

The Means and the End: Understanding the Right to Vote as a Tool in Protecting the Right to Representation

Virginia B. Lyon*

The right to vote and the right to representation are often, to each of their detriment, conflated. But to combat voter disenfranchisement most effectively and honestly, we must conceive of these as two separate rights with a distinct relationship. Part I defines representative government. It then highlights the differences between the right to vote and the right to representation and recommends how we should conceptualize of their relationship, drawing on the Framers' intent, the Constitution, and court cases. Part II looks at two battleground issues—voter ID laws and over-inclusive voter purges—where the right to vote is contested with little to no evidence of a likely impact on the American public's right to representation. The threats voter ID laws and over-inclusive voter purges pose to the right to vote raise two important questions. First, why do so few people show up to the polls? And second, if they did show up, would voting even protect their right to representation?

DOI: <https://doi.org/10.15779/Z384746S32>.

Copyright © 2021 Virginia Lyon.

* J.D. 2021, University of California, Berkeley, School of Law. Many thanks to Professor Bertrall Ross for changing the way I think about voting and inspiring (mandating) this paper; to friends who listened to rants on representation; and to Jessica Cuddihy, Mia Tsui, Ellen Ivens-Duran, and other editors at the California Law Review for their time and help polishing this piece and solidifying its ideas.

Part III analyzes two threats to representation that answer those questions: first-past-the-post voting and passive voter suppression. First-past-the-post (FPTP) voting answers the question of whether increasing voter turnout would actually increase the representativeness of government, while passive voter suppression sheds light on why groups who would be disenfranchised by strict voting laws are not showing up at the polls. Part IV looks at a method of securing representation that exists beyond the right to vote and combats the ills of FPTP voting and voter disenfranchisement: voucher systems. Scholars have theorized that voucher programs minimize the role of wealth in the political process, mobilize individuals who have not previously participated in politics, promote a more egalitarian political order and fairer legislative process, and better register the intensity of voter preferences. This, in turn, promotes a more responsive and representative government. Part IV then turns to the first set of results from Seattle’s Democracy Voucher program to see if they align with what early proponents of the voucher system promised.

“Voting gives you a nice warm feeling of being part of something big and great and wonderful—a civic miracle, the beautiful pageant of democracy. . . . But it is a snare and a delusion to confuse that warm, fuzzy feeling with politics or self-government.”¹

Introduction	673
I. Voting and Representation: The Means and the End	674
A. What is Representation?	674
B. Where Do We Find the Right to Representation and the Right to Vote?.....	676
C. Understanding the Relationship.....	679
II. Where We Fight to Vote	682
A. Voter ID Laws	683
B. Voter Purges	685
III. Threats to Representation	689
A. First-Past-the-Post Voting.....	689
B. Passive Voter Suppression.....	691
IV. Seattle’s Democracy Voucher Program.....	693
A. The Theory Behind Voucher Programs	694
B. What Seattle Showed Us.....	696
Conclusion	698

1. HENDRIK HERTZBERG, POLITICS: OBSERVATIONS & ARGUMENTS 495–96 (2004).

INTRODUCTION

The right to vote and the right to representation are often, to each of their detriment, conflated.² However, to combat voter disenfranchisement most effectively and honestly, we must conceive of these as two separate rights with a distinct relationship, one where voting is the means, and representation is the end. If we look at voting as a tool, we ask the right questions before allocating resources to protect the right to vote: namely, does protecting the tool in this way actually make it more effective in securing representation? If the answer is no, we need to ask why.

Part I begins with the essential question: What is representation? Relying on the seminal work of Hanne Pitkin, I define a representative government as one that has the requisite constructions of regular, “genuine,” and “free” elections; a representative body that exists in more than an advisory capacity; more than one person at the helm; and a government representative “of the various ‘parts’ of the society.”³ Furthermore, it must not only promote the public interest but also be responsive and responsible to that public, and, by its very nature, be under constant construction to become more representative.⁴ With this definition in mind, Part I continues by looking to the Framers’ intent, the Constitution, and court cases to highlight the difference between the right to vote and the right to representation and how we should conceptualize their relationship.

Part II looks at two battleground issues—voter ID laws and over-inclusive voter purges—where the right to vote is contested with little to no evidence of a likely impact on the American public’s right to representation.⁵ This Note recognizes the discriminatory nature of voter ID and voter purge laws but argues that representation, not casting a ballot, should be the ultimate goal. These threats to the right to vote that have no demonstrated impact on representation raise two important questions. First, why are so many people not showing up to the polls? And second, if they did show up, would voting even protect their right to representation?

Part III turns to two threats to representation that answer those questions: first-past-the-post voting and passive voter suppression. First-past-the-post

2. *See id.*

3. HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 235 (1967).

4. *See id.* at 231–40.

5. *See e.g.*, Jeff Jacoby, *Voter ID Laws Aren’t Worth Fighting Over*, BOS. GLOBE (Feb. 19, 2019, 1:13 AM), <https://www.bostonglobe.com/opinion/2019/02/19/voter-laws-aren-worth-fighting-over/gLUO1InuZl6AkgDQWP78iM/story.html> [<https://perma.cc/XX4M-BHFA>] (arguing that voter ID laws do not depress turnout and as a result do not disenfranchise voters as expected); Craig Leonard Brians & Bernard Grofman, *When Registration Barriers Fall, Who Votes? An Empirical Test of a Rational Choice Model*, 99 PUB. CHOICE 161, 161–63 (1999) (predicting that liberalizing voter registration laws actually results in greater turnout amongst those with medium income and education); Jonathan Nagler, *The Effect of Registration Laws and Education on U.S. Voter Turnout*, 85 AM. POL. SCI. REV. 1393 (1991) (finding that stricter voter registration laws had no significant impact on low-income voter turnout).

voting is the currently favored method of voting whereby every person votes for one candidate and “whoever gets the most votes wins.”⁶ The problems with first-past-the-post voting show that increasing voter turnout would not actually increase the representativeness of government. Since first-past-the-post voting leads to wasted votes and decreases the government’s responsibility to its voters, there is no promise of increased representation even if fully liberalized voting laws increased turnout of historically disenfranchised voters.⁷ Passive voter suppression sheds light on why groups that would be disenfranchised by strict voting laws do not show up to the polls in the first place. The high cost of necessary information for potential voters from poorer demographics, combined with the fact that campaigns are less likely to reach out to those individuals, means that voters from low socioeconomic strata do not turn out to vote.⁸ As such, even with fully liberalized voting practices, they still would not be voting and would still not be represented in government.

Part IV looks at voucher systems, which encourage voter turnout and candidate responsiveness. Voucher systems give registered voters money to donate to political candidates of their choice. Scholars have theorized that voucher programs minimize the influence of wealth in the political process, mobilize voters who have not previously participated in politics, promote a more egalitarian political order and fairer legislative process, and better register the intensity of voter preferences.⁹ This, in turn, promotes a more responsive and representative government.¹⁰ Part IV then looks at the first set of results from Seattle’s Democracy Voucher program to see if they align with what early proponents of the voucher system promised.

I.

VOTING AND REPRESENTATION: THE MEANS AND THE END

A. *What is Representation?*

One may rightfully ask at the outset of this Note, “What is representation?” The relationship between the everyday practice of political representation and the ideal have yet to be well defined and continue to engender debate amongst

6. Josh Franklin, *First Past the Post Voting: Our Elections Explained*, COMMON CAUSE (June 22, 2020), <https://www.commoncause.org/colorado/democracy-wire/first-past-the-post-voting-our-elections-explained> [<https://perma.cc/VV4A-6UZ2>].

7. See Douglas J. Amy, *What Is “Proportional Representation” and Why Do We Need This Reform?*, FAIRVOTE, https://www.fairvote.org/what_is_proportional_representation_and_why_do_we_need_this_reform [<https://perma.cc/KUF7-SK5Y>].

8. Bertrall L. Ross II & Douglas M. Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disfranchisement of the Poor*, 114 NW. U. L. REV. 633, 672, 681–82 (2019).

9. See Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1 (1996).

10. See *id.*

academics, politicians, and citizens alike.¹¹ The next Section of this Note will try to guess what framework the Founders conceived of and what their concept of representation was. However, this Note aims to be forward-looking and normative beyond what the Founders may have initially conceived. Our solutions to problems the Founders did not face must be responsive to our reality and built on the firm foundation of what we hope to achieve. To that end, this Section hopes to answer the question, “What, in its simplest form, is representation in government?”

“The concept of political representation is misleadingly simple: everyone seems to know what it is, yet few can agree on any particular definition.”¹² For a “particular definition,” this Section turns to Hanna Pitkin, whose work *The Concept of Representation* helped shape current understandings of political representation.¹³ In her book, Pitkin says of representative governments, “we show a government to be representative not by demonstrating its control over its subjects[,] but . . . by demonstrating that its subjects have control over what it does. . . . [It] must not merely be in control, not merely promote the public interest, but must also be responsive to the people.”¹⁴

Representative government is not defined by its actions in a single moment, but rather by “long-term systematic arrangements.”¹⁵ There are only a few prerequisites for this long-term systematic arrangement: regular, “genuine,” and “free” elections; a representative body that exists in more than an advisory capacity; more than one person at the helm; and a government representative of various parts of society.¹⁶ Of this last factor, Pitkin questions whether we can conceive of a representative body that is “truly responsive unless a number of minority or opposition viewpoints are officially active” in the governmental body.¹⁷

At its core, representation necessitates continued discussion of and movement towards government’s ideal form. A truly representative government exists at the tension between its current form and that ideal achievement. Such continued tension and resultant growing pains should lead participants to abandon neither the ideal nor the institution nor retreat from political reality. Rather, the tension “should present a continuing but not hopeless challenge: to construct institutions and train individuals in such a way that they engage in the

11. See Ian Shapiro, Susan C. Stokes, Elisabeth Jean Wood & Alexander S. Kirshner, *Editors’ Introduction to POLITICAL REPRESENTATION* 1, 12 (Ian Shapiro, Susan C. Stokes, Elisabeth Jean Wood & Alexander S. Kirshner eds. 2009).

12. SUZANNE DOVI, *Political Representation*, STAN. ENCYCLOPEDIA OF PHIL. (Aug. 29, 2018), <https://plato.stanford.edu/entries/political-representation/> [http://perma.cc/ZBU4-ZMQ6].

13. See *id.*

14. PITKIN, *supra* note 3, at 232.

15. *Id.* at 234.

16. *Id.* at 235.

17. *Id.*

pursuit of the . . . genuine representation of the public . . .”¹⁸ Taking all this together, this Note understands a representative government as one that is both responsive to its people and under constant construction to become more responsive.

B. Where Do We Find the Right to Representation and the Right to Vote?

This Section looks at the beginnings of our democratic republic and asks where, how, and if the right to representation and the right to vote appear in the Constitution. Understanding the relationship between these two rights and how founding documents consider them will shed light on constitutionally protected paths forward to protect both.

It should not come as a surprise to the reader that the Founding Fathers were hardly dedicated to enshrining a perfect right to representation in the Constitution. Rather, they conceived of a system to protect monied land-owners against the ever-growing power of common citizens.¹⁹ The Articles of Confederation created near autonomy of states, which had frequent annual elections even in their upper houses.²⁰ The result was local governments that were responsive to their citizens; or, as Alexander Hamilton put it, the result was “an excess of democracy.”²¹ Under the Articles, the Confederation Congress was unable to collect revenue to pay off war debts, war-debt interest payments were handed out to the wealthy few, and oppressively high taxes meant common citizens gave the government funds they sorely needed to survive.²² In this climate of economic turmoil, working-class Americans began rejecting elected officials who could not sympathize with their plight and voting their peers into office.²³ By the mid-1780s, these new candidates, alongside a series of farmers’ rebellions, began influencing state governments.²⁴ In response to this populist uprising, the Founding Fathers contrived the Constitution to reroute power away from the people via such methods as expanding congressional districts and lengthening terms in federal office.²⁵

We must recognize that the Constitution grew, in part, out of a desire to check the rising powers of the working class before any analysis of representation in the Constitution can begin.²⁶ With this truth in mind, we turn

18. *Id.* at 240.

19. WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION 202–03 (2007).

20. *Id.* at 4–5, 10.

21. *Id.* at 5.

22. *Id.* at 8–9, 29–33.

23. *Id.* at 166–67.

24. *Id.* at 158–60, 166–67.

25. *Id.* at 196–203.

26. To clarify, this is not to say that current court rulings should be bound by the Framers’ intent. Rather, I agree with John G. Wofford when he says,

History thus provides enlightenment . . . It is neither prologue on the one hand, nor director of the drama on the other; rather, history is a spotlight, always available to illumine, but not

to the scant references to representation in the original document and the ways it has since been expanded.

Perhaps because the Constitution arose out of a desire to decrease the representativeness of government, the document does not explicitly promise an individual's right to representation. As such, both debates around and court decisions interpreting the right to representation in the Constitution are necessary to understand the right to representation in isolation from the right to vote. Article I, § 2 demonstrates that the Framers chose to allocate representatives in the House based on total population, a move that can be read to promise representational equality.²⁷ Then, when Congress debated the Fourteenth Amendment, it chose to retain the total-population rule, rejecting proposals that allocated House seats based on voter population.²⁸ During that debate, a representative offered that making representation dependent on the number of persons rather than voters was “the principle upon which the Constitution itself was originally framed . . . Numbers, not voters; numbers, not property; this is the theory of the Constitution.”²⁹ The Supreme Court has echoed this interpretation: “As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote. . . . By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation.”³⁰

The history of the right to representation and the right to vote makes one thing clear: the right to vote and the right to representation are two distinct principles. At least from this brief history, the Founders understood non-voters to be entitled to representation in government. While boundaries, such as voting age laws, may be placed on the right to vote,³¹ the Constitution contains a right to representation that is distinct from and protected apart from any right to vote.

The right to vote is as explicit in the Constitution as the right to representation is absent. The right to vote is dealt with directly through a series

to blind. History does not provide the answers to the problems of today; it merely helps to frame the questions.

John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 532–33 (1964).

27. See *Evenwel v. Abbott*, 136 S. Ct. 1120, 1122 (2016); U.S. CONST. art. I, § 2, cl. 3.

28. See *Evenwel*, 136 S. Ct. at 1127–28; U.S. CONST. amend. XIV, § 2 (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”).

29. CONG. GLOBE, 39th Cong., 1st Sess. 2767 (1866).

30. See *Evenwel*, 136 S. Ct. at 1132.

31. See *id.* at 1127 (recalling that Alexander Hamilton said during a debate about how to determine representation in federal government, “There can be no truer principle than this—that every individual of the community at large has an equal right to the protection of government.” (quoting Robert Yates, Notes on the Constitutional Convention (June 29th, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 470, 473 (Max Farrand ed., 1911))), 1127 n.8.

of amendments. The Fourteenth,³² Fifteenth,³³ Nineteenth,³⁴ Twenty-Fourth,³⁵ and Twenty-Sixth Amendments explicitly voice and safeguard the right to vote.³⁶ These amendments prohibit denying or abridging the right to vote based on race, color, previous condition of servitude, sex, ages above eighteen, or through the use of a poll or other tax. Denying and abridging the right to vote deals with casting the physical ballot and the effects of denying that right respectively.³⁷ Specifically, “abridgment is deprivation of the vote by not only force and violence, but also through legal channels if the effect is to disenfranchise a substantial portion of the electorate.”³⁸ As such, the right to vote can be thought of in two parts: (1) the right to cast a physical ballot, and (2) the right to have that ballot counted. In other words, the right to vote is not just to the tool itself, but to its effects on representation. By prohibiting abridgment, voter-protection Amendments get only at the aspects of representation that are tied to voting. As this Note will show, even protecting the tool and its efficacy does not mean that the right to representation has been achieved. The right to representation thus cannot be preserved simply by preventing the abridgment of voting rights. Under this view, voter-protection Amendments explicitly protect the right to vote but not the right to representation.

Conflation of the right to vote and the right to representation may occur for any number of reasons. At its most innocent, we might understand the confusion to be an issue of definition. There is a simplicity in protecting the right to vote. Even in more complicated discussions of what counts as abridgment, a definition of the right to vote remains more tangible than the right to representation. At its most cynical, however, this is a purposeful distraction meant to keep power in the hands of those who already hold it. It is well documented that the Constitution was drafted to curtail working class representation in government. Despite lore, the Constitution is not a document securing representation for all but one that was meant to funnel that right into the hands of the elite. Whatever the reason, the focus on voting rights is a dangerous distraction that we must look past in order to create a truly representative government. Because even once these threats are gone, our right to representation is far from promised.

32. U.S. CONST. amend. XIV, § 2 (“But when the right to vote at any election . . . is denied . . . or in any way abridged . . . the basis of representation therein shall be reduced . . .”).

33. U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

34. U.S. CONST. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”).

35. U.S. CONST. amend. XXIV, § 1 (“The right of citizens of the United States to vote . . . shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax.”).

36. U.S. CONST. amend. XXVI, § 1 (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”).

37. See Franita Tolson, *What Is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 433–36, 478 (2015).

38. *Id.* at 478.

This Section has demonstrated that both the right to representation and the right to vote can be found in the Constitution—albeit with a little imagination. Further, it demonstrated that the Constitution views voting and representation as distinct rights with a particular relationship. The next Section will look to just how we should think of that relationship.

C. *Understanding the Relationship*

The relationship between the right to vote and the right to representation is one of a means and an end. The right to vote is a tool for procuring representation, though it is hardly a sufficient or necessary one. While perhaps counterintuitive at first blush, one might come up with a myriad of ways to procure representation without voting. Individuals could donate time or money to a campaign, reach out to elected officials, run for office, organize public demonstrations, etc. Furthermore, a vote's role in determining the outcome of an election is hardly the only power it has. Candidates' behavior and the political promises they make during campaigns, for example, are influenced not by the result of voting, but by the promise or threat of those results. The result of the vote, though, theoretically determines which candidate has to make good on those promises.

The Court's interpretation of the Voting Rights Act of 1965 (VRA) in *City of Mobile v. Bolden* and the subsequent revisions to the VRA in 1982 display that the right to vote is one of many tools to secure representation. In 1980, the Supreme Court decided a claim brought by Black citizens of Mobile, Alabama.³⁹ The complaint alleged that the practice of electing city commissioners at large violated § 2 of the VRA of 1965 because it unfairly diluted Black voters' voting strength. The plaintiffs also alleged violations of the Fourteenth and Fifteenth Amendments.⁴⁰

At the time, § 2 of the VRA provided that: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."⁴¹ The appellees argued that the Court should read § 2 of the VRA in concert with § 5, which prohibited election practices having the purpose or effect of denying or abridging the right to vote.⁴² This connection was important since § 5 established procedures for reviewing new election laws to establish that those laws did "not

39. *City of Mobile v. Bolden*, 446 U.S. 55, 58 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, *as recognized in* *Thornburg v. Gingles*, 478 U.S. 30 (1986).

40. *Id.*

41. *Id.* at 60 (quoting Voting Rights Act of 1964, 42 U.S.C. § 1973 (1976) (current version at 52 U.S.C. § 10301)).

42. Brief for Appellees at 4, *City of Mobile*, 446 U.S. 55 (No. 77-1844), 1979 WL 213678.

have the purpose and [would] not have the effect of denying or abridging the right to vote on account of race or color.”⁴³

Thus, though the VRA prohibited both denial and abridgment of the right to vote, Justice Stewart, writing for a plurality, chose to focus only on the denial of the right to vote.⁴⁴ He determined that the Court did not even need to interpret the VRA since it was “apparent that the language of § 2 no more than elaborate[d] upon that of the Fifteenth Amendment”⁴⁵ He also argued that the Fifteenth Amendment did not give Black voters the right to have Black candidates elected, but rather only prohibited “purposefully discriminatory denial or abridgment by government of the freedom to vote”⁴⁶ Since this was all the VRA and Fifteenth Amendment protected, and since Black voters in Mobile were not hindered from the physical act of voting, Justice Stewart found there was no violation.⁴⁷ With this decision, the plurality broke from established precedent and pivoted from a results-based test to an intent-based test.⁴⁸ In terms already outlined in this Note, the *Mobile* decision may be understood as a pivot from concern about whether government action ultimately abridged the right to vote by affecting its efficacy as a tool for achieving representation, to concern about whether the rule maker’s intent was to inhibit the physical act of voting. The former considers voting a tool to achieve representation; the latter considers voting an end in and of itself.

In its limited reading of the VRA and insistence on an intent standard, the plurality chose not to recognize voting as a tool but rather as an end in and of itself. This focus on the protection of the right to cast a vote in isolation from its goal of ensuring representation highlights the danger of focusing *only* on the right to vote. An intent standard removes focus from the end result of voting: representation. Malintent or not, if a tool cannot be used to accomplish an ultimate goal then the tool is broken and must be fixed.

43. *Id.* at 12–13 (quoting Voting Rights Act of 1964, 42 U.S.C. § 1973c (1976) (current version at 52 U.S.C. § 10304)).

44. *City of Mobile*, 446 U.S. at 60. It is worth noting that, despite the Appellees’ lengthy analysis of § 5’s connection to § 2, Justice Stewart’s opinion did not so much as mention § 5. It is almost as if he did not want to find for the Appellees.

45. *Id.* at 60–61.

46. *Id.* at 65.

47. *Id.*

48. Frank R. Parker, *The “Results” Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 718 (1983) (citing S. REP. NO. 97-417, at 19 (1982)). Prior to *City of Mobile*, the Supreme Court stated that unconstitutional vote dilution could be established by demonstrating that a districting scheme could “designedly or otherwise . . . minimize or cancel out the voting strength of racial or political elements of the voting population.” *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965); see also *Burns v. Richardson*, 384 U.S. 73, 88 (1966). However, in *City of Mobile*, Justice Stewart determined that “[t]he ultimate question remains whether a discriminatory intent has been proved” *City of Mobile*, 446 U.S. at 74.

Congress disagreed with Justice Stewart's analysis of the VRA and, in 1982, amended § 2 to incorporate a results test.⁴⁹ The House of Representatives' stated purpose for the amendment was "to make clear that proof of discriminatory purpose or intent is not required in cases brought under that provision."⁵⁰ During debates about whether to adopt these changes, the House investigated and discussed the VRA's impact on both voting and voting's effects on representation.⁵¹ During the House Subcommittee on Civil and Constitutional Rights hearings, an "overwhelming majority of over 100 witnesses" testified that the VRA had a significant impact on representation.⁵² By considering the effects of the VRA on participation and representation as separate considerations and endorsing an effects test, Congress highlighted that voting should be seen as a tool to secure representation rather than the ultimate goal. Treating voting as a tool in furtherance of representation rather than a right isolated from its effects cures the dangers of the plurality's purposefully myopic look at protecting the right to vote.

The Supreme Court's first dealings with the revised § 2 in *Thornburg v. Gingles* highlight the importance of contextualizing the right to vote in relation to the right to representation.⁵³ In 1986, Black voters brought a challenge in North Carolina against a new redistricting plan.⁵⁴ The question before the Court, as Justice Brennan put it, was whether the redistricting plan "violated § 2 by impairing the opportunity of [B]lack voters 'to participate in the political process and to elect representatives of their choice.'"⁵⁵ Justice Brennan took this decision as an opportunity to chart a new path away from an intent test by looking to the Senate Report that accompanied the 1982 amendments.⁵⁶ The Report found that the intent test asked the wrong question and that the right question was whether "plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."⁵⁷ To answer this question, courts must ask whether the contested structure hinders the right to cast a ballot or the right for that ballot to be counted towards representation.⁵⁸

Using the new rubric set out by the Senate Report, the Court looked at data from three election cycles which demonstrated racially polarized voting; a legacy of official discrimination in voting, education, housing, employment, and health

49. Parker, *supra* note 48, at 747. This results test resembled what Appellees proposed in *City of Mobile* regarding § 5. See Brief for Appellees, *supra* note 42, at 4.

50. Parker, *supra* note 48, at 747 (quoting H.R. REP. NO. 97-227, pt. 1, at 29 (1981)).

51. 127 CONG. REC. 22098, 22908, 22924 (1981) (statements of Rep. Chisholm, Rep. Frost, Rep. Collins).

52. *Id.* at 22098 (statement of Rep. Chisholm).

53. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

54. *Id.* at 34-35.

55. *Id.* at 34 (quoting Voting Rights Act of 1965, 42 U.S.C. § 1973 (1982) (current version at 52 U.S.C. § 10301)).

56. *Id.* at 44 (citing S. REP. NO. 97-417, at 36 (1982)).

57. *Id.* (citing S. REP. NO. 97-417, at 28).

58. S. REP. NO. 97-417, at 28-31.

services; and persistent campaign appeals to racial prejudice.⁵⁹ In light of this evidence, the Court unanimously found the new redistricting plan damaged Black voters' ability to "participate equally in the political process and to elect candidates of their choice" and thus violated the amended § 2 of the VRA.⁶⁰

The amendments to the VRA and the differences between *City of Mobile's* and *Gingles's* outcomes demonstrate that the right to vote does not equal the right to representation. When the right to vote is viewed and protected in isolation, it becomes an empty gesture, void of actual meaning or effect. *City of Mobile* offers a lesson that can be translated to other realms of legislation and politics: we must be cautious about protecting the right to vote without considering its relation to representation. When we look too myopically at the right to vote, it is protected in its simplest form while void of the utility that gives it meaning. Instead, we must proceed as the court did in *Gingles*, recognizing the right to vote as just part of a larger and more essential right to representation. And finally, we must not conflate the two as Justice Stewart did. We must not pretend that voting equals representation, but rather examine whether the tool is working. The next Sections of this Note will look at where the narrow goal of protecting the right to vote without consideration of whether it will impact representation replicates Justice Stewart's maneuvers in *City of Mobile*.

II.

WHERE WE FIGHT TO VOTE

This Section highlights fights that deal exclusively with protecting the right to vote. This Note does not assert that these fights are unimportant. Regardless of its actual impacts on representation, voting should not be a right denied to some while given to others. Issues such as voter ID laws and voter roll purges tend to impact particular groups that the electoral system has already pushed to the margins.⁶¹ This Section focuses on a question of resources. When we put our resources into protecting the right to vote, are we doing it with a measured understanding of how it will impact the right to representation? This Section does not argue for abandoning the fight to protect the right to vote, but instead that we must always consider the right to vote in relation to the right to representation and protect it most where it has the greatest effect on that right.

In the interest of better allocating resources, this Section will examine the fights around voter ID laws and voter roll purges and whether these policies are contested proportionately to the effect they have on representation. Voter ID laws and voter roll purges are hardly the only threats to voting rights. However,

59. *Thornburg*, 478 U.S. at 77–80.

60. *Id.* at 80.

61. For example, in regard to voter ID laws, national datasets indicate that certain groups of voters are less likely to possess valid IDs than others. Namely, people of color are less likely to have an ID than white people. Matt A. Barreto, Stephen Nuño, Gabriel R. Sanchez & Hannah L. Walker, *The Racial Implications of Voter Identification Laws in America*, 47 AM. POL. RSCH. 238, 242 (2019).

of the threats to voting, these policies seem to receive the most attention.⁶² As such, when considering the extent to which contesting voter-obstruction policies is worth the resources, voter ID and voter roll purge laws are a good place to start.

A. Voter ID Laws

Voter ID laws grew in popularity following the contested 2000 presidential election.⁶³ As of December 2019, thirty-five states enforce or were scheduled to enforce voter ID requirements. Eighteen states require voters to present a photo ID while the remaining seventeen accept other forms of identification.⁶⁴ Supporters of voter ID laws argue that such requirements are necessary to combat voter fraud.⁶⁵ However, there have been few confirmed cases of voter fraud.⁶⁶

Voter ID laws are politically polarizing, which may explain the contentious fight absent compelling evidence of fraud. 95.3 percent of Republican and only 2.1 percent of Democratic legislators voted in favor of voter ID bills introduced by Republican state legislators between 2005 and 2007.⁶⁷ A majority of legislatures that have enacted restrictions are Republican-controlled. Critics argue that new voter ID laws are meant to reduce turnout amongst groups historically or currently oppressed by our government that generally favor the Democratic party.⁶⁸ Some Republican politicians have lent credence to such accusations by admitting to doing just that.⁶⁹

62. See *As Midterms Approach, Voter ID Laws Gain Attention*, AM. BAR ASS'N, <https://www.americanbar.org/news/abanews/aba-news-archives/2018/10/as-midterms-approach--voter-id-laws-gain-attention-> [<https://perma.cc/6BBX-BBNV>].

63. Shelley de Alth, Essay, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL'Y REV. 185, 185 (2009).

64. *Voter Identification Laws by State*, BALLOTPEDIA, https://ballotpedia.org/Voter_identification_laws_by_state [<http://perma.cc/LU7Z-9NRP>]. This is also a valuable resource for an exhaustive list of voter ID laws by state.

65. Only ten instances of voter fraud appeared between 2000 and 2012. Benjamin L. Ginsberg, *Republicans Have Insufficient Evidence to Call Elections 'Rigged' and 'Fraudulent'*, WASH. POST (Sept. 8, 2020), <https://www.washingtonpost.com/opinions/2020/09/08/republicans-have-insufficient-evidence-call-elections-rigged-fraudulent> [<https://perma.cc/U2B6-YM4T>].

66. Brian L. Josias, *Voter ID Laws and the 2012 Election*, MINORITY TRIAL LAW, Summer/Fall 2012, at 8, 8 (showing that only 10 cases of voter fraud appeared between 2000 and 2012).

67. Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification—Voter Turnout Debate*, 8 ELECTION L.J. 85, 86 (2009).

68. *Id.*

69. Michael Wines, *Some Republicans Acknowledge Leveraging Voter ID Laws for Political Gain*, N.Y. TIMES (Sept. 16, 2016), <https://www.nytimes.com/2016/09/17/us/some-republicans-acknowledge-leveraging-voter-id-laws-for-political-gain.html> [<https://perma.cc/QYK9-6J2X>]; see also Ethan Magoc, *Flurry of Photo ID Laws Tied to Conservative Washington Group*, NEWS21 (Aug. 12, 2012, 10:48 AM), <https://votingrights.news21.com/article/movement/index.html> [<https://perma.cc/GDX6-RNSJ>] (finding that more than half of sixty-two state voter ID bills proposed in 2011 and 2012 were sponsored by members or conference attendees of the conservative nonprofit American Legislative Exchange Council); Suevon Lee & Sarah Smith, *Everything You've Ever Wanted to Know About Voter ID Laws*, PROPUBLICA (Mar. 9, 2016, 8:33 AM),

While studies of the effects of voter ID laws have produced somewhat conflicting results, there is little compelling evidence that these laws greatly impact voter turnout and, in turn, representation.⁷⁰ A 2008 study looked at the effect of voter ID laws on registered voters in the 2000 and 2004 presidential elections and in the 2002 and 2006 midterm elections.⁷¹ When the study looked at trends in the aggregate data, it found no evidence of reduced participation. However, individual-level data showed that the strictest laws—those requiring a combination of presenting an ID card, positively matching one’s signature, and showing picture ID—negatively impacted participation particularly amongst lower-income populations.⁷² Another analysis of voter turnout and the results of previous studies had similar findings but drew different conclusions.⁷³ It determined such estimates were inconclusive since the pattern the data displayed was far from statistically significant.⁷⁴ Other studies urge that socio-demographic and political motivational factors remain far more determinative of voter turnout than the presence of voter ID laws, and that these factors, instead, should be the focus for increasing voter engagement and turnout.⁷⁵

Recently, an analysis of the effects of voter ID laws across multiple states and election cycles for the National Bureau of Economic Research demonstrated that those effects were mostly null.⁷⁶ Researchers found no evidence that strict

<https://www.propublica.org/article/everything-youve-ever-wanted-to-know-about-voter-id-laws>
[<http://perma.cc/QK48-CZM5>].

70. Jacoby, *supra* note 5.

71. R. Michael Alvarez, Delia Bailey & Jonathan N. Katz, *An Empirical Bayes Approach to Estimating Ordinal Treatment Effects*, POL. ANALYSIS, Winter 2011, at 19, 26.

72. *Id.*; see also U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-634, ELECTIONS: ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS (2015) (attributing a decrease in general election turnout in Kansas and Tennessee from 2008 to 2012 relative to comparison states to changes in voter ID requirements); Zoltan Hajnal, Nazita Lajevardi & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363, 363 (2017) (finding that strict ID laws negatively impact the turnout of racial and ethnic minorities in primaries and general elections and skew democracy toward those on the political right).

73. Erikson & Minnite, *supra* note 67, at 96–98.

74. *Id.* The study did not dismiss the possibility of voter suppression but pointed out that existing research and science regarding voter suppression was incomplete and inconclusive. *Id.*; see also Benjamin Highton, *Voter Identification Laws and Turnout in the United States*, 20 ANN. REV. POL. SCI. 149 (2017) (finding no effect of voter ID laws); Lauren R. Heller, Jocelyne Miller & E. Frank Stephenson, *Voter ID Laws and Voter Turnout*, 47 ATL. ECON. J. 147 (2019) (finding that data from 2000 to 2014 federal elections showed no evidence that strict voter ID laws affect overall turnout or Black turnout but may marginally reduce Hispanic turnout).

75. See, e.g., Jason D. Mycoff, Michael W. Wagner & David C. Wilson, *The Empirical Effects of Voter-ID Laws: Present or Absent?*, 42 PS: POL. SCI. & POL. 121, 124 (2009) (acknowledging that laws requiring stricter forms of identification are on their face discriminatory and should be scrutinized but concluding that the laws have not significantly reduced turnout).

76. Enrico Cantoni & Vincent Pons, *Strict ID Laws Don’t Stop Voters: Evidence from a U.S. Nationwide Panel, 2008-2018*, at 13, 19 (Harv. Bus. Sch. Working Paper No. 19-076, 2019). As has been the case with other research cited in this Note, the study hardly supports strict voter ID laws. In particular, this report concluded that “contrary to the argument used by the Supreme Court in the 2008 case *Crawford v. Marion County* to uphold the constitutionality of one of the early strict ID laws, we find no significant impact on fraud or public confidence in election integrity.” *Id.* at 19.

ID requirements disenfranchised disadvantaged populations in the first election following the implementation of such laws, nor in following elections. The report concluded by saying that “low and unequal participation represent real threats to democracy – but these may be more effectively addressed by reducing other barriers to voting, such as voter registration costs or long travel and waiting time in areas with low polling station density.”⁷⁷

While many of the studies cited qualify their findings with how hard it is to determine the turnout effects of voter ID laws and that the effects may change over time, there is as yet no evidence that voter ID laws have any more than a marginal effect on voter turnout. This does not mean these discriminatory laws are not worth fighting. They are. Millions of Americans lack IDs and more than twenty-one million do not have government-issued photo identification. Obtaining an ID costs time and money ranging from \$75 to \$175.⁷⁸ States exclude forms of ID in a discriminatory manner, and voter ID laws are enforced in a discriminatory manner.⁷⁹ They disproportionately impact Black, Latinx, multi-racial, and poor Americans alongside naturalized citizens.⁸⁰ Furthermore, there is virtually no evidence of voter fraud, no evidence that voter ID laws curtail fraud, and no evidence that these laws inspire confidence in the U.S. electoral system.⁸¹

Still, the public should be wary of excessive focus on voter ID laws. Whether intentionally or not, the fight over voter ID laws is a distraction. Millions of Americans who lack qualifying IDs are not disenfranchised by new laws because they were not voting prior to their enforcement. All of the potential voters whom the electoral system has already disenfranchised in one way or another will not be brought into the fold even if every voter ID law were struck down. Potential voters will still strain to leverage the tool of voting in their own representation because they have been dissuaded or prevented from voting for some other reason. And even if they were brought into the fold and were magically induced to vote by the removal of voter ID laws, does the political system we have now guarantee them representation on the other end of the vote? Can the sharpest tool even work?

B. Voter Purges

Voter purging is the practice of removing voters from registration lists due to change in address, death, duplicate records, incapacitation, criminal convictions, or inactivity, in an effort to keep voter rolls up to date. Criminal conviction and inactivity tend to be the most controversial justifications for

77. *Id.* (citation omitted).

78. *Oppose Voter ID Legislation – Fact Sheet*, ACLU (May 2017), <https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet> [<https://perma.cc/ANF8-8VKQ>].

79. *Id.*

80. Hajnal et al., *supra* note 72, at 368–69.

81. Cantoni & Pons, *supra* note 76, at 19.

removing individuals from voter rolls.⁸² When carefully and consciously done, cleaning up voter rolls is important for election integrity and efficiency. However, without such care, voter roll clean-up efforts are likely to negatively affect the enfranchisement of voters who show up to vote only to find they are no longer registered. Some argue that, at its worst, purging voter rolls results in voter suppression, though possibly not to a degree on par with voter ID laws.⁸³

The literature on the effects of voter purges alone is sparse. However, significant research on the effects of barriers to registration includes discussions of voter purges. One study questioned the assumption that liberalizing voter registration laws would significantly improve turnout among low-income populations by looking at the effects of election day registration (EDR).⁸⁴ The study found that, contrary to popular assumptions in the field, EDR actually increased turnout among middle (rather than working) class individuals who were already likely to vote. Ultimately, the findings indicated that political participation requires political mobilization and education, and that “simply reducing citizens’ administrative costs only modestly affects the likelihood that they will vote.”⁸⁵ Those in favor of liberalizing voting, who assume that increased cost reduces turnout, similarly would assume that decreased cost would increase turnout and that increased turnout would increase representation. Increased representation would in turn encourage more people to vote. If the tool is working, perhaps more people will use it.⁸⁶

A paper published in 1995 focused on the impact of restrictive voting laws from 1972 to 1982 on voter registration as well as turnout in both presidential and nonpresidential elections.⁸⁷ The researchers determined that periodic, restrictive voter roll purges did more to effectively depress registration than turnout, and that the influence of purge laws on turnout was modest at best.⁸⁸ Instead, closing dates for registration had a much more significant impact on voter turnout and extending registration hours did the most to positively impact

82. Dari Sylvester Tran & Keith Smith, *Voter Registration*, in UNRIGGING AMERICAN ELECTIONS 37, 61 (2019).

83. See JONATHAN BRATER, BRENNAN CTR. FOR JUST., *VOTER PURGES: THE RISKS IN 2018*, at 1 (2018).

84. Brians & Grofman, *supra* note 5, at 161–63.

85. *Id.* at 171; see also Nagler, *supra* note 5 (finding that stricter voter registration laws had no significant impact on low-income voter turnout).

86. Brians & Grofman, *supra* note 5, at 171.

87. Glenn E. Mitchell & Christopher Wlezien, *The Impact of Legal Constraints on Voter Registration, Turnout, and the Composition of the American Electorate*, 17 POL. BEHAV. 179 (1995). The paper was responding to earlier, widely accepted research which determined that fully liberalized registration laws would increase the voting population, but that the composition of the electorate would remain essentially the same. See *id.* at 179.

88. *Id.* at 195. But see Daniel R. Biggers & Daniel A. Smith, *Does Threatening Their Franchise Make Registered Voters More Likely to Participate? Evidence from an Aborted Voter Purge*, 50 BRIT. J. POL. SCI. 933 (2020) (estimating a significant, positive participatory effect of being challenged by an aborted voter purge law, particularly for Hispanic voters).

turnout.⁸⁹ Ultimately, the paper—after looking at such factors as education, age, and race—determined that fully liberalized registration laws would increase turnout by approximately 7.6 percent but would “produce a largely unchanged national electorate.”⁹⁰

While an extensive amount of research shows that sweeping voter roll purges can often target historically disenfranchised groups,⁹¹ there is little to no research suggesting that these purges significantly affect voter turnout. Findings that the national electorate would remain largely unchanged by abandoning voter purges point in a similar direction as do findings about voter ID laws: some voters do not participate in elections regardless of accessibility of the vote. This population has already been disenfranchised and removing obstacles to voting will not grant them representation. It will not make the government responsive to their needs and wishes.

Voter suppression due to voter roll purges may be expected to grow in the coming years with the increase in “[v]oter [f]raud [v]igilantes” and pressure on states from the previous Republican administration.⁹² Recently, conservative organizations have pursued lawsuits aiming to institute more aggressive state purge practices. These organizations targeted over 250 jurisdictions—many with limited funds to defend themselves—in 2017 alone, and more than four hundred since 2014.⁹³ In some cases, threats and lawsuits have forced jurisdictions to implement problematic and overly broad voter purge practices.⁹⁴ Lawsuits, along with new methods of voter purging, such as interstate crosschecking,⁹⁵

89. Mitchell & Wlezien, *supra* note 87, at 195; see Dale Ho, Opinion, *The Ohio Purge and the Future of Voting*, N.Y. TIMES (June 12, 2018), <https://www.nytimes.com/2018/06/12/opinion/the-ohio-purge-and-the-future-of-voting.html> [<https://perma.cc/3SYK-KWWB>] (noting that the fifteen states and the District of Columbia that have Election Day registration programs see turnout rates as much as 10 percent higher than those of states that do not).

90. Mitchell & Wlezien, *supra* note 87, at 195–96.

91. Naila S. Awan, *When Names Disappear: State Roll-Maintenance Practices*, 49 U. MEM. L. REV. 1107, 1109–10, 1122 (2019) (finding that various methods of purging voter rolls can disproportionately target and remove people of color, working-class, immigrant, and poor people from lists).

92. BRATER, *supra* note 83, at 6; see also Li Zhou, *Voter Purges Are on the Rise in States with a History of Racial Discrimination*, VOX (July 20, 2018, 3:11 PM), <https://www.vox.com/2018/7/20/17595024/voter-purge-report-supreme-court-voting-rights-act> [<http://web.archive.org/web/20201217064818/https://www.vox.com/2018/7/20/17595024/voter-purge-report-supreme-court-voting-rights-act>] (“While the Department of Justice had previously served as a check on states’ voter purging, the federal agency has taken a different tack during the Trump administration and urged election officials to be more aggressive in their purging practices This guidance comes as Trump continues to warn against the threat of voter fraud . . . though there is little evidence of that happening.”).

93. BRATER, *supra* note 83, at 6–7.

94. *Id.* at 7.

95. Interstate crosschecking is when election officials share voter data with other states to identify when someone has moved across state lines and should be purged from the voter rolls. Crosschecking has many pitfalls however, such as purging voters from rolls in the states they moved to rather than from and confusing two different people as the same person. *Id.* at 4–5.

“noncitizen” voter purges, and “challenge purges,”⁹⁶ mean that voter purges may become a growing source of voter disenfranchisement in the coming years.⁹⁷

As with voter ID laws, there is ample reason to be wary of voter purge laws. There is a long history of jurisdictions using voter purge laws explicitly to prevent certain demographics from voting.⁹⁸ And modern voter purge programs disproportionately remove people of color and low-income, disabled, and veteran voters from their rolls.⁹⁹ Furthermore, following the Supreme Court’s 2013 ruling in *Shelby County v. Holder*, a decision that weakened voter protections under the VRA, counties with a history of voter discrimination have purged voters from rolls at significantly higher rates than other counties.¹⁰⁰ All in all, voter roll purges, when not carefully implemented, stand to disenfranchise voters already pushed to the margins by the electoral system. The next question is whether these purge laws actually prevent voting to a point where they negatively impact representation or, rather, government responsiveness to its citizens.

While voter ID laws and voter roll purging practices may appear to be important battleground issues in protecting the right to representation, they have little to no demonstrated effect on representation. A series of scholars have determined that voting reforms do nothing to “correct the biases inherent in the electorate, and in some cases, reforms may even worsen these biases” by increasing voter turnout in already represented groups.¹⁰¹ Fixing the right to vote will not fix representation because something beyond the mechanics of voting is broken. This is not to say that laws around voting are not often discriminatory and worth fighting. Rather, these battles should be fought with the understanding that they will do little to impact representation. Furthermore, the lack of impact that changing voter ID and voter purge laws may have on the demographics of the voting population points to a troubling fact: there are populations that do not

96. *Id.* at 2–4. Most states have “challenger” laws, which allow officials and/or private parties to question voters’ eligibility at the polls during voting. While these laws have traditionally been used to challenge a single voter’s eligibility, election officials and outside agitators have started issuing batch challenges to large pools of voters. *Id.* at 2.

97. *Id.* at 2–12; see also JONATHAN BRATER, KEVIN MORRIS, MYRNA PÉREZ & CHRISTOPHER DELUZIO, BRENNAN CTR. FOR JUST., PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 1–3 (2018) (finding a higher voter removal rate due to purges in 2014 and 2016 federal elections than in federal elections in 2006 and 2008, particularly in jurisdictions previously subject to federal preclearance).

98. See *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1863 (2018) (Sotomayor, J., dissenting) (enumerating the reasons to treat voter purge laws with great skepticism and caution).

99. For example, the voter purge law examined in *Husted* removed 10 percent of voters from rolls in neighborhoods with African American majorities, compared to only a 4 percent removal of voters in majority white neighborhoods. *Id.* at 1864.

100. Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, BRENNAN CTR. FOR JUST. (Aug. 21, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds> [<https://perma.cc/5V3H-WM28>].

101. Adam J. Berinsky, *The Perverse Consequences of Electoral Reform in the United States*, 33 AM. POL. RSCH. 471, 482 (2005).

participate in elections regardless of the difficulty of voting. To truly impact representation—the degree to which government is responsive to these populations—we must explore alternative avenues. To make lasting change, we must stop focusing on the tool, and focus on the goal.

III.

THREATS TO REPRESENTATION

In the previous Section, I explored two ways upon which the right to vote has been infringed. An examination of the effects of both voter ID laws and suspect voter roll purges demonstrates that even if the right to vote were fully liberalized, many would still choose not to participate in the voting process. Even if current non-voters did participate, would it result in representation? This Section turns to two issues affecting representation that may help to answer those questions. First, I will look at first-past-the-post voting and how the United States' electoral structures almost inherently prohibit true representation: in other words, how the United States' electoral structures ensure that protecting the right to vote has little to no effect on representation. Second, I will look at passive voter suppression. Passive voter suppression helps explain why certain eligible voters choose not to participate in the electoral process and why this means liberalizing voting laws will neither fix turnout nor protect the right to representation.

A. First-Past-the-Post Voting

Some threats to representation are embedded in the very structures of the United States democracy. When we assume perfection in our political institutions, we waste time blaming and trying to correct symptoms of deeper structural problems. However, if people living in the United States can recognize they are up against systemic problems, they “may at least be better equipped to steer clear of false answers.”¹⁰² First-past-the-post (FPTP) voting is a structure that would continue to hinder representation even in a perfect world with low bars to registering to vote and high voter turnout.

FPTP voting, used by a majority of states, is a winner-take-all system in which the candidate with a plurality of votes wins the election.¹⁰³ This method of choosing a representative inherently denies representation to any citizen who did not vote for the winner.¹⁰⁴ Returning to Pitkin's definition of a representative government as one that is responsive to the public, we see the failure in

102. HERTZBERG, *supra* note 1, at 507.

103. Ryan J. Silver, Note, *Fixing United States Elections: Increasing Voter Turnout and Ensuring Representative Democracy*, 10 DREXEL L. REV. 239, 242 (2017).

104. See Amy, *supra* note 7. While it may seem cynical and simplistic to say that a representative will not be responsive in any way to those who did not elect them, it is undeniable that an elected official cannot be responsive to every constituent. And so it stands to reason that they will be less responsive to those not responsible for putting them in office and incapable of removing them come the next election.

representation is particularly clear. A politician who can remain in office without addressing the concerns of a significant percentage of their constituents—conceivably 49 percent of the district’s population—need not be responsive to their concerns. FPTP voting produces legislatures that do not accurately reflect the public’s views, discriminate against third parties, and depress voter turnout. Each of these elements is a symptom of a violated right to representation.¹⁰⁵

FPTP voting also exacerbates a two-party system that prevents truly representative candidates from winning political office.¹⁰⁶ While there can certainly be some variation between candidates from the same party, the two-party system more often than not forces voters to pick between two choices, neither of which may actually represent their views.¹⁰⁷ This means that even if a voter picks a candidate and that candidate wins, the government still may not be responsive to the actual wishes of that voter. Public frustration with the two-party system highlights how the two parties fail to be responsive. A 2014 Gallup poll showed that 57 percent of U.S. adults believe there needs to be a third major political party since the Republican and Democratic parties fail to represent the American people.¹⁰⁸ These views have been relatively consistent since 2007, with a high of 60 percent recorded during a partial federal government shutdown in 2013.¹⁰⁹

FPTP voting has inhibited the success of third-party candidates, despite the widespread public frustration with the current two-party system. Third-party success is not for lack of options: there have been strong third parties such as the People’s Party, the Union Labor Party, the Socialist Labor Party, the Prohibition Party, the Liberty Party, and the Greenback Party.¹¹⁰ Despite strong public support and innovative initiatives responsive to the needs of the public, these parties only experienced marginal success at the polls. This is due to several factors, such as court protections and the two major parties taking on third-party-proposed reforms. However, FPTP voting systems themselves often prevent any group incapable of securing a plurality from making meaningful gains in government.¹¹¹

105. *See id.*

106. *See Silver, supra* note 103, at 242.

107. *See id.* at 253.

108. RJ Reinhart, *Majority in U.S. Still Say a Third Party Is Needed*, GALLUP (Oct. 26, 2018), <https://news.gallup.com/poll/244094/majority-say-third-party-needed.aspx> [<http://perma.cc/7NAC-L9DE>].

109. Jeffrey M. Jones, *Americans Continue to Say a Third Political Party Is Needed*, GALLUP (Sept. 24, 2014), <https://news.gallup.com/poll/177284/americans-continue-say-third-political-party-needed.aspx> [<https://perma.cc/B2PK-R2VV>].

110. Silver, *supra* note 103, at 255–56.

111. *See id.* at 256, 261. It becomes particularly apparent that these various third parties have been historically responsive to swaths of the American public when you look at the reforms they championed such as the “[a]bolition 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” *Id.* at 256.

FPTP voting does more than inhibit the success of third parties: it ensures the continued existence of the two-party system. Political scientist Maurice Duverger proposed a strong relationship between FPTP voting and a two-party system known as “Duverger’s Law.” Duverger’s Law states that FPTP voting naturally leads to a two-party system since third parties in an FPTP system will be systematically underrepresented in the legislature relative to the percentage of votes they received and because electors feel their votes are wasted if they continue to support a third party.¹¹² Duverger’s Law is more than just a theory: it has been shown to hold true. A study of voting patterns across different electoral systems in 1982 showed that FPTP voting fostered polarization and, in turn, a two-party system.¹¹³

FPTP’s reliable creation of racially, ethnically, and ideologically homogenous legislatures in the United States is another negative effect of FPTP voting on the right to representation.¹¹⁴ FPTP voting provides virtually no representation for political minorities and in the United States political and racial minorities significantly overlap.¹¹⁵ As a result of this overlap, FPTP voting in the United States gives a “racially homogeneous majority disproportionate representation at the expense of an historically oppressed racial minority.”¹¹⁶

Turning an eye to the negative effects of FPTP voting on representation, it becomes hard to justify putting so much of our energy into combating voter ID laws and liberal voter roll purges. When a significant percentage of the people who make it to the ballot boxes still are not represented in government, getting more people to those ballot boxes will not create the kind of change necessary to ensure the right to representation. Furthermore, given that FPTP voting specifically discriminates against those individuals disenfranchised by stricter registration and voting laws, even fully liberalized voting and registration would not enfranchise them. Protecting the right to vote does nothing if the mechanism for turning votes into representation does not work.

B. Passive Voter Suppression

To ensure representation, we need to both cure the ills of FPTP voting and also encourage more representative voter turnout. We can manage this by combatting passive voter suppression. The concept of passive voter suppression fills a void at which researchers hinted when finding no significant correlation between stricter voting laws and depression in turnout.¹¹⁷ The theory of passive

112. André Blais & R. K. Carty, *The Psychological Impact of Electoral Laws: Measuring Duverger’s Elusive Factor*, 21 BRIT. J. POL. SCI. 79, 79–80 (1991).

113. *Id.* at 92–93.

114. See James A. Gardner, *Madison’s Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 IOWA L. REV. 87, 90 (2000).

115. See *id.* at 100.

116. See *id.* (quoting LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 82 (1994)).

117. Berinsky, *supra* note 101, at 483–84 (“Electoral reforms, on their own, cannot ameliorate the present socioeconomic biases in the composition of the voting public because the increase in turnout

voter suppression looks at how campaign mobilization activities interact with three voting determinants—information costs, formal organizational affiliations, and social network compositions—to depress voter turnout among poor people.¹¹⁸

To best understand passive voter suppression theory, we look first to those three voting determinants and their interplay with class. To vote, an individual needs information. This includes information about where, when, and how to vote; the candidates; and the benefits of voting.¹¹⁹ As education level increases, so too does the ease and speed with which one might find and interpret that information. Since lower-income individuals tend to have attained lower levels of education, this means that the cost of finding and interpreting this information is significant. This high cost of information about the candidate and the benefits of voting contributes to poor voter turnout.¹²⁰

Affiliation with formal organizations improves voter turnout. Unfortunately, poor individuals are less likely to belong to such organizations than those of a higher socioeconomic status.¹²¹ Affiliation with a formal organization—such as a union or church—has shown to increase the likelihood of voting. This may be for any number of reasons, including easier access to important information or an increased sense of duty that belonging to such a group creates.¹²²

Similarly, sociologists have found that a person's social networks impact whether they vote. Simply put, the more politically interested people are in an individual's social network, the more likely that individual will be provided with political information and come to view voting as an obligation. This, in turn, increases their likelihood of voting.¹²³ However, since social networks tend to

these reforms bring is the result of the retention of transient voters, not the stimulation of nonvoters. . . . [L]iberalization has not led to greater socioeconomic equality in the composition of the electorate However, a positive agenda can emerge from these results. The failure of electoral reforms to produce a more representative electorate casts doubt on the possibility of achieving full equality of political voice through institutional reform. Perhaps, then, institutional reform is not the proper response to the problem. There is another solution—one that involves reframing the puzzle of participation. . . . Put another way, instead of making it incrementally easier for citizens to participate in politics, we should make people *want* to participate.”)

118. Ross & Spencer, *supra* note 8, at 672.

119. *Id.* at 637; see also David Dreyer Lassen, *The Effect of Information on Voter Turnout: Evidence from a Natural Experiment*, 49 AM. J. POL. SCI. 103, 114–15 (2005) (confirming a sizeable and significant causal effect of being informed on the likelihood that someone will vote).

120. Ross & Spencer, *supra* note 8, at 671.

121. *Id.*

122. *Id.* at 667–68; see also Samuel Jeremy Abrams, *Where Everyone Knows Your Name: A Socio-Rational Theory of Voter Turnout in Advanced Industrial Democracies* 71 (Feb. 2010) (Ph.D. dissertation, Harvard University) (ProQuest).

123. Ross & Spencer, *supra* note 8, at 670; see also David W. Nickerson, *Is Voting Contagious? Evidence from Two Field Experiments*, 102 AM. POL. SCI. REV. 49, 55 (2008) (finding a placebo-controlled experiment suggests that direct campaign contact to households with multiple registered voters increases voter turnout through behavioral contagion); Katherine Haenschen, *Social Pressure on Social Media: Using Facebook Status Updates to Increase Voter Turnout*, 66 J. COMMUN. 542, 558

be made up of individuals with similar backgrounds and makeups, and poor individuals are already less inclined to vote, poor individuals tend to be in social networks with other people who have little interest in politics and do not vote.¹²⁴

Political campaigns provide another source of information. Motivated to mobilize voters, effective campaigns employ various methods to provide individuals with tailored information.¹²⁵ However, political campaigns do not have the time nor resources to reach out to every voter and often choose to reach out only to individuals who are already likely to vote for that candidate.¹²⁶ This means that campaigns often neglect to send tailored information to “unregistered, infrequent, and nonvoters,” which negatively impacts poor potential voters.¹²⁷ The disparity in information from campaigns is further exacerbated by the fact that having someone in one’s network contacted increases one’s chances of voting.¹²⁸

High barriers to tailored election information, absence from organizations and networks that might provide that information, and a decreased likelihood that they—or their network—will be contacted by campaigns depress turnout of poor individuals. Overcoming this information desert is a necessary but certainly not a sufficient step in the process of securing representation. Without the proper information, neither a shift to proportional representation nor fully liberalized voting can possibly result in the honest representation of significant portions of the American people.

So long as the current system for electing political leaders stays in place, tools to further representation must combat the ills of both FPTP voting and passive voter disenfranchisement that injure the right to representation. To do this, such tools should ideally accomplish one or more of the following: allow for preference-aggregation, combat the two-party system, reduce barriers to election information, and increase the likelihood that representatives will tailor their messages to poor communities. Democracy vouchers promise to address a number of these problems.

IV.

SEATTLE’S DEMOCRACY VOUCHER PROGRAM

In 2015, more than 60 percent of Seattle voters approved a new public-financing program unlike anything previously implemented in the United States.¹²⁹ Since 2017, the government has sent each registered voter four \$25

(2016) (finding that inducing political activity within an individual’s Facebook network resulted in significantly increased turnout from members of that network).

124. Ross & Spencer, *supra* note 8, at 671–72.

125. *Id.* at 674.

126. *Id.* at 679.

127. *Id.* at 680.

128. *See id.* at 685.

129. Russell Berman, *Seattle’s Experiment with Campaign Funding*, ATLANTIC (Nov. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/11/seattle-experiments-with-campaign->

vouchers they can donate to any candidates of their choosing.¹³⁰ Residents who are not registered to vote can still request vouchers from the Seattle Ethics and Elections Commission.¹³¹ To qualify to receive vouchers, candidates must agree to spending and contribution limits and collect a minimum number of contributions between \$10 and \$250.¹³² When the program was first established, drafters hoped it would increase the percentage of adults in Seattle contributing to campaigns from approximately 1.5 percent to 10 or 15.¹³³ This Section now turns to a discussion of the theory behind voucher programs and an analysis of results from Seattle's first election cycle with vouchers to determine whether what early theorists promised was true: that voucher systems promote a more representative government.

A. *The Theory Behind Voucher Programs*

Voting is not the only road to securing representation. Elections are also influenced by the donors who fund them. Despite the prominent role that money plays in American politics, only a fraction of people actually contribute to political campaigns. In 2016, 0.52 percent of adults accounted for 70 percent of donations received by political candidates.¹³⁴ In addition to being a sliver of the population, this group of donors is also notably wealthier, whiter, older, more male, and more highly educated than the broader electorate.¹³⁵ The influence of wealth might explain why government policy is significantly more responsive to wealthy Americans than those in lower socioeconomic classes.¹³⁶

Voucher programs aim to disrupt the inequality of representation in donor pools and, ultimately, increase government responsiveness to the electorate at large. In an essay published in 1996, legal scholar Richard L. Hasen evaluated the benefits of voucher systems through several lenses, including egalitarianism,

funding/415026 [https://perma.cc/6QT8-U95W]. While this is the first time this kind of program has been implemented, it is not the first time the idea has been proposed. Scholars have suggested voucher programs in the past as a way to minimize the role of wealth in the political process, mobilize individuals who have not previously participated in politics, promote a more egalitarian political order and fairer legislative process, and better register the intensity of voter preference. *See* Hasen, *supra* note 9, at 6–7.

130. Dyana Mardon, *Enhancing Political Engagement in Oakland: Barriers and Solutions* 34 (Spring 2018) (Advanced Policy Analysis, University of California, Berkeley) (available at https://cao-94612.s3.amazonaws.com/documents/OAK070808.pdf [https://perma.cc/NJJ7-DLPJ]).

131. *Id.*

132. *Id.*

133. Berman, *supra* note 129.

134. Brian J. McCabe & Jennifer A. Heerwig, *Diversifying the Donor Pool: How Did Seattle's Democracy Voucher Program Reshape Participation in Municipal Campaign Finance?*, 18 *ELECTION L.J.* 323, 323 (2019).

135. *Id.* at 325–27.

136. *See* Martin Gilens, *Inequality and Democratic Responsiveness*, 69 *PUB. OP. Q. (SPECIAL ISSUE)* 778, 793–94 (2005) (finding a vast discrepancy in government responsiveness to citizens with different incomes and hypothesizing a relationship through campaign donations). *See generally* Adam Bonica, *Inferring Roll-Call Scores from Campaign Contributions Using Supervised Machine Learning*, 62 *AM. J. POL. SCI.* 830 (2018) (demonstrating that campaign contributions predict elected officials' voting behavior).

impact on governance, and benefits as a preference-aggregation mechanism.¹³⁷ There are two ways in which a voucher system makes elections more egalitarian. First, to the extent that we understand political capital as coterminous with money, a voucher system equalizes that power. Second, it equalizes an independent function of wealth: organizational ability. Because wealthy voters tend to be more highly educated, members of official organizations, and part of social networks already inclined to vote, the cost of collective action is lower for those in higher socioeconomic classes.¹³⁸ Equalizing political capital and organizational ability respond to major causes of passive voter disenfranchisement.

Democracy vouchers equalize organizational ability by spreading money evenly for use in the political market. Once the voucher system has equalized political capital, candidates will no longer be able to rely on a few large donors to fund their campaigns and will have to begin mobilizing more of the electorate. In doing so, campaigns and other political groups take on the cost of collective action that donors once had to bear. In these two ways, candidates will have new incentives to explore the entire electorate for campaign contributions, making them more responsive to a greater percentage of potential voters.¹³⁹ Increased responsiveness directly combats a major cause of passive voter suppression: the relatively high cost of information about the candidate and the benefits of voting. If candidates are actively incentivized to reach out to and target all voters—including those of a low socioeconomic status—information costs go down and fewer voters are passively disenfranchised. Furthermore, since people are more likely to vote if others in their social circles vote, these impacts stand to be multiplied.

Voucher systems make political responsiveness to a broader swath of the population more likely. Mobilized groups of voucher holders will function much like current powerful interest groups that pressure politicians into voting for legislation they favor at the risk of losing their funding.¹⁴⁰ As the number of new interest groups increases under a voucher system, the power of these pre-existing interest groups will decrease until each group holds less sway with politicians.¹⁴¹

Voucher systems will also bring about faster social change. As the interests of the electorate evolve, it will no longer have to wait for political action groups to form to express political influence. Instead, desired societal changes could be “reflected through the voucher system’s market mechanism at the next election cycle. . . . The fluidity of the funding mechanism assures more responsive political outcomes.”¹⁴² This more direct link from the voters to the government

137. Hasen, *supra* note 9, at 27.

138. *Id.* at 29.

139. *Id.* at 29–30.

140. *Id.* at 31.

141. *Id.* at 32.

142. *Id.*

may weaken political parties.¹⁴³ Because the two-party system—kept alive and thriving through FPTP voting—hinders a truly representative government, weakening political parties may also make government more responsive to the public.¹⁴⁴

Finally, vouchers function effectively as a preference-aggregation mechanism since they allow the electorate to register the intensity of their preferences. For example, under the Seattle system, which awards each potential voter four \$25 vouchers, a voter could give \$50 to Candidate A and \$25 each to Candidates B and C. Another voter who has a stronger preference for Candidate B could give all \$100 to candidate B. If this preference were expressed only in votes then we would simply see one vote for Candidate A and one for Candidate B. Expressed in dollars, though, we can more accurately see how strongly the voters feel about each candidate since the candidates received different total amounts of voucher money. This makes vouchers more representative of public opinion than the simple FPTP voting system that much of the United States uses, which simply registers a plurality of support rather than the intensity of that support.¹⁴⁵

All in all, democracy vouchers have the potential to combat problems raised by FPTP voting and passive voter disenfranchisement, problems that go more directly to the question of representation than do current battleground issues with strict voting laws. Vouchers stand to combat passive voter disenfranchisement by minimizing the role of wealth in politics, mobilizing individuals who have not previously participated in politics, and forcing candidates to address the needs of all voters, not just large donors. Vouchers stand to combat the ills of FPTP voting by making legislatures more responsive to societal changes and better registering the intensity of voter preferences. Ultimately, democracy vouchers may promote a more egalitarian political order, a fairer legislative process, and greater representation. The next Section turns to early results from Seattle's recently enacted Democracy Voucher program to see if any of these promises have been fulfilled.

B. *What Seattle Showed Us*

Seattle's voucher program demonstrates a system that can increase and diversify individual campaign donations, creating an increased financial incentive for candidates and elected officials to better represent their constituents. When the program launched in 2017, 20,727 registered voters—approximately 4.05 percent of the voting-age population—redeemed their vouchers for candidates in the at-large city council and city attorney races.¹⁴⁶ This was nearly a three-fold increase in donors from the previous comparable

143. *Id.* at 33.

144. *See* Silver, *supra* note 103, at 242.

145. *See* Hasen, *supra* note 9, at 35.

146. McCabe & Heerwig, *supra* note 134, at 330.

election in 2013 in which only 1.49 percent of the voting-age population contributed to a municipal candidate.¹⁴⁷ Furthermore, approximately 84 percent of donors in the 2017 election were new donors and had not donated to city candidates in the 2013 or 2015 election cycles. Seventy-one percent of those new donors used vouchers.¹⁴⁸

Compared to cash donors in the 2017 mayoral race (which was not included in the voucher program), voucher donors in the 2017 city council and city attorney races better reflected the demographics of Seattle's population. Increased numbers of young people, women, people of color, and poor residents won elections.¹⁴⁹ Young people (aged 18 to 35) made up 35 percent of registered voters in 2017, 27 percent of voucher donors, and only 9 percent of cash donors.¹⁵⁰ While women made up more than half of registered voters in 2017, they made up less than half of the cash donor population but most of the voucher population.¹⁵¹ Neighborhoods with household incomes below the city median (\$80,000) contributed a 44 percent larger share in the city council and city attorney races than in mayoral campaigns. And neighborhoods in which people of color were the majority contributed a 46 percent larger share when vouchers were provided.¹⁵²

There is also evidence that candidates who qualified for vouchers did not rely as heavily on big-money donations. Eighty-seven percent of financial support for qualified candidates' campaigns came from small donations of \$250 or less and vouchers.¹⁵³ This was a jump from the city council and city attorney races in 2013, where such donations made up only 48 percent of funding.¹⁵⁴ As a result, candidates spent more time reaching out to and seeking support from a larger number of potential Seattle voters in communities typically excluded from campaign efforts.¹⁵⁵ One candidate noted that his campaign "mobilized homeless residents to use their Democracy Vouchers to expand their political agency."¹⁵⁶

Candidates significantly bought-in to the program. Despite such restrictions as limiting cash contributions from any one individual to \$250 rather than \$500, thirteen out of seventeen primary candidates opted into the program.¹⁵⁷ In the general election, five of the six candidates chose to run with the voucher program.¹⁵⁸ Candidates who received most of their funding from vouchers won

147. *Id.* at 331–32.

148. WIN/WIN NETWORK & EVERY VOICE CTR., FIRST LOOK: SEATTLE'S DEMOCRACY VOUCHER PROGRAM 2 (2017).

149. *Id.*

150. *Id.* at 3–4.

151. *Id.* at 4.

152. *Id.* at 4–5.

153. *Id.* at 5–6.

154. *Id.* at 2.

155. *Id.* at 7.

156. *Id.* at 5.

157. *Id.*

158. *Id.*

each of the three elections and one of the candidates credited the voucher system as the reason she won her seat.¹⁵⁹

All told, early results from Seattle's Democracy Voucher program delivered on a number of promises early supporters of voucher systems made. Candidates made efforts to mobilize voters often ignored by campaigns, many voters who had never donated to campaigns before got involved, and donors more accurately reflected the demographic makeup of the electorate at large. Whether these beginnings translate into a genuinely more responsive and representative government remains to be seen, but given what theorists have outlined, these early results are promising. Such changes will likely continue at a fast pace as awareness of the program grows in future elections. Vouchers returned in 2019 were nearly double the amount returned in 2017, indicating the growing knowledge about and popularity of the program.¹⁶⁰

CONCLUSION

The right to representation, while hinted at throughout the Constitution, is often overshadowed by the contrastingly explicit right to vote. Legal skirmishes over such issues as voter ID laws and over-inclusive voter-roll purges have garnered mass attention. These battles are waged with the silent assumption that reshaping these laws will somehow give groups the government has historically intentionally disenfranchised greater access to said government. But there is no compelling evidence that this is the case, and, as a result, these fights appear to be over no more than protecting the right of people to cast a ballot who—once this right is protected to the greatest extent—are unlikely to do anything at all with that right.

Fully liberalized voting laws are certainly a goal. However, when we do not view voting honestly, as a tool to make government beholden to the wishes of the American people, and instead dress it up as a sacred civic right that must be protected at all costs, we lose sight of what is truly important. We lose sight of the extensive potential-voter disenfranchisement and the appalling aspects of our electoral system that work at multiple levels to keep certain groups from being represented in government.

This Note examined two problems that work in tandem to disenfranchise voters *outside* of the polls: FPTP voting and passive voter suppression. An examination of these two problems indicates they negatively impact representation far more than either voter ID laws or over-inclusive voter roll purges. Even if voting laws were fully liberalized, FPTP voting would still mean that as much as 49 percent of the voting population is not represented in government. And passive voter suppression would prevent people from showing

159. *Id.* at 5–6.

160. *Internal Program Reports: 2019 Biennial Report*, SEATTLE.GOV, <https://www.seattle.gov/democracymvouch/program-data/internal-program-reports> [<https://perma.cc/4SM4-DFQU>].

up at the polls. These threats to the right to representation require structural change and innovative solutions.

One potential solution comes in the form of voucher programs. Voucher programs promise not only to bring a wider and more representative portion of the electorate into the political process but also to make the government more responsive to their wishes. Early results from Seattle support such theories and prove that there are creative and structural changes that can protect the right to representation. Beyond that, Seattle's results further highlight that if we are to protect the right to representation, we must examine the problem from all sides. We must certainly keep our eyes on threats to voting, but voting is only one of the tools to achieving representation. To truly make the government responsive to the wishes of the people, we must look at all the tools, including the voting systems that translate our votes into electing officials, campaign financing to get officials elected, and the ways in which campaigns secure those votes. Only when we understand representation—not voting—as the goal can we truly create a more representative government.