

VOTING WITHOUT LAW?

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*As now, when here's the fixed Assembly Day,
And morning come, and no one in the Pnyx.
They're in the Agora chattering up and down
Scurrying to dodge the cord dripping red.*

—Aristophanes, *The Acharnians*¹

INTRODUCTION

In ancient Athens, election officials corralled voters with a red-dyed rope, herding them from the marketplace to the Assembly's voting area at the nearby Pnyx.² Athenian officials in later years simply paid voters to attend the Assembly.³ In contemporary Italy, those who fail to vote face the prospect of having their names

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¹ ARISTOPHANES, *The Acharnians*, in *THE COMPLETE PLAYS OF ARISTOPHANES* 13, 15 (Moses Hadas ed. & B.B. Rogers trans., 1962).

² See E.S. STAVELEY, *GREEK AND ROMAN VOTING AND ELECTIONS* 80 (1972) ("Authoritarian as the procedure may appear, the purpose of the red-dyed rope used by the police is expressly said to have been to drive loiterers from the open market on to the Pnyx. By surrounding the area and contracting the rope, thereby threatening to stain with the dye all those who allowed themselves to come in contact with it, they presumably succeeded in inducing people there assembled to make off in the direction of the Pnyx."); see also MOGENS H. HANSEN, *THE ATHENIAN ECCLESIA* 124 (1983) (suggesting that the Peloponnesian War created an attendance problem and noting that Athenian authorities later fined citizens for remaining in the marketplace); DAVID STOCKTON, *THE CLASSICAL ATHENIAN DEMOCRACY* 71-72 (1990) (suggesting that the purpose of the practice was probably to diminish the noise and distraction of the marketplace rather than to enforce attendance at the assembly).

³ See STAVELEY, *supra* note 2, at 78-79 (noting that after payment for attendance was introduced at the beginning of the fourth century, the lower echelons of society could afford to forego the daily wage and attend). Plato ridiculed the practice, saying it made the people "idle and cowardly, and encouraged them in the love of talk and money." Plato, *Gorgias*, in *7 GREAT BOOKS OF THE WESTERN WORLD* 252, 288 (Robert M. Hutchins ed. & Benjamin Jowett trans., 1952).

posted by the mayor on the communal notice wall and of being branded a nonvoter in official papers.⁴ In (where else but?) California, a voting stub obtained after casting a ballot has entitled voters to a free half-dozen "Yum-Yum" doughnuts or a discounted spinal adjustment by a chiropractor.⁵

Carrots and sticks have been employed to increase voter turnout since the birth of democracy, in reaction to what rational choice theorists have termed "the paradox of voting":⁶ given the infinitesi-

⁴ See Presidential Decree No. 361, *Raccolta Ufficiale delle Leggi e dei Decreti della Repubblica Italiana* [Racc. Uff.] art. 115 (Mar. 30, 1957); see also COST. [Constitution] art. 48 (Italy), translated in Gilbert H. Flanz, *Italy*, in *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* (Albert P. Blaustein & Gilbert H. Flanz eds., 1987) (stating that voting is a civic duty of each Italian citizen); Giacomo Sani, *Italian Voters: 1976-1979, in ITALY AT THE POLLS, 1979: A STUDY OF THE PARLIAMENTARY ELECTIONS* 34, 43 n.25 (Howard R. Penniman ed., 1981); Christopher Seton-Watson, *Italy, in DEMOCRACY & ELECTIONS: ELECTORAL SYSTEMS AND THEIR POLITICAL CONSEQUENCES* 110-12 (Vernon Bogdanor & David Butler eds., 1983) (describing the complex nature of Italy's electoral system); Raymond E. Wolfinger et al., *Predictors of Electoral Turnout: An International Comparison*, 9 POL'Y STUD. REV. 551, 562 (1990) (noting that although voting is not formally required, the Italian constitution declares voting a duty; therefore, "Italians who fail to vote may have 'DID NOT VOTE' stamped on their identification papers").

⁵ See Faye Fiore, *Gimmicks, Glitches Mark Effort to Get Out the Vote*, L.A. TIMES, June 9, 1993, at A1 (noting that those who voted could receive free doughnuts); *Vote-Buying? No, But Take 10% Off*, N.Y. TIMES, Nov. 8, 1995, at C22 (noting that among the goods and services offered by merchants in the city of San Ramon to encourage voting are "savings on hams and oil changes, free checking at a local bank, restaurant discounts, even a visit to a chiropractor"); see also Jac C. Heckelman, *The Effect of the Secret Ballot on Voter Turnout Rates*, 82 PUB. CHOICE 107, 119 (1995) (describing the existence of the secret ballot as "a hole in the Democrats' [get-out-the-vote] doughnut plan"). Such incentives are legal in California elections so long as they are not offered to induce a voter to vote or refrain from voting for a particular candidate or ballot measure, but they are illegal in elections involving candidates for federal office. Compare CAL. ELEC. CODE § 18522(a)(2) (West 1995) with 18 U.S.C. § 597 (1994) (imposing a fine or imprisonment on anyone who "makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate," as well as on anyone who "solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote") and 42 U.S.C. § 1973i(c) (1994) (imposing a fine or imprisonment on anyone who offers or accepts payment either for registration to vote or for voting) and *United States v. Garcia*, 719 F.2d 99, 102 (5th Cir. 1983) (holding that the federal prohibition on vote-buying applies to nonfederal candidates who are on the same election-day ballot as candidates for federal offices, and thus affords Congress the power to regulate conduct in state elections).

⁶ This concept should not be confused with the so-called "voting paradox," or the idea that "collective decisions may lack coherence or appear arbitrary because they depend on the order in which alternatives are considered." Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 984-85 (1989). The voting paradox is most closely associated with Kenneth Arrow's work, which showed that "given certain conditions, it is impossible—whether through

mal chance that one's own vote could affect the outcome of most elections or the stability of the electoral system, it often appears rational to abstain from voting. The paradox facing rational choice scholars is that many people *do* vote in the absence of visible carrots or sticks, although not in the same numbers in comparable elections or across state or national boundaries.

Social norms may solve the paradox of voting in a meaningful way. A social norm could induce voting through (1) social sanctions that raise the costs of nonvoting; (2) social rewards that raise the benefits of voting; and (3) internalization of a norm of voting. The norm of voting overcomes at least two collective action problems: First, society is better off if all (or at least many) people vote because a large turnout legitimates democratic government, which is itself a public good. Second, a group is better off if all of its members vote in a bloc for a particular candidate or party because politicians offer groups rents or other advantages in exchange for bloc votes.⁷ Despite these benefits, voting has (at least opportunity) costs and each person's individual vote alone has a negligible effect on the provision of these public goods. The norm of voting overcomes the apparent irrationality of voting, thereby facilitating the provision of these public goods.

This Article examines the plausibility and implications of a norm-based explanation for voting. Part I reviews rational choice models for voting, contrasts the rational choice models with the social norms hypothesis, and examines the empirical evidence regarding the existence of a norm of voting. As Part I demonstrates, rational choice explanations have offered only a tautological explanation of why people vote: People vote when the psychic benefits of voting exceed its costs.⁸ Unlike the rational choice explanation, a norm-based explanation of voting can explain plausibly why some people vote, as well as explain aggregate changes in voter turnout over time. Although the norms hypothesis is plausible, evidence supporting the hypothesis is sketchy and may be consistent with alternative explanations for voting. The analysis

majority or *any* other method of aggregating individual preferences—to assure that social outcomes will not be paradoxical.” *Id.* at 987-88 (citing KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951)).

⁷ See Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 8-11 (1996).

⁸ Rational choice theory has much to say about voting on the margin, but very little to say about why voting occurs in the first place. See *infra* part I.A.

in Part I illustrates a general proposition that norm-based explanations are about as easy to conjure up as they are difficult to prove.

Assuming that a norm of voting has served to overcome collective action problems for only certain groups in the United States, and assuming that the norm has eroded over time even among these groups because of a decrease in social connectedness, arguably the state should take on the role of social sanctioner of last resort through a compulsory voting law. Part II of this Article, building upon Ellickson's pathbreaking work, *Order Without Law*,⁹ examines the substitutability of state- and societal-based mechanisms for social control in the voting context. In particular, this Part considers whether compulsory voting laws could serve as a good substitute for a norm of voting.

Part II demonstrates that state- and societal-based methods of control are not always substitutable. Enactment of a compulsory voting law in the United States, even if desirable as a method of overcoming collective action problems, and even if proven effective as a means of increasing turnout in other states, is unlikely to occur because of a widely held libertarian belief against government interference in the decision to vote.

I. USING SOCIAL NORMS TO SOLVE THE PARADOX OF VOTING

A. *Like Voting for Chocolate: The Vacuity of the Rational Choice Voting Model*

The paradox of voting has proven to be something of a "roach motel" for rational choice theorists: entering the debate has proven much easier than emerging from it unscathed. Indeed, opponents of rational choice theory have pointed to the paradox as indisputable proof of the theory's failure to explain political phenomena generally.¹⁰ This is not the place to examine whether the paradox

⁹ ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

¹⁰ See, e.g., DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY* 70 (1994) (analyzing the inadequacy of rational choice theory in predicting an equilibrium rate of turnout and concluding that "[r]eaders interested in determinants of voter turnout . . . will derive little insight from the empirical work in the rational choice tradition"); Raymond E. Wolfinger, *The Rational Citizen Faces Election Day or What Rational Choice Theorists Don't Tell You About American Elections*, in *ELECTIONS AT HOME AND ABROAD: ESSAYS IN HONOR OF WARREN E. MILLER* 71, 71 (M. Kent Jennings & Thomas E. Mann eds., 1994) ("The inescapable conclusion is that rational choice theory is inherently unsuited to illuminating voter turnout.").

is symptomatic of general "pathologies" of rational choice theory;¹¹ rather, I focus here on various rational choice attempts to explain the paradox of voting.

Although he never used the phrase, Anthony Downs is credited with first recognizing the paradox in his classic work, *An Economic Theory of Democracy*.¹² Downs made the following assumptions necessary to the paradox: (1) there are costs associated with acquiring information about whom to vote for¹³ and, more importantly, with voting itself;¹⁴ (2) each citizen derives benefits from living in a democracy, and those benefits depend upon a sufficient number of people voting;¹⁵ and (3) each voter "will actually get this reward even if he himself does not vote as long as a sufficient number of other citizens do."¹⁶

Downs's solution to the paradox rested on what is now widely recognized as faulty rational choice logic: He argued that the rational voter "is willing to bear certain short-run costs he could avoid *in order to do his share* in providing long-run benefits."¹⁷ As

Even Russell Hardin has noted that rational choice theory "yields a notoriously poor explanation of voting behavior." RUSSELL HARDIN, *COLLECTIVE ACTION* 11 (1982).

¹¹ See GREEN & SHAPIRO, *supra* note 10, at 49. For a number of rational choice proponents' responses to Green and Shapiro's work, see 9 *CRITICAL REV.*, Winter-Spring 1995, at 1-223.

¹² ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 260 (1957) ("[E]very rational man decides whether to vote just as he makes all other decisions: if the returns outweigh the costs, he votes; if not, he abstains.").

¹³ See *id.* at 221-25 (arguing that most information about whom to vote for is "free" information obtained accidentally); *id.* at 245 (noting that the rational voter "is likely to rely purely on the stream of free information he receives in the course of his nonpolitical pursuits" and that "[h]e will not even utilize all the free information available, since assimilating it takes time").

¹⁴ See *id.* at 265-66 ("[T]ime is the principal cost of voting: time to register, to discover what parties are running, to deliberate, to go to the polls, and to mark the ballot.").

¹⁵ See *id.* at 261-62 ("If no one votes, then the system collapses because no government is chosen. We assume that the citizens of a democracy . . . derive benefits from its continuance; hence, they do not want it to collapse.").

¹⁶ *Id.* at 270.

¹⁷ *Id.* (emphasis added); see also *id.* at 269 ("Since the consequences of universal failure to vote are both obvious and disastrous, and since the cost of voting is small, at least some men can rationally be motivated to vote even when their personal gains in the short run are outweighed by their personal costs."). Significantly, Downs recognized (but failed to pursue) "social prestige" as an alternative explanation for voting and rejected as "irrational" nonpolitical reasons for voting, like pleasing "one's employer or one's sweetheart." *Id.* at 275 n.11, 276 (noting that the reward or guilty feelings, for voting or not voting, associated with social prestige function on an unconscious level to achieve the same end that the return for voting *per se* achieves consciously in his model); see also *id.* at 7 (limiting rational behavior to that which is

Brian Barry has explained, Downs's reasoning

requires our citizen to reason that since the benefits he gets depends on the efforts of others, he should contribute too. This may be good ethics, but it is not consistent with the assumptions of the model, which require the citizen to compute the advantage that accrues to him from his doing x rather than y ; not the advantage that would accrue to him from *himself and others* doing x rather than y , unless, of course, his doing it is a necessary and sufficient condition of the others doing it.¹⁸

On this reasoning, even a pure altruist in the conventional rational choice model would conclude that it is irrational to vote.¹⁹

Riker and Ordeshook addressed the paradox using a model consistent with rational choice theory, but virtually devoid of explanatory power. In their model, a citizen chooses to vote rather than abstain whenever:

$$pB - C + D > 0,^{20}$$

politically motivated and excluding behavior such as a man deciding to vote for a particular candidate to "prevent his wife's tantrums"). No doubt this last statement will remind the reader that Downs wrote his book in 1957.

¹⁸ BRIAN BARRY, *SOCIOLOGISTS, ECONOMISTS AND DEMOCRACY* 20 (Univ. Chicago Press 1978) (1970) ("If the system is going to collapse because too few people vote, [the rational voter's] one additional ballot-paper is unlikely to prevent it."); see also Thomas Schwartz, *Your Vote Counts on Account of the Way It Is Counted: An Institutional Solution to the Paradox of Not Voting*, 54 PUB. CHOICE 101, 110 (1987) ("[If preserving democracy or electing a particular candidate] are the only political goals of voting then individual citizens have no incentive to vote apart from a sense of obligation to cooperate in the pursuit of common goals.").

¹⁹ See HOWARD MARGOLIS, *SELFISHNESS, ALTRUISM, AND RATIONALITY: A THEORY OF SOCIAL CHOICE* 85 (Univ. Chicago Press 1984) (1982) (noting that the rational voter model does not assume narrow self-interest: "[y]ou are free to be as public-spirited as you wish").

²⁰ William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25, 28 (1968). Ferejohn and Fiorina have presented an alternative "minimax regret" model, whereby a rational decisionmaker "imagines himself in each possible future state of the world and looks at how much in error each of his available actions could be, given that state. Then he chooses that action whose maximum error over the states of nature is least." John A. Ferejohn & Morris P. Fiorina, *The Paradox of Not Voting: A Decision Theoretic Analysis*, 68 AM. POL. SCI. REV. 525, 535 (1974). In the context of voting, the authors argue that a minimax regret decisionmaker might explain why he voted by stating: "My God, what if I didn't vote and my preferred candidate lost by one vote? I'd feel like killing myself." *Id.* For early criticisms of this model, see the articles collected at 69 AM. POL. SCI. REV. 908-28 (1975). As an example of the most trenchant criticism, imagine the minimax regret decisionmaker who might explain why he did not vote by stating: "My God, what if I went out to vote and I was run over by a steamroller? If I weren't dead, I'd feel like killing myself." On the suggestion that a steamroller could run over the minimax regret decisionmaker, see Schwartz, *supra* note 18, at 111.

where B is "the differential benefit, in utiles, that an individual voter receives from the success of his more preferred candidate over his less preferred one,"²¹ p is the probability that a citizen will bring about B by voting, where $0 \leq p \leq 1$,²² C is "the cost to the individual of the act of voting,"²³ and D is the utility of other psychic benefits of voting, including "the satisfaction from compliance with the ethic of voting."²⁴

Recognizing that in most elections p is close to zero,²⁵ the equation reduces to the expression that people vote when

$$D > C,$$

or when the psychic benefits of voting exceed the costs.²⁶ As evidence supporting their hypothesis, Riker and Ordeshook pointed to the high correlation between voting and a sense of "citizen duty," as measured by Election Day polling conducted by the Survey

²¹ Riker & Ordeshook, *supra* note 20, at 25.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 28. Other psychic benefits include: "the satisfaction from affirming allegiance to the political system; the satisfaction from affirming a partisan preference; the satisfaction of deciding, going to the polls;" and "the satisfaction of affirming one's efficacy in the political system." *Id.*

²⁵ Meehl notes that Riker and Ordeshook estimate the value for p in an American presidential election

as $p = 10^{-8}$, and my rough calculations indicate my chances of determining who becomes President are of about [the] same order of magnitude as my chances of being killed driving to the polls—hardly a profitable venture. Precise estimates are neither possible nor necessary, since any fairly computed value surely lies below the $p \leq .0001$ whose complement $q = .9999$ Bernoulli and Buffon, and all reasonable men, regularly treat as a "moral certainty."

Paul E. Meehl, *The Selfish Voter Paradox and the Thrown-Away Vote Argument*, 71 AM. POL. SCI. REV. 11, 11 (1977) (footnotes omitted).

There is little empirical support for the claim that turnout increases with an increase in p . See John G. Matsusaka, *Election Closeness and Voter Turnout: Evidence from California Ballot Propositions*, 76 PUB. CHOICE 313, 328-32 (1993) (finding no systematic relation between closeness and turnout in 885 California ballot propositions between 1912 and 1990). Riker and Ordeshook nonetheless claim that voters' subjective valuation of p positively correlates with turnout. As Green and Shapiro point out, however, this conclusion is subject to serious question because Riker and Ordeshook had no data on voters' subjective probabilities of casting the decisive vote. See GREEN & SHAPIRO, *supra* note 10, at 54. Instead, Riker and Ordeshook used a survey question regarding how close the voter believed the outcome of the presidential election might be, hardly a good proxy for p . See Riker & Ordeshook, *supra* note 20, at 35. For a discussion of Riker and Ordeshook's argument that voter misperception of p explains turnout, see *infra* part I.C.

²⁶ See Riker & Ordeshook, *supra* note 20, at 35.

Research Center at the University of Michigan.²⁷

Gordon Tullock and others have concluded from the body of work following Riker and Ordeshook that rational choice theory has very little to say about why people vote. Tullock has characterized voting as an act of consumption, driven by a taste for voting exogenous to the economic model, much like the taste for chocolate.²⁸ Although a consumption explanation can tell us about voting on the margin (for example, the amount of voting goes down, like the demand for chocolate, when its price relative to other goods goes up),²⁹ it tells us nothing about who has this taste,

²⁷ See *id.* at 37-38. This data set, now known as the National Election Study (NES) data, constitutes the most important survey research conducted regarding national elections. The data are available through the Inter-university Consortium for Political and Social Research.

Wolfinger argues that

the NES's citizen duty scale is remarkably ill-suited to its place in Riker and Ordeshook's model. For one thing, none of the four items concerns expressive gratification. Moreover, one statement dismisses many local elections as "not important enough to bother with," which seems beside the point when studying voting in a presidential election.

Wolfinger, *supra* note 10, at 73; see also GREEN & SHAPIRO, *supra* note 10, at 67 n.26 (explaining that the phraseology of citizen duty questions in the NES survey may bias the results against those with less education).

²⁸ See, e.g., Rebecca B. Morton, *Groups in Rational Turnout Models*, 35 AM. J. POL. SCI. 758, 759 n.2 (1991) (citing personal communications from Gordon Tullock). Wolfinger, apparently unaware of the chocolate metaphor, has suggested that "[i]t must be a bittersweet experience to salvage formal choice theories of turnout with such squishy variables." Wolfinger, *supra* note 10, at 74.

Grofman takes a view similar to Tullock: "[I]t is appropriate to think about rational choice models in the context of accounting for changes in choices, rather than choices, per se." Bernard Grofman, *Is Turnout the Paradox That Ate Rational Choice Theory?*, in INFORMATION, PARTICIPATION, AND CHOICE 93, 94 (Bernard Grofman ed., 1993); see also Donald Wittman, Comment, 18 J.L. & ECON. 735, 736-37 (1975) ("We rarely ask in economics whether somebody who likes French cooking, went to college and who prefers green to yellow vegetables is more likely to buy a market basket with three pounds of steak, one pound of onions, a jar of French's mustard, etc., than a market basket with two pounds of chicken, one pound of liver, green beans, etc. Yet th[ese are] precisely the kinds of questions asked in voting studies."). Hinich, relying on the taste for voting assumption, models voting as a consumption activity characterized by people gaining utility by voting for the winner of an election and disutility by voting for the loser. See Melvin J. Hinich, *Voting As an Act of Contribution*, 36 PUB. CHOICE 135, 136 (1981). But, as Morton observes, "[t]his rationale would predict that the highest turnout levels occur when there is a landslide, which most empirical evidence disavows." Morton, *supra*, at 760 n.3.

²⁹ See Randall G. Chapman & Kristian S. Palda, *Electoral Turnout in Rational Voting and Consumption Perspectives*, 9 J. CONSUMER RES. 337, 339 (1983) ("[An individual's] relative consumption of voting rises, not because tastes shift in favor of electoral participation, but because the participation's shadow price falls as skill and experience in the appreciation of politics and political activities are acquired with exposure.").

where it is acquired, or whether the taste for voting changes over time.³⁰ As Barry has remarked, Riker and Ordeshook's analysis "does not leave any scope for an economic model to come between the premises and the phenomenon to be explained. Instead, the question shifts back to: 'Why do some people have this kind of motivation more than others?'"³¹

Rational choice theorists have had greater success explaining voting on the margin, given a taste for voting distributed somehow in the population. This work has focused primarily upon how changes in costs, such as elimination of the poll tax or increased availability of political information, affect turnout.³²

A few brave theorists have ventured to explain why people vote without relying on a "taste for voting" argument. These efforts have largely failed, however. One line of research has examined circumstances under which p could be high enough to make $pB > C$. Palfrey and Rosenthal noted that the value of p depends upon strategic interaction among all voters—after all, if a voter knew everyone else was planning to abstain, $p = 1$ for that voter and her vote is decisive.³³ The authors concluded that in a society in which every voter had complete information about the preferences and

³⁰ For a classic argument that tastes "neither change capriciously nor differ importantly between people," see George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76, 76 (1977).

³¹ BARRY, *supra* note 18, at 16. As Wittman similarly observed: "Just as we would expect that people who feel it is important to eat lettuce every day are more likely to eat lettuce than those who do not, we expect that those who feel more obligated to vote, vote more often than those who do not." Wittman, *supra* note 28, at 740. Sen observed that if people vote out of a sense of delight rather than in an attempt to affect the outcome of an election, individual votes may not follow true preferences. See AMARTYA K. SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* 195-96 (1970); see also GEOFFREY BRENNAN & LOREN LOMASKY, *DEMOCRACY AND DECISION: THE PURE THEORY OF ELECTORAL PREFERENCE* 32-37, 117-20 (1993) (contrasting expressive and instrumental voting).

³² See, e.g., John E. Filer et al., *Voting Laws, Educational Policies, and Minority Turnout*, 34 J.L. & ECON. 371, 375-89 (1991) (discussing how the Voting Rights Act, voter literacy tests, and poll taxes affected African-American turnout between 1948 and 1980); Stephen Knack, *The Voter Participation Effects of Selecting Jurors from Registration Lists*, 36 J.L. & ECON. 99, 103-09 (1993) (analyzing the disincentive effect on voting of choosing jurors from voter registration rolls); John G. Matsusaka, *Explaining Voter Turnout Patterns: An Information Theory*, 84 PUB. CHOICE 91, 95-105 (1995) (using information costs to explain change in turnout); see also Peverill Squire et al., *Residential Mobility and Voter Turnout*, 81 AM. POL. SCI. REV. 45, 51-57 (1987) (finding nonvoting correlated with residential mobility).

³³ See Thomas R. Palfrey & Howard Rosenthal, *A Strategic Calculus of Voting*, 41 PUB. CHOICE 7, 10 (1983) (noting that "if everyone else votes, p can readily be very small," but "if no one else votes, the probability of being decisive would be 1").

voting costs of every other voter, p could be very close to 1 in equilibrium.³⁴ They later conceded, however, that the full information assumption is unrealistic for large electorates, and that without that assumption, the only citizens who vote are those "whose sense of duty outweighs any cost in voting. We have come full circle and are once again beset by the paradox of not voting."³⁵

Schwartz also has presented a model with a nontrivial value for p , positing that although one person's vote has no chance of determining an election winner, "it has, at least by comparison, a non-negligible chance of determining which candidate carries her precinct, and that might well determine whether and at what levels her precinct receives distributive benefits."³⁶ Unfortunately, Schwartz failed to provide any evidence demonstrating that p is truly non-negligible in what he terms the voter's "sub-electorate," or that voters go to the polls because they believe their vote affects the provision of distributive benefits in their precinct.

Another line of research has looked for tangible economic benefits from voting, thereby injecting narrow self-interest into the D term.³⁷ Schwartz, arguing from the unproven premise that

³⁴ See Thomas R. Palfrey & Howard Rosenthal, *Voter Participation and Strategic Uncertainty*, 79 AM. POL. SCI. REV. 62, 64 (1985) ("In equilibrium, the presumably small p . . . could in fact be 1 or very close to 1, independent of electorate size."); see also George Tsebelis, *A General Model of Tactical and Inverse Tactical Voting*, 15 BRIT. J. POL. SCI. 395, 398 (1986) (suggesting that a person chooses to vote whenever "he cannot exclude the possibility that his vote might influence the result" of an election).

³⁵ Palfrey & Rosenthal, *supra* note 34, at 64. Hardin made the same point earlier: "[I]n general for large n , looking at the matrix to decide whether it is a Prisoner's Dilemma may be less compelling than determining the expected value to me of my contribution." HARDIN, *supra* note 10, at 59-60; see also JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* 290 n.8 (1990) (characterizing voting as "a game against nature, a non-strategic other").

³⁶ Schwartz, *supra* note 18, at 105. Wolfinger similarly argues that "as the relevant political unit becomes smaller, the likelihood of being decisive increases." Wolfinger, *supra* note 10, at 77.

³⁷ Similarly, many rational choice theorists have posited that C , the costs of voting, are negligible. See, e.g., HARDIN, *supra* note 10, at 61 (referring to the act of voting as "public and uncostly"); John H. Aldrich, *Rational Choice and Turnout*, 37 AM. J. POL. SCI. 246, 261 (1993) (noting that "for many people most of the time . . . [voting is] a low-cost, low-benefit action"); Richard G. Niemi, *Costs of Voting and Nonvoting*, 27 PUB. CHOICE 115, 115 (1976) (observing that "voting has a very low cost"); Schwartz, *supra* note 18, at 107-08 (analogizing the cost of voting to the costs associated with buying a candy bar or strolling); Gordon Tullock, *The Paradox of Not Voting for Oneself*, 69 AM. POL. SCI. REV. 919, 919 (1975) ("Clearly the cost of voting is very slight."). Even if this debatable point were universally true, it does not explain why some people bear these low costs and others spend their time voting when they could be eating a candy bar or strolling. See GREEN & SHAPIRO, *supra* note 10, at 53-54 (noting

"often it is obvious to others" how one voted, posits that voting can earn the voter "access, influence and credit toward political favors."³⁸ Although Schwartz's proposition does not appear to be true generally,³⁹ there is evidence that narrow self-interest motivates at least some voters. Wolfinger and Rosenstone found that government employees in patronage states tend to have a higher turnout as a group than government employees in states using a merit system for government employment,⁴⁰ presumably because politicians can monitor patronage employees' trips to the voting booths and dole out punitive sanctions for nonvoting. Schwartz's thesis has nothing to say, however, about why government employees in nonpatronage states and federal government employees (whose voting behavior is not monitored by politicians) tend to have a higher voter turnout than private employees possessing similar education and income levels.⁴¹

In a more plausible line of analysis, Uhlaner has argued that group leaders obtain tangible benefits from politicians in exchange for promises to deliver votes from group members. Group leaders then use some of the benefits supplied by politicians to provide selective incentives to group members to vote. As Uhlaner argues:

Sometimes the benefits are economic selective incentives (e.g., dollar bills in envelopes handed to known supporters at the polls or repair of the sidewalk in front of the homes of those who voted). Some of the surplus may be used to decrease the costs of voting (e.g., by providing information or transportation to the polls). Many times the surplus may go in to increasing the

that given the small probability of casting a decisive vote, even voting at a very low cost often will not be rational).

³⁸ Schwartz, *supra* note 18, at 104-05.

³⁹ Schwartz's argument may have been true historically, however. The introduction of the secret ballot in various states at the beginning of the century apparently accounted for an average drop in turnout of 6.9%. See Heckelman, *supra* note 5, at 119. Heckelman attributes the drop to the elimination of the possibility of effective bribery. See *id.*

⁴⁰ See RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES 94-101 (1980); see also Wolfinger, *supra* note 10, at 77 (suggesting that "the parents, spouses, significant others, siblings and adult children of the candidates" are likely to vote, presumably for similar reasons).

⁴¹ See WOLFINGER & ROSENSTONE, *supra* note 40, at 97-101; see also Stephen Knack, *Civic Norms, Social Sanctions, and Voter Turnout*, 4 RATIONALITY & SOC'Y 133, 135 (1992) ("Material rewards such as cash or patronage account for only a tiny portion of turnout in contemporary American national elections . . ."); Matsusaka, *supra* note 32, at 101 (attributing high turnout rates of public employees to their access to low cost information about candidates and parties).

normative benefits of voting, such as enhancing a sense of fulfilling a group-specific duty to participate.⁴²

Unfortunately, so far no one has produced compelling evidence supporting Uhlaner's thesis.⁴³ None of the people I know personally (an undoubtedly unscientific sample) admit to receiving tangible economic benefits from any group leaders in exchange for their vote. Given the recent furor over allegations that African-American ministers in New Jersey received money to suppress voter turnout in a recent governor's race,⁴⁴ I suspect we would see more than occasional public reports that voters received tangible selective incentives for their votes if the practice was widespread enough to account for much voting.

In sum, the standard rational choice model of why people vote has not moved beyond positing a taste for voting distributed randomly in the population. Although creative rational choice theorists have set forth novel explanations for voting without relying on the taste argument, these theorists have provided no evidence thus far sustaining their claim. Rational choice theory seems best suited to explaining voting on the margin only, by examining how changes in costs (the *C* term) affect turnout.

⁴² Carole J. Uhlaner, *What the Downsian Voter Weighs: A Reassessment of the Costs and Benefits of Action*, in INFORMATION, PARTICIPATION, AND CHOICE 67, 74 (Bernard Grofman ed., 1993) [hereinafter Uhlaner, *Downsian Voter*]. For a more extended analysis, see Carole J. Uhlaner, *Rational Turnout: The Neglected Role of Groups*, 33 AM. J. POL. SCI. 390, 396-413 (1989) (developing the group model empirically); Carole J. Uhlaner, *Political Participation, Rational Actors, and Rationality: A New Approach*, 7 POL. PSYCHOL. 551, 559-66 (1986) (presenting an alternative rational actor theory of participation that focuses on leaders and groups in addition to voters and candidates).

⁴³ I focus here on Uhlaner's claim that *tangible* selective incentives provided by group leaders account for voting. For a discussion of her claim regarding nontangible benefits, see *infra* note 77. Green and Shapiro reanalyzed the empirical evidence Uhlaner provided for her thesis (an increase in turnout by union members during the midterm congressional elections following Reagan's 1980 election) and contend that her interpretation is unsupported by any statistical evidence. See GREEN & SHAPIRO, *supra* note 10, at 53 n.7. In addition, Morton notes that if group leaders were motivated solely by receiving "perks" from candidates, policy would play no role in whom group leaders choose to support. "This type of approach would appear to contradict all empirical evidence that groups do vote in response to policy differences of candidates." Morton, *supra* note 28, at 770 n.8.

⁴⁴ For a fascinating analysis of the issues involved, see Pamela S. Karlan, *Not By Money But By Virtue Won? Vote Trafficking and the Voting Rights System*, 80 VA. L. REV. 1455 (1994).

B. *The Origin, Stability, and Possible Decline
of a Norm of Voting*

If proven, a norm solves the paradox of voting in a meaningful way; that is, by doing more than merely positing a taste for voting distributed randomly in the population. This subpart sets forth a theoretical account of the origin, stability, and possible decline of a voting norm. Part I.C then examines whether the empirical evidence supports the norms hypothesis.

1. The Origin, Stability, and Possible Decline of Norms

A social norm is a behavioral pattern characterized by three practices: (1) nearly everyone in a group conforms to it; (2) nearly everyone in the group approves of this conformity and disapproves of deviation from it; and (3) the approval and disapproval helps to ensure that nearly everyone in the group conforms.⁴⁵ Although sanctions and rewards induce some norm-based behavior, a central component of social norms is *internalization*, whereby "an individual comes to have an internal sanctioning system which provides punishment when he carries out an action proscribed by the norm or fails to carry out an action prescribed by the norm."⁴⁶ Thus, many group members follow the norm even when others cannot observe their behavior.

Early work on theories of social norms had a decidedly functionalist orientation, "explaining the emergence of a norm by the functions it serves for the set of actors who hold it."⁴⁷ Functionalism explanations of norms violate the principle of methodological individualism, constituting "an unacceptable *deus ex machina*—a concept brought in at the macrosocial level to explain social behavior, yet itself left unexplained."⁴⁸ In functionalist accounts, norms present a typical free-rider paradox: "Everyone is better off

⁴⁵ In this definition, I roughly follow Philip Pettit, *Virtus Normativa: Rational Choice Perspectives*, 100 *ETHICS* 725, 751 (1990); see also Jon Elster, *Norms of Revenge*, 100 *ETHICS* 862, 864 (1990) ("For norms to be social, they must be shared by other people and sustained by their approval and disapproval."). See generally Symposium, *Norms in Moral and Social Theory*, 100 *ETHICS* 725 (1990).

⁴⁶ COLEMAN, *supra* note 35, at 293.

⁴⁷ *Id.* at 259. The work of sociologist Talcott Parsons, which asserts the primacy of values, is most closely associated with such explanations. See *id.* at 241. For a critique of Parson's "sociological approach," see BARRY, *supra* note 18, at 75-98.

⁴⁸ COLEMAN, *supra* note 35, at 242; see also *id.* at 259 ("The fact that a set of actors is interested in gaining the right to control the actions of individual actors is not sufficient as an explanation for their coming to gain that right.").

if everyone enforces a norm, but because enforcement is costly each is motivated not to bother enforcing it himself."⁴⁹

Fortunately, scholars committed to methodological individualism—most notably Ullmann-Margalit,⁵⁰ Sugden,⁵¹ Elster,⁵² and Coleman⁵³—have moved the theory of norms beyond its functionalist orientation. Coleman has set forth two requirements for the emergence of a social norm. First, a demand for the norm must arise, such as in the presence of a collective action problem.⁵⁴ Second, those who would benefit from the norm, acting rationally, can share appropriately either the costs of sanctioning or the costs of inducing others to sanction.⁵⁵ The second condition, which Coleman terms the "second order free-rider problem," is met when there are sufficient social relationships among the beneficiaries of the norm.⁵⁶

Coleman uses the example of team sports, whereby a norm emerges for a team member to work harder than rational choice theory would predict, given the free-rider problem. The encouragement of others, that is, positive sanctions, motivates the team member to act with "zeal,"⁵⁷ "[t]he shouts of encouragement to an athlete from his teammates may cost them little but provide him with rewards that lead him to work even harder."⁵⁸ The team member rationally increases the effort because the payoff for acting with zeal is greater than the payoff for free-riding.

Although Coleman explains the rationality of the teammate's zeal in a straightforward manner, he is less than clear in explaining why other team members provide positive sanctions to the zealous teammate. Why does each individual member not free-ride rather than shout encouragement?⁵⁹

⁴⁹ Pettit, *supra* note 45, at 739; *see also* Elster, *supra* note 45, at 873 ("Empirically, it is not true that people frown upon others when they fail to sanction people who fail to sanction people who fail to sanction a norm violation.").

⁵⁰ *See* EDNA ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* (1977).

⁵¹ *See* ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, CO-OPERATION AND WELFARE* (1986).

⁵² *See* JON ELSTER, *THE CEMENT OF SOCIETY* (1990).

⁵³ *See* COLEMAN, *supra* note 35.

⁵⁴ *See id.* at 241.

⁵⁵ *See id.* at 273.

⁵⁶ *See id.*

⁵⁷ *Id.* at 274.

⁵⁸ *Id.* at 277.

⁵⁹ *Cf. id.* at 274 ("If a number of persons' interests are satisfied by the same outcome, then each has an incentive to reward the others for working toward that outcome.").

Social relationships are the key to sanctioning.⁶⁰ Positive (and sometimes negative) sanctioning often is either costless or provides a benefit to the sanctioners. Using an important example, Braithwaite explains that people enjoy gossip, an activity that presupposes existing social relationships.⁶¹ Talking about others' activities—positively or negatively—is a consumption activity. People playing team sports similarly enjoy shouting encouragement to the zealous team member; the activity increases, not decreases, utility.

Moreover, people in social relationships care about others' opinions of them—what McAdams has called "esteem"⁶²—and Pettit has explained how people valuing esteem may be rewarded or punished, even if others expend no costs on sanctioning:

[It is commonly assumed] that the enforcement of norms must involve intentional action and since action always generates at least time costs that it must therefore be potentially costly for those who conduct it. The surprising thing however is that this is false. . . . [P]eople do not have to identify violators intentionally; they just have to be around in sufficient numbers to make it likely that violators will be noticed. And equally, people do not have to discipline violators intentionally, going out of their way for example to rebuke them or report them to others; they just have to disapprove of them—or at least be assumed to disapprove of them—whether that attitude ever issues in intentional activity.

....

We care not just about the rebukes and commendations we receive from others but also about whether they take a negative or positive view of what we do How can we know about other people's dispositions if they are not exercised? Easy. We know what they know of us and, ascribing similar standards to them, we know whether they are likely to think well or badly, to take a favorable or unfavorable attitude.⁶³

To clarify and summarize the argument thus far, for a social norm to arise, group members must demand a norm, as they might in the presence of a collective action problem. The norm will

⁶⁰ See *id.* at 270, 276.

⁶¹ See Pettit, *supra* note 45, at 739 n.37 ("[R]eporting violators to others is generally something people enjoy." (citing JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989))); see also Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON. 215, 224-25 (1994) ("Social norms evolve through a process of discussion").

⁶² See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1019-21 (1995).

⁶³ Pettit, *supra* note 45, at 739-40.

emerge, however, only when it is rational for group members to provide positive or negative sanctions. In the presence of social relationships, sanctioning may be a beneficial (or at least a costless) activity. The greater the intensity of social relationships (or "social connectedness"), the greater the opportunity for positive and negative sanctioning. Social connectedness means that there will be (1) unintentional observation of group members' behavior; (2) opportunities for gossip; and (3) concern about esteem.

Once the norm emerges, it has a certain "stickiness." Group members internalize the norm, and social sanctions reinforce that internalization. Norms have what Jon Elster terms "a grip on the mind."⁶⁴ Individuals follow the norm and sanction others without going through an outcome-oriented rational calculus.⁶⁵ The "stickiness" ensures that norms will remain stable over time even if demand for the norm ceases. An often-used example of this phenomenon is the norm of dueling. Some claim that the norm arose as a product of the aristocracy's effort to raise their relative social status. But it is impossible to understand the rationality of a particular aristocrat participating in a duel—even if the chances of death by dueling were only one in fourteen—without resort to a theory that social sanctioning or internalization have changed what look like impressive payoffs for deviating from the norm.⁶⁶

Norms may decline under a few conditions. First, norms decline as social connectedness diminishes. Sanctioning occurs in social settings, and sanctioning therefore depends on people being around each other some of the time; we care less about opinions of others we never see.⁶⁷ In the absence of an opportunity for others to observe behavior and sanction it, internalization of a norm

⁶⁴ Elster, *supra* note 45, at 864.

⁶⁵ Elster contrasts the outcome-oriented calculus of rational action with non-outcome behavior stemming from social norms: "Rationality says: If you want Y, do X. . . . The simplest social norms are of the type: Do X (wear black for funerals), or: Don't do X (don't eat human flesh)." *Id.* at 863. For this reason, I disagree with Jim Lindgren's argument that Coleman's account of norms is a rational choice explanation; it is not a rational choice explanation to the extent that individuals who are internalizing a norm fail to undergo an outcome-oriented calculus. Their behavior is rational only *after* the change in tastes has occurred, and the explanation for *why* tastes change is exogenous to the rational choice model.

⁶⁶ See RUSSELL HARDIN, ONE FOR ALL: THE LOGIC OF GROUP CONFLICT 91-100 (1995) (analyzing the economics of the duel).

⁶⁷ But we still care about what they think. See SUGDEN, *supra* note 51, at 151 (noting that some people tip a taxi driver in a city in which they never expect to return; others do not, but "keep their hands in their pockets . . . with sensations of unease and guilt").

eventually deteriorates.

Moreover, as time progresses payoffs for violating the norm may change. For example, a norm may solve a particular collective action problem at a time when the individual benefit of free-riding over contributing to the collective good is x . People follow the norm and incur x without making an outcome-oriented decision to do so. If the benefit of free-riding later increases to $x + y$, however, individuals may start considering outcomes once again and determine whether the benefits of free-riding (with the accompanying social sanctions) exceed the benefits of complying with the norm.⁶⁸ Moreover, some members' norm violations may have a snowball effect—once enough people decide to violate the norm and incur punishment, others may be emboldened to violate the norm.⁶⁹ As free-riders increase in number, the number of sanctioners decreases, thereby decreasing the odds of being punished for a norm violation or rewarded for following the norm.

2. Application to a Norm of Voting

Having set forth an explanation for the origin, stability, and possible decline of social norms generally, I turn now to the norm of voting. If the norm exists, it leads to (1) social sanctions that raise the costs of not voting; (2) social rewards that raise the benefits of voting; and (3) internalization of a norm of voting that provides self-sanctioning analogous to (1) and (2). As Coleman describes it:

The end result is that control over the voting of each, which was initially held by each alone, becomes widely distributed over the whole set of actors, who exercise that control in the direction of approval for voting and disapproval for not voting—despite the fact that each has some reluctance to vote himself.⁷⁰

⁶⁸ See Timur Kuran, *Private and Public Preferences*, 6 ECON. & PHIL. 1, 8 (1990) ("Experimental social psychology . . . suggests that social pressures, although very powerful, are not decisive.").

⁶⁹ See Knack, *supra* note 41, at 146; see also Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2032-33, 2035 (1996) (discussing norm cascades).

⁷⁰ COLEMAN, *supra* note 35, at 292; see also STEVEN J. ROSENSTONE & JOHN M. HANSEN, *MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA* 29 (1993) ("Citizens who comply and participate [in political action] reap the rewards of social life. They enjoy the attentions and esteem of their friends and associates; they enjoy the intrinsic satisfactions of having helped their colleagues' cause. Citizens who fail to comply and refuse to participate receive no rewards; in fact, they may suffer social sanctions.").

Using rational choice terminology, a norm of voting changes the voter's calculus by raising the costs of not voting (the functional equivalent of lowering the relative cost of *C*) and by creating the taste for voting (increasing *D*). The existence of a voting norm tells us more than rational choice theory's taste for voting accounts, however. As explained below, it leads to predictions as to *which* groups of people should have that taste, how *stable* the amount of voting should be, and the likelihood of a *decline* in a taste for voting.

Consider first the origin of a voting norm. Recall the two conditions for a norm to arise: (1) demand for a norm arises among members of the group, and (2) those who would benefit from the norm, acting rationally, can share appropriately the costs of sanctioning or the costs of inducing others to sanction.⁷¹

Members of a group might demand a voting norm because it leads to provision of two public goods. First, widespread voting legitimates democratic government, itself a public good. When enough people vote, elected officials appear to have the consent of the governed, one of the cornerstones of democratic theory.⁷² Second, when enough members of a particular group vote, politicians agree to supply benefits to the group in exchange for its votes.⁷³

Note that both theories for generating demand presuppose familiarity with political theory: Potential voters must appreciate the relationship between voting in the aggregate and the stability and power relationships of the political system. This observation suggests that demand for a norm of voting will not be distributed equally among all groups in the population; rather, the norm is

⁷¹ See *supra* part I.B.1.

⁷² See Jack Dennis, *Support for the Institution of Elections By the Mass Public*, 64 AM. POL. SCI. REV. 819, 823 (1970) (positing existence of such a norm). For a good summary of the normative arguments that widespread voting is essential to the survival of democratic government, see Stephen E. Bennett & David Resnick, *The Implications of Nonvoting for Democracy in the United States*, 34 AM. J. POL. SCI. 771, 773-76 (1990).

⁷³ Coleman's analysis mistakenly focuses only on this second collective good. See COLEMAN, *supra* note 35, at 291-92, 825-28; cf. Knack, *supra* note 41, at 136 ("Voting participation is not only a partisan or group public good but is widely perceived as a societal or national public good . . ."). Wealthy and powerful groups in society certainly have an interest in electing officials who will further their immediate policy goals. But these groups have an *even greater* interest in the maintenance of democratic order, which provides the underlying rules of the game allowing for further accumulation of power and wealth. In other words, it is of greater collective interest to prevent the Maoist revolution than to elect a president who will eliminate the capital gains tax.

more likely to emerge among educated groups and among groups that already reap positive benefits from the system. Those least educated and most discriminated against in society are therefore also least likely to demand a norm.

Even more fundamentally, formidable legal and illegal barriers to voting prevent emergence of a norm of voting. The story of African-American disenfranchisement is well known.⁷⁴ Perhaps less well known are efforts in this century to erect institutional barriers to prevent the poor from voting.⁷⁵ Without a realistic chance to exchange group votes for rents from politicians, and with a lesser stake in the legitimacy of the government, members of these groups had little reason to demand a norm of voting. Instead, they focused on securing the right to vote in the first place, which itself presented collective action problems.⁷⁶

Demand for a voting norm is a necessary but insufficient condition for the norm's emergence. The second condition is sanctioning by group members. Sanctioning requires observability of the decision to vote and no cost (or perhaps some benefit) to sanctioning of others' voting behavior.⁷⁷ At a minimum, it requires some degree of social connectedness among group members.

The wide emergence of a norm of voting in the United States among enfranchised Americans over the last century may be explained by reference to the two factors necessary for norm creation.⁷⁸ The last century was characterized by social connectedness; people knew their neighbors. Even assuming *how* one voted was secret,⁷⁹ *whether* one voted was public knowledge in the

⁷⁴ For a summary, see J. Morgan Kousser, *Suffrage*, in 3 *ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY* 1236, 1240-49, 1251-54 (Jack P. Greene ed., 1984.).

⁷⁵ For a detailed examination, see FRANCES F. PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE* (1988).

⁷⁶ See generally DENNIS CHONG, *COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT* (1991).

⁷⁷ Following Uhlaner, group leaders who recognize that they receive tangible benefits from politicians may attempt to create demand for a norm among group members by educating members about the benefits of a well-functioning democratic system and then using social sanctions to encourage voting. See *supra* note 42 and accompanying text.

⁷⁸ In the last century voter turnout averaged 77.7%, roughly 23% higher than current turnout. See RUY A. TEIXEIRA, *THE DISAPPEARING AMERICAN VOTER* 8 (1992).

⁷⁹ But cf. Heckelman, *supra* note 5, at 110-11 (noting that more than 30 states did not enact secret-ballot voting laws until the last quarter of the nineteenth century). Secrecy further undercuts Coleman's argument that demand for a voting norm may be explained solely by a group's desire to support a particular candidate or party. The secret ballot prevents effective monitoring of voting behavior; the group may

community.⁸⁰ On their way to vote, people in the community unintentionally gathered information about who else went to vote. Those community members working at polling stations observed all voters.⁸¹ Gossiping about who voted served as a consumption activity that made sanctioning individually rational. With social connectedness usually assured, the norm arose among those groups demanding a norm of voting.⁸²

Once a voting norm arises, the theory predicts it should remain stable unless social connectedness decreases or the payoff for free-riding increases to such an extent that obeying the norm becomes an outcome-oriented calculation.⁸³ Arguably, both conditions have occurred in recent decades.

First, as Knack has argued, we are living in a period of decreasing social connectedness.⁸⁴ Current society is dominated by

insure only that the group member makes it to the polling place, not that she votes for a particular candidate or party.

⁸⁰ It was (and still is) part of the public record, although checking the voting rolls would require a deliberate, significant effort. It is hard to imagine deliberate investment in such information as a source for emergence of a norm of voting.

⁸¹ The absentee ballot is a recent phenomenon. See TEIXEIRA, *supra* note 78, at 145 n.85. In Puerto Rico, a former section of the voting laws required all voters assigned to a particular polling place to show up at the polls before voting could commence for any voter. See P.R. LAWS ANN. tit. 16, § 211, *repealed by* Act of Feb. 13, 1974, No. 1, pt. 1, art. 10-016, available in LEXIS, Codes library, Prcodes file.

⁸² See Michael Schudson, *Voting Rites: Why We Need a New Concept of Citizenship*, AM. PROSPECT, Fall 1994, at 59, 59-60, 62 (describing the atmosphere of voting during the eighteenth and nineteenth centuries).

⁸³ Even then, we should expect to see some "stickiness"; if many have internalized the norm (that is, developed a taste for voting), there should not be a precipitous decline in voting.

⁸⁴ See Knack, *supra* note 41, at 146-48; see also TEIXEIRA, *supra* note 78, at 36-42. But see CLAUDE S. FISCHER, TO DWELL AMONG FRIENDS 54-62 (1982) (arguing that urbanism does not decrease social involvement); *id.* at 60-61 (arguing that although urbanites are less likely to encounter someone they know, this fact does not mean that urbanites have less intimate social relationships).

Robert Putnam has similarly argued that the decline of social connectedness in America—what he labels "social capital"—is responsible for a host of social ills and that the main culprit for the decline is the advent of television. See, e.g., Robert D. Putnam, *Tuning In, Tuning Out: The Strange Disappearance of Social Capital in America*, 28 PS: POL. SCI. & POL. 664, 677 (1995); Robert D. Putnam, *Why We're On Our Worst Behavior*, CHI. TRIB., Jan. 10, 1996, at 17. Putnam's thesis, as well as his symbol of socially disconnected Americans now "bowling alone," has spawned numerous commentaries and gained Putnam two trips to the White House. See, e.g., Fred Buning, *Bowling Alone Isn't the Answer*, NEWSDAY (N.Y.), Mar. 19, 1996, at B4. Putnam's thesis may be overdrawn, and his bowling metaphor seems plainly incorrect. See Peter Y. Hong, *Bowling Alley Tour Refutes Theory of Social Decline*, L.A. TIMES, Mar. 18, 1996, at A1 (examining Putnam's "catchy metaphor" of people bowling alone, and finding that "rather than a dearth of community," current attendance at bowling

anonymity—many people do not know even three of their neighbors. Individuals go to the voting booth and recognize not a single person there. Indeed, Knack contends that this lack of social connectedness helps to explain the steady decline in turnout for presidential elections since 1960, despite rational choice predictions that turnout should have increased because of a reduction of costs, such as elimination of the poll tax and relative easing of voter registration provisions.⁸⁵

Second, payoffs for not voting have increased. We have become the society of the “overworked American”; for example, comparing 1969 with 1987, “the average employed person is now on the job an additional 163 hours, or the equivalent of an extra month a year.”⁸⁶ The opportunity cost of time has greatly increased as citizens have devoted more time to work and less to leisure activities. The extent to which voting must be “scheduled in” to a busy day leads to renewed outcome-oriented thinking about voting, creating conditions for the norm’s erosion.

The voting norm hypothesis tells a plausible story about why some people vote. The same could be said, however, for Uhlaner’s story about group leaders providing tangible benefits to group

alleys evidences a “more relaxed, less traditional pattern of social connection shaped by the new ways American live and work”); see also Katha Pollitt, *For Whom the Ball Rolls*, NATION, Apr. 15, 1996, at 9 (tracing bowling leagues of prior decades to “specific forms of working-class and lower-middle-class life . . . that fostered group solidarity, a marital ethos that permitted husbands plenty of boys’ nights out, a lack of cultural and entertainment alternatives” and arguing that people still bowl “with friends, on dates, with their kids, with other families”).

⁸⁵ See Knack, *supra* note 41, at 143-48; see also TEIXEIRA, *supra* note 78, at 47-48 (observing that social connectedness, as measured by age, marital status and church attendance, accounts for about half of the turnout decline predicted by Teixeira’s statistical analysis). Teixeira’s proxies for social connectedness are weak, because turnout may be correlated with these variables for all sorts of other reasons.

The literature on the U.S. turnout decline since 1960 is voluminous. See, e.g., Paul R. Abramson & John H. Aldrich, *The Decline of Electoral Participation in America*, 76 AM. POL. SCI. REV. 502 (1982) (attributing turnout decline in part to lowered feelings of political efficacy). For a critique of this work and other explanations for turnout decline, see Carol A. Cassel & Robert C. Luskin, *Simple Explanations of Turnout Decline*, 82 AM. POL. SCI. REV. 1321, 1322-24 (1988) (criticizing Abramson and Aldrich’s study because it unreasonably oversimplifies voting variables); see also Carol A. Cassel & David B. Hill, *Explanations of Turnout Decline: A Multivariate Test*, 9 AM. POL. Q. 181 (1981); Matsusaka, *supra* note 32, at 105-11 (explaining turnout decline using informed voting theory).

⁸⁶ JULIET B. SCHOR, *THE OVERWORKED AMERICAN* 29 (1991); see also Judy Pasternak & Cathleen Decker, *For Non-Voters, Ballot Box Offers No Representation*, L.A. TIMES, Nov. 7, 1995, at A1, A14 (noting that 21% of nonvoters say they are “just too busy” to vote).

members to encourage voting. The true test is comparing the story with the evidence. As the next subpart shows, some evidence supports the norms hypothesis, but there is not yet enough evidence to eliminate rival hypotheses.

C. *Evaluating the Empirical Evidence For and Against a Norm of Voting*

Certain testable propositions follow from the norm of voting hypothesis. Perhaps most important is the proposition that a person's propensity to vote should be positively correlated with social sanctioning related to voting. Other testable propositions include a finding that overall turnout decreases or increases as social connectedness decreases or increases and that voting rates will be lower among the least educated and politically powerless members of society, who the norm of voting hypothesis predicts should have less demand for the norm.

As this subpart shows, evidence demonstrates the correlation between social sanctions and voting. Unfortunately, much of the evidence may be consistent with a modified rational choice taste for voting model as well. Although additional evidence may be adduced to bolster the norms hypothesis, the nature of norms means definitive results probably are impossible.

Rational choice scholars since Downs have noted the possible role of social pressure in stimulating voting,⁸⁷ but Stephen Knack is the first researcher to test systematically whether negative social sanctions correlate positively with voting.⁸⁸ Knack began by

⁸⁷ See DOWNS, *supra* note 12, at 7 (offering as an example a man who prefers party A, but whose wife will throw a tantrum unless he votes for party B); see also HARDIN, *supra* note 10, at 216-17; Niemi, *supra* note 37, at 117 (noting the "psychological cost of saying 'no' when asked whether or not you voted"); Tullock, *supra* note 37, at 919 (arguing that people decide not to investigate whether they should stop voting because the cost of voting is very slight and the cost of investigating is quite expensive); Wittman, *supra* note 28, at 740 n.14 ("Embarrassment and other forms of social pressure used in 'coercing' others with similar preferences to vote . . . may be a relatively inexpensive method of getting a significant number of votes on your side.").

⁸⁸ See Knack, *supra* note 41. The "social context" literature also examines the role of social relationships in stimulating voting from the perspective of a potential voter's social structure or network, usually at the neighborhood level. See, e.g., Heinz Eulau & Lawrence Rothenberg, *Life Space and Social Networks As Political Contexts*, 8 POL. BEHAV. 130, 151-52 (1986) (concluding that while the neighborhood as a geographic unit is not a "perceptually salient environment for political behavior," social relations among particular neighbors "result in an interpersonal context that has an impact on political behavior"); Robert Huckfeldt & John Sprague, *Networks in Context: The Social*

examining negative sanctioning in marriage, arguably the most intense of social relationships. Research has long shown that married people tend to have a higher voter turnout than unmarried people.⁸⁹ That correlation does not reveal, however, whether reduced information and transportation costs, sanctioning, or some other factor correlated with marriage accounts for increased turnout.

Knack designed the Social Sanctions Survey (SSS) to test the effect of sanctioning on a spouses's voting. The SSS showed a 21% increase in the probability of reporting that one's spouse had voted among those respondents indicating that, on discovering that a

Flow of Political Information, 81 AM. POL. SCI. REV. 1197, 1213 (1987) (emphasizing the "interdependence of private preference and politically relevant distributions in the individual's social context"); Christopher B. Kenny, *Political Participation and Effects from the Social Environment*, 36 AM. J. POL. SCI. 259, 259 (1992) (noting that "[s]ocial contexts have been found to have important consequences for certain forms of political participation"); Bruce C. Straits, *Bringing Strong Ties Back In*, 55 PUB. OPINION Q. 432, 433 (1991) (analyzing the frequency of political conversations within core networks); M. Stephen Weatherford, *Interpersonal Networks and Political Behavior*, 26 AM. J. POL. SCI. 117, 117 (1982) (describing "local, neighborhood-based social networks as influences on individual political attitudes"). Unfortunately, the social context literature is unclear on the causal connection between social relationships and voting. See Jan E. Leighley, *Social Interaction and Contextual Influences on Political Participation*, 18 AM. POL. Q. 459, 472 (1990) ("The basic theory . . . argues that social interaction enhances participation because it provides information and specific opportunities as well as introduces the individual to others who act as role models. Alternatively, social interaction itself could be considered another form of individual initiative, and as such does not explain participation . . ."); Bruce C. Straits, *The Social Context of Voter Turnout*, 54 PUB. OPINION Q. 64, 65 (1990) (arguing for a "contagion" model of voting).

Rosenstone and Hansen use both the social context literature and the norms literature to explain changes in voter turnout over time, although they fail to distinguish between the two theories. See ROSENSTONE & HANSEN, *supra* note 70, at 160 ("Citizens who are part of dense webs of association of the workplace, church, and community receive more information and encounter more bountiful social benefits."). They hypothesize that involvement in social life "brings greater exposure to the mobilization efforts of political leaders" and that much of the decline in voter turnout is explained by a decrease in these mobilization efforts. *Id.* at 88, 217-19. Yet Rosenstone and Hansen provide no explanation for the origins or perpetuation of social sanctioning, a prerequisite to mobilization, and they assume without any evidence that social sanctioning occurs equally among all groups with identical degrees of social connectedness. See *id.* at 228-29 ("People who occupy social positions that expose them to information and to social incentives bear less burdensome costs and receive more substantial benefits from their involvement in public affairs.").

⁸⁹ See WOLFINGER & ROSENSTONE, *supra* note 40, at 44-46. Knack's analysis of the NES data reveals that turnout is higher only for married respondents with a spouse who has been to college; otherwise marital status has no independent effect on the probability of voting. See Knack, *supra* note 41, at 138.

friend did not vote in the last election, "I would disapprove and let him or her know."⁹⁰ This finding supports the norms hypothesis by suggesting a causal relationship between negative sanctioning and voting.

The survey design is open to some criticism, however. Knack failed to verify the spouse's actual voting using voting records.⁹¹ Survey respondents had an incentive to lie in order to avoid some embarrassment: Those respondents who stated that they would communicate disapproval of nonvoting would be hard-pressed to admit to a stranger conducting a survey that their disapproval would be ineffective in motivating their spouse to vote.⁹² In addition, Knack has examined the relationship between those willing to express disapproval regarding a friend's decision not to vote and the spouse's voting; a better test would have asked directly about expressing disapproval to a spouse. People may be more or less willing to express disapproval to a friend than to a spouse.

Green and Shapiro criticize Knack for failing to take into account "the general level of political communication between spouses."⁹³ In other words, Knack has not controlled fully for the role of reduced information costs in marriage. Suppose, as John Matsusaka argues, there is a taste for *informed* voting distributed in the population; some people enjoy voting, but they vote only if they feel they have enough information to make an informed choice.⁹⁴ "Information transmission between couples is likely to be relatively inexpensive because they are in frequent contact, have similar value

⁹⁰ Knack, *supra* note 41, at 139 ("[R]espondents were asked in the survey whether, on discovering that a friend did not vote in the election, 'I would disapprove and let him or her know,' 'I would disapprove, and keep it to myself,' or 'It wouldn't matter to me at all.'").

⁹¹ See *id.* For a discussion of verifying self-reports of voting, see *infra* note 105.

⁹² Knack downplays the potential for overreporting of a spouse's voting by claiming that "[a] similar degree of overreporting should be associated with the choice of Option 2 . . . which also indicated disapproval of nonvoting. But passive disapproval was associated with only a (not statistically significant) 12-point increase in reported voting for spouses . . ." Knack, *supra* note 41, at 139.

⁹³ GREEN & SHAPIRO, *supra* note 10, at 67 n.25.

⁹⁴ See Matsusaka, *supra* note 32, at 92-93 (hypothesizing that "even if people believe it is their duty to vote, rational citizens abstain if they feel unable to evaluate the choices"); see also John M. Strate et al., *Life Span Civic Development and Voting Participation*, 83 AM. POL. SCI. REV. 443, 450-52 (1989) (testing a theory of "civic competence" similar to Matsusaka's model). Both Matsusaka's theory and the norms theory are consistent with Kenny's finding that people are more likely to vote when the people with whom they discuss politics vote or put up political signs. See Kenny, *supra* note 88, at 263-64.

systems, and tend to trust each other."⁹⁵ Without controlling for political communication between spouses, we cannot comfortably accept Knack's finding that negative sanctioning in marriage explains higher voter turnout among married couples.

Knack also examined whether negative sanctions between *neighbors* contributed to voting. The 42% of SSS respondents who answered "yes" to the question, "Do you have any friends, neighbors, or relatives who would be disappointed or angry with you if they knew you had not voted in this year's election?,"⁹⁶ were more likely to vote than those that answered "no." Indeed, a "yes" answer to that question was the most powerful predictor of voting after civic duty.⁹⁷

This evidence further supports the norms theory by suggesting a causal relationship between negative sanctions and voting.⁹⁸ But this evidence is consistent as well with a taste for voting theory not dependent upon social norms.⁹⁹ Suppose, for example, that most individuals' friends, neighbors, and relatives *do not* actually express their disapproval for not voting, a possibility not ruled out by the SSS question. Instead, respondents with a high sense of civic duty (a full 70% of SSS respondents¹⁰⁰) merely *presume* that others would disapprove based on their own attitudes toward voting.¹⁰¹

⁹⁵ Matsusaka, *supra* note 32, at 102; see also Laura Stoker & M. Kent Jennings, *Life-Cycle Transitions and Political Participation: The Case of Marriage*, 89 AM. POL. SCI. REV. 421, 429-30 (1995) (finding that a spouse's political activity or inactivity is correlated with an individual's decision to vote and that marriage transitions—marriage, divorce, and widowhood—account for an short-term decrease in political participation).

⁹⁶ Knack, *supra* note 41, at 142.

⁹⁷ See *id.* at 141-42. Knack also found that "respondents claiming to 'know and occasionally talk to' three or more people in their neighborhoods were significantly more likely to have voted than those knowing two or fewer." *Id.* at 141. This evidence, however, is equally consistent with Matsusaka's informed voting hypothesis. See Matsusaka, *supra* note 32, at 92-93.

⁹⁸ Knack verified most self-reports of voting through an examination of elections board data. See Stephen F. Knack, *Essays on Electoral Participation: Some Neglected Costs and Benefits of Voting* 149 (1991) (unpublished Ph.D. dissertation, University of Maryland (College Park)) (on file with author). His method of administering the survey, however, was nonrandom: 110 of the 289 residents were interviewed on their way into or out of the polls on election day, and "[m]ost of the remainder of the sample were surveyed door-to-door after election day within [the precincts studied]; a smaller number of surveys were administered at shopping malls in or adjacent to the neighborhoods." *Id.*

⁹⁹ Although neighbors may also be a source of *information* about voting (lending credence to the Matsusaka hypothesis), Knack controlled for this variable in his study. See Knack, *supra* note 41, at 142.

¹⁰⁰ See *id.*

¹⁰¹ See Pettit, *supra* note 45, at 739-40.

Does Knack's evidence demonstrate norm internalization as the product of social sanctioning or as merely a randomly (but prevalently) distributed taste for voting?¹⁰²

Despite the problems with Knack's study, he should be commended for his effort. It is difficult to imagine a survey design that could adequately test for the presence of norm internalization. It cannot be done merely by asking about *actual* sanctioning. If many people have internalized the norm, actual sanctioning might be rare because compliance with the norm could be high.¹⁰³

Knack's research includes the only direct tests that I am aware of regarding the role of social sanctions in stimulating voting.¹⁰⁴ Other evidence consistent with the norms hypothesis exists, however. On average, about 25% of nonvoters in the validated NES voting surveys intentionally or otherwise misrepresented their voting behavior, compared to an average of only 1% of voters who said they did not vote.¹⁰⁵ Fear of a stranger's disapproval is the only

¹⁰² Knack suggests that internalization is quickly reversed when sanctions are removed. See Knack, *supra* note 41, at 146-47.

¹⁰³ Thus, I am not as sanguine as Knack that long-term time series data on interpersonal pressures will fully resolve the question. See *id.* at 148. In another article, Knack found that poor weather conditions do not deter those voters with a high sense of civic duty; only those with low civic duty respond to bad weather by not voting. See Steve Knack, *Does Rain Help the Republicans? Theory and Evidence on Turnout and the Vote*, 79 PUB. CHOICE 187, 202 (1994). Perhaps those with high civic duty internalized a norm to the extent that they do not weigh the costs of voting. Alternatively, perhaps these people have a strong taste for voting.

¹⁰⁴ The other testable proposition flowing from the norms hypothesis, that voting rates will be lower among the least educated and the poorest, is certainly true as an empirical matter. See WOLFINGER & ROSENSTONE, *supra* note 40, at 17 (finding a very strong relationship between rates of voting and years of education); *id.* at 25 (finding that income is related to turnout, having the greatest effect on those who have not graduated from college). But we would see the same effect under Matsusaka's informed voting model: Education gives a person a better understanding of politics and the world, as well as teaching the value of acquiring additional information to make an informed choice. See Matsusaka, *supra* note 32, at 105 (predicting that turnout will correlate with income under his model). Further proof of the third proposition is useless because it does not eliminate rival hypotheses.

Pomper and Sernekos have found a positive correlation between those integrated into their communities (as measured by home ownership, church attendance, etc.) and the likelihood of voting. See Gerald M. Pomper & Loretta A. Sernekos, *The "Bake Sale" Theory of Voting Participation 2* (n.d.) (unpublished manuscript, on file with author) ("People who vote are more likely to be people who patronize bake sales. . . . Both acts are expressions of community solidarity, a sharing and a ritual."). Their data are equally consistent with the norms hypothesis or the informed voting hypothesis, however, because those integrated in their communities are likely to have low-cost access to political information.

¹⁰⁵ See Brian D. Silver et al., *Who Overreports Voting?*, 80 AM. POL. SCI. REV. 613,

reasonable hypothesis to explain why nonvoters were much more likely to lie and say that they voted than voters were to lie and say that they did not vote. Explaining this phenomenon as nonvoters' attempts to avoid social sanctions is all the more plausible given the finding that "Americans who are more highly educated and more politically efficacious, who have a stronger sense of citizen duty and stronger partisan attachments, and who are more concerned about the outcome of the election, are also more likely to overreport voting."¹⁰⁶ Thus, those most likely to have been exposed to the norm of voting are also the most likely to attempt to avoid expected negative sanctioning by the surveyor.

Evidence from cognitive psychologists also bolsters the norms hypothesis over the rational choice taste for informed voting hypothesis. Riker and Ordeshook have suggested that many people misperceive p , the probability of casting a decisive vote in an election.¹⁰⁷ Although this may be true, misperception would have

613-14 (1986). In addition, African-American nonvoters who were interviewed for the NES presidential surveys by African-American interviewers were more likely to report falsely that they voted than African-American nonvoters interviewed by white interviewers. See Barbara A. Anderson et al., *The Effects of Race of the Interviewer on Measures of Electoral Participation By Blacks in SRC National Election Studies*, 52 PUB. OPINION Q. 53, 54 (1988) (noting that "research demonstrates that whether the respondent and the interviewer are of the same race affects responses on items related to race, such as expressed hostility or closeness toward members of different racial groups"). The authors suggest that the effect occurs because the interview "may stimulate concern about how the election outcome could affect the respondent and other members of his or her race, and could stimulate the respondent's sense of civic obligation to vote." *Id.* at 71.

¹⁰⁶ Silver et al., *supra* note 105, at 614. Pre-election interviews themselves stimulate voting, with estimates ranging from a two percent increase among those surveyed to a doubling of turnout. See Donald R. Kinder & David O. Sears, *Public Opinion and Political Action*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 659, 703 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985); see also Anderson et al., *supra* note 105, at 71-73 (noting that African-Americans living in certain areas were more likely to vote if interviewed before the election by another African-American rather than by a white interviewer). That pre-election interviewing stimulates voting is consistent with both the norms hypothesis and with the informed voting hypothesis.

¹⁰⁷ Riker and Ordeshook state:

It is likely that, for many people, the subjective estimate of P is higher than is reasonable, given the objective circumstances. Subjected as we are to constant reminders that a few hundred carefully selected votes by nonvoters could reverse the results of very close elections, such as the Presidential election of 1960, the subjectively estimated chance of a tie (i.e., P) may be high as the propaganda urges it to be, even though in objective calculations the chance of a tie may be low.

Riker & Ordeshook, *supra* note 20, at 38-39; see also Uhlaner, *Downsian Voter*, *supra* note 42, at 77 ("The pB term has the form of a very low probability of winning a large

to be severe to account for much voting.¹⁰⁸ But a more subtle, related cognitive error may be at work, what Quattrone and Tversky have termed the *voter's illusion*:

[P]eople often fail to distinguish between causal contingencies (acts that produce an outcome) and diagnostic contingencies (acts that are merely correlated with an outcome). For example, there is a widespread belief that attitudes are correlated with actions. Therefore, some people may reason that if they decide to vote, that decision would imply that others with similar political attitudes would also decide to vote. Similarly, they may reason that if they decide to abstain, others who share their political attitudes will also abstain. Because the preferred candidates can defeat the opposition only if politically like-minded citizens vote in greater numbers than do politically unlike-minded citizens, the individual may infer that he or she had better vote; that is, each citizen may regard his or her single vote as diagnostic of *millions* of votes, which would substantially inflate the subjective probability of one's vote making a difference.¹⁰⁹

Using an ingenious study design,¹¹⁰ Quattrone and Tversky

amount; thus, people overestimate the value of the gamble. The cost term actually summarizes a series of moderate probability low-cost chance events, such as that a voter has a long wait at the polls or that he or she missed out on something else while voting. Thus, costs are likely to be underestimated. The net effect would be to produce more voting.").

¹⁰⁸ Suppose that people misperceive by 1000 times the value of p . Using the actual value of $p = 10^{-8}$ in a presidential election, that would make the perceived value of $p = 10^{-5}$, hardly a figure that could account for much voting. See *supra* note 25.

¹⁰⁹ George A. Quattrone & Amos Tversky, *Contrasting Rational and Psychological Analyses of Political Choice*, 82 AM. POL. SCI. REV. 719, 733 (1988) [hereinafter Quattrone & Tversky, *Contrasting*]. The authors first summarized their results in George A. Quattrone & Amos Tversky, *Causal Versus Diagnostic Contingencies: On Self-Deception and on the Voter's Illusion*, 46 J. PERSONALITY & SOC. PSYCHOL. 237, 244-47 (1984). For an example of a parallel illusion that may explain participation in groups like the antinuclear power movement, see Edward N. Muller & Karl-Dieter Opp, *Rational Choice and Rebellious Collective Action*, 80 AM. POL. SCI. REV. 471, 484-85 (1986).

¹¹⁰ Quattrone and Tversky conducted an experiment in which participants read about an imaginary country named Delta. Participants were to imagine that they supported party A, opposed party B, and that there were roughly four million supporters of each party in Delta as well as four million non-aligned voters. Subjects imagined that they were deliberating over whether to vote in the upcoming presidential election, having learned that voting in Delta can be costly in time and effort.

Quattrone & Tversky, *Contrasting*, *supra* note 109, at 733. Participants were told to consult one of two prevailing theories concerning the election outcome. Some participants were told that nonaligned voters would split their vote and the electoral outcome would be determined by whether supporters of A or B became more

demonstrated that the voter's illusion is prevalent, thereby explaining the ubiquity of a common, nonrational argument: "If you don't vote . . . think of what would happen if *everyone* felt the same way."¹¹¹

Quattrone and Tversky's experiment undercuts any rational voting model by positing cognitive error in the p term as a plausible explanation for much voting.¹¹² What may be less clear is how their experiment *supports* the norms hypothesis.¹¹³ The voter's illusion constitutes a "useful myth" that stimulates voting, much like Ellickson's cattlemen who had false beliefs about the effect of closed-range laws on liability.¹¹⁴ Widespread false belief in the causal efficacy of voting reinforces a norm of voting, providing a

involved in the election. "The political experts were split as to whether the supporters of *A* or *B* would become more involved, but all agreed that the party whose members did become more involved would win by a margin of roughly 200 thousand to 400 thousand votes." *Id.* Other participants were told a nearly identical story, except that the supporters of *A* and *B* were expected to vote in equal numbers, and the electoral outcome would be determined by whether nonaligned voters supported primarily party *A* or *B*. "The experts were split as to which party would capture the majority of the nonaligned voters, but all agreed that the fortunate party would win by a margin of at least 200 thousand votes." *Id.*

Rational choice theory predicts that the participants' decision to vote should be about equal in the two groups. Assuming psychic benefits of voting (D) are distributed randomly in the population, all other variables are held constant. Costs (C) and benefits of an electoral victory (B) are the same for each voter, and the probability of effecting the election outcome (p) is minuscule, given that in both elections experts agree the margin of victory will be at least 200,000 votes. Nonetheless, turnout depended upon which theory respondents received, with 16% of those given the first theory indicating they would not vote but only 7% of those given the second theory so indicating. *See id.* at 734.

Even more interestingly, when respondents were asked to indicate (assuming no communication between voters) "how likely it was that the supporters of party *A* would vote in greater numbers than the supporters of party *B* 'given that you decided to vote' and 'given that you decided to abstain,'" those exposed to the first theory "thought that their individual choice would have a greater 'effect' on what others decided to do than did subjects exposed to the [second] theory." *Id.* "Similar effects were observed in responses to a question probing how likely party *A* was to defeat party *B* 'given that you decided to vote' and 'given that you decided to abstain'" *Id.*

¹¹¹ *Id.* at 734.

¹¹² For a detailed examination of how cognitive error is inconsistent with economic rationality, see Richard L. Hasen, Comment, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391 (1990).

¹¹³ I am grateful to Jim Lindgren for suggesting that cognitive error reinforces, rather than undercuts, the norms hypothesis.

¹¹⁴ See ELLICKSON, *supra* note 9, at 118-19; see also McAdams, *supra* note 62, at 1064-71. I suspect that the "useful myth" phenomenon may be one of the key psychological links in the process of norm internalization generally.

backup mechanism for voting when social sanctioning and internalization fail. Thus, when the decision to vote becomes outcome-oriented due to the norm's weakness, the quasi-rational calculus is skewed in favor of voting by the useful myth that one person's vote causally affects how many others vote as well; the pB term is replaced in the voter's calculus with a term npB , where n represents the number of other voters a voter expects to affect by her decision to vote. Under this quasi-rational model, it often will be "rational" to vote.¹¹⁵

To be sure, some of the evidence adduced in this subpart to support the norms hypothesis has a ring of ad hoc'ery (or at the very least, post hoc'ery). But we cannot expect to do much better given the difficulty in research design for testing the existence of a voting norm. The best we can do is continue to search for examples that falsify either the norms hypothesis or competing theories.

II. COMPULSORY VOTING AND THE QUESTIONABLE SUBSTITUTABILITY OF NORMS AND LAW

A. Introduction

Unlike the first Part of this Article, the goal of which was to examine critically the existence of a norm to explain the paradox of voting, this Part conducts a thought experiment by assuming for the sake of argument that the evidence adduced above proves the existence of a voting norm. In this Part, I demonstrate that if the norms hypothesis is correct, state-based mechanisms that seek to duplicate norms may be warranted, but they are likely to be successful only to the extent that norms and laws are good substitutes for one another. I examine the substitutability issue below, first generally and then with regard to a proposal for compulsory voting.

The consistent decline in American voter turnout over the past decades¹¹⁶ has led to calls for increasing turnout. Some people advocate programs to increase turnout because they support the political reform goal of egalitarian pluralism, that is, the redistribu-

¹¹⁵ Suppose that people think their vote affects a million other voters in a presidential election, or $n = 1,000,000$. Again using a value of $p = 10^{-8}$ in a presidential election, the term npB becomes $1,000,000(10^{-8})B$, or $0.01B$, quite a substantial number if an election outcome, B , is worth something significant to a voter. See *supra* notes 25, 105.

¹¹⁶ See *supra* notes 85-86 and accompanying text.

tion of political capital in rough proportion to the interests of society's members.¹¹⁷ Wealthier, better-educated whites are more likely to vote than other groups in society;¹¹⁸ egalitarian pluralists hope to increase turnout among groups with low turnout so that each group has a better ability to affect the outcome of elections.¹¹⁹

For those who reject the concept of egalitarian pluralism, government intervention to stimulate turnout may be justified on the narrower ground that it overcomes the other collective action problem associated with voting, legitimating democratic government. Of course, this second ground is much more controversial: It is hardly self-evident that a government program *forcing* voting would increase a societal belief in the *legitimacy* of government.

According to the norms hypothesis, the presence or absence of a voting norm accounts for much of the difference in voter turnout among groups and the decline of voter turnout generally. Communities with well-educated members who already benefit from the system of government are more likely to demand and later develop a norm of voting than communities with members who faced disenfranchisement and formidable legal and illegal barriers to voting.¹²⁰ In addition, the decline of social connectedness and the increased opportunity cost of time have led in recent decades to the erosion of the voting norm in those communities having such a norm.¹²¹

Both of these problems could be solved ideally through a program that creates or re-creates the voting norm. Creating such a norm directly, however, is all but impossible: Someone must

¹¹⁷ See generally Hasen, *supra* note 7, at 4-6 (arguing for campaign finance vouchers as a method to further egalitarian pluralism).

¹¹⁸ See ROSENSTONE & HANSEN, *supra* note 70, at 43-45; see also STANDING COMM. ON LAW AND THE ELECTORAL PROCESS, AMERICAN BAR ASS'N, THE DISAPPEARANCE OF THE AMERICAN VOTER REVISITED 93-94 (1990) [hereinafter AMERICAN BAR ASS'N].

¹¹⁹ See Malcolm M. Feeley, *A Solution to the "Voting Dilemma" in Modern Democratic Theory*, 84 ETHICS 235, 241 (1974) (advocating compulsory voting "to eliminate some of the inefficiencies . . . caused by unequal distributions of income, division of labor, informally administered selective benefits, and skewed assessments of costs"); Alan Wertheimer, *In Defense of Compulsory Voting*, in PARTICIPATION IN POLITICS 276, 292-93 (J. Roland Pennock & John W. Chapman eds., 1975) (noting that compulsory voting would lead "the poor and uneducated" to "act in their common interests," making compulsory voting "more consistent with social justice than is our present system"). For some classic arguments against compulsory voting, see HENRY J. ABRAHAM, COMPULSORY VOTING (1955).

¹²⁰ See *supra* notes 74-76 and accompanying text.

¹²¹ See *supra* notes 84-86 and accompanying text.

stimulate demand for voting over a long period through some sort of value inculcation program and ensure adequate "social connect-
edness."¹²² Given the impossibility of centrally directing an inherently decentralized process, a more plausible alternative requires the state to take over the role of social sanctioner directly. If the state uses the law to offer rewards or punishments for voting, perhaps *state* sanctioning, like *social* sanctioning, will lead to internalization of a taste for voting.

Whether state sanctioning leads to internalization is the crucial question. To understand why, consider again the contrast between the norms hypothesis and the rational choice hypothesis. Although both hypotheses predict an increase in voting if the state imposes fines for nonvoting, the long term prospects for state sanctioning differ. If the rational choice model is correct, a temporary penalty would increase turnout only temporarily. Once the penalty is removed or enforcement levels are decreased, old voting patterns reemerge; there is no internalization because the rational choice model cannot account for a change in tastes.¹²³ In contrast, if the norms model is correct and norms and law are substitutes for one another, state sanctioning could shape preferences through internalization so that turnout would remain high even if the state eventually removed or lessened such penalties.

In short, the norms hypothesis predicts a greater payoff for state action—a long term increase in turnout—making government intervention in the voting decision more justifiable. This conclusion is only correct, however, to the extent that state sanctioning is a good substitute for a social norm.

¹²² For a similar view, see Pomper & Sernekos, *supra* note 104, at 30 ("Ultimately, higher turnout may well depend on a long-term rebuilding of American communities—a difficult task, and perhaps an impossible one."). But see TEIXEIRA, *supra* note 78, at 155 ("Clearly people cannot (or should not) be made to get older, get married, attend church, or stay in the same place.").

¹²³ See Stigler & Becker, *supra* note 30, at 76 (arguing that "tastes neither change capriciously nor differ importantly between people"). For an argument in favor of preference-shaping within the law and economics paradigm, see Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law As a Preference-Shaping Policy*, 1990 DUKE L.J. 1; see also Kenneth Dau-Schmidt, *Legal Prohibitions As More Than Prices: The Economic Analysis of Preference Shaping Policies in the Law*, in LAW AND ECONOMICS: NEW AND CRITICAL PERSPECTIVES 153 (R. Malloy & C. Braun eds., 1995) (arguing from an autonomy perspective in favor of limited government preference shaping).

B. Norms and Law As Alternative Means of Social Control

Although Robert Ellickson was not the first scholar to observe that social norms and law are alternative methods of social control,¹²⁴ his detailed examination of norms among neighbors in Shasta County demonstrated that norms maximizing a group's welfare may emerge not only in the absence of law, but also despite the existence of contrary law.¹²⁵ Ellickson concluded that "law-makers who are unappreciative of the social conditions that foster informal cooperation are likely to create a world in which there is both more law and less order."¹²⁶

Ellickson's study shows the undesirability (and sometimes futility) of legislating contrary to an established social norm. But here we are faced with the opposite problem: a norm has failed to emerge in some communities even though a group's welfare arguably would be maximized if the norm existed.¹²⁷ Moreover, the voting norm's overall decline has led to conditions that could threaten the legitimacy of democratic government. In this situation of what might be called *social failure*, law may be the pathway to order, not an obstacle to it.

The law may cure social failure in two ways. First, and most obviously, law changes behavior through rewards and penalties that alter an individual's instrumental calculus along the lines of the rational choice hypothesis. I may want to drive eighty miles per hour on an empty freeway, but I do not do so if the punishment I expect exceeds the benefits I get from speeding.

Second, law works in a more subtle way as well, by shaping

¹²⁴ See, e.g., Donald T. Campbell, *Legal and Primary-Group Social Controls*, 5 J. SOC. BIOLOGICAL STRUCTURES 431, 434 (1982) (arguing that the four mechanisms of social control are mutual monitoring, internalized restraint, legal control, and market mechanisms).

¹²⁵ For Ellickson's general observations on the benefits of norms over laws, see ELICKSON, *supra* note 9, at 249-58.

¹²⁶ *Id.* at 286. Although Ellickson claims to limit his argument to norms among close-knit groups, the evidence he presents indicates that norms may emerge in a broader social context as well. See Herbert Jacob, 1 LAW & POL. BOOK REV. 125, 126 (1991) (reviewing ELICKSON, *supra* note 9) (noting that "the contemporary American professoriate which extends over many disciplines and across an entire continent" cannot be considered a tight-knit group as Ellickson implicitly assumes), *available in* gopher://nuinfo.nwu.edu:70/11/library/journal.

¹²⁷ To give a more mundane example of the same phenomenon, why has a norm against rubber-necking on the highway failed to emerge? For an interesting discussion of the phenomenon, see THOMAS C. SCHELLING, *MICROMOTIVES & MACROBEHAVIOR* 124-33 (1978).

preferences (or changing tastes) in much the same way as social norms. I may not drive eighty miles per hour either because I believe that following the law is the right thing to do or because the law shapes my preferences so that I come to believe that driving eighty miles per hour is wrong. Tyler indicates that many people obey the law *not* because of any instrumental calculus and *not* out of respect for either the courts or the police—indeed, many respondents in his Chicago survey had respect for neither institution. Instead, respondents follow the law because they believe that following the law itself is right.¹²⁸ A law represents some kind of social consensus about acceptable behavior in much the same manner as social norms.

On this view, strict enforcement of many laws may be unnecessary; the state, by passing a law, causes people to internalize a preference about acceptable behavior. The scant need for enforcement of most laws indicates that such internalization is common. As Donald Campbell noted:

[I]t is remarkable that [legal control] ever worked. As a pure form, without mutual monitoring or internalized restraint, with all detection of non-compliance and delivery of sanctions delegated to specialists, the required size of this specialist corps becomes unaffordably large, even if the self-interests and nepotistic biases of these legal-control specialists is disregarded.

....

One must conclude that legal social control can only have worked well when supported by mutual monitoring and internalized restraint.¹²⁹

Tyler's evidence suggests that the law may serve as a social sanctioner of last resort and that legal control works principally through a law's enactment, not its enforcement; enactment affects internalization, whereas enforcement affects only the instrumental calculus. Thus, state-centered laws theoretically may act like decentralized norms in shaping preferences. As the next subpart shows, however, the substitutability of the two methods of social control is a much trickier issue than first appears.

¹²⁸ See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 40-56 (1990) (presenting data that "suggests a general feeling among respondents that law breaking is morally wrong" and a "perceived obligation to obey the law").

¹²⁹ Campbell, *supra* note 124, at 437 (emphasis omitted).

C. *Compulsory Voting Laws As a Substitute for a Norm of Voting*

1. Carrots or Sticks?

As noted in the Introduction, governments have used both carrots and sticks to stimulate voting since voting began in ancient Athens. The use of red-dyed ropes would be impracticable and certainly undesirable as a substitute for a norm of voting today. But what about other methods used by modern democratic governments to stimulate voting?

In practice, sticks triumph over carrots.¹³⁰ Compulsory voting laws are the primary device used by modern democracies to stimulate voting. Such laws require that a citizen vote in an election unless the citizen has an excuse for not voting. Penalties for not voting without an excuse range from Australia's imposition of a fifty-dollar fine,¹³¹ to Greece's penalty of imprisonment from one to twelve months.¹³² Italy's penalty of posting nonvoters' names on the communal notice board is particularly interesting in that its sole purpose appears to generate shame for nonvoting; there are no tangible costs associated with it.¹³³ Moreover, Italy has the highest

¹³⁰ I am not aware of a democratic government since Ancient Athens that has paid its citizens to vote. *But cf. The Concept of National Voter Registration: Hearings Before the Subcomm. on Census and Statistics of the House Comm. on Post Office and Civil Service*, 92d Cong., 2d Sess. 16-17 (1972) (statement of Rep. Udall) (suggesting possible payment to stimulate voting). Crewe notes that "a provision unique to Italy makes generous concessions on train fares available to those who have to return to their home constituency to vote, a real benefit to migrant workers in the North or beyond Italy's frontiers who wish to spend a few days with their families in Sicily and the South." Ivor Crewe, *Electoral Participation*, in *DEMOCRACY AT THE POLLS: A COMPARATIVE STUDY OF COMPETITIVE NATIONAL ELECTIONS* 216, 241 (David Butler et al. eds., 1981). In an effort to provide a carrot for voting, Kentucky recently began posting the names of those who voted, to "affirm those folks (who voted) and say (voting) is a civic responsibility." Richard Wilson, *State Elections Board Will Distribute Lists of Those Who Voted*, *COURIER-J.* (Louisville, Ky.), Aug. 25, 1995, at 2B (quoting elections board member John Chowning), available in 1995 WL 2331165, at *1. Efforts to encourage voting in California are not state-sponsored. *See supra* note 5 and accompanying text.

¹³¹ *See* Commonwealth Electoral Legislation Amendment Act of 1983, sec. 99, § 128A, 1983 AUSTL. ACTS No. 143, available in LEXIS, Codes Library, Ausact File.

¹³² *See* Phaeodo Vegleris, *Greek Electoral Law*, in *GREECE AT THE POLLS: THE NATIONAL ELECTIONS OF 1974 AND 1977*, at 21, 28 (Howard R. Penniman ed., 1981). Greek law additionally provides for onerous administrative penalties. *See id.*

¹³³ *See supra* note 4. The other Italian penalty is having one's certificate of good conduct stamped "Did not vote." *See supra* note 4. Although the certificate has "now largely fallen into disuse," Sani, *supra* note 4, at 43 n.25, "such a procedure in a country with a long tradition of bureaucratic control helps to spread a conviction that

average voter turnout among Western democracies.¹³⁴

Despite the wide range of stated penalties, lax enforcement is ubiquitous.¹³⁵ In Australia, perhaps four percent of nonvoters incur a penalty of some type.¹³⁶ In Belgium, less than one quarter of one percent of nonvoters are even prosecuted.¹³⁷ In Greece, the penalty of jail time apparently is not imposed at all.¹³⁸ Yet the

voting is not only a right but a public duty and that failure to exercise the right might have unfortunate consequences." GIORGIO GALLI & ALFONSO PRANDI, PATTERNS OF POLITICAL PARTICIPATION IN ITALY 28 (1970); *see also* Wolfinger et al., *supra* note 4, at 562 ("What prudent Italian would risk blighting his chances of favorable consideration by a government official?"). Sani argues that a relatively small decline in Italian turnout might be attributable to these minor sanctions having lost their force. *See* Sani, *supra* note 4, at 43. *But see* ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 93 (1993) (explaining lower turnout in Italian national referenda compared to parliamentary elections by the absence in referenda (and presence in parliamentary elections) of "uncivic motivations" for voting, such as the compulsory voting law, the influence of party organizations, and political patronage).

¹³⁴ *See* G. Bingham Powell, Jr., *American Voter Turnout in Comparative Perspective*, 80 AM. POL. SCI. REV. 17 app. at 38 (1986). Other scholars using different figures or methodology give slightly different turnout percentages across states. All the comparative studies of turnout that I have seen, however, place states with compulsory voting at or near the top of the list and the United States near the bottom.

¹³⁵ *See* Crewe, *supra* note 130, at 240 ("In reality, in the countries where voting is compulsory, both convictions and sanctions against nonvoters appear to be negligible, except perhaps in Venezuela."); Robert W. Jackman, *Political Institutions and Voter Turnout in the Industrial Democracies*, 81 AM. POL. SCI. REV. 405, 409 (1987) (attributing turnout percentages below 100% in states with compulsory voting to lax enforcement); Richard Rose, *Elections and Electoral Systems: Choices and Alternatives, in DEMOCRACY & ELECTIONS*, *supra* note 4, at 20, 26 (noting that among states with compulsory voting laws, "penalties for voting are slight and rarely enforced").

¹³⁶ *See* Stephen Kirchner, *Compulsory Voting in Australia: The Case for Reform* 4 (June 19, 1995) (unpublished manuscript, on file with author); *see also* Murphy v. Australian Electoral Comm'n, No. Q93/585AAT (Administrative App. Trib. May 24, 1994), available in LEXIS, Aust Library, Ausmax File (denying a request under Australian Freedom of Information Act for documents containing policy and guidelines used by the Australian Electoral Commission to determine whether a reason given for not voting is a "sufficient reason" under Australian law); J.D.B. MILLER, AUSTRALIAN GOVERNMENT AND POLITICS 101 (1954) (noting that compulsory voting "results in polls of over 90%, and a few people being fined nominal sums for not voting").

¹³⁷ *See* Crewe, *supra* note 130, at 240; *see also* Keith Hill, *Belgium: Political Change in a Segmented Society*, in ELECTORAL BEHAVIOR: A COMPARATIVE HANDBOOK 29, 59 (Richard Rose ed., 1974) ("Between 1946 and the period after the election of 1961 only 0.24% of all abstainers were prosecuted, and only 0.20% convicted.").

¹³⁸ I have been unable to locate any scholarly studies of Greek enforcement rates. George Tsebelis informs me that those who do not vote may have minor difficulties renewing a passport, but a medical excuse for not voting usually clears up the problem. Personal Communication from George Tsebelis to Author (on file with

democracies with compulsory voting laws have among the highest turnouts among the industrialized democracies: Australia, 86%;¹³⁹ Belgium, 88%;¹⁴⁰ Greece, 78.6%;¹⁴¹ and Italy, 94%.¹⁴² This compares to an average turnout of 54% for the United States for the same period.¹⁴³ Turnout was about ten to thirteen percentage points higher on average in democracies with penalties for nonvoting compared to those without penalties.¹⁴⁴

The evidence of high voter turnout in the absence of much enforcement suggests that compulsory voting laws serve much the same function as a social norm of voting.¹⁴⁵ Although Kaempfer and Lowenberg argue that a compulsory voting law may reflect the existing political system as well as constitute an independent cause

author).

¹³⁹ See Powell, *supra* note 134, at 38.

¹⁴⁰ See *id.*

¹⁴¹ See Wolfinger et al., *supra* note 4, at 553 tbl. 1. The 78.6% figure represents voting as a percentage of *registered voters*, not as a percentage of the *voting age population*. Using population figures obtained from a different source, the authors reached the anomalous conclusion that 84.9% of Greece's voting age population (as opposed to the percentage of registered voters) voted in Greece's most recent national election. See *id.* The authors calculated the percentage of voters among the voting age population in other states as follows: Australia, 83.1%; Belgium, 88.7%; Italy, 94%; and the United States, 52.6%. See *id.*

¹⁴² See Powell, *supra* note 134, at 38. Compulsory voting is also used in parts of Austria and Switzerland. See *id.* at 20.

¹⁴³ See *id.* at 38. This figure is for presidential elections. In the 1994 congressional elections, voter turnout reached an all-time low, representing only 44.6% of the total voting age population. See BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1995, at 289 tbl. 459 (1995). By race or ethnicity, 46.9% of Whites voted, compared to only 37% of Blacks, and 19.1% of Hispanics. See *id.*

¹⁴⁴ See Andre Blais & R.K. Carty, *Does Proportional Representation Foster Turnout?*, 18 EUR. J. POL. RES. 167, 176 (1990) (noting that compulsory voting increases turnout by 12%); Jackman, *supra* note 135, at 415 (13%); Powell, *supra* note 134, at 9-10 (10%). Hirczy argues that these cross-national studies do not prove that compulsory voting laws *cause* an increase in turnout; they only show a correlation. See Wolfgang Hirczy, *The Impact of Mandatory Voting Laws on Turnout: A Quasi-Experimental Approach*, 13 ELECTORAL STUD. 64, 65 (1994). To better gauge the impact of compulsory voting laws, Hirczy looked at changes in turnout *within* nations that adopted or repealed compulsory voting laws. He concluded that compulsory voting laws have a strong effect on turnout, but the increase in turnout following enactment of a compulsory voting law is likely to be larger if the turnout before enactment was low. See *id.* at 74-75.

¹⁴⁵ Alternatively, it is possible that people overestimate the amount of enforcement. If this were so, voting in the face of these penalties would appear more rational. Kirchner maintains that the Australian Electoral Commission deliberately creates uncertainties about the costs of not voting by publicizing that voting is compulsory but not publicizing the relatively small penalty. Personal Communication from Stephen Kirchner to Author (Apr. 1, 1996) (on file with the author).

of turnout,¹⁴⁶ there is no doubt that compulsory voting laws affect turnout, whatever the original impetus for the law. For example, when the Netherlands repealed compulsory voting, turnout declined by an initial rate of sixteen percent, and it has remained ten percent lower on average than voting turnout under the compulsory voting law.¹⁴⁷ Similarly, voting increased by about fifteen percent when Costa Rica introduced penalties for not voting.¹⁴⁸

Why the prevalence of sticks over carrots among those governments using law to increase turnout? One simple answer is that sticks, if enforcement is low, are likely to be cheaper than carrots. Payment to voters in ancient Athens was apparently the biggest item in the budget.¹⁴⁹ Because it would be difficult for the government to price-discriminate and pay only those voters who would not have voted absent payment, all citizens must receive payment. In contrast, a compulsory voting law stimulates voting among those citizens who otherwise would not vote, but it does not discourage others who would have voted anyway from voting.¹⁵⁰

Sticks have the additional advantage over carrots of making internalization of the voting requirement more likely. A half-dozen Yum-Yum doughnuts does not send the same message to a voter as does a government law compelling all to vote. The doughnut inspires an outcome-oriented calculus; the law suggests moral authority or social consensus.

¹⁴⁶ See William H. Kaempfer & Anton D. Lowenberg, *A Threshold Model of Electoral Policy and Voter Turnout*, 5 RATIONALITY & SOC'Y 107, 108 (1993) ("[G]overnment compulsion policies . . . regarding voting and registration . . . are themselves a function of the degree of party polarization in the polity, and a function of the degree to which proportional representation is used in elections.").

¹⁴⁷ See G. Bingham Powell, Jr., *Voting Turnout in Thirty Democracies: Partisan, Legal, and Socio-Economic Influences*, in ELECTORAL PARTICIPATION: A COMPARATIVE ANALYSIS 5, 10 (Richard Rose ed., 1980); see also Galen Irwin, *Compulsory Voting Legislation: Impact on Voter Turnout in the Netherlands*, 7 COMP. POL. STUD. 292, 294 (1974) ("The large drop in turnout only a few weeks after the repeal of [compulsory voting] legislation leaves little doubt that the change was due to the change in the law and not to external factors.").

¹⁴⁸ See Powell, *supra* note 147, at 100.

¹⁴⁹ See HANSEN, *supra* note 2, at 133.

¹⁵⁰ For an analogous argument in another context, compare WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 146-48 (1987) (suggesting altruists would be less likely to rescue in the presence of a duty-to-rescue law, leading to a decline in the number of rescues) with Richard L. Hasen, *The Efficient Duty to Rescue*, 15 INT'L REV. L. & ECON. 141 (1995) (disputing such a claim).

2. Why Compulsory Voting Will Not Be Enacted in the United States

Compulsory voting in federal elections¹⁵¹—particularly compulsory voting with an option for a voter to abstain from voting for a candidate once at the polls¹⁵²—could serve as a good substitute for the declining and unequally distributed voting norm in the United States.¹⁵³ Nonetheless, compulsory voting has virtually no chance of enactment in the United States.

Although Georgia and Virginia experimented with compulsory

¹⁵¹ Because I do not believe a compulsory voting law would be considered seriously in the United States, I do not provide a detailed rationale here for limiting compulsory voting to federal elections. It is enough to note that (1) federal elections are in some senses the most important elections in terms of reaffirming the legitimacy of American government (although certainly local elections have more immediate impact on many citizens' daily lives); and (2) federal elections are relatively infrequent in number and involve relatively short ballots, making the costs of voting and making an informed decision relatively low.

¹⁵² See Feeley, *supra* note 119, at 241-42 (advocating compulsory voting with a "no-preference" choice); cf. *Faderson v. Bridger*, 126 C.L.R. 271 (1971) (Austl.) (stating that a voter's explanation that he has no preference among the candidates offering themselves for election to the Australian Senate is not a "valid and sufficient reason" for failing to vote under Australian law); *Judd v. McKeon*, 38 C.L.R. 381 (1926) (Austl.) (same). But see Chris Puplick, *The Case for Compulsory Voting*, in 2 AUSTRALIAN ELECTORAL COMM'N, *THE PEOPLE'S SAY—ELECTIONS IN AUSTRALIA* 22 (1994) ("Compulsory voting is something of a misnomer. What the law requires is that an elector turn up at a polling booth and take a ballot paper. They are not compelled to fill in that ballot paper and have an absolute right not to vote by placing a blank or spoiled ballot paper in the ballot box."). Although Australia has relatively high levels of invalid ballots (averaging 2.7% of ballots cast, compared to 0.9% in Canada and 2.1% in the Netherlands), political protest apparently accounts for few of these ballots. See Ian McAllister, *Institutions, Society or Protest, Explaining Invalid Votes in Australian Elections*, 12 ELECTORAL STUD. 23, 24 (1993); see also Timothy J. Powell & J. Timmons Roberts, *Compulsory Voting, Invalid Ballots, and Abstention in Brazil*, 48 POL. RES. Q. 795, 816-20 (1995) (finding that political protest explains only some of the invalid ballots cast, and that the complexity of the ballot provides a better explanation). For a discussion of the benefits of an abstention option, see *infra* note 165 and accompanying text.

¹⁵³ One may wonder why a less drastic alternative, such as universal voter registration, could not accomplish the same goal. The problem is that easing voter registration may not be enough. In their recent study of the effects of the so-called "motor-voter" bill, the National Voter Registration Act of 1993 (NVRA), Highton and Wolfinger conclude that the act's provisions easing registration are likely to have little impact on turnout of those who take little or no interest (or those with high interest) in the political system. Instead, the NVRA "ought to have their greatest impact on individuals with moderate levels of motivation." Benjamin Highton & Raymond E. Wolfinger, *Anticipating the Effects of the National Voter Registration Act of 1993*, at 27 (Aug. 31, 1995) (unpublished manuscript, on file with author). Highton and Wolfinger estimate that the provision of NVRA allowing for voter registration at motor vehicle departments should increase national turnout by 8.7%. See *id.* at 13.

voting laws in the eighteenth century,¹⁵⁴ history records no modern compulsory voting laws in the United States. Most Americans with whom I discuss the idea, including academics, bristle at the thought of such a law: "Compulsory voting is fundamentally inconsistent with the individualism of American political culture;"¹⁵⁵ it is "antithetical to American values."¹⁵⁶ Although instrumental objections to compulsory voting exist, I agree that compulsory voting is a nonstarter because of a libertarian belief prevalent in the United States against government interference in the decision to vote.

Perhaps the strongest instrumental argument against compulsory voting is that it would lead to poorer decisionmaking by the electorate. Although the law would mandate casting a ballot, it would not mandate becoming an informed voter before doing so.¹⁵⁷ There certainly is some merit to this argument. Kirchner's study of Australia's compulsory voting law suggests that a compulsory voting law does not necessarily encourage voters to educate themselves about politics.¹⁵⁸ Moreover, Bennett and Resnick found that although American nonvoters had opinions similar to

¹⁵⁴ Virginia only rarely levied fines against nonvoters, amounting to one-quarter of the voter's annual tax. See J.R. POLE, *POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC* 293 (1966). Georgia's 1777 Constitution imposed a fine of not more than £5 on nonvoters, "but there is no evidence that this provision was ever enforced." A HISTORY OF GEORGIA 75 (Kenneth Coleman ed., 2d ed. 1991). Abraham describes other attempts in the United States to enact compulsory voting laws. See Henry J. Abraham, *What Cure for Voter Apathy?*, 39 NAT'L MUN. REV. 346, 346-47 (1952).

¹⁵⁵ Michael G. Colantuono, Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473, 1503 (1987); see also AMERICAN BAR ASS'N, *supra* note 118, at 4 ("I can imagine the reactions of Texans if they were told they had to vote or it was a misdemeanor not to do so." (quoting Professor Norman R. Luttbeg, Texas A & M University)). Most analyses of proposals to increase American voter turnout do not even consider a compulsory voting law as a viable proposal. See, e.g., GENERAL ACCOUNTING OFFICE, GAO/PEMD-91-1, VOTING: SOME PROCEDURAL CHANGES AND INFORMATIONAL ACTIVITIES COULD INCREASE TURNOUT 21-22 (1991) (noting that penalties for not voting would have a major impact on turnout but failing to discuss such penalties among proposals for increasing American voter turnout); Powell, *supra* note 134, at 35 (assuming that the United States would not wish to introduce compulsory voting).

¹⁵⁶ TEIXEIRA, *supra* note 78, at 154.

¹⁵⁷ See AMERICAN BAR ASS'N, *supra* note 118, at app. A-3 (report of Professor Norman R. Luttbeg, Texas A & M University) ("[O]ne cannot be certain about the qualities of the potential non-voter brought to the polls solely by fear of receiving a non-voting citation and fine.").

¹⁵⁸ See Kirchner, *supra* note 136, at 10-11 (citing a number of statistics demonstrating the ignorance of Australians about their political system).

voters on issues ranging from egalitarianism to civil liberties to government spending, nonvoters tend to be more ill-informed than voters about public affairs.¹⁵⁹

This problem of ignorance could be ameliorated by a compulsory voting law that allows ignorant voters to abstain once at the polls. More importantly, the risk of poor decisionmaking is an unavoidable side effect of equalizing political capital among individuals. Mervyn Field's research reveals that only a small percentage of nonvoters are content with the political system.¹⁶⁰ Without compulsory voting, an important segment of the American population remains without an effective voice. "People 'without voice' are not represented. They are more akin to 'subjects' than to the 'citizens' who English and American proponents of popular sovereignty 'invented' in the seventeenth and eighteenth centuries" ¹⁶¹

Another instrumental argument against a compulsory voting law is that enforcement would be costly and ineffective. The analysis above, however, suggests that the law need not be well-enforced to be effective;¹⁶² the very enactment of the law, with its attendant publicity and perhaps an initial effort at enforcement aimed at those making instrumental calculations, should do much to stimulate voting.¹⁶³

¹⁵⁹ See Bennett & Resnick, *supra* note 72, at 786-88, 799. For a further comparison of the policy preferences of voters and nonvoters, see TEIXEIRA, *supra* note 78, at 97-101.

¹⁶⁰ See AMERICAN BAR ASS'N, *supra* note 118, at 93-94.

¹⁶¹ Bennett & Resnick, *supra* note 72, at 799; see also TEIXEIRA, *supra* note 78, at 105 ("[L]ow and declining voter turnout weakens the democratic link between elites and citizens, particularly in terms of democratic legitimacy and agenda setting."); Crewe, *supra* note 130, at 262 ("[I]t is those who most need the vote who tend to use it least, and universal suffrage fails to provide the political counterweight to the power of property and wealth in the way that was intended by its more radical proponents.").

Nino has justified compulsory voting in Argentina "as legitimate paternalism, given the coordination problems that arise when many individuals belonging to specific sectors of society think that their particular vote is not essential for their group's interest to be taken into account." Carlos S. Nino, *Transition to Democracy, Corporatism and Constitutional Reform in Latin America*, 44 U. MIAMI L. REV. 129, 143 (1989); see also *id.* (calling for compulsory voting "in order to strengthen the democratic power of common citizens against that of corporations").

¹⁶² See *supra* notes 130-44 and accompanying text.

¹⁶³ Two other impediments to a compulsory voting law deserve mention. First, a compulsory voting proposal with a requirement for some sort of national identity card could get embroiled in immigration and other politics, as have proposals for same-day vote registration. See Wolfinger et al., *supra* note 4, at 567-68. On the other hand, compulsory voting without the card requirement likely would result in claims that compulsory voting would lead to voter fraud—as suggested by the

These instrumental arguments, though, dance around the real issue of libertarianism. Although the government tells people what to do all the time—file an income tax return, serve on a jury, register in the Selective Service Program, separate trash¹⁶⁴—hackles rise when compulsory voting is mentioned. I have no good explanation for this phenomenon, especially in a compulsory voting system allowing for abstention.¹⁶⁵

It is doubtful that opposition to a compulsory voting law stems from a concern over time spent going to the polling booth—voting in federal elections occurs one day every two years, and with the

arguments against the National Voter Registration Act of 1993. *See, e.g.*, 139 CONG. REC. S5739-01 (daily ed. May 11, 1993) (statement of Sen. Helms) ("This Bill should be called the Illegal Aliens' Voter Registration Act.").

Second, one might raise First Amendment objections: Forcing someone to vote arguably is tantamount to requiring speech. This point has considerably less force given the abstention option—the only conduct that is forced is showing up to the polls and abstaining in each race. In any case, the Supreme Court has rejected any argument that the vote itself may be expressive speech. *See Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (rejecting a voter's claim that Hawaii's ban on write-in candidates deprives him of the right to cast "a 'protest vote' for Donald Duck"). "[T]he function of the election process is 'to winnow out and finally reject all but the chosen candidates,' not to provide a means of giving vent to 'short-range political goals, pique, or personal quarrels.' Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Id.* (citations omitted); *see also Hoffman v. Maryland*, 928 F.2d 646, 648-49 (4th Cir. 1991) (rejecting the argument that Maryland's voter-purge statute deprives voters of the right to express dissatisfaction through not voting, on grounds that the statute is content neutral and does not block "other means of communicating the same dissatisfaction with the candidates"). *But see Kansas City v. Whipple*, 38 S.W. 295, 297 (Mo. 1896) (striking down, without mentioning particular constitutional violations, a Kansas City penalty tax imposed for failure to vote on grounds that "it is obnoxious to the provisions of the organic law which secures to every citizen protection against partial and discriminative taxation, and against invasion of his sovereign right of suffrage"); Jeffrey A. Blomberg, *Protecting the Right Not to Vote from Voter Purge Statutes*, 64 FORDHAM L. REV. 1015 (1995) (arguing that courts should recognize a fundamental right not to vote and therefore strike down voter purge statutes); Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330 (1993) (arguing that voting should be seen as an expressive activity).

In addition to the impediments, some commentators have argued that compulsory voting in the United States might affect the ideological content of party politics. *See, e.g.*, KEVIN P. PHILLIPS & PAUL H. BLACKMAN, *ELECTORAL REFORM AND VOTER PARTICIPATION* 69 (1975). Depending upon one's views of good politics, stronger ideological parties could be a positive development.

¹⁶⁴ *See* Ross Parish, *For Compulsory Voting*, POLICY, Autumn 1992, at 15, 17 (analogizing compulsory voting to jury duty and military conscription).

¹⁶⁵ *Cf. Kirchner, supra* note 136, at 9 ("[Australia's compulsory voting law] prevents the expression of dissatisfaction with the political system, political parties and individual candidates by denying electors the option of 'staying at home' on polling day.").

possibility of absentee balloting, one could choose the time to vote well in advance. Nor can the opposition be traced to the fact that repressive regimes also have employed compulsory voting—usually for a single candidate or party. This is no better a reason to oppose compulsory voting than it is a reason to oppose the trains running on time in a democracy.

I can sketch two possible explanations for the libertarian opposition. The first is historical. Voluntary voting has been in place too long in the United States for it to be questioned now. Voting in this country is seen as a civic duty, and a call for compulsory voting may be viewed as a failure of the democratic experiment. Americans find it somehow perverse to *require* people to affirm their faith in the democratic system. Compare the situation in Australia, which has had compulsory voting for most of this century. Approximately seventy percent of the Australian public favors compulsory voting.¹⁶⁶ Arguably we can explain current attitudes about compulsory voting as a product of each state's past history with such a law.¹⁶⁷

The other explanation for opposition to compulsory voting in the United States may be found in the "political culture" of American society. According to this cultural explanation, the "individualism" of American society best explains the opposition to the law.¹⁶⁸ This explanation is hard to square, however, with the Australian case, a society no less renowned for its commitment to rugged individualism¹⁶⁹ but apparently committed to compulsory voting as well.

Locating American opposition to a compulsory voting law in the national psyche has a certain intuitive appeal, but it is a troubling explanation for social scientists. Cultural explanations of political

¹⁶⁶ See AUSTRALIAN ELECTORAL COMM'N, RES. REP. NO. 1, SOURCES OF ELECTORAL INFORMATION 17 (1989); Kirchner, *supra* note 136, at 1. Australian attitudes about compulsory voting did not vary significantly with gender, voting intention, education, income, or occupation status. See AUSTRALIAN ELECTORAL COMM'N, *supra*, at 17. Curiously, about 72% of Australians agree with the proposition that most people vote only because the law requires them to do so. See *id.* at 18. Perhaps respondents would have answered this question differently if they were asked whether *they themselves* would vote in the absence of a compulsory voting law.

¹⁶⁷ This argument is bolstered by opposition to Australia's compulsory voting law, which declines steadily with age. See AUSTRALIAN ELECTORAL COMM'N, *supra* note 166, at 17.

¹⁶⁸ See Colantuono, *supra* note 155, at 1503.

¹⁶⁹ For Hollywood's characterization, see "CROCODILE" DUNDEE (Paramount Pictures Corp. 1989).

behavior went out of vogue in political science at about the same time as functionalist sociological theory,¹⁷⁰ and such explanations similarly are beginning to reemerge in a "new and improved" form.¹⁷¹ We need to know much more about how culture arises and shapes preferences before we can advance cultural arguments about why Americans but not Australians are vehemently opposed to a compulsory voting law.

CONCLUSION

A theory of social norms provides a richer account of social interaction than pure rational choice theories. Freed from functionalism, social norms theory promises to advance "post-Chicago" law and economics to new heights.¹⁷² As the emerging theory grapples to explain the origin, stability, and decline of social norms, we should not lose sight of the need to generate testable propositions that can disprove norm-based hypotheses. I have attempted to show here that there is good evidence suggesting the existence of a norm of voting that overcomes the rational choice paradox of voting. Although additional evidence may bolster the case for norms, it is difficult to imagine a rock-solid case given the murky nature of norms.

Social norms theory also provides important information for making normative judgments. Voting without law for many people means simply not voting. The paradox of voting set forth by rational choice theory demonstrates why individuals may not vote even if it is in the collective interest of the individual's group or society as a whole to do so. And the theory of social norms indicates that an equal distribution of a voting norm among groups in society is hardly inevitable. Rather, the unequal conditions for the emergence of a norm of voting have led (along with a host of other factors) to unequal distribution of political power. In addition, a decline in the American voting norm at some point may threaten the legitimacy of our democratic government.

Depending upon one's view of good politics, a compulsory voting law may be justifiable as a preference-shaping mechanism.

¹⁷⁰ The classic work on political culture is GABRIEL A. ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE* (1963). For a critique, see BARRY, *supra* note 18, at 48-52.

¹⁷¹ See David D. Laitin, *The Civic Culture at 30*, 89 AM. POL. SCI. REV. 168 (1995) (reviewing recent work in political culture theory).

¹⁷² See Symposium, *"Post-Chicago" Law and Economics*, 65 CHI.-KENT L. REV. 1 (1989).

Nonetheless, for reasons that may be historical or cultural, and certainly for reasons that are poorly understood, adoption of compulsory voting in the United States is about as likely as being corralled by a red-dyed rope.

