligible voters in many recent elections would not even be sufficient to constitute a quorum for some of the most important American political institutions." *Id.* at 595. "A majority of the members of either house of Congress must be present in order for the house to do any business." *Id.* at 595 n.27 (citing U.S. CONST. art. I, § 5, cl. 1). "By statute, six of the nine justices of the Supreme Court must be present in order for the Court to do business." *Id.* (citing 28 U.S.C. § 1 (2016)). Voter turnout for Congressional elections, during both midterm and presidential election years, however, is regularly below 50%. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 244 (2012), <https://www2.census.gov/library/publications/2011/compendia/statab/131ed/2012-statab.pdf>.

51. See U.S. CENSUS BUREAU, *supra* note 50.

52. James Thomas Tucker, *Redefining American Democracy: Do Alternative Voting Systems Capture the True Meaning of "Representation"?*, 7 MICH. J. RACE & L. 357, 410 (2002).

53. *Id.*

54. *Id.*

55. Molly J. Walker Wilson, *Financing Elections and "Appearance of Corruption": Citizen Attitudes and Behavior in 2012*, 63 CATH. U. L. REV. 953, 992 (2014).

56. *Id.* at 993.

staining, did the nation as a whole truly speak? Can the person elected in this manner to lead the nation claim to represent the values and ideals of a majority of the people? This is a stunning example of when “majority rule” does not actually apply in U.S. elections.⁵⁷

1. Voter turnout in U.S. elections

Democracy unquestionably relies on the continued participation of its members. When examining voter participation in U.S. elections,⁵⁸ however, a brief look at voter participation in both presidential and congressional elections paints a startling picture. Between 1932 and 2010, the highest voter turnout⁵⁹ was 62.8% in the 1960 presidential election.⁶⁰ Even in the historic 2008 presidential election, voter turnout was only 58.23%.⁶¹ In congressional elections, the highest voter turnout between 1932 and 2010 was just 57.7% in 1964.⁶² The 2016 presidential election illustrates a similar trend.

In the 2016 presidential election, the Democrats chose Hillary Clinton and the Republicans chose Donald Trump as their parties’ respective nominees. By most accounts, voters were largely disillusioned with both candidates; many voters even believed that either candidate would not make even a decent president.⁶³

57. Early estimates show that voter turnout as a percentage of voting eligible population for the 2016 presidential election was 59.3%. Michael P. McDonald, *2016 November General Election Turnout Rates*, U.S. ELECTION PROJECT, <http://www.electproject.org/2016g> (last visited Nov. 17, 2017).

58. For a brief history of voting behavior in the United States, see Christopher W. Carmichael, *Proposals for Reforming the American Electoral System After the 2000 Presidential Election: Universal Voter Registration, Mandatory Voting, and Negative Balloting*, 23 *HAMLIN J. PUB. L. & POL’Y* 255, 265–71 (2002).

59. This is calculated as a percentage of the voting age population.

60. U.S. CENSUS BUREAU, *supra* note 50.

61. FED. ELECTION COMM’N, *FEDERAL ELECTIONS 2008: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES* 5 (2009), <https://transition.fec.gov/pubrec/fe2008/federaelections2008.pdf>.

62. U.S. CENSUS BUREAU, *supra* note 50.

63. In a Pew Research study on voter perception of the presidential candidates, it was found that 55% of registered voters believed that Trump would be a poor or terrible president. *Perceptions of the Presidential Candidates*, PEW RES. CTR. (Aug. 18, 2016), <http://www.peoplepress.org/2016/08/18/2-perceptions-of-the-presidential-candidates/>. Clinton fared slightly better in voter perception; however, 45% of voters still believed she would be poor or terrible.

Perhaps the reason why so many voters felt uneasy with both candidates has to do with the fact that an overwhelming majority of voters did not choose them. In the party primaries, only 28.5% of estimated eligible voters actually voted.⁶⁴ At the general election, voter turnout was 59.3%.⁶⁵

It appears nearly impossible for the United States to have more than 60% of eligible voters participate in any given election. While presidential elections tend to fare slightly better, the fact that the highest voter turnout for representative (midterm) elections between 1932 and 2012 did not even reach 60% is alarming. Arguably, those elections are even more critical to the welfare of our society because Congress creates the laws and possesses the power to override a presidential veto.⁶⁶ Some argue that approximately 60% voter turnout is not actually a problem, as it is still a majority of eligible voters. When comparing the United States to other democratic nations, it is clear that the United States' voter participation is lacking.⁶⁷

2. *Contrasting the United States and abroad*

Contrary to popular belief,⁶⁸ American democracy is not perfect. Voter turnout lags far behind many other democratic nations.⁶⁹ In one study, the United States ranked twentieth out of the twenty-one established democracies that were studied in

Id.

64. Drew DeSilver, *Turnout was High in the 2016 Primary Season, but Just Short of 2008 Record*, PEW RES. CTR. (June 10, 2016) <http://www.pewresearch.org/fact-tank/2016/06/10/turnout-was-high-in-the-2016-primary-season-but-just-short-of-2008-record/>. The "record" that the 2008 primaries set was only a turnout of 30.4% of the voting age population. *Id.*

65. McDonald, *supra* note 57. Turnout as a percentage of voting age population was 54.7%. *Id.*

66. U.S. CONST. art. I, §§ 7-8.

67. See *infra* Section I.A.2.

68. See *The Freest and Most Democratic Nation? Answering Proponents of American Exceptionalism*, ECONOMIST (Mar. 1, 2010), http://www.economist.com/blogs/democracyinamerica/2010/03/quality_american_democracy (responding to the argument that America is "freer, more individualistic, more democratic, and more open and dynamic than any other nation on earth").

69. See Hunter Schwarz, *Proof that Voter Turnout in the U.S. is Embarrassing*, WASH. POST (May 6, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/05/06/proof-that-voter-turnout-in-the-u-s-is-embarrassing/>.

regards to voter turnout.⁷⁰ In a more recent report by the Pew Research Center, the United States ranked twenty-eighth among the thirty-five countries listed in the Organization for Economic Cooperation and Development (OECD) for voter turnout.⁷¹

Elections in other OECD nations underscore the abysmal nature of the United States' voter turnout. For example, Belgium recently had a voter turnout of 87.2%.⁷² While that figure may be the product of Belgium's compulsory voting law,⁷³ other countries without such laws also have voter turnouts well above the United States. For example, Sweden had a voter turnout of 82.6% in 2014, and Denmark reached 80.3% in 2015.⁷⁴ Looking at Canada and the United Kingdom, which many view as the two countries most similar to the United States, Canada had a voter turnout of 62.1% in 2015, and the United Kingdom had a turnout of 68.7% in 2017.⁷⁵ While these numbers are not as high as other countries, they still outpace the United States.

In the most recent French presidential election, the citizens of France shocked the world when, in the first round of the election, neither candidate from a major political party advanced to the second round runoff.⁷⁶ Voter turnout in the first round was 77%, a respectable turnout, yet less than the 2012 first round.⁷⁷ While turnout dropped in the second round,⁷⁸ it is reported that

70. Dianne Wheatley-Giliotti & Marilyn Wills, *The American Voter*, 80 FLA. B.J. 36, 37 (2006).

71. Drew DeSilver, *U.S. Trails Most Developed Countries in Voter Turnout*, PEW RES. CTR. (May 15, 2017), <http://www.pewresearch.org/fact-tank/2016/08/02/u-s-voter-turnout-trails-most-developed-countries/> [hereinafter *U.S. Trails Most Developed Countries*]. Voter turnout was calculated "based on the estimated voting-age population." *Id.*

72. *Id.*

73. *Id.*

74. *Id.*; see also *The Case for Compulsory Voting in the United States*, *supra* note 49, at 591 ("Voter turnout in the United States is much lower than in other democracies. In European nations, voter turnout regularly tops 80%.").

75. Niall McCarthy, *How the UK's Voter Turnout Measures Up*, STATISTA (June 13, 2017), <https://www.statista.com/chart/9795/how-the-uks-voter-turnout-measures-up/>; see also *U.S. Trails Most Developed Countries*, *supra* note 71.

76. Yasmeen Serhan, *Marine Le Pen and Emmanuel Macron Advance*, ATLANTIC (Apr. 23, 2017), <https://www.theatlantic.com/news/archive/2017/04/french-election-results-first-round/523965/>.

77. Voter turnout in the first round of the 2012 French presidential election was 79%. *Id.*

78. Sixty-nine percent of abstaining voters refused to vote for either Macron or Le Pen, who

turnout was 67.9% of the French electorate.⁷⁹

This brief comparison demonstrates just how poorly the United States does with voter turnout. The United States struggles to get even 60% voter turnout⁸⁰ while other democracies across the world see upwards of 80% turnout.⁸¹ When over 40% of the population is not voting, and when a candidate can win with only a mere plurality, it is hard to say that America is a nation of true majority rule and representation.⁸² To better understand why voter turnout is so low in the United States compared to other nations, it is important to determine what causes voters to forgo their right to vote.

B. Causes of the Crisis

In the 2004 presidential election, 142 million people were registered to vote.⁸³ Of the 142 million, 16 million did not vote.⁸⁴ A poll of these nonvoters after the election, found that “[t]wenty percent did not vote because they were too busy or had conflicting . . . schedules. Fifteen percent said they did not vote because they were ill, disabled, or had a family emergency. Eleven percent were not interested in voting or felt their vote would not make a difference.”⁸⁵ While 11% may not seem like a particularly striking number, it means that almost two million registered voters felt that they had no voice. This statistic, combined with any nonregistered voters who may have felt the same way and were not represented in this study, demonstrates low voter

were not members of major French parties. *Macron Seen Winning French Presidential Runoff with 62 Percent of Votes: Poll*, CNBC (last updated May 5, 2017), <http://www.cnbc.com/2017/05/04/macron-seen-winning-french-presidential-runoff-with-62-percent-of-votes-poll.html>.

79. Will Worley, *French Election Turnout Worst in Modern History as Emmanuel Macron Heads for Landslide Victory in Parliament*, INDEPENDENT (June 12, 2017), <http://www.independent.co.uk/news/world/europe/french-election-turnout-emmanuel-macron-parliament-france-victory-fn-marine-le-pen-national-front-a7785366.html>.

80. See *supra* Section I.A.1. and related citations.

81. See *supra* Section I.A.2. and related citations.

82. See *U.S. Trails Most Developed Countries*, *supra* note 71.

83. Wheatley-Giliotti & Wills, *supra* note 70.

84. *Id.*

85. *Id.*; see also Sean Matsler, *Compulsory Voting in America*, 76 S. CAL. L. REV. 953, 959–61 (2003) (stating that voter apathy is often cited as a key reason to explain low voter turnout in the United States).

turnout is a critical issue to American democracy. In a tight presidential election such as in 2000, those nearly two million voters could have swung history in an entirely different direction.

What causes the United States to struggle so mightily with voter turnout? What causes voters to feel as if they have no voice? The answer lies, at least in part, in two of the principles of American politics: the two-party system and first-past-the-post voting.

1. *The two-party system*

A defining feature of the U.S. political scene is the prominence and sustained dominance of the two-party system.⁸⁶ This deeply entrenched two-party system means that elections almost always come down to two choices: Democrat or Republican.⁸⁷ These two parties, however, have not always been the two dominant parties, nor the only parties.⁸⁸ Part of America's growth came at the hands of third parties.⁸⁹ Yet because of state laws, and state and federal courts, laws favoring the two-party system prevailed, pushing third parties to the fringes.⁹⁰

Generally, Americans are tired of the two-party system.⁹¹ In a 2010 Gallup poll, 58% of Americans responded that they believe there needs to be a third major political party.⁹² This call came

86. See ROSENSTONE, *supra* note 12, at 3; see also Daniel R. Ortiz, *Duopoly Versus Autonomy: How the Two-Party System Harms the Major Parties*, 100 COLUM. L. REV. 753, 753-54 (2000).

87. See Carmichael, *supra* note 58, at 274.

88. See ROSENSTONE, *supra* note 12, at 79 (stating nineteenth century third parties "were not random phenomena totally disconnected from the political mainstream"); see also *infra* Section II.B.1.a.

89. *Id.*

90. See *infra* Section I.B.1.b. and related citations.

91. In Oregon, for example, this is best reflected in the number of registered voters who are "nonaffiliated," or are registered as members of a third party. Richard A. Clucas, *The Oregon Constitution and the Quest for Party Reform*, 87 OR. L. REV. 1061, 1063 (2008) ("In 1968, just more than two percent of state voters were not registered as either Republican or Democrat. As of 2008, more than twenty-four percent of voters were registered as nonaffiliated or with a third party.").

92. Jeffrey M. Jones, *Americans Renew Call for Third Party*, GALLUP (Sept. 17, 2010), http://www.gallup.com/poll/143051/Americans-Renew-Call-Third-Party.aspx?utm_source=alert&utm_medium=email&utm_campaign=syndication&utm_content=morelink&utm_term=Government%20-%20Political%20Parties%20-%20Politics%20-

from the belief that the Republican and Democratic parties failed to represent the American people.⁹³ This belief did not just come from one particular group. Ideologically, 61% of liberals, 60% of moderates, and 54% of conservatives stated that they believed a third major party was needed.⁹⁴ Seemingly, a desire for a third major party to challenge the current duopoly is one of the few things liberals and conservatives can agree on.

The disdain for the two-party system is not entirely a recent phenomenon. The founding fathers expressed fear and distrust for political parties. John Adams, in a 1780 letter, wrote: "There is nothing which I dread so much as a division of the republic into two great parties."⁹⁵ James Madison referred to parties, or "factions," as a "dangerous vice" that must be controlled.⁹⁶ Nine years later, President George Washington in his farewell address warned the American people of the dangers of parties.⁹⁷ This is not indicative of the founders' disapproval of a two-party system, nor their approval of a multi-party system. It does show, however, that there was great concern for the stability of the government and the American form of democracy. The founders were concerned that power would be monopolized by one or two warring factions. That is exactly what has happened. Only two major parties exist, and state laws operate to advance and continue this dominance that was warned against long ago.⁹⁸

a. Brief history

While the major political parties are well organized today, that has not always been the case. At the time of the American

%20USA.

93. *Id.*

94. *Id.*

95. Steve Straub, *John Adams, Letter to Jonathan Jackson, October 1780*, FEDERALIST PAPERS PROJECT (Dec. 1, 2012), <http://thefederalistpapers.org/founders/adams/john-adams-letter-to-jonathan-jackson-october-1780>.

96. *The Federalist Papers*, CONGRESS.GOV, <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-10> (last visited Nov. 21, 2017).

97. See *Washington's Farewell Address*, USHISTORY.ORG, <http://www.ushistory.org/documents/farewelladdress.htm> (last visited Nov. 21, 2017).

98. See *infra* Section I.B.1.b.

Revolution, the American people, most notably the Founding Fathers, saw political parties as dangerous concentrations of power that had to be limited.⁹⁹ By 1789, however, the Federalist Party and the Republican Party stood as the two major parties in early American politics.¹⁰⁰ The parties, however, continued to morph over time.¹⁰¹ Prior to the 1830s, these “political affiliations” were considered largely “informal and localized,”¹⁰² with the exception of parties such as the Federalists, Republicans, and Democrats. During the Jacksonian Era, these affiliations evolved into more organized, national groups.¹⁰³ It was during this period that the two-party system formed. As political parties began to nationalize in the 1830s and gain more prominence, the use of plurality rule and “winner take all,” elections for both state and federal governments led to the establishment and dominance of two major parties.¹⁰⁴

There have been periods throughout history characterized by strong third parties as well. In 1896, the “People’s Party claimed twenty-two seats in the U.S. House of Representatives and had an additional five in the Senate.”¹⁰⁵ Throughout history there have been other prominent third parties such as the Union Labor Party,¹⁰⁶ the Socialist Labor Party,¹⁰⁷ the Prohibition

99. Carmichael, *supra* note 58, at 271.

100. *See id.* at 272.

101. *See id.*

102. Tucker, *supra* note 52, at 427.

103. *See id.*

104. *See id.*

105. Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court’s Understanding of Elections*, 85 B.U. L. REV. 1277, 1283 (2005).

106. Formed in 1888 after the decline of the Greenbacks, the Union Labor Party supported a similar labor-focused platform. *See* ROSENSTONE, *supra* note 12, at 67.

107. *Id.* at 89.

Party,¹⁰⁸ the Liberty Party,¹⁰⁹ and the Greenback Party.¹¹⁰ Despite only marginal success at the polls, these parties, and many other third parties, were active publicly and became a vehicle for social and political change.¹¹¹ Abolition of slavery, women's suffrage, child labor laws, the eight-hour work day, the graduated income tax, and many programs that the New Deal later modeled its initiatives after all started with third parties.¹¹² These reforms were commandeered by the major parties in order to both draw support from a larger base of voters and to use them as direct attacks against their competitor party.¹¹³ While one might applaud the major parties for implementing these reforms and propelling them further into the national and political spotlight, one must also recognize that it had the practical effect of taking potential voters away from smaller parties and solidifying the two-party system's grip on the American political system. This grip appears unlikely to loosen given that state law and courts protect the two-party system.

b. Enforcement of the two-party system

Today, despite the existence of the Libertarian and Green

108. The Prohibition Party originally formed in 1869 as a single issue party, but soon expanded and became the first political party to endorse women's suffrage. *Id.* at 75-76. The oldest running third party in America, the party participated in the 2016 Presidential Election in which candidate Jim Hedges appeared on the ballot in three states — Arkansas, Colorado, and Mississippi — garnering a little over 5000 votes. *2016 Presidential Election Results*, POLITICO, <http://www.politico.com/2016-election/results/map/president> (last visited Nov. 21, 2017).

109. An anti-slavery party formed in 1840 as an outgrowth of the American Anti-Slavery Society which formed as a result of the two major parties, the Whigs and Democrats, virtually ignoring the issue of slavery. See ROSENSTONE, *supra* note 12, at 49-50.

110. See *id.* at 63-67; see also Oliver Hall, *Death by A Thousand Signatures: The Rise of Restrictive Ballot Access Laws and the Decline of Electoral Competition in the United States*, 29 SEATTLE U. L. REV. 407, 422 (2005). The Greenback party officially organized in 1876 as a collection of farmers who sought to battle the railroad monopoly and bring relief to the laborers they believed were harmed by Republican and Democratic policies. See ROSENSTONE, *supra* note 12, at 63-67. The party eventually adopted a platform which called for, among other things, a shorter work week and government labor bureaus. *Id.* at 65.

111. See Evseev, *supra* note 105, at 1283; see also Hall, *supra* note 110; Keith Darren Eisner, Comment, *Non-Major-Party Candidates and Televised Presidential Debates: The Merits of Legislative Inclusion*, 141 U. PA. L. REV. 973, 983-84 (1993).

112. See Evseev, *supra* note 105, at 1284; see also Hall, *supra* note 110; *supra* notes 77-80 and accompanying text.

113. Eisner, *supra* note 111, at 984-85.

Parties – and the innovation that third parties have championed in the past – third parties have never generated much success on a national level. In fact, “[n]o third party has succeeded in displacing a major party since the Republicans replaced the Whigs as the chief competitors to the Democrats in the 1850s.”¹¹⁴ Considering the current election laws, it seems unlikely third parties will ever revive past success. This is due to the fact that state laws and the courts have aided in the establishment and protection of the two-party system.

The first ballot access laws had relatively little effect on third parties.¹¹⁵ The early laws required no more than 500 to 1000 signatures to be listed on the ballot.¹¹⁶ States, however, gradually increased the number of signatures required, effectively pushing third parties out.¹¹⁷ Facing the threat of losing a place on ballots, minor parties had to find a way to bring potential voters to their cause.

One way that minor parties attempted to challenge the duopoly of the two major parties was to bring popular, established candidates from major parties and have them run under the banner of a third party. In 2012, for example, Gary Johnson initially sought the Republican nomination for president.¹¹⁸ After struggling early in the GOP primaries, however, Johnson left the Republican Party and began running as the Libertarian candidate.¹¹⁹ In order to limit the ability of third parties to lure potential candidates, many states have enacted “sore loser” laws. These laws “prohibit losing candidates in one party’s primary election from subsequently filing to run as the nominee of another party or as an independent candidate on the general election ballot in the same electoral cycle.”¹²⁰ For example,

114. Evseev, *supra* note 105, at 1315.

115. *See id.* at 1284.

116. *Id.*

117. *See id.*

118. Kendra Marr, *Johnson: “I am Running for President”*, POLITICO (Apr. 21, 2011, 3:17 PM) <http://www.politico.com/story/2011/04/johnson-i-am-running-for-president-053532>.

119. Rebecca Stewart, “Liberated” Gary Johnson Seeks Libertarian Nomination, CNN (Dec. 28, 2011, 12:16 PM) <http://politicalticker.blogs.cnn.com/2011/12/28/liberated-gary-johnson-seeks-libertarian-nomination/>.

120. Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 GEO. L.J. 1013, 1042

Colorado's "sore loser" law states: "No person who has been defeated as a candidate in a primary election shall be eligible for election to the same office by ballot or as a write-in candidate in the next general election unless the party vacancy committee nominates that person."¹²¹ Through these laws, states have effectively cut off a valuable pool of candidates that could help launch third parties into a more prominent national spotlight.¹²²

It is not just these "sore loser" laws that have marginalized third parties and reinforced the two-party system. Courts have upheld laws on the basis that political stability is best served through the two-party system. In *Timmons v. Twin Cities Area New Party*,¹²³ a minor party challenged a Minnesota law prohibiting multi-party, or "fusion," candidates.¹²⁴ The Minnesota law barred "candidate[s] from appearing on the ballot as the candidate of more than one party."¹²⁵ The case arose after Andy Dawkins, a Minnesota state representative, attempted to run in the 1994 general election as the candidate for both the Democratic-Farmer-Labor Party and the New Party.¹²⁶ While the Supreme Court acknowledged the First Amendment's protection of citizens' right to associate and to form political parties, it declared that it is "clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."¹²⁷ The Court admitted that many features of the U.S. political system hamper third parties, including first-past-the-post elections, but stated that the Constitution does not require a specific remedy to this problem, if at all.¹²⁸ While the Court acknowledged that a state

(2011).

121. COLO. REV. STAT. § 1-4-105 (2017); *see also* CAL. ELEC. CODE § 8001 (West 2017); N.J. STAT. ANN. § 19:13-8.1 (West 2017).

122. *See* ROSENSTONE, *supra* note 12, at 139-42.

123. 520 U.S. 351 (1997).

124. *Id.* at 353.

125. *Id.* at 354.

126. *Id.*

127. *Id.* at 358. "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Id.* (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)).

128. *See id.* at 362.

may not “completely insulate the two-party system from minor parties’ or independent candidates’ competition and influence,”¹²⁹ it contradicted this proposition no more than a few lines later. In order to further its strong interest in political stability, the Court declared that states may enact reasonable regulations that have the practical effect of favoring and insulating the two-party system.¹³⁰

In 2016, the United States Court of Appeals for the Fourth Circuit held in a similar fashion. In *Libertarian Party of Virginia v. Alcorn*,¹³¹ a minor party challenged a Virginia ballot-ordering law, which ordered candidates based on a three-tier system.¹³² “The first tier includes candidates from ‘parties’ or ‘political parties,’ which a related section of the Code defines as organizations of citizens that received at least 10 percent of the vote for any statewide office filled in either of the two preceding statewide general elections.”¹³³ Further, “the Code provides that any organization seeking ‘party’ or ‘political party’ status must also have had a state central committee and an elected state chairman present in Virginia for six months prior to any nominee from that organization filing for office.”¹³⁴ Based on this definition, only the Democratic and Republican Parties were designated as “political parties” and placed in the first tier.¹³⁵ “The second tier includes candidates from recognized political parties.”¹³⁶ In order to be “designated a ‘recognized political party’ . . . [the] organization must have had a state central committee present in Virginia for six months prior to any nominee from that party filing for office, and the state central committee

129. *Id.* at 367.

130. *Id.* (“The Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system.”); *see also* *Davis v. Bandemer*, 478 U.S. 109, 144–45 (1986) (O’Connor, J., concurring) (“There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government.”).

131. 826 F.3d 708 (4th Cir. 2016).

132. *See id.* at 712.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

must be comprised of voters residing in each Virginia congressional district."¹³⁷ The organization "must also have a duly elected state chairman and secretary as well as a party plan and bylaws."¹³⁸ Finally, "the third tier of the ballot includes '[i]ndependent candidates' not associated with 'political parties' or 'recognized political parties.'"¹³⁹

The Fourth Circuit upheld the ballot ordering law on the grounds that it was supported by important regulatory interests, most notably political stability.¹⁴⁰ The court, in holding that the law supported political stability, stated:

While minor parties have long been an important feature of political protest and American democratic life, it is also entirely legitimate for states to correlate ballot placement with demonstrated levels of public support. Indeed, there are many who believe that "the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government."¹⁴¹

Despite these cases and others like them,¹⁴² it is important to note that nowhere in the Constitution is a two-party system required. The Constitution merely states: "The Times, Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators."¹⁴³ The reality, however, is that the dominance of the

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 719.

141. *Id.* (O'Connor, J., concurring) (quoting *Davis v. Bandemer*, 478 U.S. 109, 144-45 (1986)).

142. See generally Brian L. Porto, *The Constitution and the Ballot Box: Supreme Court Jurisprudence and Ballot Access for Independent Candidates*, 7 BYU J. PUB. L. 281 (1993) (discussing the Supreme Court's ballot-access jurisprudence as being more consistent and more favorable to the two-party system).

143. U.S. CONST. art. I, § 4, cl. 1.

two-party system pushes third parties to the fringes. This, combined with the first-past-the-post, plurality-majority voting, causes voters to view third party votes as little more than wasted votes.

2. *Plurality-majority voting*

A second key factor in the American democratic crisis, and a tool in furthering the two-party system, is the current voting system employed in the United States, the plurality-majority voting system. All states, with the exception of Nebraska and Maine, utilize first-past-the-post voting for appointing the state's electors.¹⁴⁴ This system was a catalyst for the creation of the two-party system.¹⁴⁵ This system has the practical effect of marginalizing third parties and voters, and failing to ensure majority rule.

In his influential work, Maurice Duverger, a renowned political scientist, argued that "the simple-majority single-ballot system favors the two-party system."¹⁴⁶ This proposition is generally referred to as "Duverger's Law."¹⁴⁷ According to Duverger's Law, a first-past-the-post electoral system will naturally lead to the development of a two-party system.¹⁴⁸ This conclusion is based on two main components: a "mechanical" component and a "psychological" component.¹⁴⁹ "The mechanical component is the fact that third parties in a first-past-the-post system will be systematically underrepresented in the legislature relative to their proportion of the popular vote."¹⁵⁰

144. Roberta A. Yard, *American Democracy and Minority Rule: How the United States Can Reform Its Electoral Process to Ensure "One Person, One Vote."*, 42 SANTA CLARA L. REV. 185, 193 (2001).

145. See MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* 216-28 (Barbara and Robert North trans., 2d ed. 1961).

146. *Id.* at 217.

147. See William H. Riker, *The Two-Party System and Duverger's Law: An Essay on the History of Political Science*, 76 AM. POLIT. SCI. REV. 753, 754 (1982).

148. DUVERGER, *supra* note 145, at 217; see also Steven G. Calabresi, *The President, the Supreme Court, and the Founding Fathers: A Reply to Professor Ackerman*, 73 U. CHI. L. REV. 469, 484 n.62 (2006).

149. DUVERGER, *supra* note 145, at 224.

150. Calabresi, *supra* note 148 (citing DUVERGER, *supra* note 145, at 224-26).

The psychological component proposes that “the electors soon realize that their votes are wasted if they continue to give them to the third party: whence their natural tendency to transfer their vote to the less evil of its two adversaries in order to prevent the success of the greater evil.”¹⁵¹ Duverger determined that these two components, “operating together . . . lead to the deterioration of third political parties and the rise of a two-party system.”¹⁵² This proposition, therefore, heavily implies that a two-party system is most likely to result from first-past-the-post voting.¹⁵³

Not only does this lead to the establishment of a two-party system, a majority of political scientists agree that the first-past-the-post, winner-take-all voting system “is a peculiarly bad system of democratic self-governance.”¹⁵⁴ It is argued that this voting system:

[U]nfairly denies representation to those who vote for losing candidates; causes politicians to adopt shifting and ill-defined positions on important political issues; installs a permanent monopoly of the two major political parties; results in a racially, ethnically, and ideologically homogeneous legislature; and ultimately raises unnecessarily the possibility of majoritarian factional tyranny.¹⁵⁵

Furthermore, the first-past-the-post system “effectively disenfranchises a great number, and sometimes even a majority, of the voting population.”¹⁵⁶ Disenfranchisement results from the fact that voters’ votes “only count in their state’s particular election, and if their candidate does not win in that state, they

151. *Id.* (citing DUVERGER, *supra* note 145, at 226).

152. *Id.* (citing DUVERGER, *supra* note 145, at 226).

153. *Id.*

154. James A. Gardner, *Madison’s Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 IOWA L. REV. 87, 89 (2000).

155. *Id.* at 89–90.

156. Yard, *supra* note 144, at 199.

do not receive a single electoral vote from that state, nullifying the votes for that candidate.”¹⁵⁷

Additionally, first-past-the-post voting effectively places third party and independent candidates in the role of “spoiler,” which may discourage people from voting for the candidate they really prefer.”¹⁵⁸ “This occurs because voters realize that in a three way race, if they ‘take away’ votes from one of the major party candidates by voting for a third party candidate, the other major party candidate has a better chance of winning their state’s electoral votes.”¹⁵⁹ The voter may prefer the losing major party more than the winning major party.¹⁶⁰ By forcing voters to forgo their true choice, they become disillusioned with the electoral system. Disillusionment may lead to a decline in voter participation in elections at all levels of government.¹⁶¹

If a key goal of any electoral system is to ensure that the majority rules, the first-past-the-post voting system clearly fails because it leads to mere plurality winners and voter disenchantment.¹⁶² First-past-the-post, however, is not the only voting system that is available, nor is it the only system used in this country.¹⁶³

II. ALTERNATIVE VOTING SYSTEMS

As an alternative to the winner-take-all election system, many European nations—and some U.S. cities—have turned to proportional representation (PR). PR voting is based on the principle that legislatures should accurately reflect the voter’s

157. *Id.*

158. *Id.* at 199-200.

159. *Id.* at 200.

160. *Id.* at 204.

161. *See id.* at 200; *see also* Kristen S. Coy, *In Re Nader: Challenging the Duopoly of American Politics One Individual Signature at a Time*, 15 WIDENER L.J. 389, 389 (2006); Kevin R. Huguelet, *Death by A Thousand Cuts: How the Supreme Court Has Effectively Killed Campaign Finance Regulation by Its Limited Recognition of Compelling State Interests*, 70 U. MIAMI L. REV. 348, 385-86 (2015).

162. *See* Gardner, *supra* note 154, at 90 (citing Vernon Bogdanor, *First-Past-the-Post: An Electoral System Which is Difficult to Defend*, 34 REPRESENTATION 80, 80 (1997)).

163. *See* Yard, *supra* note 144.

choice.¹⁶⁴ The traditional “party list” PR system allocates seats in legislatures proportionate to the votes received. For example, if Party A received 45% of the votes, Party B received 30%, and Party C received 25%, then the legislature would be comprised of this exact makeup.¹⁶⁵ PR, however, can take the form of many other types of voting, including, but not limited to, instant runoff voting (IRV) and single transferable vote (STV), which allow voters to rank their preferences.¹⁶⁶

A. *Single-Member Districts*

Single-member district elections are the most common in the United States.¹⁶⁷ Areas are geographically defined and divided into separate voting districts.¹⁶⁸ These districts are represented by a single representative.¹⁶⁹ Under PR voting systems, single-member district elections may take the form of IRV, Borda counting, or Condorcet voting, all of which are designed to counteract the shortcomings of the traditional first-past-the-post, winner-take-all elections.

IRV replaces multiple rounds of traditional runoff voting with a single election.¹⁷⁰ Voters rank the candidates in order of preference; for example if there are four candidates, the voter ranks them from one (first preference) to four (fourth preference), or only to the point that they wish (i.e., only rank one through three).¹⁷¹ “If one candidate receives an absolute ma-

164. See *Fair Representation*, FAIRVOTE, http://www.fairvote.org/fair_representation#what_is_fair_voting (last visited Dec. 6, 2017); *Proportional Representation*, ELECTORAL REFORM SOCIETY, <http://www.electoral-reform.org.uk/proportional-representation> (last visited Dec. 6, 2017).

165. See Allan Ides, *Approximating Democracy: A Proposal for Proportional Representation in the California Legislature*, 44 LOY. L.A. L. REV. 437, 440 (2011); see also Paul L. McKaskle, *Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States*, 35 HOUS. L. REV. 1119, 1155-56 (1998).

166. See *infra* Sections III.A.-B. and related citations.

167. See *Single Member Districts*, FAIRVOTE, <http://archive.fairvote.org/?page=765> (last visited Dec. 6, 2017).

168. *Id.*

169. *Id.*

170. Jeffrey C. O’Neill, *Everything That Can Be Counted Does Not Necessarily Count: The Right to Vote and the Choice of A Voting System*, 2006 MICH. ST. L. REV. 327, 334 (2006).

171. See *id.*; see also Ides, *supra* note 165, at 446.

majority of the first-preference votes, then that candidate wins.”¹⁷² If, however, no candidate receives an absolute majority of first preference votes, then

the candidate with the lowest number of first preferences is “eliminated” from the count, and [the voters’] ballots are examined for their second preferences. Each [of these] ballots is then transferred to whichever remaining candidate has the highest preference in the order as marked on the ballot paper. This process is repeated until one candidate has an absolute majority¹⁷³

A Borda voting system combines instant runoff with range voting.¹⁷⁴ Voters rank the candidates in order of preference, but instead of transferring votes, the candidates receive points based on their ranking.¹⁷⁵ For example, “two points for every first choice, one point for every second choice, and no points for every third choice.”¹⁷⁶ If a voter fails to rank a candidate, that candidate may also receive zero points.¹⁷⁷

Finally, Condorcet voting¹⁷⁸ also requires voters to rank candidates similarly to the IRV.¹⁷⁹ In Condorcet voting, however, there is no runoff. Instead, pairings are established and the winner is determined by identifying whom voters would “prefer against every other candidate if separate head-to-head contests were held between that candidate and each of the other candidates.”¹⁸⁰ For example, “for three candidates (A, B, and C),

172. Ides, *supra* note 165, at 446.

173. *Id.*; see also O’Neill, *supra* note 170.

174. See Renée Steinhagen, *Giving New Jersey’s Minor Political Parties A Chance: Permitting Alternative Voting Systems in Local Elections*, N.J. LAW., Aug. 2008, at 18.

175. O’Neill, *supra* note 170, at 335; Steinhagen, *supra* note 174.

176. O’Neill, *supra* note 170, at 335.

177. Steinhagen, *supra* note 174.

178. For a discussion on the background of a “Condorcet winner,” see Paul H. Edelman, *The Myth of the Condorcet Winner*, 22 SUP. CT. ECON. REV. 207 (2014) (refuting the claim that the Condorcet winner is the preferred option among multiple alternatives).

179. See Ides, *supra* note 165, at 448; O’Neill, *supra* note 170, at 335.

180. Ides, *supra* note 165, at 448; see O’Neill, *supra* note 170, at 335.

there are three pairwise contests (A-B, A-C, and B-C)."¹⁸¹ If A were to beat both B and C in their separate head-to-heads, then A would be declared the Condorcet winner.

B. Multi-Member Districts

Multi-member district elections are characterized as the voters of a district electing more than one representative.¹⁸² In the United States, there are five different types of multi-member districts; "staggered" districts – perhaps one of the most recognizable multi-member district types – characterize U.S. Senate elections.¹⁸³ In these districts, PR can take such forms as cumulative voting and STV.

In cumulative voting, each voter typically selects as many candidates as there are open seats for that given election.¹⁸⁴ The voter does not, however, have to select a different candidate with every one of her votes. The voter may cast all of her selections on one candidate or split them evenly among a few candidates.¹⁸⁵

Alternatively, STV is essentially IRV but applied to multi-member districts. The voter ranks the candidates in order of preference, and "when a candidate is eliminated, votes for that candidate are transferred to the subsequent choice on the ballot. Additionally, candidates who have more votes than necessary to win will have some of their votes transferred to subsequent choices."¹⁸⁶

III. AN ARGUMENT IN FAVOR OF THE MULTI-PARTY SYSTEM AND STV/IRV

In order to create a true representative democracy, alleviate the feelings of underrepresentation, and enhance voter turnout,

181. O'Neill, *supra* note 170, at 335.

182. Anthony Gierzynski et al., *The Pros and Cons of Multi-Member Districts*, U. VT. (Dec. 1, 2011) <https://www.uvm.edu/~vlrs/PoliticalProcess/MMD.pdf>.

183. *Id.*

184. See O'Neill, *supra* note 170, at 336.

185. See *id.*

186. *Id.* at 337.

the United States must adopt both a multi-party system, as well as STV/IRV for elections at all levels. These two changes will facilitate greater inclusion of a diverse nation filled with people of all beliefs. Voter turnout will begin to rise as a result of an increase in voter choices as voters will be reinvigorated with a newfound belief that their vote matters.

A. Multi-Party System

A multi-party system is best equipped to satisfy the constitutional right to association. Currently, voters go to the polls faced with, essentially, two viable options. There is no guarantee that either of the two viable candidates will represent the voter's values on current issues. When voters are faced with a lack of choices, they become "apathetic at best and disenfranchised at worst."¹⁸⁷ Adopting a multi-party system can counter this trend and provide a more inclusive democracy.

As an initial point, many Americans simply see our government as "doing nothing."¹⁸⁸ This perception is the result of a highly partisan government.¹⁸⁹ As a result of this divide, politicians refuse – or have forgotten how – to compromise in order to accomplish their goals.¹⁹⁰ Under a multi-party system, Congress would be comprised of at least three parties. This system would allow the President an opportunity to bargain.¹⁹¹ As a result, the government might actually "do something," increas-

187. Coy, *supra* note 161.

188. See Chris Cillizza, *Want to Understand Why Nothing Gets Done in Washington? It's a Trust Thing*, WASH. POST (Nov. 17, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/11/17/want-to-understand-why-nothing-gets-done-in-washington-its-a-trust-thing/>; see also Susan Milligan, *The Do-Nothing Congress*, U.S. NEWS (Sept. 8, 2014), <https://www.usnews.com/news/articles/2014/09/08/the-do-nothing-congress>.

189. See Carroll Doherty & Jocelyn Kiley, *Key Facts About Partisanship and Political Animosity in America*, PEW RES. CTR. (June 22, 2016), <http://www.pewresearch.org/fact-tank/2016/06/22/key-facts-partisanship/>.

190. See Cindy Casares, *Nothing Will Ever Get Done if Our Politicians Don't Learn to Compromise*, GUARDIAN (Dec. 3, 2015), <https://www.theguardian.com/commentisfree/2015/dec/03/nothing-will-ever-get-done-if-our-politicians-dont-learn-to-compromise>.

191. David A. Dulio & James A. Thurber, *America's Two-Party System: Friend or Foe?*, 52 ADMIN. L. REV. 769, 777 (2000) (citing THEODORE J. LOWI, TOWARDS A RESPONSIBLE THREE-PARTY SYSTEM: PROSPECTS AND OBSTACLES, IN THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES 10–11 (John C. Green & Daniel M. Shea eds., 3d ed. 1999)).

ing voters' faith that their candidates, and by extension themselves, have a fighting chance.

Moreover, today, the United States is an incredibly diverse nation made up of people of nearly every background.¹⁹² With such diversity, it is hard to imagine that a two-party system could meet the demands of the electorate. A multi-party system, however, would provide more choices for this diverse electorate. In fact, it has been argued that a multi-party system is best suited for heterogeneous societies.¹⁹³ Arend Lijphart, a political scientist, believed that "[s]ocieties that are deeply 'divided along religious, ideological, linguistic, cultural, ethnic, or racial lines' find it difficult to seek solace in a simple majority because of the inevitable that some group will have their rights or opinions submerged by a majority rule that differs substantially from their own group."¹⁹⁴ Today, a multi-party system is necessary to account for the growth in population and diversity that the United States has seen since the founding of the nation. The two-party system is no longer a viable option.

The two-party system has not instilled a satisfactory feeling in many Americans.¹⁹⁵ When voters are unsatisfied and faced with a lack of choice, they become disillusioned. When voters become disillusioned, voter turnout suffers. A decline in voter turnout is a direct threat to democracy because a small but powerful minority would be able to select the representatives for the entire nation. Adopting a multi-party system may alleviate the decline in voter turnout because it appears that there is a correlation between more viable parties and voter turnout.¹⁹⁶ Adding a third major political party would allow voters

192. See generally D'Vera Cohn & Andrea Caumont, *10 Demographic Trends that Are Shaping the U.S. and the World*, PEW RES. CTR. (Mar. 31, 2016), <http://www.pewresearch.org/fact-tank/2016/03/31/10-demographic-trends-that-are-shaping-the-u-s-and-the-world/> (examining the racial and ethnic makeup of America as compared to the past and as projected for the future).

193. See Coy, *supra* note 161, at 404.

194. *Id.* (quoting AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 31-34 (1999)).

195. See Jones, *supra* note 92.

196. See Nathaniel Persily, "Celebrating" the Tenth Anniversary of the 2000 Election Controversy: What the World Can Learn from the Recent History of Election Dysfunction in the United States, 44 IND. L. REV. 85, 105 (2010) (citing AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIAN

a chance to find at least one party that represents them, without oversaturating the political climate.¹⁹⁷ This, however, is not the only change that must be made.

B. STV/IRV

To effectively operate with a multi-party system, create a true representative democracy, and increase voter turnout, it is imperative that the U.S. adopts STV/IRV voting systems to replace the current first-past-the-post voting. As it currently stands, third parties are seen as wasted votes, or worse, a vote for the “other side.”¹⁹⁸ Further, in a multi-party, winner-take-all system, it would be possible for a party to win with only slightly more than a third of the vote when there is only one seat up for grabs. STV/IRV can alleviate these concerns while at the same time better comporting with Americans’ constitutional rights.

The current first-past-the-post, winner-take-all system is ineffective at ensuring majority rule.¹⁹⁹ STV/IRV, on the other hand, is specifically designed to ensure that the winning candidate is selected by a majority, not just a mere plurality.²⁰⁰ Under first-past-the-post, “a single candidate must obtain more votes than her strongest single opponent, but not necessarily a higher total than all of her opponents combined.”²⁰¹ While the election will declare a winner, it “does not have to correspond with strict majority rule.”²⁰² Effectively, a powerful minority can control.²⁰³ This issue is not a concern with STV/IRV. Under such a proportional system, majority rule is secured through built-in run-

AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES 106–14 (1984)); *see also* Mary Becker, *Towards a Progressive Politics and a Progressive Constitution*, 69 *FORDHAM L. REV.* 2048 (2001) (“Voters are more likely to vote when their vote counts and they have more options than two parties both trying to capture the middle.”); Tucker, *supra* note 52, at 419.

197. *See* Persily, *supra* note 196, at 105–06 (citing LIJPHART, *supra* note 196, at 120–23 (1984)).

198. *See infra* Section III.C.

199. *See supra* Section I.B.1.

200. *See* Brian P. Marron, *One Person, One Vote, Several Elections?: Instant Runoff Voting and the Constitution*, 28 *VT. L. REV.* 343, 343 (2004).

201. Tucker, *supra* note 52, at 412.

202. *Id.*

203. *See id.*

off elections.²⁰⁴ Through instant run-offs, the winning candidates will have the support of a majority of voters, albeit at varying degrees of support.²⁰⁵

Further, adopting STV/IRV will eliminate the issues of spoiler candidates and wasted votes. It will also allow Americans to vote for the candidates who they actually support and who more closely align with their political ideals. Under the current system—because voters must only select one candidate, and whoever wins a mere plurality, wins the election—third and minor parties are seen as spoilers who voters do not want to waste a vote on because they have virtually no chance of winning against the two major parties.²⁰⁶ Voters, in essence, see a vote for a candidate outside of the two major parties as both a vote taken away for one party and a vote given to the other—a terrifying proposition for many.²⁰⁷

The current voting system forces voters to vote for a candidate they do not truly support, which goes directly against the right to vote and associate, and discourages people from voting together.²⁰⁸ STV/IRV will allow voters to support a “long shot” candidate without fear that their vote will end up going to a candidate who ends up receiving no more than 10% of the votes, while the candidate they dislike the most ends up winning by less than a fraction of a point. The STV/IRV ranking system ensures that a candidate the voter actually likes, though maybe not as much as their first choice, will end up with their vote, and at least one winning candidate in multi-seat elections is favored by the voter. STV/IRV gives voters a feeling of equal power. The voter is assured that every candidate has an equal chance of winning and that every voter has an equal chance of voting for a winning candidate.

Most importantly, STV/IRV will have an impact on fixing the abysmal voter turnout in U.S. elections. When voters see their

204. See Marron, *supra* note 200, at 344–45.

205. See *id.*; see also Tucker, *supra* note 52, at 412–13.

206. See Blair Bobier, *Stuck in the Middle with You*, 71 OR. ST. B. BULL. 62 (2010).

207. See Yard, *supra* note 144, at 203.

208. See *id.* at 205; see also Yen-Tu Su, *Beyond Nightmare and Hope: Engineering Electoral Proportionality in Presidential Democracies*, 30 J. LEGIS. 205, 216 (2004).

preferred candidates as nothing more than spoilers, or think their votes would be wasted (or potentially worse, an effective vote for the other side), they become discouraged and feel as if they have no effect.²⁰⁹ “Under a winner-take-all system, a voter’s perception on the election could have a negative impact on that election.”²¹⁰ For example, “in winner-take-all elections, a 10% lead by one candidate in the polls immediately preceding an election often translates into a likely ‘blowout’ for the leading candidate Conversely, in a proportional representation system, a 10% deficit to the leading candidate is by no means fatal.”²¹¹ Voter apathy is less likely to occur when voters believe that their vote matters, and feel secure that their vote for the candidate that he or she supports is not a wasted vote. Therefore, the issue of low voter turnout that the United States experiences in each election cycle would be alleviated.²¹² Individual states would be responsible for enacting laws that adopt a multi-party system and STV/IRV. Opposition to a change from the current system, however, will likely give rise to legal challenges.

C. *Constitutionality of Multi-Party System & STV/IRV*

Under the Constitution, the states are left with the power to control elections.²¹³ States, therefore, must enact laws favoring a multi-party system and moving toward STV/IRV voting. By creating these laws, the states open themselves to the possibility of constitutional challenges on the grounds that the laws violate

209. See Michael McCann, *A Vote Cast; A Vote Counted: Quantifying Voting Rights Through Proportional Representation in Congressional Elections*, 12 KAN. J.L. & PUB. POL’Y 191, 202 (2002); see also Yard, *supra* note 144, at 205; Su, *supra* note 208.

210. See McCann, *supra* note 209.

211. See *id.*

212. Studies have shown that proportional representation voting systems, such as STV/IRV, lead to an increase in voter turnout. “[V]oting studies that control for other voting influences find that proportional representation has increased voter turnout in European elections from 9% to 12%.” *Id.* Another study has shown that “turnout rates in Western industrialized democracies using proportional representation systems tend to be roughly ten percentage points higher on average than in countries using the traditional, winner-take-all electoral method.” Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. REV. 1867, 1894–95 (1999).

213. U.S. CONST. art. I, § 4, cl. 1.

the First and Fourteenth Amendments. Under the *Anderson* test, however, it is clear that these laws will be upheld as constitutional.

In *Anderson v. Celebrezze*,²¹⁴ the Supreme Court announced a two part test to resolve constitutional challenges to a state's election laws. The test is as follows:

[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.²¹⁵

There have been at least two challenges to the constitutionality of laws enacting STV/IRV voting systems. In 2009, the Minnesota Supreme Court heard a challenge brought by voters against the IRV system adopted by the City of Minneapolis for its municipal elections.²¹⁶ In that case, the appellants argued that the city's IRV system violated "their right to vote, right to political association, and right to equal protection under one-person, one-vote principles," and because "these are fundamental rights, the ordinance is subject to strict scrutiny."²¹⁷ Applying the *Anderson* test, the Minnesota Supreme Court held

214. 460 U.S. 780, 780 (1983).

215. *Id.* at 789 (citations omitted).

216. *Minn. Voters All. v. City of Minneapolis*, 766 N.W.2d 683, 685 (Minn. 2009).

217. *Id.* at 689.

that the IRV system was constitutional.²¹⁸ The court found that the IRV system did not unequally weigh votes or reallocate surplus votes in violation of the Constitution.²¹⁹ The court also found that the IRV system served several legitimate city interests, including increasing voter turnout.²²⁰

In *Dudum v. Arntz*,²²¹ the United States Court of Appeals for the Ninth Circuit heard a challenge to the IRV system adopted by San Francisco.²²² Unlike the IRV system in Minneapolis, San Francisco used a restricted IRV in which the Director of Elections may “limit the number of candidates voters may rank to no fewer than three.”²²³ The Ninth Circuit applied the *Anderson* test to determine if San Francisco’s restricted IRV system was unconstitutional.²²⁴ The court determined that the burdens placed on voters by this system were minimal at best, and regardless, the system advances sufficiently important city interests to justify its use.²²⁵ In coming to its decision, the court found that the IRV system did not deny any voter an equal opportunity to vote, nor did it provide some voters with more votes than others.²²⁶ IRV allows voters to rank multiple preferences, but this ranking does not mean that voters are given multiple votes.²²⁷ Applying rational basis review, the court found that the IRV system satisfied several important governmental interests, including “electing candidates with strong plurality support.”²²⁸

Constitutional challenges brought against STV/IRV voting systems, like those in *Minnesota Voters Alliance* and *Dudum*, and

218. *Id.* at 689–98.

219. *Id.* at 689–96.

220. *Id.* at 696–97.

221. 640 F.3d 1098, 1098 (9th Cir. 2011).

222. *Id.* at 1100.

223. *Id.* at 1101.

224. *See id.* at 1105–06.

225. *See id.* at 1117.

226. *See id.* at 1109–12.

227. *See id.* 1112.

228. *Id.* at 1116 (quoting *Storer v. Brown*, 415 U.S. 724, 732 (1974)) (noting a state interest in “assur[ing] that the winner is the choice of a majority, or at least a strong plurality, of those voting”).

laws favoring a multi-party system would more than likely pass the *Anderson* test. In applying the test, the burden argument would likely be predominately based on violations of one-person, one-vote, and the right to association. Even so, strict scrutiny would not apply because the burdens would be minimal.

In regards to STV/IRV, courts would likely find that no voters are given unequal weight and the principle of one person, one vote is not violated. While voters in such a system will be able to list several *preferences*, their votes will count only once.²²⁹ Voters are not giving a vote to every candidate they list, just ranking candidates in order of preference to determine who gets the sole vote in instant runoffs. Further, because one voter will have her vote count only for her first choice candidate, while another has his count for his third choice (after the first and second choices are eliminated), it does not mean that votes are given unequal weight.²³⁰ A ballot is not exhausted just because a voter's first choice is not eliminated and her vote counts for the same candidate through multiple rounds.²³¹ Voters are given one vote, whether it stays with the same candidate through every round or is cycled through several preferences, their vote counts in every round no more and no less than any other voter.

In addition, states have compelling, legitimate interests in adopting STV/IRV and favoring a multi-party system. First, STV/IRV is better situated to ensure that winning candidates have the support of a majority of the electorate, something that first-past-the-post does not.²³² Second, STV/IRV will have the practical effect of limiting the issues of spoiler candidates and wasted votes.²³³ Third, encouraging multi-party systems will create more diversity amongst voters and provide voters with more choices.²³⁴ Finally, both STV/IRV and a multi-party sys-

229. See O'Neill, *supra* note 170, at 336.

230. See *Minn. Voters All. v. City of Minneapolis*, 766 N.W.2d 683, 690 (Minn. 2009).

231. *Id.*

232. See *supra* Section III.B.

233. See *supra* Section III.B.

234. See *supra* Section III.B.

tem will help increase voter turnout.²³⁵ Therefore, it is likely that courts, when faced with constitutional challenges to STV/IRV and laws encouraging a multi-party system, will find that both systems pass the *Anderson* test because they pose limited burdens while advancing important government interests.

D. Model STV/IRV Legislation

To help implement STV/IRV voting throughout the United States, and ensure that the voting laws are uniform, it is helpful to look toward model laws with which new legislation can be based. The organization FairVote has been a leader in this regard by drafting sample statutory language for the implementation of IRV.²³⁶ Perhaps the most useful tool that states may use in drafting the STV/IRV legislation is the Colorado Ranked Vote Enabling Law.²³⁷ The law clearly and concisely details the methodology behind STV/IRV, and provides for guidelines to be followed when carrying out such election.²³⁸ States will be able to adapt this legislation to fit their unique needs, while maintaining relative uniformity nationwide. Further, the law is clear, which allows voters to easily understand and participate in STV/IRV voting.

CONCLUSION

The United States currently has a two-party system and most states use first-past-the-post voting for nearly all elections. Yet these two systems fail to produce high voter turnout and reinforce constitutional rights. The Supreme Court has stated on multiple occasions that there is a fundamental right to vote and a fundamental right of association. These rights are two of the most important rights in any democratic society. The two-

235. See *supra* Section III.B.-C.; see also Tucker, *supra* note 52, at 419–20.

236. *Sample Statutory Language for Instant Runoff Voting*, FAIRVOTE, <http://archive3.fairvote.org/reforms/instant-runoff-voting/irv-resources/model-legislation-2/irv-model-legislation-and-ballot-language/sample-statutory-language-for-instant-runoff-voting/> (last visited Nov. 22, 2017).

237. COLO. REV. STAT. § 1-7-1003 (2017).

238. *Id.*

party system and first-past-the-post voting systems fail because they force voters toward the two major parties, generate feelings of apathy, and make voters feel as if they have no voice. To ensure majority rule, secure a true representative democracy, and increase voter turnout, the United States must adopt laws promoting a multi-party system and STV/IRV. Only then will Americans' voices truly be heard. Only then will Americans be guaranteed their constitutional rights. As James Madison said:

Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. *The electors are to be the great body of the people of the United States.*²³⁹

239. *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (emphasis added) (citation omitted).