

Pay the Voter: A Legal, Economic, and Policy Analysis of Financially Incentivizing Political Participation

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This Note explores the idea of paying Americans to cast their ballots as a mechanism to increase electoral participation among lower income voters and rebalance the influence that wealthy Americans have on policy outcomes. The Note begins by exploring the rationale behind the idea, drawing on political science, economic, and legal literature to argue that subsidizing the franchise could help rebalance elected officials' perception of the "median voter" away from the wealthy. The Note hypothesizes that a small dollar incentive, perhaps no more than \$20, paid in a municipal election would have a greater incentivizing effect on low-propensity, low-income voters than it would on higher-income voters. Next, the Note explores the legality and constitutionality of paying the voter. When President Johnson signed the Voting Rights Act, vote buying became illegal across the United States. Nevertheless, this Note argues that, based on the legislative history of the Act, a government program to incentivize voting would be legal under federal law. Further, neither the First nor the Fourteenth Amendment poses a barrier to such a program, and a local government in California could enact such a program without violating state law. Finally, the Note explores policy design, proposing that policymakers should begin in a local government, provide direct and highly visible subsidies, and allow voters who cast blank ballots to collect a subsidy.

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INTRODUCTION

If I promise to give you \$20, and all you need to do in return is vote in the next election, would you do it? Your answer to that question likely depends on several considerations. For example, when was the last time you voted? How far could you stretch that \$20? Would you get the money today, in two weeks, or in six months? Would it be illegal for you to accept the money, or for me to give it to you? Unfortunately for you, the answer to that last pair of questions is “yes.” But what if instead, the *government* offered you \$20 for casting a ballot? This Note explores that question by detailing the participatory, economic, and legal considerations that would arise were the government to implement a voter incentive program.

I stumbled across this idea while authoring a paper about campaign finance reform. *Citizens United* outlawed many critical policies aimed at staunching the distorting effects that wealth—and the influence that follows it—has on our political system. As a result of both *Citizens United* and socio-economic imbalances in voter participation, American policy outcomes tend to favor the wealthy.

So, how would paying voters address this concern? The theory behind a voter incentive program proceeds as follows: Incentives influence behavior. A program that pays people to cast a ballot would increase participation, and offering a relatively small size of the payment would incentivize turnout in lower-income communities at higher rates than in wealthier ones. Seeing new activity from historically low-propensity voters, campaigns and lawmakers behind those campaigns would turn their organizing efforts, policy proposals, and attention away from the wealthy and towards the lower-income and underrepresented segments of the electorate.

Scholars, advocates, and lawmakers have proposed (and enacted) excellent policies that would do much to increase participation. Indeed, American democracy would likely be better off if lawmakers implemented ideas like same-day voter registration, universal vote by mail, compulsory voting, a federal holiday for election day, and consolidated local elections. Yet the focus of this Note—a policy I refer to as a “voter incentive program”—operates in a liminal space between campaign finance and participation. It seeks to level the influence playing field by increasing participation.

To date, proposals to incentivize voting have received scant academic attention. In my research, I came across only one article that seriously addressed the topic. And as I discuss below, that article considered the policy from a purely economic lens. Otherwise, the idea of paying people to vote appears in a handful of white papers on the broader topic of incentivizing participation, but authors typically give the policy no more than a paragraph of thought.

This Note argues that a voter incentive program is worth deeper consideration. Paying people to vote could achieve many of the participatory goals as the policies noted above in a much more direct fashion while also checking wealth influence. Local governments would be well positioned to implement such a policy and would face few legal barriers in doing so.

This Note proceeds in three parts. Part I discusses the logic of a voter incentive program, drawing upon political science, campaign finance, and economic literature. Part I concludes by addressing policy counterarguments. Part II analyzes the program’s legality. America outlawed vote buying in 1965 with the passage of the Voting Rights Act; this Note explores that history and argues that a voter incentive program would nevertheless be statutorily and constitutionally permissible. Finally, in Part III, this Note gets into the weeds of policy implementation, proposing that lawmakers begin with a test case: a small-dollar incentive for any voter who casts a completed or blank ballot in a purely

local election. After sufficient operation and refinement at the local level, lawmakers might then consider scaling the policy to the state or federal level.

I am sure many who pick up this Note may think that there are bigger fish to fry—or perhaps bigger DOGEs to leash. So why this, now? Unfortunately, democratic erosion has become a norm rather than an aberration in the United States. Stricter voting laws, partisan gerrymandering, and a hollowing out of campaign finance law, to name but a few, have all weakened once-robust political institutions. So, in the face of democratic backsliding, those committed to the project of representative and multiracial democracy must continue advancing policies and reforms that push back against these recent trends and bring the vision of representative democracy closer to fruition. This Note contributes to that effort by proposing a new and simple idea: Pay Americans for casting their ballots.

I.

THE PARTICIPATORY AND ECONOMIC LOGIC OF A VOTER INCENTIVE PROGRAM

This Part explores the logic of a voter incentive program through two lenses. First, this Part begins by discussing economic inequality in our political system, imbalanced forms of political participation, and how a voter incentive program can create opportunities to bring new voters into the system. Second, this Part draws on political science and economic literature to explore why some voters may choose to stay home on election day and how a small-dollar incentive might help get them to the polls. This Part concludes by addressing counterarguments.

A. *The Participatory Rationale Behind a Voter Incentive Program*

This Section begins by considering how economic inequality skews policy outcomes away from the interests of the median voter. Then, this Section focuses on how a voter incentive program might recalibrate the ways in which elected officials perceive the electorate. Finally, this Section argues that this perception shift could lead elected officials to pursue policy outcomes that more closely align with the interests of the median voter.

Economic inequality has increased significantly in recent decades.¹ And, due to the design of the American political system, those economic inequalities “transform[] into political inequalities that affect both electoral and legislative

1. See, e.g., Ana Hernández Kent & Lowell R. Ricketts, *The State of U.S. Wealth Inequality*, FED. RSRV. BANK OF ST. LOUIS (Oct. 22, 2024), <https://www.stlouisfed.org/institute-for-economic-equity/the-state-of-us-wealth-inequality> [https://perma.cc/6YG3-7E96]; *Geographic Inequality on the Rise in the U.S.*, U.S. DEP’T COM. (June 15, 2023), <https://www.commerce.gov/news/blog/2023/06/geographic-inequality-rise-us> [https://perma.cc/24PN-UHQR]; Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, *Most Americans Say There is Too Much Economic Inequality in the U.S., but Fewer than Half Call it a Top Priority*, PEW RESCH. CTR. (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/> [https://perma.cc/HZD8-7V4P].

outcomes.”² Wealthy Americans vote at higher rates;³ they donate to political causes in higher frequencies and volumes;⁴ and they comprise a greater share of our elected representatives.⁵ In turn, these phenomena produce policy outcomes that favor the wealthy.⁶ I refer to this as “democratic imbalance”: Wealthy Americans have greater access to and influence over democratic inputs and, as a result, reap disproportionate benefits of policy outcomes.

Democratic imbalance operates at two distinct levels. First, Americans’ propensity to vote correlates with their socio-economic status, what I refer to as “electoral imbalance.” For example, in the 2020 election, those in the lowest income bracket—below \$10,000 annually—voted at a rate of 47 percent whereas those in the highest income bracket—above \$150,000—turned out at a rate of nearly 85 percent.⁷ This correlation holds across the socio-economic spectrum and extends back decades.⁸ Elected representatives tend to act in ways that benefit their median voter. Since low-income Americans engage less frequently, representatives perceive the median voter to be wealthier than the median

2. RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN POLITICS* 5 (2016).

3. See, e.g., Matt Stevens, *Poorer Americans Have Much Lower Voting Rates in National Elections than the Nonpoor, A Study Finds*, N.Y. TIMES (Aug. 11, 2020), <https://www.nytimes.com/2020/08/11/us/politics/poorer-americans-have-much-lower-voting-rates-in-national-elections-than-the-nonpoor-a-study-finds.html> [https://perma.cc/79QC-K2F7]; Sean McElwee, *The 1% are More Likely to Vote than the Poor or the Middle Class, and it Matters – A Lot*, VOX (Oct. 24, 2014), <https://www.vox.com/2014/10/24/7055091/class-and-turnout> [https://perma.cc/6XS9-WAM9].

4. See, e.g., Nicholas Confessore, Sarah Cohen & Karen Yourish, *Small Pool of Rich Donors Dominates Election Giving*, N.Y. TIMES (Aug. 1, 2015) <https://www.nytimes.com/2015/08/02/us/small-pool-of-rich-donors-dominates-election-giving.html> [https://perma.cc/ETP3-DLK5]; Fay Lomax Cook, Benjamin I. Page & Rachel L. Moskowitz, *Political Engagement by Wealthy Americans*, 129 POL. SCI. Q. 381, 388 (2014) (“[W]ealthy Americans tend to be very active in politics—far more so than the average citizen, and considerably more so than the merely affluent people found at the upper end of . . . general-population surveys.”).

5. The median net worth of an individual member of the 116th Congress who filed financial disclosures sat at just over \$1 million in 2020. Karl Evers-Hillstrom, *Majority of Lawmakers in 116th Congress are Millionaires*, OPEN SECRETS (Apr. 23, 2020), <https://www.opensecrets.org/news/2020/04/majority-of-lawmakers-millionaires/> [https://perma.cc/ZF92-KWEB].

6. See, e.g., Adam Bonica, Nolan McCarty, Keith T. Poole & Howard Rosenthal, *Why Hasn’t Democracy Slowed Rising Inequality?*, 27 J. ECON. PERSPS. 103, 111 (2013).

7. U.S. CENSUS BUREAU, TABLE 7: REPORTED VOTING AND REGISTRATION OF FAMILY MEMBERS, BY AGE AND FAMILY INCOME: NOVEMBER 2020 (2020), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html> [https://perma.cc/8R3P-PUD4].

8. See, e.g., U.S. CENSUS BUREAU, TABLE 8: REPORTED VOTING AND REGISTRATION OF FAMILY MEMBERS, BY AGE AND FAMILY INCOME: NOVEMBER 2000 (2000), <https://www2.census.gov/programs-surveys/cps/tables/p20/542/tab08.xls> [https://perma.cc/UZB3-BVPB] (showing a similar trend during the 2000 election).

constituent.⁹ In turn, policy outcomes tend to favor those at the higher end of the economic spectrum.¹⁰

This electoral imbalance is even more pronounced in local elections. Voters turn out at lower rates in local elections as compared to national or statewide elections. For example, in 2021, only 23 percent of New York City voters cast a ballot in the mayoral election.¹¹ In many cities, turnout in local elections is often half the turnout of presidential elections.¹² And, due to the plethora of elections in the United States, local turnout in off-cycle elections tends to be heavily skewed toward affluent voters,¹³ especially those who own their homes.¹⁴ In turn, low turnout creates room for special interests—teachers’ unions, homeowners associations, the Chamber of Commerce—to wield great influence over local policy.¹⁵

Second, Americans’ opportunity to influence policy outcomes is positively correlated with wealth, a phenomenon I refer to as “influence imbalance.” This concept is distinct from the notion that money buys elections and, with it, policy outcomes.¹⁶ Rather, “influence imbalance” is the idea that money affects the government’s agenda, the policies elected officials champion,¹⁷ the interest

9. Bertrall L. Ross II, *Addressing Inequality in the Age of Citizens United*, 93 N.Y.U. L. REV. 1120, 1126 (2018) (“While precise calculation is difficult, the median voter in the ‘perceived electorate’ is likely to be richer than the median voter in the actual electorate. The perceived median voter is also likely to be richer than the median voter in the actual electorate, which, according to the median voter theorem, further diminishes or even eliminates pressure on politicians to redistribute in the context of rising economic inequality.”).

10. See, e.g., Bonica et al., *supra* note 6, at 111.

11. Jerusalem Demsas, *Americans Vote Too Much*, ATLANTIC (Aug. 21, 2023), <https://www.theatlantic.com/ideas/archive/2023/08/806anhatta-election-frequency-voter-turnout/675054/> [https://perma.cc/NK4L-KLWM].

12. Daniel J. Hopkins, *Declining Turnout in Big-City Elections: A Growing Problem for Democratic Accountability*, MANHATTAN INST. (May 18, 2021), <https://manhattan.institute/article/declining-turnout-in-big-city-elections-a-growing-problem-for-democratic-accountability/> [https://perma.cc/W5GN-RDU3].

13. See Demsas, *supra* note 11.

14. Hopkins, *supra* note 12.

15. Demsas, *supra* note 11 (“Anzia finds, unsurprisingly, that pressure from interest groups works. Political activity by police and firefighters’ unions correlates with greater spending on their salaries, and cities with more politically active police unions are less likely than cities with less active ones to have adopted body cameras . . . The point is that the government should act according to public need, not based on who has the money, time, and will to create and sustain an advocacy group.”).

16. See, e.g., HASEN, *supra* note 2, at 1; cf. Seema Mehta & Maeve Reston, *Jerry Brown Nearly Matched Meg Whitman’s Campaign Spending on TV in Final Weeks of Race*, L.A. TIMES (Feb. 1, 2011), <https://www.latimes.com/archives/la-xpm-2011-feb-01-la-me-governor-money-20110201-story> [https://perma.cc/AK9J-JQ5S] (showing how a well-resourced candidate for California governor invested over \$140 million of personal wealth into her campaign).

17. See HASEN, *supra* note 2, at 46; see also Peter K. Enns, Nathan J. Kelly, Jana Morgan & Christopher Witko, *The Power of Economic Interests and the Congressional Economic Policy Agenda*, WASH. CTR. FOR EQUITABLE GROWTH (July 2016), <https://equitablegrowth.org/wp-content/uploads/2016/06/enns-kelly-morgan-witko-econinterests-policyagenda.pdf> [https://perma.cc/S4M8-NNPD] (finding that legislators signal concern for the interests of the wealthy at a greater rate than they signal concern for the interests of the poor to attract resources from organized interests).

groups elected officials meet with, and who lawmakers consider part of their circle of advisors.¹⁸ Money affords well-resourced individuals and organizations—through lobbying firms, political action committees, and independent expenditure organizations—greater influence in policy decisions¹⁹ and informal levers of policy formation largely unavailable to most Americans.²⁰

In *Citizens United v. Federal Election Commission*, the Supreme Court took many policies directed at stanching the flow of money in elections off the table.²¹ In the years since *Citizens United*, reformers have turned to what Professor Richard Hasen refers to as “level-up” policies.²² Such policies address influence imbalance by creating more opportunities for those with fewer financial resources to take part in political spending. For example, many states and cities match small-dollar contributions from a voter to a candidate for office, thus increasing the effective value of small-dollar donations.²³ Other cities, like Oakland and Seattle, have enacted voucher programs whereby every voter can receive—and then donate—a certain dollar amount (say \$100) to the campaign

18. HASEN, *supra* note 2, at 50; Joshua L. Kalla & David E. Broockman, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, 60 AM. J. POL. SCI. 545, 552–54 (2015).

19. See HASEN, *supra* note 2, at 46, 53; Jane Mayer, *The Big Money Behind the Big Lie*, NEW YORKER (Aug. 2, 2021), <https://www.newyorker.com/magazine/2021/08/09/the-big-money-behind-the-big-lie> [<https://perma.cc/TV3K-V984>]; Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 POLS. & SOC’Y 152, 175–79 (2010).

20. Cf. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POL. 564, 565–66 (2014) (“Recent research . . . indicates that the apparent connection between public policy and the preferences of the average citizen may indeed be largely or entirely spurious.”).

21. 558 U.S. 310 (2010). *Citizens United* held that “independent expenditures . . . do not give rise to corruption or the appearance of corruption” and, therefore, that the government cannot directly regulate them. *Id.* at 357. This has led courts across the country to strike down similar legislation. See, e.g., *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014) (striking down regulations limits to aggregate individual campaign contributions); *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) (striking down a regulation that limited what an individual can donate to a Super PAC); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1121 (9th Cir. 2011) (enjoining contribution limits as applied to independent expenditure committees in San Diego). But see ANDREW ALBRIGHT, CAL. COMMON CAUSE, ALL HOPE IS NOT LOST: EFFECTIVELY REGULATING INDEPENDENT EXPENDITURES IN A POST-CITIZENS UNITED WORLD 13–14 (2024) (arguing that *Citizens United* allows states to regulate the relationships between candidates and the independent organizations that support them through coordination laws).

22. See HASEN, *supra* note 2, at 84–103. Hasen also defines “level down” policies that check the influence of money in politics by directly regulating things like independent expenditures. *Citizens United* has led to the fall of many “level down” policies. See *supra* note 21.

23. For example, New York voters who donate to a political campaign will have their donations matched; the program matches the first \$50 at 12:1, the next \$100 at 9:1, the final \$100 at 8:1. *Program Overview: Public Campaign Finance Program*, N.Y. STATE PUB. CAMPAIGN FIN. BD., <https://pcfb.ny.gov/program-overview> [<https://perma.cc/7Z4N-ZXBA>] (last visited Mar. 6, 2025).

of their choice.²⁴ Instead of capping the ability of the wealthy to donate, level-up policies seek to bring new donors into the system.²⁵

Level-up thinking is highly relevant to a voter incentive program. The current approach to electoral imbalance often focuses on reducing barriers to entry. For example, automatic or same-day voter registration removes the hurdle of pre-registration, and vote-by-mail eliminates the need to travel to a polling location. Though barrier elimination is critical to electoral rebalancing, level-up thinking indicates that such efforts are necessary but not sufficient. If barrier reduction alone were sufficient, participation rates would likely be much higher in cities and states that have significantly reduced barriers to voting. Indeed, platforms like ActBlue and WinRed have removed barriers to entry for small-dollar donors.²⁶ Yet, small-dollar matching programs have gone one step further by leveraging incentives to draw in a new and diverse set of donors.²⁷ Thus, leveraging the logic of level-up policy to bring in new or infrequent voters may result in greater progress towards achieving a representative electorate and ultimately addressing democratic imbalance. A great policy proposal that leverages this type of level-up thinking to address electoral imbalance is the Mobilization Matching Fund, proposed by Professor Bertrall Ross II.²⁸ This policy would use federal dollars to match campaign expenditures used to mobilize voters. For example, if a campaign spends \$10,000 to mobilize voters, the government would send the campaign another \$10,000 to spend on additional mobilization efforts. Ross recommends that the government consider requiring campaigns to target specific types of voters, such as voters with a history of infrequent electoral participation, commonly referred to as “low-propensity voters.”²⁹

Similarly, this Note applies the thinking of level-up policy to the problem of influence imbalance. Like Seattle and Oakland’s Democracy Dollars, a voter

24. *Democracy Voucher Program: About the Program*, CITY OF SEATTLE, <https://www.seattle.gov/democracyvoucher/about-the-program> [<https://perma.cc/8PUM-2LUW>] (last visited Mar. 6, 2025).

25. See HASEN, *supra* note 2, at 84–103. Granted, Hasen also notes that “[n]ot all level-up measures are a good idea. Some claim that empowering small donors leads to more polarized campaigns and legislatures, for example, because small donors tend to be most ideological and to support highly ideological candidates.” *Id.* at 91.

26. ActBlue and WinRed are online fundraising platforms that serve the Democratic and Republican parties, respectively. See, e.g., Carrie Levine & Parker Overby, *Red Shift: How Republicans Plan to Catch Democrats in Online Fundraising*, NPR (July 1, 2019), <https://www.npr.org/2019/07/01/736990455/red-shift-how-republicans-plan-to-catch-democrats-in-online-fundraising> [<https://perma.cc/2HZQ-LZ53>] (“Republicans covet ActBlue efficiencies and features that make it easier and faster for donors to give, resulting, potentially, in more dollars raised.”).

27. See, e.g., Michael J. Malbin, Peter W. Brusoe & Brendan Glavin, *Small Donors, Big Democracy: New York City’s Matching Funds as a Model for the Nation and States*, 11 ELECTION L.J. 3 (2012) (using an empirical study to find that New York City’s program increased the number of small donors in local elections).

28. Ross, *supra* note 9, at 1186–87.

29. *Id.*

incentive program would use a small dollar amount—say, \$20³⁰—to incentivize participation. And like the Mobilization Matching Fund, a voter incentive program would bring new voters into the system by paying a financial incentive upon receipt of a voter’s ballot.

But a voter incentive program also benefits from one feature that many level-up policies lack. Namely, the policy directly incentivizes behavior. Voucher programs, matching fund programs, and the Mobilization Matching Fund all require involvement from a third party: the campaign apparatus. By contrast, a voter incentive program does not rely on any engagement between a campaign and a voter. Instead, the government would cut out the middleman and incentivize turnout by paying the voter directly. There could be numerous benefits from this approach. For example, removing the campaign as an intermediary could reduce transaction costs, thereby lowering the overall budget constraints of the program. Voters may also be more trustful of a program that does not rely on a political middleman, and instead rewards them directly for making their own, informed decision.

In sum, lawmakers should consider policies that leverage level-up thinking to create new opportunities for political participation. A voter incentive program fits this bill. It could help to shift lawmaker perception of the median voter and, in turn, better align policy outcomes toward the median constituent. As explored in the next Section, a voter incentive policy can achieve both of these goals by shifting an individual voter’s perceptions about the costs and benefits of casting a ballot.

B. The Economic Rationale Behind a Voter Incentive Program

This Section considers why, given the individual and societal benefits that flow from higher rates of political participation, turnout may remain low. Although this Section is styled as “the economic rationale behind a voter incentive program,” the purpose of this Section is to employ traditional economic frameworks to the problem of low participation rates. Specifically, political participation may fall prey to problems of collective action and positive externalities. Although many benefits flow from voting, individuals may free ride on the participation of their peers or otherwise fail to perceive the immediate benefits of voting. Selective incentives, like a voter incentive program, may provide one solution to both problems.

There are many benefits that flow from voting, both to the individual voter and to societies with high levels of participation. At the individual level, voting is how we voice our opinion to the government, advocate for change, and elect those who represent our values. At the societal level, several studies have shown a positive correlation between participation levels and beneficial policy

30. I use this figure for the purpose of discussion. As discussed *infra* Part II.C.2, policymakers can tailor the incentive level to bring in new voters without overly rewarding frequent voters.

outcomes. For example, higher participation may lead to less conflict, higher quality public services, and greater governmental expertise.³¹ Inequality in health outcomes may fall as the turnout gap between high and low educated citizens shrinks.³² Many have argued that as political participation increases among low-income populations, political systems become more responsive to rising levels of inequality.³³ In the United States, some expect that increasing participation will ease polarization,³⁴ lift faith in government, and make policy outcomes more responsive to all segments of the socio-economic ladder.³⁵

Despite these benefits, voter turnout in the United States remains a perennial problem. Though turnout has increased in recent years, with a recent high of 66 percent of eligible voters casting a ballot in the 2020 presidential election,³⁶ 51 percent of eligible voters still stayed home in the 2018 midterms.³⁷ These numbers only degrade at the local level. In 2015 for example, average turnout for mayoral elections in ten of America's largest cities fell below 15 percent.³⁸ Across 463 municipal elections in North Carolina's 2021 elections, only 15 percent of voters showed up.³⁹ In school board elections, turnout typically sits between 5 and 10 percent.⁴⁰

31. See INVOLVE UK, THE TRUE COSTS OF PUBLIC PARTICIPATION 25–27 (2005), https://www.involve.org.uk/sites/default/files/uploads/docuemnt/True-Costs-Full-Report2_3.pdf [<https://perma.cc/TV3K-V984>] (reviewing literature detailing the benefits of voting).

32. Aaron Reeves & Johan P. Mackenbach, *Can Inequalities in Political Participation Explain Health Inequalities?*, 234 SOCIAL SCI. & MED. 112371, at 4–7 (2019).

33. “If those with lower incomes are less likely to vote, then the political system will be less responsive to a rise in inequality.” Bonica et al., *supra* note 6, at 110. “Overall, the kinds of government policies that could have ameliorated the sharp rise in inequality have been immobilized by a combination of greater polarization, lack of voter participation, feedback from high-income campaign contributors, and political institutions that must overcome a series of key pivots before making significant changes.” *Id.* at 121.

34. See EZRA KLEIN, WHY WE'RE POLARIZED 247–48, 257 (2020).

35. See Emily Badger, *What if Everyone Voted?*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/2018/10/29/upshot/what-if-everyone-voted.html> [<https://perma.cc/WMW3-FZB6>].

36. Hannah Hartig, Andrew Daniller, Scott Keeter & Ted Van Green, *Voter Turnout, 2018–2022*, PEW RSCH. CTR. (July 12, 2023), <https://www.pewresearch.org/politics/2023/07/12/voter-turnout-2018-2022/> [<https://perma.cc/D5EB-UUWM>]. Turnout dipped slightly in 2024 with 64 percent of eligible voters casting a ballot in the presidential election. See *2024 General Election Turnout*, ELECTION LAB, UNIV. OF FLA. (Mar. 17, 2025) <https://election.lab.ufl.edu/2024-general-election-turnout/> [<https://perma.cc/AGX8-PAEA>].

37. Hartig et al., *supra* note 36.

38. Kelly Devine, *Visualizing Voter Turnout in Local and School Board Elections*, CARNEGIE CORP. N.Y. (Nov. 2, 2022), <https://www.carnegie.org/our-work/article/visualizing-voter-turnout-local-school-board-elections/> [<https://perma.cc/EP5L-NM92>]; see also Jan Brennan, *Increasing Voter Turnout in Local Elections*, NAT. CIV. LEAGUE (2020), <https://www.nationalcivicleague.org/ncr-article/increasing-voter-turnout-in-local-elections> [<https://perma.cc/RLA6-Z3VX>] (last visited Mar. 10, 2025) (“Across the U.S., only 15 to 27 percent of eligible voters cast a ballot in their local election.”).

39. Demsas, *supra* note 11.

40. Jinghong Cai, *The Public's Voice: Uncontested Candidates and Low Voter Turnout Are Concerns in Board Elections*, NAT'L SCHOOL BDS. ASS'N (Apr. 1, 2020), <https://www.nsba.org/ASBJ/2020/April/the-publics-voice> [<https://perma.cc/G5A7-H9BN>].

Microeconomic theory may provide some insight into low turnout rates. Market-based theories posit that an individual will act based on the perceived utility of their action. For example, numerous political science models have used these same theories to explain why an individual chooses to stay home on election day.⁴¹ Such theories weigh factors like a voter's perceived benefit, duty, or probability of casting the decisive vote against the costs of voting, like waiting in line or skipping work.⁴²

Two specific economic frameworks help to explain why a voter may choose to stay home and indicate that an incentive program may alter that decision: positive externality problems and collective action problems. First, voting may suffer from a positive externality problem. A positive externality is "a consequence or side effect of one's economic activity" that "benefits" an individual or individuals other than the person engaging in the economic activity.⁴³ These spillover benefits are "external" because at scale they accrue to society's benefit; the individual voter does not realize the benefit upon casting their vote.⁴⁴ In a theoretical exploration of positive externalities and voting, Stefan Krasa and Mattias Polborn have described this phenomenon as follows: Assume two candidates, *A* and *B*, are running for office. About 60 percent of the population supports Candidate *A*, but, in a hypothetical match-up, Candidate *A* wins by only one vote. Many of Candidate *A*'s supporters stayed home. Those who turned out to vote for Candidate *A* impose a positive externality on society by electing the general population's preferred candidate.⁴⁵

Why did Candidate *A*'s supporters stay home? Assume that Candidate *A* is popular because they champion an economic program that promises broad social benefits. When a voter—let's call her Jane—casts her ballot, she does not immediately reap the benefits of Candidate *A*'s economic program; the program could take years to enact. Thus, the immediate benefit that Jane derives from voting is quite low. Jane will consider the costs of voting—driving to the polls, waiting in line, missing work—and may decide to stay home.⁴⁶ If, say, Jane's family and friends make the same decision, participation will fall, and Candidate *B* might win. Economists refer to this phenomenon as "market failure"—that is,

41. See S. ERDEM ATYAÇ & SUSAN C. STOKES, WHY BOTHER? RETHINKING PARTICIPATION IN ELECTIONS AND PROTESTS 13–33 (2019) (reviewing theories of electoral participation).

42. *Id.*

43. *Externality*, BLACK'S LAW DICTIONARY (11th ed. 2019).

44. See JEFFREY M. PERLOFF, MICROECONOMICS: THEORY AND APPLICATIONS WITH CALCULUS 605 (4th ed. 2017).

45. Stefan Krasa & Mattias K. Polborn, *Is Mandatory Voting Better than Voluntary Voting?*, 66 GAMES & ECON., BEHAV. 275, 276 (2009).

46. See PERLOFF, *supra* note 44, at 605; see also Stef W. Kight, *The Top Reasons People Didn't Vote*, AXIOS (Nov. 15, 2021), <https://www.axios.com/2021/11/16/election-voting-rights-congress> [<https://perma.cc/VB2S-DFMJ>] (listing reasons people stayed home in the 2020 election).

a market producing a good below its socially optimal level.⁴⁷ Market failure is often a justification for government intervention.⁴⁸

Second, low participation may result from a collective action problem, a concept related to but distinct from the positive externality problem.⁴⁹ Collective action problems arise when there exists some nonexcludable public good, meaning that it is impossible to prevent any one individual from enjoying or using the good.⁵⁰ If Jane believes that she can benefit from the election of Candidate *A* regardless of whether or not she votes, she may stay home and “free ride” off the participation of her peers.⁵¹ The likelihood that Jane will free ride rises the less she perceives her vote as being pivotal to the election’s outcome. Scholars have estimated that an individual has a one in sixty million probability of casting a decisive ballot in American elections.⁵² Indeed, in 2020, 16 percent of non-voters stayed home because they believed that their vote would not make a difference.⁵³

Even if Jane believes that Candidate *A*’s election will be a boon for her community, she may stay home if the costs of voting are too high. A poll of the 2020 election showed that voters tend to be more affluent than non-voters.⁵⁴ For example, 43 percent of non-voters made under \$50,000 annually, compared to 21 percent of voters; 60 percent of voters were married and lived in a dual-income household, compared to 44 percent of non-voters.⁵⁵ Thus, with a smaller economic cushion, non-voters may be particularly sensitive to the costs of voting. Indeed, 19 percent of non-voters stated that voting in their state is “harder than it should be.”⁵⁶ And one study revealed that some marginal voters, those who vote sporadically, may be particularly sensitive to weather patterns on

47. See PERLOFF, *supra* note 44, at 296, 484, 610–11.

48. See *id.*

49. Rational Choice Theory predicts that turnout in large national elections should fall close to zero. Numerous scholars have puzzled over how to square this with comparatively high turnout in national elections. See, e.g., Satoshi Kanazawa, *A New Solution to the Collective Action Problem: The Paradox of Voter Turnout*, 65 AM. SOCIO. REV. 433 (2000). Here, my discussion of the collective action problem focuses less on the electorate as a whole and more on the marginal non-voter who weighs their decision to vote on the costs and benefits of the action.

50. See e.g., PERLOFF, *supra* note 44, at 625–28; INVOLVE UK, *supra* note 31, at 28; Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968).

51. See PERLOFF, *supra* note 44, at 625 (“[F]ree rider problem: people benefit from the actions of others without paying. The people who do not pay benefit from a positive externality. Firms can rarely profitably provide a public good because few people are willing to pay for the good no matter how much they value it.”).

52. Andrew Gelman, Nate Silver & Aaron Edlin, *What is the Probability Your Vote will Make a Difference?*, 50 ECON. INQUIRY 321, 321 (2012).

53. Domenico Montanaro, *Poll: Despite Record Turnout, 80 Million Americans Didn’t Vote. Here’s Why*, NPR (Dec. 15, 2020), <https://www.npr.org/2020/12/15/945031391/poll-despite-record-turnout-80-million-americans-didnt-vote-heres-why> [<https://perma.cc/9WWQ-HPUA>].

54. See *id.*

55. *Id.*

56. *Id.*

election day.⁵⁷ Thus, although Jane believes that voting will benefit her community, she may decide to rely on her peers to vote for her and spend her time on something with more immediate economic benefits.

Coinciding positive externalities and free riding indicates that direct incentives may be a solution to non-voting. Solutions to an externality problem focus on internalizing the benefits (or the costs) at the level of individual decision making.⁵⁸ Even if all the costs of voting fall away, Jane may still stay home. But if Jane sees an immediate and tangible benefit for her vote, here a small payment, her decision to stay home might change. By internalizing the societal benefit to Jane, participation may rise in the aggregate, thus ensuring heightened societal benefit.⁵⁹ Indeed, Krasa and Polborn's theoretical models predict that subsidizing the vote is the best way to improve "the quality of electoral decisions and social welfare."⁶⁰

A collective action problem counsels similar solutions. Recall that a collective action problem arises where a public good is nonexcludable; nobody can take the benefit of Candidate *A*'s election away from Jane. The solution is to provide a selective incentive.⁶¹ Unlike a public good, a selective incentive is excludable; Jane only gets it if she participates.⁶² For example, in Australia, many polling places set up community barbecues and serve "democracy sausages," which a citizen gets only after they have voted.⁶³ Selective incentives can take many forms;⁶⁴ a direct financial incentive surely qualifies.

57. See Anthony George Fowler, *Five Studies on the Causes and Consequences of Voter Turnout* 45–48 (2013) (Ph.D. dissertation, Harvard University) (Digital Access to Scholarship at Harvard) (finding that in any given election, "about 1 in 200 people will have either voted only because the weather was nice or abstained only because it rained or snowed").

58. See PERLOFF, *supra* note 44, at 612–13 (using an emissions fee charged to polluters to illustrate the social benefits of manufacturers internalizing their externalities and bearing the costs of their decisions).

59. For example, there are many positive externalities that correlate with higher levels of education. But left to the free market, private education would become too expensive, and consumption of education would fall to a socially undesirable level. Thus, the government provides free public education. See *Externalities – The Economic Lowdown Podcast Series*, FED. RES. BANK OF ST. LOUIS, <https://www.stlouisfed.org/education/economic-lowdown-podcast-series/episode-11-externalities> [<https://perma.cc/EBZ9-B5EE>].

60. See Krasa & Polborn, *supra* note 45, at 285.

61. See TERRY M. MOE, *THE ORGANIZATION OF INTERESTS: INCENTIVES AND THE INTERNAL DYNAMICS OF POLITICAL INTEREST GROUPS* 28 (1980) ("Selective incentives are private benefits which, precisely because they are private rather than collective in nature, can operate selectively on membership as a whole: they can be conferred upon those who contribute and withheld from those who do not.").

62. See *id.*

63. Tacey Rychter, *How Compulsory Voting Works: Australians Explain*, N.Y. TIMES (Oct. 22, 2018), <https://www.nytimes.com/2018/10/22/world/australia/compulsory-voting.html> [<https://perma.cc/GFB9-CRB6>] (describing "democracy sausages" and the various incentives Australia offers citizens to vote).

64. For example, polling locations in the United States hand out "I voted" stickers, another form of selective incentive.

In sum, a voter incentive program offers an elegant way to address collective action and positive externality problems. A small-dollar payment for voting internalizes benefits at the individual level while also allowing the government to withhold the incentive until the point at which an individual casts their ballot.

C. Policy-Based Counterarguments to a Voter Incentive Program

This Section lays out what I believe to be the strongest policy-focused counterarguments to a voter incentive program. These counterarguments include the risk of incentivizing perfunctory voting, the risk of incentivizing frequent and affluent voters, the risk of high costs, and the risk of credit claiming. For each, I either address why the counterargument is unavailing or present ideas to counteract the unintended policy consequences the counterargument highlights. I leave legal counterarguments for Part III.

1. The Risk of Incentivizing Perfunctory Voting

Some may argue that increasing participation only serves to turn out the “wrong” types of voters, namely uninformed voters who lack the initiative to read up on the issues and candidates before heading to the polls.⁶⁵ In other words, the concern is that new voters will show up only to collect their \$20, not because they understand or care about what is at stake in the election. Though such arguments often sound in elitism and rely on dated tropes about why people may or may not vote, the argument as it relates to a voter incentive program is also wrong on the merits.

A voter incentive program may have the opposite effect on turnout because campaigns will turn their mobilization and education efforts to the new set of voters. Bertrall Ross and Douglas Spencer argue that one of the primary ways that voters learn about issues in an election is through targeted messaging from campaigns.⁶⁶ Although voters can take advantage of free media to learn about the issues on their own, doing so “require[s] greater cognitive skill[] and time to process.”⁶⁷ Thus, campaigns target tailored messaging to both social networks and to formal organizations as proxies to disseminate information to voting communities.⁶⁸ But because “campaigns do not have the resources or inclination to contact everyone,” they decline to target low-propensity voters.⁶⁹ As a result,

65. See, e.g., Anthony Fowler & Michele Margolis, *The Political Consequences of Uninformed Voters*, 34 ELECTORAL STUD. 100, 100 (2024) (“Americans fall short of the democratic ideal of a well-informed electorate. As a result, citizens may have difficulty translating their policy preferences into partisan opinion and vote choices.”).

66. See Bertrall L. Ross II & Douglas M. Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disfranchisement of the Poor*, 114 NW. U. L. REV. 633, 674 (2019).

67. *Id.*

68. See *id.* at 637–74.

69. “There is one consistent feature that cuts across virtually all contemporary campaign mobilization strategies: the avoidance of unregistered, infrequent, and nonvoters.” *Id.* at 675, 680.

low-propensity voters have fewer opportunities to learn about the issues in an election. This dynamic perpetuates socio-economic divisions in participation rates because lower-income voters tend to vote at lower frequencies: Since campaigns target them with less frequency, the long-term underrepresentation of low-income voters continues.⁷⁰

Accepting the proposition that campaigns are one of the main mechanisms through which voters become more educated about the issues in a campaign, the fear of the “uneducated” or “perfunctory” voter begins to dissolve. Today, campaigns may avoid low-propensity voters in part because targeting a low-propensity voter (about whom the campaign has no data of partisan affiliation) may cause that voter to support the opposition.⁷¹ Thus, the outreach itself poses a risk to the candidate. But where a non-voter is incentivized to cast a ballot by way of an external incentive (e.g., a financial subsidy), campaigns may in turn view these voters as an opportunity rather than a risk. A campaign may want to contact newly incentivized voters to frame their message before the opposition has the chance to do so. In turn, newly activated voters may be faced with a bevy of tailored messaging from a multitude of campaigns, providing ample low-effort ways to learn about the stakes of the election.

For those who reject the premise that voter education happens through the campaign apparatus, a voter incentive program may yet provide a solution to the “uneducated” or “perfunctory” voter problem. As discussed further in Part III.B.3, an ideal program design would allow voters to collect their \$20 even if they cast a blank ballot. In a hypothetical world where every new voter failed to learn about the issues and instead opted to cast a blank ballot, there would be no net change from the status quo. And for those who do cast a vote for a random candidate, in the aggregate these votes would likely cancel one another out.

2. *The Risk of Incentivizing Frequent and Affluent Voters*

I find the most challenging counterargument to be one that cuts against the policy’s foundational premise of incentivizing turnout among poor voters: This program will likely dole out a higher share of payments to affluent rather than poor voters. Higher-income voters participate more frequently.⁷² Thus, a voter incentive program may operate as an indirect handout to higher-income voters who will vote regardless of the incentive. For a program intended to alleviate electoral imbalance, its mechanism may have perverse side-effects. There are two main responses to this criticism.

First, although paying people to vote will likely end up benefiting high-earners, it will also likely incentivize a greater number of low-earning non-voters than high-earning non-voters. Every dollar spent on a public policy has some

70. See *id.* at 680–87.

71. See *id.* at 680–81.

72. See the discussion accompanying *supra* notes 6–15.

level of marginal utility both to the individual who receives the benefit and to the government that administers the program.⁷³ From the individual's perspective, this concept is intuitive: One dollar is worth more in relative terms to somebody without money than it is to somebody with a lot of money.⁷⁴ That same logic applies here. Consider two individuals: One is a cashier who makes \$15 per hour, and the other is an attorney who makes \$150 per hour. A twenty-dollar incentive to vote makes taking the time off work more economically advantageous for the restaurant worker, but it will barely move the needle for the attorney. If structured correctly, a voter incentive program could bring in enough low-income or first-time voters to make it worth the cost of subsidizing regular or affluent voters.

Further, the government is well-versed in designing programs to maximize the utility of every dollar spent. Consider the Earned Income Tax Credit (EITC), a policy whose benefits can pull in opposite directions. On the one hand, the EITC encourages low-income workers to enter the workforce by conditioning receipt of aid on employment.⁷⁵ But for a working individual, receiving the EITC might also be an incentive to work fewer hours per week.⁷⁶ Thus, policymakers weigh their desired level of aggregate participation against their desired level of individual work-hour participation. In designing the policy, the government determines the utility of each additional dollar spent by balancing these considerations.⁷⁷

Policymakers can take a similar approach in determining the optimal per-capita incentive to provide for voting. To maximize the utility of each dollar spent, policymakers can set the incentive at the level at which one additional dollar spent brings in the highest number of new voters on a per-dollar basis.⁷⁸ The point at which returns on the dollar begin to diminish should indicate to policymakers that the program has reached the point of overly subsidizing those who would vote regardless of the incentive.

Table 1, below, illustrates this point by sketching out a hypothetical scenario in which the number of new voters increases as the incentive increases. Column (a) represents the amount a voter would receive upon casting their vote.

73. See PERLOFF, *supra* note 44, at 68–69, 80–83.

74. See *id.*

75. See Nada Eissa & Hilary Hoynes, *Behavioral Responses to Taxes: Lessons from the EITC and Labor Supply* 6–10 (Nat'l Bureau of Econ. Rsch., Working Paper No. 11729, 2005).

76. See *id.* (noting that the phase-out rate of the EITC creates a disincentive to work for all but the lowest-wage people studied).

77. See *id.*

78. See generally David Autor, *Lecture 4 – Utility Maximization*, MIT OPEN COURSE 1, 9 (Fall 2016), https://ocw.mit.edu/courses/14-03-microeconomic-theory-and-public-policy-fall-2016/662896910b5530e160224afe6ac30752_MIT14_03F16_lec4.pdf [<https://perma.cc/WKW3-9R3C>] (discussing utility maximization in the context of a constrained budget); PERLOFF, *supra* note 44, at 80–83 (discussing utility maximization under constrained choice); *Utility Maximization*, SCIEDIRECT (2018), <https://www.sciencedirect.com/topics/economics-econometrics-and-finance/utility-maximization> [<https://perma.cc/C5B8-BZR5>] (same) (collecting sources).

Column (b) demonstrates the total number of new voters casting a ballot at the incentive level in column (a). Column (c) measures the difference in the number of new voters between a \$1 and \$2 incentive, a \$2 and \$3 incentive, and so on. Column (d) measures the total number of new voters per dollar by dividing the figure in column (c) by the figure in column (a). Column (d) represents the marginal utility of each dollar spent in terms of its ability to attract new voters.

Table 1: The Marginal Utility of Incentive Levels

(a) Incentive Level	(b) Total New Voters	(c) Marginal New Voters	(d) New Voters Per Dollar
\$1	10	10	10
\$2	100	90	45
\$3	300	200	67
\$4	600	300	75
\$5	800	200	40

If policymakers want to maximize the utility of the dollars spent attracting new voters, they should focus on the figures in column (d). The point at which this figure is the highest, here \$4, is the point at which policymakers should set the incentive level. Even though a \$5 incentive brings in more new voters than a \$4 incentive—eight hundred compared to six hundred, respectively—the \$4 incentive brings in more voters per dollar than the \$5 incentive—seventy-five compared to forty, respectively.⁷⁹ Thus, under this scenario, policymakers seeking to maximize the utility of dollars spent on the program should pay voters \$4 to cast a ballot. The diminishing return on new voters at the \$5 level should signal to policymakers that the program has reached the point of overly subsidizing those who would vote regardless of the incentive, likely more affluent voters.

Second, policymakers can adjust the policy mechanism to specifically target new voters and reduce the risk of incentivizing affluent voters. Part IV.B deals in greater detail with questions of policy mechanism but suffice it to say that lawmakers need not structure the policy to pay voters every time they cast a ballot. Policymakers might instead pay voters for the first three times they vote, each time at a lower dollar amount. This might habituate voting in non-voting populations and reduce the need to continue spending public dollars on those

79. This discussion is largely intended for the cost-conscious lawmaker who may be concerned with over-incentivizing those who already vote regularly. I do not mean to say that it is a bad idea for lawmakers to set an incentive at my hypothetical \$5 level. Indeed, it would be both reasonable and defensible for a lawmaker to conclude that bringing in forty new votes per dollar is worth the cost, even if the marginal utility of the \$5 incentive is lower than the \$4 or \$3 incentives. A lawmaker focused on fully maximizing turnout might wait until the figure in column (d) hits zero; this point would imply that the program has achieved near-universal voter participation, an admirable—yet perhaps unrealistic—goal.

who would vote absent the incentive.⁸⁰ This type of policy mechanism could operate as a continual method of drawing in new voters and avoid evolving into a perennial handout for frequent voters.

3. *The Risk of High Costs*

Another clear argument against this policy is that it could be incredibly expensive. In 2024, 156.7 million people voted in the presidential election.⁸¹ If the federal government paid every voter \$20, the policy would cost over \$3 billion at current turnout rates, a rate this policy aims to increase. At the local level—where I propose legislators should first implement this policy—budget concerns will likely predominate. In Oakland, CA, 125,522 people voted in the 2022 mayoral election.⁸² At \$20 per voter, this policy would cost Oakland over \$2.5 million at current turnout levels. This figure would compound if the City implemented the policy annually. For the 2023–2025 budget cycle, Oakland faced a \$360 million budget deficit.⁸³ One solution to the City’s budgetary woes was to delay the start of the recently enacted Democracy Dollars program.⁸⁴ A policy to pay voters might meet a similar fate.

There is no easy answer to this concern; indeed, all public programs face budgetary concerns. As discussed further in Part IV.B.2, cities could avoid high costs by structuring a policy to pay only first-time voters or offer the incentive in only certain elections, for example. The city could also provide the benefit for only certain elections, such as mayoral elections. These adjustments could defray the program’s costs significantly.

Counterintuitively, requiring local governments to pay their voters might reduce costs in the long run. By increasing the expense of elections, states and localities might choose to consolidate their elections. One key reason why people

80. One study found that voting in one election substantially increases the probability that a voter will vote again in the following election. See Alan S. Gerber, Donald P. Green & Ron Shachar, *Voting May be Habit-Forming: Evidence from a Randomized Field Experiment*, 47 AM. J. POL. SCI. 540, 545–46 (2003).

81. *2024 General Election Turnout*, UNIV. OF FLA. (Mar. 17, 2025), <https://election.lab.ufl.edu/2024-general-election-turnout/> [https://perma.cc/AGX8-PAEA].

82. *General Election - 11/08/2022*, OFF. ELECTION SITE OF ALAMEDA CNTY., <https://www.alamedacountyca.gov/rovresults/248/> [https://perma.cc/676R-P3V4] (last updated Dec. 8, 2022).

83. *Oakland City Council Adopts Balanced Budget, Closing Historic Deficit and Maintaining Critical Services*, CITY OF OAKLAND (June 27, 2023), <https://www.oaklandca.gov/news/oakland-city-council-adopts-balanced-budget-closing-historic-deficit-and-maintaining-critical-services> [https://perma.cc/QH6Z-34LU].

84. See Eli Wolfe, *Oakland’s Democracy Dollars Delayed, But Not Dead*, OAKLANDSIDE (July 26, 2023), <https://oaklandside.org/2023/07/26/oakland-democracy-dollars-delayed-until-2026-election-campaign-finance/> [https://perma.cc/DJX4-FMN3] (discussing the delay of the Democracy Dollars’ launch until 2026).

often do not vote is that in many cities, there are simply too many elections.⁸⁵ Cities that consolidate their elections to align with state or national elections can reduce their long-term costs by sharing those costs with other levels of government that hold elections on the same day.⁸⁶ In a sense, the overabundance of local elections may impose a negative externality of diminished voter participation on localities. As discussed in Part II.B, a \$20 subsidy to the voter may internalize the positive externalities of voting at the individual level. Similarly, requiring localities to pay for such a program may internalize the negative externalities of abundant elections at the governmental level. Indeed, if implementing a voter-incentive policy also incentivizes cities to consolidate elections to defray costs, this too could have a knock-on participatory benefit. Voters pay attention to elections when they occur less frequently.⁸⁷

4. *The Risk of Credit Claiming*

The final, and perhaps least concerning, risk potentially associated with a voter incentive program is that candidates for office—particularly incumbents—will find ways to take credit for the program. I call this the “credit-claiming risk.” In 1965, Congress passed the Voting Rights Act and in doing so enacted the Clean Elections Amendment, which made it a federal crime to financially incentivize paying an individual to vote.⁸⁸ The provision’s purpose was “to stop fraudulent registrations and vote buying in any election involving national candidates.”⁸⁹ At the time of the Voting Rights Act’s passage, its drafters understood that candidates might conscript the levers of government to achieve their ends, typically by promising voters jobs in exchange for electoral support.⁹⁰

Despite the Clean Elections Amendment, the fear that candidates will claim credit for policies that benefit voters persists. For example, when the federal government sent \$1,200 checks to millions of Americans at the height of the COVID-19 pandemic, President Trump’s name appeared in large type on the

85. See Demsas, *supra* note 11 (“We have too many elections, for too many offices, on too many days. We have turned the role of citizen into a full-time, unpaid job. Disinterest is the predictable, even rational response.”).

86. See ZOLTAN L. HAJNAL, PAUL G. LEWIS & HUGH LOUCH, *MUNICIPAL ELECTIONS IN CALIFORNIA: TURNOUT, TIMING, AND COMPETITION* ix (2002).

87. Hopkins, *supra* note 12 (“[T]he frequency of American elections can dampen and distort voter turnout . . . [b]ut cities can increase turnout, often dramatically, by holding their mayoral elections alongside statewide or federal elections.”).

88. See 52 U.S.C. § 10307(c).

89. 111 CONG. REC. app. at 9076 (1965) (explaining the Clean Elections Amendment).

90. See, e.g., *To Enforce the 15th Amendment to the Constitution of the United States: Hearing on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. 549 (1965) (statement of Leander H. Perez, Judge, Plaquemines Parish, La.) [hereinafter Perez Testimony] (“I know of a personal friend of mine whose wife ran for commissioner in New Orleans. He said, ‘Judge, you want to hire some Negro preachers?’ I said, ‘Why, do you have them on the payroll?’ He said, ‘I have got 40 of them.’”).

front of those checks.⁹¹ At the time, President Trump was running for reelection, and many saw this as a political attempt to curry favor with voters in advance of a tight election.⁹² Indeed, to this day, many voters continue to credit President Trump for those payments because his signature appeared on the checks, demonstrating that the credit-claiming risk still exists.⁹³

Two factors may exacerbate the credit-claiming risk. First, the risk increases as the dollar amount the government pays increases. A voter might feel more thankful to a politician for a \$500 check than they would for a \$20 check. A solution to this risk is to keep the payment amount relatively small, an approach that comports with similar policies that reward individuals for fulfilling their constitutional duties. For example, in California, jurors receive no more than \$15 per day for their jury service.⁹⁴ Second, the credit-claiming risk may rise in states and localities where a single party dominates the electoral process. For example, in New York, the Democratic Party controlled forty-five of the fifty-one city council seats following the 2023 election.⁹⁵ There, voters may associate a policy with the Democratic Party, whose officials may in turn use that association to further entrench their power. While this concern may be valid, it stems more from the United States's increased geographic political polarization rather than from the voter incentive policy itself. And lawmakers can ameliorate this concern by ceding administration of the policy to a nonpartisan, politically insulated body.

The heart of this concern is more complex than the fear that an elected official will take credit for a generally applicable program. Elected officials should take credit for programs they implement; doing so can protect that program from repeal later on. Rather, the concern is that an elected official may insinuate that receipt of the program's benefit is contingent upon a favorable vote, which implicates the heart of the Clean Elections Amendment. But every policy that benefits a constituency is susceptible to this risk. Though voters may elect a specific party to strengthen or reform programs like Medicare or Social Security, it is unlikely that the electorate gives the incumbent credit for Social Security benefits or Medicare benefits, given that the programs have been around for many decades. Indeed, over time voters come to understand such programs

91. See Chris Young, *How did Trump's Name End up on Coronavirus Relief Checks in 2020? ABC News Successfully Sued to Find Out*, REPS. COMM. FOR FREEDOM OF THE PRESS (Mar. 2, 2022), <https://www.rcfp.org/trump-covid-checks-abc-news/> [<https://perma.cc/BUR4-TEED>].

92. See *id.*

93. The Daily, *Black Voters and the Democratic Party: One Family's Story*, N.Y. TIMES, at 26:05 (Oct. 31, 2024) <https://www.nytimes.com/2024/10/31/podcasts/the-daily/black-voters-democratic-party.html> [<https://perma.cc/AT43-SGTD>] ("The money was pushed forward by Democrats in Congress, but Trump's name was on the checks, and so many people gave him credit for that relief.").

94. *Jury Service*, CAL. CTS., <https://www.courts.ca.gov/jury-service.htm> [<https://perma.cc/6FTE-MJ8B>] (last visited Mar. 10, 2025) (noting that jurors are eligible for this per diem and a mileage payment starting on their second day of service).

95. *Council Members & Districts*, N.Y. CITY COUNCIL, <https://council.nyc.gov/districts/> [<https://perma.cc/25P8-557N>] (last visited Oct. 13, 2023).

as critical components of a welfare state.⁹⁶ In this context, once incentive payments become regularized, the credit-claiming risk will dissipate. Voters will understand that the benefit spans party and electoral cycle.

* * *

In summary, any new program or policy comes with risks. Some of those risks, like credit-claiming, are attendant to every type of policy. For newer risks, like over incentivizing frequent or affluent voters, policymakers can tailor the incentive to optimize the program to target those voters who simply turn out to vote less frequently. Despite the potential unknowns, a voter incentive program is an adaptable policy that can provide a solution to the collective action and externality problems inherent in voting. In turn, the resulting participatory increases may help reorient lawmakers' attention away from the wealthy and toward the median constituent.

II.

THE LEGALITY OF A VOTER INCENTIVE PROGRAM

This Note assumes that some local government in California might take an interest in a voter incentive program. This Part assesses whether doing so would violate statutory, constitutional, or California state law. This Part begins by arguing that neither federal nor state statutes would stand in the way of a voter incentive program. Next, this Part explores the constitutionality of a voter incentive policy under the Fourteenth Amendment, First Amendment, and the unconstitutional conditions doctrine, specifically arguing that such a policy would pass constitutional muster if challenged as a burden on the “right” not to vote.

A. Federal and State Statutory Analysis

Five statutes are relevant to this analysis: 18 U.S.C. § 597, which punishes expenditures intended to influence voting; 52 U.S.C. § 10307(c), which prohibits paying another to vote in a federal election; and California Elections Code sections 18521 to 18523, which prohibit vote buying.⁹⁷ While these statutes operate together to prohibit a private individual from paying somebody to vote for or against a candidate in any election—federal, state, and local—none of these statutes apply to a government *policy* aimed at incentivizing turnout in a purely state or local election.

96. Cf. Ashley Kirzinger, Isabelle Valdes, Alex Montero, Liz Hamel & Mollyann Brodie, 5 *Charts About Public Opinion on the Affordable Care Act*, KFF (May 15, 2024), <https://www.kff.org/affordable-care-act/poll-finding/5-charts-about-public-opinion-on-the-affordable-care-act/> [<https://perma.cc/336S-3VA5>] (demonstrating the growing acceptance and popularity of the Affordable Care Act since its passage in 2010).

97. See 18 U.S.C. § 597; 52 U.S.C. § 10307(c); CAL. ELEC. CODE §§ 18521–18523. Although the scope of this Note is limited to assessing California statutory law, a similar analysis could apply to any other state.

1. *Federal Statutes that Criminalize Vote Buying*

First, 18 U.S.C. § 597 punishes by fine, imprisonment, or both, “[w]hoever 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.”⁹⁸ The statute further punishes anybody who accepts such expenditure in exchange for their vote.⁹⁹

Although the statute’s plain language is broad—purporting to criminalize any use of financial means to incentivize voting—courts have narrowly construed this statute in two distinct ways. On the one hand, courts have read this language as only applying to the election of federal officers.¹⁰⁰ Thus, no person could challenge a voter incentive program under this statute where the program operates in an election in which only state or local officers appear on the ballot.¹⁰¹ Indeed, this comports with the principle that courts avoid applying statutes to states unless Congress clearly indicates its intent to regulate state activities.¹⁰² On the other hand, to indict somebody under the statute, the government must show that an individual made an expenditure with the purpose of influencing the election of a federal officer.¹⁰³ Thus, where an individual paid another to influence the election of a state official—even where a federal officer appeared on the ballot—§ 597 would not apply.¹⁰⁴ Further, the requirement that a payment have the purpose of influencing a federal election indicates that the statute does not apply to a voter incentive program because an incentive program seeks to increase turnout and not sway the election in a given direction. The “influence” such a policy might have on an election would be available to every voter who turns in a ballot, not in exchange for supporting one candidate or another. Finally, as discussed below regarding 52 U.S.C. § 10307(c), the statute’s inclusion of criminal penalties also indicates an implied requirement of private action.

The second statute relevant to this inquiry is 52 U.S.C. § 10307(c), known as the “Clean Election Amendment,” which criminalizes paying or accepting payment for voting on election day. The Senate incorporated its language into the Voting Rights Act on April 30, 1965.¹⁰⁵ It reads as follows:

98. 18 U.S.C. § 597.

99. *See id.*

100. *See United States v. Simms*, 508 F. Supp. 1179, 1183 (W.D. La. 1979) (“Congress had previously enacted a provision designed to govern expenditures to influence voting in an election for a federal official.”).

101. *See* U.S. DEP’T JUST., *FEDERAL PROSECUTION OF ELECTION OFFENSES* 32 (2017) [hereinafter *DOJ Handbook*].

102. *See, e.g., Gregory v. Ashcroft*, 501 US. 452, 461 (1991) (stating this rule “is nothing more than an acknowledgement that the States retain substantial sovereign powers . . . with which Congress does not readily interfere”).

103. *See* DOJ Handbook, *supra* note 101, at 43 n.19.

104. *See United States v. Bruno*, 144 F. Supp. 593, 594 (N.D. Ill. 1955) (dismissing vote buying charges because “[t]he indictment contains no allegation that any of the voters were influenced to vote for a candidate for federal office”).

105. 111 CONG. REC. app. at 9076–77 (1965).

52 U.S.C. § 10307(c) False information in registering or voting; penalties Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both: *Provided, however*, That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

The Clean Elections Amendment is broader than § 597 because it applies whenever a federal officer appears on the ballot, regardless of whether the purpose of the payment was to influence the federal election. Since its inception, the proponents of the Clean Elections Amendment understood it to apply to all “mixed-elections,” or elections in which both a federal officer and a state or local official appear on the ballot.¹⁰⁶ But § 10307(c) explicitly does not extend to purely local or state elections, which the drafters confirmed in their explanation of the amendment.¹⁰⁷ Thus, no person could challenge a voter incentive program under either § 597 or § 10307(c) if the program applied in a purely state or local election.

Further, courts avoid applying statutes to states unless Congress expresses a clear intent to alter the “constitutional balance between the [s]tates and the [f]ederal [g]overnment,”¹⁰⁸ and § 10307(c) does not contain this clear language.

106. See *id.* at 1076 (“Explanation of Amendment”) (“[H]owever, in those cases where candidates for local office appear on the same ballot as candidates for the U.S. Congress or Senate or presidential electors, then they would be subject to the provisions of the amendment.”); see also DOJ Handbook, *supra* note 101, at 39 (“In fact, the original version of Section 10307(c) would have applied to all elections. However, constitutional concerns were raised during congressional debate on the bill, and the provision’s scope was narrowed to elections that included a federal contest.”); *United States v. Simms*, 508 F. Supp. 1179, 1183 (W.D. La. 1979) (“[T]he designed impact of this statute was to extend the protection of the federal courts to local elections held at the same time that any federal office was voted upon to secure the federal election from the danger of any impropriety or irregularity.”); *United States v. Mason*, 673 F.2d 737, 739 (4th Cir. 1982) (“Thus the statute uncategorically proscribes payment or offers of payment for voting, whether in a purely federal election or a mixed federal/state election. There is no requirement that the payment or offer of payment be made specifically on behalf of a federal candidate or that a special intent to influence a federal race exist.”).

107. See 111 CONG. REC. 9076 (1965) (“Explanation of Amendment”) (“The penalties under this amendment are not applicable in local elections such as school boards, city councils, etc., when such elections are held separately from national elections . . .”).

108. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal quotations omitted); see also *United States v. Gradwell*, 243 U.S. 476, 485 (1917) (“[T]he policy of Congress for so great a part of our constitutional life has been, and now is, to leave the conduct of the election of its members to state laws,

Consider the clear statement in § 2 of the Voting Rights Act, codified at 52 U.S.C. § 10301. This provision bans electoral policies “imposed or applied by any State or political subdivision” that abridge voting rights based on race.¹⁰⁹ And subsection (b) clearly contemplates policies in “State[s] or political subdivision[s],” signaling Congressional intent to regulate elections even where no federal officer appears on the ballot.¹¹⁰ By contrast, 52 U.S.C. § 10307(c) includes no such language. And § 10307(c) explicitly cabins itself to elections in which a federal officer appears on the ballot, stating in clear language that it should not apply in purely local or state elections.¹¹¹

But at a more fundamental level, § 10307(c) (like § 597) does not apply to government policy because it includes an implied requirement of private action. Such a requirement means that the provision only proscribes private conduct; it does not explicitly reach conduct taken pursuant to government policy or by government agents acting in their official capacity. In other parts of the Voting Rights Act, Congress used specific language to proscribe government policy as distinct from private action; such language is absent from § 10307(c). For example, § 10307(a) prohibits any person from preventing a registered voter from casting a ballot, but it applies only to those “acting under color of law.”¹¹² And subsection (b) applies to government and private actors alike; it prohibits any person, “whether acting under color of law or otherwise,” from intimidating, threatening, or coercing any voter from casting a ballot.¹¹³ Thus, subsections (a) and (b) demonstrate how Congress curbs government policy: by using the phrase “under color of law.” By contrast, subsections (c), (d), and (e) include no such language.¹¹⁴ Thus, a court assessing subsection (c) may reason that by excluding¹¹⁵ “under color of law,” Congress did not intend this statute to reach government policy.¹¹⁶

administered by state officers, and that whenever it has assumed to regulate such elections it has done so by positive and clear statutes . . .”).

109. 52 U.S.C. § 10301(a).

110. *Id.* § 10301(b).

111. 52 U.S.C. § 10307(c) (“*Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.”).

112. *Id.* § 10307(a).

113. *Id.* § 10307(b).

114. *Id.* §§ 10307(c)–(e).

115. For example, a court may use a rule of interpretation like *expressio unius*, which generally stands for the idea that “expressing one item of [an] associated group or series excludes another left unmentioned.” *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002) (internal citation omitted); *see also* *N.L.R.B. v. SW General, Inc.*, 580 U.S. 288, 302 (2017) (“The force of any negative implication, however, depends on context . . . [the] canon applies only when circumstances support a sensible inference that the term left out must have been meant to be excluded.”) (internal citation omitted) (cleaned up).

116. It is worth noting that § 10307(c) can reach government officials. Indeed, the federal register is replete with caselaw involving government officials attempting to buy votes. But typically, when

Section 10370(c)'s criminal prohibitions further support the notion that it requires private action. Subsection (c) criminalizes vote buying with a fine of up to \$10,000 or imprisonment of five years.¹¹⁷ So too for subsections (d) and (e).¹¹⁸ Congress frequently regulates private behavior through criminal penalties, so the absence of the "color of law" language, paired with a criminal penalty, is a straightforward way of regulating private action. By contrast, neither subsection (a) nor (b) applies criminal penalties because both apply where an individual acts pursuant to government policy.¹¹⁹ This accords with basic logic. Consider a scenario in which a state election official follows state law and denies another their right to vote. If subsection (a) or (b) included a criminal penalty, that state official could face federal criminal charges for following state law.

The legislative history further supports the conclusion that § 10307(c) does not prohibit a voter incentive program. The animating worry behind the Clean Elections Amendment was protecting the integrity of the vote. Once the federal government outlawed state practices of keeping Black voters from the polls, countless new voters would enter the system. Officials worried that nefarious actors—be they self-interested party officials, racist white voters, or both—would use every means at their disposal to corrupt the Black vote.¹²⁰ Many found this concern compelling.¹²¹ Others worried that one corrupted vote¹²² effectively nullified a validly cast vote.¹²³ In either instance, the amendment's primary purpose sought to fortify electoral integrity.

On March 30, 1965, Judge Leander H. Perez of Louisiana testified in front of the Senate Judiciary Committee, demonstrating why so many senators were concerned about the corruption of the Black vote. Perez was the party boss of

government officials engage in this behavior, they do so in their capacity as private candidates running for public office. *See, e.g.,* *United States v. Campbell*, 845 F.2d 782, 784 (8th Cir. 1988) ("Campbell was a candidate for re-election as county judge of Newton County, Arkansas at the general election . . . at which time a U.S. Senator and Representative . . . were to be elected."). But the point here is that subsections (a) and (b) serve to eradicate state policies and laws that allowed election administrators to keep Black voters from the polls, whereas subsection (c) operates upon private interactions between voters and candidates.

117. 52 U.S.C. § 10307(c).

118. *See id.* § 10307(d)–(e).

119. *See id.* § 10307(a)–(b).

120. H.R. REP. NO. 439, at 50 (1965) ("For it can confidently be expected that once systematized impediments to Negro registration and voting are removed, there will be an increase in practices of fraud and corruption in attempts to nullify the impact on election results of the reinfranchised voters.").

121. *See id.* ("The committee-Celler bill attempts to meet this serious problem only to a limited extent . . . the vice of paying or accepting payment for voting is not even mentioned.").

122. "Corrupted," as used here, refers to a ballot cast under circumstances that § 10307(c) prohibits.

123. 111 CONG. REC. 8423 (1965) (statement of Sen. Williams) ("I feel just as strongly that [the] guarantee [of equal opportunity to participate in the electoral process] is meaningless if that vote is not counted properly, or if that vote is effectively canceled by a vote that is illegally cast, or if another person illegally registers to vote.").

Plaquemines Parish, where he “held absolute power.”¹²⁴ In an exchange with Senator Dirksen, Perez maintained that Louisiana officials did not actively keep Black voters from the polls.¹²⁵ But he also admitted that he does not “beat around the bushes to register Negroes. You know why . . . in Saint Bernard . . . there [are] about 800 Negroes registered in every election. They have got to pay them off. You have got to bribe them.”¹²⁶ Perez, in starkly racist terms, revealed that once a Black person registered to vote, white candidates believed that the only way to win that vote was to buy it.¹²⁷

Perez’s account accords with similar anecdotes regarding this concern. When introducing the Clean Elections Amendment, Senator Williams read into the record a *Chicago Tribune* article that acknowledged, “[a]t every election in Chicago thousands of Negroes and other citizens are intimidated and bribed by precinct captains.”¹²⁸ Senator Miller read statements by Sidney Holzman, the Democratic chairman of the Chicago Board of Election Commissioners, who stated, “[a]ll precinct captains worth their salt pay for votes.”¹²⁹ An article in the *Washington Star* cited the history of fraudulent elections in Arkansas and nicely summed up the necessity of the Clean Elections Amendment: “The evils of . . . fraud and trickery are likely to be increased by the voting rights bill, . . . the Federal Government, having taken the original step in policing local elections, eventually will have to take another. The right to vote is certainly no more basic than the right to have that vote counted honestly, and not to have it canceled by a fraudulent vote.”¹³⁰ Thus, the purpose of the Clean Elections Amendment is clear: It protects the integrity of the vote by preventing private individuals from using fraud, bribery, and false information to corrupt the voting behavior of those Americans that state laws had previously forcibly kept from the polls due to the color of their skin.¹³¹

124. GLEN JEANSONNE, LEANDER PEREZ: BOSS OF THE DELTA xxi (2006). Perez was known for being a staunch segregationist, deeply racist, and one of the most powerful figures in Louisiana politics. See *id.*; see also *National Affairs: Racist Leader*, TIME (Dec. 12, 1960), <https://content.time.com/time/subscriber/article/0,33009,871886-1,00.html> [<https://perma.cc/UH3S-AS67>].

125. See Perez Testimony, *supra* note 90, at 543.

126. See *id.* at 544.

127. *Id.* at 550. Continuing in his exchange with Senator Scott, Perez explained that party officials would “segregate” Black voters by how much a candidate paid them: “There are \$2 votes, \$5 votes, and \$10 votes.” Senator Scott asked, “You segregated the voters according to how much you paid them, then[?]” Mr. Perez answered: “Yes, sir.” *Id.*

128. 111 CONG. REC. 8423 (1965) (statement of Sen. Williams, quoting an unnamed *Chicago Tribune* editorial).

129. 111 CONG. REC. 8814 (1965) (statement of Sen. Miller) (citing Nobuo Abiko, *Vote Fraud Charged: Eagle Eyes in Chicago*, CHRISTIAN SCI. MONITOR (Nov. 6, 1964)).

130. 111 CONG. REC. 8424 (1965) (statement of Sen. Williams) (citing Richard Wilson, *A New Evil to Correct an Old?*, WASHINGTON (D.C.) STAR (Apr. 21, 1965)).

131. See, e.g., *United States v. Simms*, 508 F. Supp 1179, 1183 (W.D. La. 1979) (“The legislative history of this section illustrates that its purpose was to assure ballot security for the expanded franchise contemplated by the Voting Rights Act.”); DOJ Handbook, *supra* note 101, at 43–44 (“The statute rests

The aims of a voter incentive program stand in sharp contrast to the concerns that breathed life into the Clean Elections Amendment. Far from corrupting the vote, such a program would bring more voters to the polls, irrespective of how they cast their ballot. And in turn, increased participation safeguards the integrity of the process,¹³² which places a voter incentive program in line with the Clean Elections Amendment's underlying purpose. Finally, the Amendment's drafters feared that an illegally cast ballot would cancel out a validly cast ballot.¹³³ This fear implicates a concern that one voter may cast their ballot under different considerations—namely commercial—from another voter, thus compromising the integrity of certain votes. But the benefits of a voter incentive program are universal; a voter need only cast a ballot to receive the incentive, thus maintaining a parity of conditions for all voters and respecting the goal of the Clean Elections Amendment.

2. *California State Statutes that Criminalize Vote Buying*

Like the federal government, California also criminalizes vote buying¹³⁴ in a manner that does not reach government action. Further, California's statutes only ban using financial means to keep somebody from the polls or for influencing an individual to vote for or against a specific candidate.¹³⁵ Thus, a voter incentive program would likely survive a challenge under the California Elections Code.

California prohibits individuals and political committees from using payment, gifts, or other consideration to influence an individual's vote;¹³⁶ California also criminalizes the acceptance of such consideration.¹³⁷ Like the federal statute, California's vote-buying statutes apply criminal penalties to those found guilty of violating their prohibitions,¹³⁸ implying that the State did not intend to proscribe government policy in passing these statutes. Thus, neither the State of California nor a local government would face statutory barriers to enacting a voter incentive program.

Even if the California Elections Code did cover government policy, the statutes' plain texts do not prohibit anybody from paying an individual to simply show up on election day. The two relevant statutes, Sections 18521 and 18522,

on the premises . . . that the selection of the nation's leaders should not degenerate into a spending contest, with the victor being the candidate who can pay the most voters . . .").

132. See *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 197 (2008) ("[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.").

133. CAL. ELEC. CODE § 18522; see 111 CONG. REC. 8423 (1965) (statement of Sen. Williams) ("Is a man any better off when his ballot is canceled by an illegally cast ballot than he is if he does not vote at all?").

134. See CAL. ELEC. CODE §§ 18521–18523.

135. *Id.* §§ 18521, 18522.

136. *Id.* §§ 18521–18523.

137. *Id.* § 18521.

138. *Id.* §§ 18521, 18522.

are structurally and linguistically similar in this respect. Both prohibit using financial means to convince an individual to vote or refrain from voting “for any particular person or measure.”¹³⁹ The statutes further criminalize using financial means to convince a voter to “remain away from the polls” and “refrain from voting.”¹⁴⁰ The statutes primarily criminalize two types of behavior: improperly influencing a voter to (1) vote for or against a specific candidate and (2) stay home on election day. Notably absent from this list is any prohibition on using financial means to encourage an individual to cast a ballot for a candidate *of their own choosing*. Here too, a court may reason that by declining to include such language—given a list of other clear prohibitions—California did not intend to reach policies or behaviors that simply encourages individuals to cast a ballot.¹⁴¹

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In sum, neither federal nor California state law prohibit a voter incentive program. A voter incentive policy would not influence an election’s outcome, and the program would operate through a governmental policy, so it lacks the private action and intent to influence that such statutes proscribe.

B. Constitutional Analysis: The “Right” Not to Vote

A future litigant may also challenge a voter incentive policy under the federal Constitution, possibly alleging that the policy burdens their “right not to vote.” At the outset, I will note that one benefit of this policy is that potential litigants would face a high hurdle to even getting into court. Unlike a system of compulsory voting—where the government sanctions non-voters—declining to vote poses minimal to no burden, thus posing a high barrier for a litigant to demonstrate an injury in fact. But standing is outside the scope of this Note;¹⁴² for this analysis, I assume the existence of a viable suit.

This Section explores the idea of a constitutional “right not to vote” under the Fourteenth Amendment, the First Amendment, and the unconstitutional conditions doctrine. A viable lawsuit might allege either a direct burden on the right not to vote or that the program imposes an unconstitutional condition,

139. *Id.* (emphasis added).

140. *Id.*

141. In 2015, the Southwest Voter Registration Education Project created a privately run voter incentive program. The group entered every person who voted in District 5 of the Los Angeles Board of Education into a \$25,000 lottery. Howard Blume, *Voter in L.A. School Board Race Wins \$25,000 for Casting a Ballot*, L.A. TIMES (July 17, 2015), <https://www.latimes.com/local/lanow/la-me-ln-lausd-election-winner-20150717-story.html> [<https://perma.cc/647N-WYJN>].

142. A theory of standing to such a program might take one of three forms: (a) a vote-dilution plaintiff arguing that the policy somehow dilutes their voting power; (b) a candidate for office claiming that the policy somehow changed the outcome of the race; (c) a non-voter claiming that the policy somehow abridges a fundamental right. For this analysis, I assume the type of case brought in federal court would take the character of the third category: a non-voter claiming a right not to vote. *See, e.g.,* Partnoy v. Shelley, 277 F. Supp. 2d 1064, 1071 (S.D. Cal. 2003) (finding that plaintiffs who had shown a danger of “being coerced into having to vote” had satisfied Article III’s “case or controversy” requirement).

requiring individuals to forego such a right to qualify for the program's benefits. Paltry evidence exists to support either of these constitutional attacks. And even if such an argument prevailed, a narrowly tailored policy would readily surmount constitutional scrutiny.

1. *The Fourteenth Amendment*

The Constitution does not explicitly protect the right to vote. But courts have interpreted the Fourteenth Amendment to protect voting as a “fundamental” right.¹⁴³ Some have argued that the Fourteenth Amendment also protects the inverse of that right, namely the right to stay home on election day.¹⁴⁴ This Section refutes that idea for two simple reasons. First, no court has ever agreed with that proposition. Second, not all fundamental rights do or should incorporate their opposite.

No court in the United States has ever conclusively held that the First or Fourteenth Amendments create a fundamental right to not vote. To date, the question of a right not to vote has appeared in fewer than ten federal cases.¹⁴⁵ Rather than analyzing whether the First or Fourteenth Amendments incorporate a right not to vote, courts have invariably assumed the right's existence for the purpose of analysis.

For example, in *Hoffman v. State of Maryland*, the Fourth Circuit considered the constitutionality of a law requiring the state to purge those who had not voted in the prior five years from voter rolls.¹⁴⁶ The petitioners argued that the law compelled them to vote once every five years, thus burdening their right not to vote. The district court reasoned that “[t]he right not to vote—and to have one's nonvote recorded—must be viewed in the same light. In that context, the right to vote includes the right not to vote.”¹⁴⁷ But the Fourth Circuit distanced itself from that rationale, stating that it “need not and do[es] not decide the correctness of the comparison because, even if there is a right not to vote of constitutional significance, it is not infringed upon by” the statute.¹⁴⁸ The district

143. See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 667–68 (1966) (“The principle that denies the State the right to dilute a citizen's vote on account of his economic status . . . bars a system which excludes those unable to pay a fee to vote or who fail to pay.”); *Reynolds v. Simms*, 377 U.S. 533, 561–62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.”); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“It is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure.’”) (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)).

144. See Jeffrey A. Bloomberg, *Protecting the Right Not to Vote from Voter Purge Statutes*, 64 *FORDHAM L. REV.* 1015, 1019–20 (1995).

145. *Dixon v. Md. State Admin. Bd. of Election L.*, 878 F.2d 776 (4th Cir. 1989); *Hoffman v. Maryland*, 736 F. Supp. 83 (D. Md. 1990), *aff'd* 928 F.2d 646 (4th Cir. 1991); *Am. Ass'n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183 (D.N.M. 2010); *Beare v. Smith*, 321 F. Supp. 1100 (S.D. Tex. 1971), *aff'd sub nom.* *Beare v. Briscoe*, 498 F.2d 244 (5th Cir. 1974); *Partnoy*, 277 F. Supp. 2d 1064; *Common Cause v. Kemp*, 243 F. Supp. 3d 1315, 1322 (N.D. Ga. 2017).

146. *Hoffman*, 928 F.2d at 647.

147. *Hoffman*, 736 F. Supp. at 85 (applying rational basis review to the statute).

148. *Hoffman*, 928 F.2d at 648.

court's analysis was paltry at best, and the Fourth Circuit never affirmatively held that the right to vote encompasses its opposite; rather, the panel assumed so for the purpose of holding that Maryland's statute did not burden such a right.¹⁴⁹

Hoffman's assumption of the right not to vote stems from another Fourth Circuit Case, *Dixon v. Maryland State Administrative Board of Election Laws*.¹⁵⁰ In *Dixon*, the court considered the constitutionality of a law requiring that write-in candidates pay a filing fee of \$150 to run for public office.¹⁵¹ In its analysis, the court stated that a ballot does not shed its "constitutional significance . . . if cast for a non-existent or fictional person, for surely the right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable."¹⁵² In what comes closer than any other court has come to examining why a right not to vote is important, the court explained that dissent is critical "to the principle that debate on public issues should be uninhibited, robust, and wide-open."¹⁵³ This may be true, but the court made this statement in the context of casting a ballot for a fictitious candidate or an electorally unviable candidate, not in the context of staying home altogether.¹⁵⁴ Further, the *Dixon* court's brief foray into the right not to vote appeared as pure dicta; the court never held that petitioners in fact had a fundamental right not to vote.¹⁵⁵ Instead, the court concluded that the policy at issue—Maryland's refusal to count write-in votes—"undermine[d] the right to vote," paying no attention to any burden on the right not to vote.¹⁵⁶

Hoffman and *Dixon* remain the only cases in which federal circuit courts have considered the right not to vote.¹⁵⁷ Every district court that has engaged

149. See *id.* Similarly, in *Common Cause*, 243 F. Supp. at 1322, the court cited *Hoffman* for the proposition that the court "need not find that such a right exists, because even assuming that there exists a [fundamental] right not to vote, [the statute] does not violate that right."

150. *Dixon*, 878 F. 2d 776 (4th Cir. 1989).

151. See *id.* at 777.

152. *Id.* at 782. ("It is apodictic that a vote does not lose its constitutional significance merely because it is cast for a candidate who has little or no chance of winning.")

153. *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

154. *Id.* ("[I]n many cases write-in voters may be backing persons who are not even running for office, in effect expressing the comment 'A plague o' both your houses.'")

155. But see *Am. Ass'n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1216 (D.N.M. 2010) (characterizing *Dixon* as "holding that a person has a right not to vote as an expression of dissatisfaction with the choices given). As explained above, *Herrera* overstates the weight of *Dixon's* right not to vote dicta.

156. *Dixon*, 878 F.2d at 782.

157. Bloomberg argues that the Fifth Circuit gave a "strong endorsement of the right not to vote" in *Beare v. Briscoe*, 498 F.2d 244 (5th Cir. 1974). Bloomberg, *supra* note 128, at 1026. This vastly overstates the Fifth Circuit's treatment of the issue. In *Beare v. Smith*, the district court stated, "At the outset, it must be said that the right to vote is a right which is at the heart of our system of government. Parenthetically, it must be said that there is also a right not to vote." 321 F. Supp. at 1102-03 (S.D. Tex. 1971). That was the extent of the district court's treatment of the issue. Indeed, this statement assumes that, rather than explains why, a right not to vote is a corollary of the right to vote. In affirming the district court's opinion, the Fifth Circuit held that Texas's "statutory provisions requiring annual voter registration during a restricted four-month period" burdened the fundamental *right to vote*. Contrary to

with the question has taken a similarly cursory approach.¹⁵⁸ No court has affirmatively held that an individual has a fundamental right to stay home on election day.

This is for good reason. Not all fundamental rights do—or should—incorporate their opposite. Ryan Eason persuasively argues that some rights protect from government overreach while others reflect core societal values.¹⁵⁹ Rights that fall under the former category—like rights to own a gun or to speak—can be waived. By contrast, rights that fall under the latter category—like rights against enslavement or cruel or unusual punishment—cannot be waived.¹⁶⁰ The values that underlie waivable rights are critical to individual autonomy and guarding against government oppression. Likewise, nonwaivable rights are critical to building a decent society. Because the right to vote is integral to societies that value democratic participation, courts should not treat voting as a waivable right.¹⁶¹ Indeed, American democracy can only function with the consent of the People,¹⁶² and political participation is the primary way voters make their preferences known. A right not to vote would thus undermine the fundamental values on which our democracy relies.

Nevertheless, even if a court were to assume a right not to vote, the program passes scrutiny. If a court finds that a voter incentive program burdens a fundamental right not to vote, that court will likely¹⁶³ apply the balancing test set out in *Anderson v. Celebrezze*¹⁶⁴ and later applied in *Crawford v. Marion County Election Board*.¹⁶⁵ This approach asks whether “[t]he state’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.”¹⁶⁶ Courts applying this test consider three

Bloomberg’s proclamation, the Fifth Circuit did not find, discuss, or even mention a right *not* to vote. See *Briscoe*, 498 F.2d at 248.

158. See, e.g., *Partnoy v. Shelley*, 277 F. Supp. 2d 1064, 1078 (S.D. Cal. 2003) (stating that Plaintiffs allege the right not to vote stems from the Ninth, Fourteenth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments yet holding that the statutory provision at issue “unconstitutionally burden[ed] Plaintiffs’ right to vote”)

159. See Ryan Eason, *Get Out the Vote (or Else): Testing the Constitutionality of Compulsory Voting*, 94 S. CALIF. L. REV. 963, 989 (2021).

160. See *id.* at 989–90.

161. See *id.* at 990.

162. See, e.g., U.S. CONST. pmb1.

163. Though I believe a court would follow the *Anderson* and *Crawford* balancing approach, this is not a foregone conclusion. The three courts that assumed the existence of a right not to vote each applied a different level of scrutiny. See *Beare v. Smith*, 321 F. Supp. 1100, 1102–03 (S.D. Tex. 1971) (applying strict scrutiny); *Dixon v. Md. State Admin. Bd. of Elections*, 878 F.2d 776, 780 (4th Cir. 1989) (applying *Anderson*’s balancing test); *Hoffman v. Maryland*, 736 F. Supp. 83, 85 (D. Md. 1990) (applying rational basis review). I believe *Dixon* is the most instructive. *Beare* applied strict scrutiny before the Supreme Court set out its balancing test in *Anderson v. Celebrezze*. Further, *Hoffman*’s scrutiny analysis was cursory at best; instead, *Hoffman* considered the right not to vote under the First Amendment and applied *United States v. O’Brien*, 391 U.S. 367 (1968). I discuss this latter approach below, under Part III.B.2.

164. 460 U.S. 780 (1983).

165. 553 U.S. 181 (2008).

166. *Anderson*, 460 U.S. at 788.

factors: (1) the burden on the asserted right, (2) the “precise interests put forward by the State,” and (3) whether the burden is necessary to fulfill the state’s interests.¹⁶⁷ Under this approach, a court will likely uphold a voter incentive program for three reasons.

First, a voter incentive program’s impact on the “right not to vote” is de minimis for numerous reasons. Any voter who chooses not to cast a ballot under this program will find themselves no worse off for doing so. Unlike a compulsory voting system, non-voters will face no fines or other forms of punishment.¹⁶⁸ And although setting a specific dollar amount for the incentive is largely outside the scope of this Note, I expect that any incentive to vote will be relatively small, likely under \$100 per voter. By contrast, if a city set the incentive level much higher—say \$2,000—and implemented it via a tax rebate instead of a direct incentive, a non-voter may have a stronger case that such a policy burdens or unduly influences them to forego their right to stay home.¹⁶⁹ Finally, states can substantially lessen any burden by allowing non-voters to cast a blank ballot and receive the benefit for simply showing up at the polls.¹⁷⁰

Second, the “precise interests” the program advances further support its constitutionality.¹⁷¹ In Part II.A, I explained the possible benefits this program may have on electoral imbalance. As a general matter, governments seeking to defend a voter incentive policy should avoid arguments that sound in electorate rebalancing. In the campaign finance context, the Supreme Court has struck down laws whose purpose was to “level the playing field” between candidates.¹⁷² Government programs that explicitly seek to incentivize a specific type of voter could likely meet the same fate, even if that benefit is open to all comers.¹⁷³ Further, in *Citizens United*,¹⁷⁴ the Supreme Court rejected the government’s reliance on the “antidistortion” rationale, which the Court had upheld in both *Austin*¹⁷⁵ and *McConnell*.¹⁷⁶ The antidistortion rationale maintains that the government can enact campaign finance regulations in order to ensure that

167. *Id.* at 789.

168. *But see, e.g., Non-Voters*, AUSTL. ELECTORAL COMM’N, <https://www.aec.gov.au/Elections/non-voters> [<https://perma.cc/G7AS-6JXL>] (clarifying that in Australian federal elections, those who do not vote are subject to a “\$20 administrative penalty”).

169. *See* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Public State*, 132 U. PA. L. REV. 1293, 1382–87 (1984).

170. This is discussed in Part IV.B.3, *infra*.

171. *Anderson*, 460 U.S. at 789.

172. *Az. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 748 (2011).

173. *Id.*

174. *Citizens United v. FEC*, 558 U.S. 310, 349–56 (2010).

175. *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 660 (1990) (“We find that the Act is precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views.”).

176. *McConnell v. FEC*, 540 U.S. 93, 205–06 (2003) (“We have repeatedly sustained legislation aimed at ‘the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.’”) (quoting *Austin*, 494 U.S. at 660).

elected officials' views are not overly influenced by wealthy corporate expenditures.¹⁷⁷ Although *Citizens United* dealt with First Amendment speech rights, it is nevertheless instructive as to what government interests are sufficient to burden fundamental rights in the electoral context.

Instead of relying on arguments that sound in electoral fairness, the government can point to its interest in increasing political participation. In *Crawford*, the Court upheld laws related to preventing voter fraud as "unquestionably relevant to the State's interest in protecting the integrity and reliability of the electoral process."¹⁷⁸ The Court stated that protecting the integrity of the system increases voter confidence and thus has "independent significance" because a reliable voting system "encourages citizen participation in the democratic process."¹⁷⁹ In other words, the integrity of the voting system is itself an important end, but it is also a means to an even more critical end: democratic participation,¹⁸⁰ the central goal of a voter incentive program. The Court's focus on participation makes sense. Democracies derive their power from the consent of the governed, and democratic legitimacy depends in large part on active participation. Absent robust participation, states would lose the faith of their voters. Few interests could be so vital to democratic legitimacy.

Finally, a court will conclude that any burden imposed by a voter incentive program is necessary to the state's interest.¹⁸¹ Here, the program readily satisfies this requirement. The entire point of encouraging political participation is to get non-voters to cast a ballot on election day; thus, a policy that seeks to incentivize voting behavior must necessarily withhold its incentives from those who would rather stay home. Many non-voters stay home for reasons unrelated to exercising a purported right not to vote. Withholding incentives from non-voters may indirectly and minimally burden those who stay home for political purposes. Even in states with minimal barriers to voting,¹⁸² it is difficult to imagine how a state might encourage participation without imposing some burden on non-voters. Providing a benefit to those who cast a ballot necessarily requires withholding that benefit from those who refuse to.

In conclusion, I think it unlikely that a litigant could successfully challenge this policy under the Fourteenth Amendment. Even if a court entertained such a

177. Tony Dechario, *Campaign Finance: Citizens United and the Conflict Between Speech and Self-Government*, COLUM. UNDERGRAD. L. REV. (Mar. 20, 2017), <https://blogs.cuit.columbia.edu/cult/2017/03/20/campaign-finance-citizens-united-and-the-conflict-between-speech-and-self-government/> [https://perma.cc/4FSG-9ZF3].

178. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008).

179. *Id.* at 197.

180. *See id.*

181. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

182. For example, California allows voters to register to vote the day of the election and allows voters to submit a ballot by mail. *See Voting & Elections Legislation and Initiatives*, COMMON CAUSE CAL., <https://www.commoncause.org/california/our-work/expand-voting-rights-election-integrity/voting-elections-legislation/> [https://perma.cc/G6CV-MMKE] (last visited Oct. 19, 2023) (summarizing California voting laws).

claim, the program would readily withstand scrutiny under *Anderson* because the minimal burden of denying a small-dollar incentive to non-voters is necessary to the program's goal of increasing participation.

2. *The First Amendment*

The First Amendment prevents Congress and states from passing laws that "abridge[e] the freedom of speech."¹⁸³ This protection extends to expressive conduct that might not take the literal form of speech but that nevertheless communicates a message.¹⁸⁴ This Section first argues that non-voting is not sufficiently expressive to warrant First Amendment protection. Then, this Section concludes that, even if a court does find that a right not to vote exists under the First Amendment, a voter incentive program would nevertheless pass scrutiny.

Expressive conduct, though not itself speech, enjoys First Amendment protection so long as the "conduct possesses sufficient communicative elements."¹⁸⁵ In *Spence v. Washington*, the Court relied on two factors to define expressive conduct: whether (1) the conduct "inten[ded] to convey a particularized message," and (2) whether it is likely that "the message [will] be understood by those who view[] it."¹⁸⁶ If a policy regulates expressive conduct under *Spence* and the policy's purpose is unrelated to suppressing that expression, then courts apply intermediate scrutiny.¹⁸⁷

I am skeptical that non-voting amounts to expressive conduct under *Spence*. Eason argues that voting is expressive conduct, and non-voting might therefore receive First Amendment protection as a corollary to the right not to speak.¹⁸⁸ But this analytical approach misapprehends the potential political nature of non-voting. A voter who wants to make a point by not voting necessarily sees some communicative value in their decision to stay home that is distinct from the expressive nature of affirmatively casting a ballot. Instead of deriving the right not to vote from the right not to speak, a litigant may instead argue that the right not to vote derives directly from the right to speak. Perhaps I'm splitting hairs, but in the context of *Spence*, focusing on non-voting changes the analysis in a meaningful way.

As an example, the Court famously applied *Spence* in *Texas v. Johnson* when it considered whether the act of burning an American flag "constituted expressive conduct."¹⁸⁹ *Johnson* helps to demonstrate why non-voting is not sufficiently communicative to warrant First Amendment protection.

183. U.S. CONST. amend. I.

184. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

185. *Id.*

186. 418 U.S. 405, 410–11 (1974).

187. See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968).

188. See Eason, *supra* note 159, at 976–80.

189. *Johnson*, 491 U.S. at 403.

Under *Spence*'s first factor, the Court found that Johnson intended to convey a particular message by burning the flag; it served as "the culmination" of his "political demonstration" at the Republican National Convention.¹⁹⁰ Although voting clearly intends to convey a message of support or opposition to a candidate, can we say the same about non-voting? Sure, a non-voter may stay home to express their narrow dissatisfaction with the choice of candidates.¹⁹¹ Or, the non-voter may wish to express broad frustration with the entire system of democracy by refusing to take part. Indeed, in *Buckley v. American Constitutional Law Foundation, Inc.*, the Supreme Court discussed the choice to refuse to register to vote.¹⁹² "[T]here are also individuals for whom . . . the choice not to register implicates political thought and expression . . . because they don't believe that the political process is responsive to their needs."¹⁹³

But the argument that non-voting implicates political thought and expression assumes that every voter has a message-based reason for not voting when in fact people stay home for myriad reasons. A voter might stay home because they feel generally apathetic about the election or because they feel uninformed on the issues. But a voter's choice to stay home does not necessarily imply an intent to convey a message to the public. Indeed, many people choose to stay home because the costs of showing up are too high, the polling place is too far, the lines are too long, or the time spent working is too valuable.¹⁹⁴ Unlike setting fire to the flag, one of the clearest and most evocative ways to express dissatisfaction with the country, the picture of the non-voter's intent is blurry. And at *Spence*'s second factor, the analysis becomes even murkier.

In *Johnson*, the "overtly political" message behind Johnson's flag burning was "overwhelmingly apparent" to all those who witnessed it.¹⁹⁵ Unlike burning a flag in a public square, non-voting is a largely anonymous act. Although anonymity does not preclude First Amendment protection,¹⁹⁶ it does complicate the *Spence* analysis by obscuring a non-voter's motivations. Consider the relative expressive clarity in voting: Somebody wins, and somebody loses.¹⁹⁷ By contrast, it is impossible to discern an aggregate non-voting message on election day—absent some form of accompanying expression, like a conversation, a protest, or a burnt flag—there is no inherent expressive message attached to not casting a ballot. A voter might stay home because they forgot it was election day. In fact, a voter incentive program that allows individuals to receive a benefit for

190. *Id.* at 406.

191. *Dixon v. Md. State Admin. Bd. of Elections*, 878 F.2d 776, 782 (4th Cir. 1989) ("[I]n many cases write-in voters may be backing persons who are not even running for office, in effect expressing the comment 'A plague o' both your houses.'").

192. 525 U.S. 182 (1999).

193. *Id.* at 195–96 (internal quotations omitted).

194. *See* Kight, *supra* note 46.

195. *Johnson*, 491 U.S. at 406.

196. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

197. *See* Eason, *supra* note 159, at 980.

casting a blank ballot may make the expressive content of a non-vote all the more salient. The election results will clearly show how many voters cast blank ballots, thus revealing the number of voters who showed up to say that no candidate was worthy of their vote.

For the reasons demonstrated above, a court would be hard-pressed to find that staying home on election day satisfies *Spence*'s two-pronged inquiry. And as a policy that touches only conduct, a court would likely subject a voter incentive policy to rational basis review.

But if a court finds *Spence* satisfied,¹⁹⁸ it will subject the voter incentive policy to *United States v. O'Brien*'s four-part, intermediate scrutiny test.¹⁹⁹ First, the regulation must be "within the constitutional power of the Government."²⁰⁰ The Constitution gives states the power to regulate elections, unless preempted by federal law.²⁰¹ The Court has construed this provision broadly, and a state would undoubtedly have the power to enact a voter incentive program as part of its prerogative to regulate elections, especially in purely state or local elections.²⁰² Second, the regulation must "further[] an important or substantial government interest."²⁰³ States should point to their interest in encouraging political participation. Increased political participation, in turn, fosters voter confidence and electoral integrity, interests of "independent significance."²⁰⁴

Third, the interest must be "unrelated to the suppression of free expression."²⁰⁵ A voter incentive program readily satisfies this requirement by benefitting the expressive conduct of voting and withholding benefits from only the nonexpressive conduct of staying home. A policy that paid *only* Democratic or Republican voters would fail here because it would "target the communicative nature" of voting by incentivizing "particular conduct *because*" the conduct tends to express support for a specific party.²⁰⁶ But under the policy I suggest, a voter would receive a benefit regardless of the candidate for whom they vote; a voter could cast an entirely blank ballot and still receive the program's benefit.²⁰⁷

198. Indeed, a court applying Eason's approach to *Spence* would move to this stage of the analysis. *See id.* at 980–81.

199. 391 U.S. 367, 377 (1968); *see Johnson*, 491 U.S. at 406 (citing *O'Brien* for the proposition that "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word"). As noted above, *supra* note 163, in *Hoffman v. State of Md.*, 736 F. Supp. 83 (D. Md. 1990), the district court conducted the bulk of its "right not to vote" analysis pursuant to *O'Brien*'s four-part test.

200. *O'Brien*, 391 U.S. at 377.

201. U.S. CONST. art. I § 4, cl. 1.

202. *See, e.g., Smiley v. Holm*, 285 U.S. 355, 366 (1932) (describing the Constitution as giving states the power "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved").

203. *O'Brien*, 391 U.S. at 376 ("[A] sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.").

204. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008).

205. *O'Brien*, 391 U.S. at 377.

206. *Texas v. Johnson*, 491 U.S. 398, 406 (1989).

207. This is discussed further in Part IV.B.3, *infra*.

Indeed, incentivizing voting is a far cry from suppressing the expressive conduct that *O'Brien* protects. By bringing more voters into the system, regardless of the content of their vote, the program does the exact opposite of suppressing free speech; it encourages it.²⁰⁸

Finally, *O'Brien* requires that the “incidental restriction on [non-voting must be] no greater than is essential to further the interest.” As discussed further in Part IV.B.3, states can readily meet this requirement through measured policy design. For example, in Australia, voters can file an entirely blank or marred ballot to avoid the government’s non-voting fine.²⁰⁹ In this light, the incidental restriction does not affect non-voting at all, since any citizen is free to cast a blank ballot. Rather, the incidental burden falls on an individual’s preference for staying home or not dropping a ballot in the mail, neither of which are a fundamental right. Any burden born from a voting incentive program thus readily meets *O'Brien*’s balancing test.²¹⁰ In sum, I think it highly unlikely that the First Amendment protects an individual’s right not to vote. But even if it did, a voter incentive program would likely pass muster under *United States v. O'Brien*.

3. *The Unconstitutional Conditions Doctrine*

A litigant might challenge the program as applying an unconstitutional condition on the right not to vote. This doctrine maintains that the government cannot condition a benefit or privilege on an individual’s agreement to waive a constitutional right.²¹¹ The Supreme Court has not been a model of consistency in applying this doctrine,²¹² but an individual may nevertheless rely on this doctrine to challenge a voter incentive policy under either First or Fourteenth Amendment arguments outlined above.

Such a challenge would likely falter: Because the right to vote is fundamental, it would be unconstitutional for the government to pay individuals

208. Indeed, because a program “does not discriminate against any [voter] or point of view, and it does not restrict any person’s ability to speak . . . [It] creates more speech and thereby broadens public debate.” *Ariz. Free Enter. Club’s Freedom Club v. Bennett*, 564 U.S. 721, 756 (2011) (Kagan, J., dissenting) (discussing a public campaign finance program that used a matching funds mechanism to encourage candidates to refrain from private fundraising).

209. Rychter, *supra* note 63 (“Voters are compelled to appear at the polls, but they can cast a blank or marred ballot as a protest, which doesn’t count.”).

210. Ultimately, I expect that a court would apply rational basis review to a voter incentive program. To prevail under that test, a policy must rationally relate to a legitimate government interest. *See, e.g., Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (applying the rational basis test in the context of the Equal Protection Clause). At a minimum, the policy relates to increasing voter participation, which, as previously discussed, is clearly a legitimate government interest.

211. *Regan v. Tax’n with Representation of Wash.*, 461 U.S. 540, 545 (1983).

212. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 582 (5th ed. 2015); *compare* *Rust v. Sullivan*, 500 U.S. 173 (1991) (finding constitutional a grant of aid to family planning centers conditioning aid on those centers not providing abortion counseling), *with* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (finding unconstitutional a grant of aid to legal services organizations conditioning aid on those organizations not challenging the validity of welfare laws).

to give up their right to vote. As discussed in Part III.B.1, because no court has recognized a fundamental right to stay home on election day, such a challenge would fail. But assuming the right does exist, *Rust v. Sullivan* stands for the proposition that government retains discretion in funding decisions, particularly where it seeks “to encourage certain activities it believes to be in the public interest.”²¹³ Voting undoubtedly satisfies this criterion. For the sake of argument, assume that both voting and non-voting are forms of expressive conduct under the First Amendment. A state could choose to fund one over the other as furthering the public interest of increased political dialogue²¹⁴ because “a legislature’s decision not to subsidize a fundamental right does not infringe the right.”²¹⁵ Moreover, any such program should only subsidize casting a ballot. Thus, a voter who chooses to exercise their right not to vote can do so by casting a blank ballot and receive the program’s subsidy.

* * *

In sum, a court assessing a voter incentive program would likely find it both statutorily and constitutionally permissible. The statute runs afoul of neither federal nor California state statutory law. Further, neither the Fourteenth nor the First Amendments protect a “right not to vote.” Even if a court were to apply a form of heightened constitutional scrutiny to a voter incentive program, the policy would readily withstand such scrutiny.

III.

HOW TO DESIGN A VOTER INCENTIVE POLICY

In Parts I and II, I demonstrated that a policy to pay people to vote might help to help boost participation and that that such a policy is statutorily and constitutionally permissible. This Part considers policy implementation, specifically at what level of government and by what mechanism officials should implement the policy.

A. Start with a Local Government

I suggest that the best way forward is to start with a test case: A local government should provide a financial incentive for voting in a purely local election. Cities are often a domain for pro-democracy experimentation. For example, cities allow noncitizens to vote in certain elections,²¹⁶ enact ranked-

213. *Rust*, 500 U.S. at 193.

214. This scenario requires the reader to assume away the absurd notion that a state might seek to increase participation by incentivizing people to stay home on election day.

215. *Rust*, 500 U.S. at 193 (citations omitted).

216. Perhaps most prominently, San Francisco allows noncitizens to vote in school board races. *Appeal Court Upholds San Francisco’s Noncitizen Voting Program*, CITY ATT’Y OF S.F. (Aug. 8, 2023), <https://www.sfcityattorney.org/2023/08/08/appeal-court-upholds-san-franciscos-noncitizen-voting-program/> [<https://perma.cc/2VXU-QRC2>].

choice voting,²¹⁷ and even allow those under eighteen to vote.²¹⁸ Indeed, four characteristics make local elections an ideal testing ground for a voter incentive policy: (1) local elections provide ample opportunity for comparative empirical assessment; (2) policy may be easier to refine at the local level; (3) implementation in a purely local election avoids unintended spillover effects; and (4) local elections have relatively “lower stakes” than state or national elections.

First, in furtherance of building a robust and scalable policy, it may be easier for researchers to compare the effects of a voter incentive program to policies in other cities. Several cities across the country have implemented programs that seek to democratize campaign finance.²¹⁹ For example, Seattle has a “democracy voucher” program that gives voters vouchers they can donate to a campaign.²²⁰ Although this program addresses unequal financial participation in campaign contributions, it likely has a knock-on effect of increased voter participation. Researchers could conduct comparative empirical analyses that compare the effects that such programs have on voter turnout, or even electoral balancing, as compared to a voter incentive program. Studying this at the purely local level will also help researchers control for confounding variables to truly isolate the effect that a small-dollar payment has on a voter’s decision to vote. For example, in a mixed election that uses a voter incentive program, a voter who would not otherwise vote in a purely local election may show up to vote for a state or federal candidate. Thus, teasing out the causal impact of a voter incentive program may be easier at the local level, where fewer variables weigh on a voter’s decision to vote. In turn, advocates can begin to understand which policies best increase turnout and target their efforts accordingly.

Second, it may be easier and faster for local officials to refine and optimize the policy over time. Ideally, as local officials learn about how the voter incentive program performs—what works and what does not—they can refine and improve the program. Local officials likely have more flexibility to update policy because they represent fewer people and have fewer competing priorities than state legislatures and Congress. A local government can test new approaches to the policy, from adjusting its dollar amount to its frequency and then study the

217. In 2019, New York City voters approved a ballot initiative allowing ranked choice voting in local elections. See *Ranked Choice Voting in New York City*, COMMON CAUSE N.Y., <https://www.commoncause.org/new-york/work/ranked-choice-voting-in-new-york-city/> [https://perma.cc/XJV9-YRYT]. As of the 2022 election cycle, sixty-two different jurisdictions had adopted some form of ranked choice voting. *Where is RCV Used?*, RANKED CHOICE VOTING RES. CTR., <https://www.rcvresources.org/where-is-rcv-used/> [https://perma.cc/274H-HNGB] (last updated Mar. 2024).

218. See *Voting Age Status Report*, NAT’L YOUTH RTS. ASS’N, <https://www.youthrights.org/issues/voting-age/voting-age-status-report/> [https://perma.cc/MDF7-46VU] (last visited Dec. 27, 2023).

219. I explore these programs in Part II.A *supra*. See *supra* notes 23–29 and the corresponding discussion.

220. See CITY OF SEATTLE, *supra* note 24.

impacts of the change on voter turnout. As local officials learn and refine, they can provide valuable insights for policy makers in other localities or states. And given that that “America’s voting problem is primarily a local one,”²²¹ local policymakers will have ample opportunity to see how policy intervention impacts the non-voting population.

Third, implementing this in a purely local election avoids possible adverse spillover effects on other levels of government. Consider a state-wide election in Arizona, a state that has become a highly competitive partisan battleground.²²² In the 2022 General Election, Democrat Kris Mayes won the race for Attorney General by a mere 511 votes out of over 1.5 million ballots cast. Now assume that Pima County, and *only* Pima County, implemented a voter incentive policy for all local *and* state-wide elections. In Pima County, 38 percent of voters are registered Democrats compared to 27.6 percent Republicans,²²³ and in 2020, about 60 percent of Pima County voters cast a ballot for Mayes.²²⁴ A policy that increases voter turnout in only one county could swing a state-wide election with such thin margins.²²⁵ To ensure that this policy does not have unintended spillover effects on other levels of government, incentives must be made available to every voter in a given election. This could certainly happen at the state-wide level, but for reasons detailed in the paragraph above, I assume this would be an easier feat at the local level. Relatedly, guarding against spillover effects may further insulate the policy from partisan attack.

Finally, the stakes are simply a bit lower at the local level due to the limited size of the affected population. This is not to say that local elections are unimportant, far from it.²²⁶ Rather, any new and untested policy may have unintended, unforeseen, and negative consequences. By virtue of cities being smaller political units, fewer people would experience any unintended consequences from a voter incentive policy. But implementing the program in a city of sufficient size, diversity, and competitive electoral politics may signal how such a policy would perform in analogous geographies. And, as discussed

221. Demsas, *supra* note 11.

222. Steve Phillips, *How Did Arizona Turn Purple—And What’s Next?*, NATION (Dec. 1, 2022), <https://www.thenation.com/article/politics/arizona-swing-state-democrats> [<https://perma.cc/8SUF-XC3L>].

223. ARIZ. SEC. OF STATE, STATE OF ARIZONA REGISTRATION REPORT 1 (2023), https://azsos.gov/sites/default/files/state_voter_registration_2023_july.pdf [<https://perma.cc/NU6R-QRDW>].

224. ARIZ. SEC. OF STATE, STATE OF ARIZONA OFFICIAL CANVASS: 2022 GENERAL ELECTION 10 (2022), https://azsos.gov/sites/default/files/2022Dec05_General_Election_Canvass_Web.pdf [<https://perma.cc/YJK2-BLFU>].

225. It is entirely possible that a voter incentive program would have a greater impact on Republican turnout or would not have any politically skewed effect at all. The point here is that implementing this in a purely local election would help to avoid such spillover effects.

226. Indeed, local policy often has the most direct impact on an individual’s day-to-day life, touching police, emergency, zoning, and traffic considerations.

above, local officials could probably adjust the policy with more agility than state or federal lawmakers.

B. Consider Policy Design

This Section addresses two central policy design considerations. First, how will the government get money to someone once they have voted? And second, how frequently should the government offer the benefit?

1. Use a Direct, Visible, and Immediate Subsidy

Governments often institute financial policies by way of a tax incentive or a direct subsidy. This Section explores both mechanisms, highlighting the strengths and weaknesses of each. Ultimately, a direct subsidy will best serve the turnout goals of a voter incentive program.

A tax credit, a particular type of tax incentive, operates by reducing an individual's overall tax liability.²²⁷ A voter who owes the government \$100 in taxes and receives a \$20 tax credit for voting will have a total tax liability of \$80 for that election year. Every level of government, from the federal government to the county, offers some form of tax credit. For example, the federal government, California, and San Francisco all offer their own version of the Earned Income Tax Credit, a program the government operates through the tax code to the benefit of low-income working families.²²⁸ A clear benefit of implementing a voter benefit program through the tax code is that governments possess the infrastructure to implement such a program. Indeed, a state could easily implement a voter incentive program by doing little more than including a new line-item on a voter's tax form.²²⁹ Should policymakers implement the program as a refundable tax credit, the government could leverage an individual's direct deposit information to send them the incentive quickly and efficiently.²³⁰

The primary drawback of a tax credit is that this approach is neither visible nor immediate to voters. Suzanne Mettler describes a "submerged policy" as one that lies "beneath the surface of US market institutions and within the federal tax

227. See *Tax Credits for Individuals: What They Mean and How They Can Help Refunds*, IRS (Apr. 2023), <https://www.irs.gov/newsroom/tax-credits-for-individuals-what-they-mean-and-how-they-can-help-refunds> [<https://perma.cc/35RN-N3XR>].

228. See *Working Families Credit (WFC)*, S.F. HUM. SERVS. AGENCY, <https://www.sfhsa.org/services/financial-assistance/free-tax-help/working-families-credit-wfc> [<https://perma.cc/45TQ-AC98>] (last visited Mar. 10, 2025) (describing the San Francisco Working Families Credit, as well as the federal Earned Income Tax Credit (EITC) and California Earned Income Tax Credit (CalEITC)).

229. Of course, including a self-reported "did you vote?" box on a tax form runs the risk of a non-voter checking the box despite not having voted. The local tax authority would likely need to develop some form of verification system with the county registrar of voters.

230. A refundable tax credit essentially operates as a direct subsidy for individuals who have a tax liability of \$0.

system.”²³¹ These policies are “submerged” because their effects are not immediately apparent to those they benefit; they operate in stealth and are “largely invisible to most Americans.”²³² For example, the 2009 stimulus bill included nearly \$300 billion in tax reductions. This policy benefitted nearly 97 percent of Americans to the tune of roughly \$1,200 per person over the course of a year.²³³ Instead of a lump-sum, stand-alone payment, the policy paid out in small amounts as part of Americans’ monthly paycheck. Fewer than 10 percent of those polled had any clue that the policy existed.²³⁴ By contrast, in 2020 Congress passed emergency pandemic relief that included stand-alone, direct payments of between \$600 and \$1,400 to about 90 percent of taxpayers.²³⁵ Surveys showed that Americans were aware this money had hit their bank accounts, and they used it for its intended purpose: to buy food, household products, and pay for rent and utilities.²³⁶

A highly visible payment, like a direct incentive, will help voters see the immediate benefits of the program and, in turn, create a positive feedback loop increasing voter turnout in the future. Recall the discussion above in Part II.B about positive externalities and collective action. Voters may choose to stay home when they do not perceive their vote as having a direct, personal benefit. Submerged policies like tax credits fall prey to this danger because they lack immediacy. By contrast, when an individual receives a direct benefit, like food stamps or unemployment insurance, they perceive the immediate benefit of that program; as soon as funds appear in a bank account or on an EBT card, the holder can spend that money immediately.²³⁷ To maximize turnout, an optimal voter incentive program will make its benefits as visible as possible to voters as close to the moment that they cast their ballot as possible.

Mettler provides one additional insight relevant to direct incentives: “[V]isible policies have the potential to enhance individuals’ . . . disposition to

231. SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY* 4 (2011).

232. *Id.* at 4, 14.

233. Howard Gleckman, *Why Nobody Noticed Obama’s Tax Cuts*, TAX POL’Y CTR. (Oct. 21, 2010), <https://www.taxpolicycenter.org/taxvox/why-nobody-noticed-obamas-tax-cuts> [https://perma.cc/LE6G-94D2].

234. Michael Cooper, *From Obama, the Tax Cut Nobody Heard of*, N. Y. TIMES (Oct. 18, 2010), <https://www.nytimes.com/2010/10/19/us/politics/19taxes.html> [https://perma.cc/35DF-BD2U].

235. Lorie Konish, *How Effective Were Those Stimulus Checks? Some Argue the Money May Have Fueled Inflation*, CNBC (June 11, 2022), <https://www.cnbc.com/2022/06/11/the-pandemic-stimulus-checks-were-a-big-experiment-did-it-work.html> [https://perma.cc/6T5D-8BHL].

236. Daniel J. Perez-Lopez & Lindsay M. Monte, *Household Pulse Survey Shows Stimulus Payments Have Eased Financial Hardship*, U.S. CENSUS BUREAU (Mar. 24, 2021), <https://www.census.gov/library/stories/2021/03/many-american-households-use-stimulus-payments-to-pay-down-debt.html> [https://perma.cc/R8V5-5P46]; Carson McCullough, *Polls Show Broad Support for Covid Stimulus Bill*, COURTHOUSE NEWS SERV. (Mar. 3, 2021), <https://www.courthousenews.com/poll-shows-broad-support-for-covid-stimulus-bill/> [https://perma.cc/M75E-VDDF].

237. METTLER, *supra* note 231, at 13.

become [more] involved.”²³⁸ A visible policy signals to people that they are valued community members and thus encourages other forms of participation.²³⁹ Visible benefits demonstrate a responsive government and encourage voters to show up, vote, and take part in policy formation.²⁴⁰ Beyond simple turnout, a direct-incentive policy, by virtue of tying a government benefit to political participation, may encourage voters to participate in other ways, perhaps by showing up at a local council meeting or educating themselves on the issues in an upcoming election.

The critical challenge with a direct-incentive approach is implementing the program in a way that is visible to voters. The simplest way to achieve this goal might work as follows. A voter goes to their local polling place, casts their ballot, and then picks up a \$20 bill on their way out of the polling place. Alternatively, the polling place manager might hand the voter a ballot receipt, which the voter takes to City Hall to collect their \$20 bill.

Perhaps counterintuitively, reforms that have reduced barriers to vote in states like California may make a direct incentive more challenging to implement. In 2021, Governor Newsom signed AB 37, which requires that every voter receives a ballot in the mail.²⁴¹ As a result, most Californians now vote at home instead of at a polling place.²⁴² So in a state like California, the implementing government would likely need to mail a check to a voter or directly deposit it in their account. A direct-deposit system could be particularly challenging to implement if a division like a county registrar’s office runs the program. The registrar would need to acquire a voter’s banking information and then set up a payment system. By contrast, registrar offices do have every voter’s address; thus, mailing checks may be more straightforward for local elections officials. Further, in line with Mettler’s preference for highly visible policy, mailing a check would do more to avoid the problems of submerged policy. Indeed, a government could even include an “I Voted” sticker with every voter incentive check to make it abundantly clear to the voter that they are receiving a check because they cast a ballot.

Finally, although local governments are no stranger to direct benefits programs like the Supplemental Nutrition Assistance Program (SNAP),

238. *Id.* at 27 (arguing that visible policies increase “interest in politics [and the] sense that government is responsive”).

239. *Id.*

240. *Id.*

241. *Governor Newsom Signs Landmark Elections Legislation Making Vote-by-Mail Ballots Permanent for Every Registered Voter, Strengthening Elections Integrity*, OFF. OF GOV. GAVIN NEWSOM (Sept. 27, 2021), <https://www.gov.ca.gov/2021/09/27/governor-newsom-signs-landmark-elections-legislation-making-vote-by-mail-ballots-permanent-for-every-registered-voter-strengthening-elections-integrity/> [<https://perma.cc/X5WH-RKY5>].

242. In the 2022 Gubernatorial Election, over 80 percent of California voters cast their ballot via mail, up from 43 percent one decade prior. CAL. SEC. OF STATE, VOTE-BY-MAIL STATISTICS 2003 TO 2022, <https://elections.cdn.sos.ca.gov/vote-by-mail/vbm-statistics.xlsx> [<https://perma.cc/Z26E-KWAY>].

operationalizing this type of program poses unique challenges. At the outset, the local government would need to verify that an individual voted. This would require building communication systems between the county registrar's office and whichever municipal finance office the government appoints to print and mail checks. Following that, the government must ensure each check makes it to the right household. In 2020 and 2021, the IRS and Treasury issued over \$900 billion in direct payments to individuals as part of COVID-19 stimulus programs; in doing so the government ran into a lot of problems, including improper payments and getting funds to first-time tax filers and those experiencing homelessness.²⁴³ Cities have developed tools to serve unhoused populations,²⁴⁴ low-income tax filers,²⁴⁵ and other hard-to-reach communities,²⁴⁶ but if a highly resourced federal agency like the IRS faced challenges operationalizing a direct payment program, local governments might as well. Assuming that local governments can surmount such challenges, providing a direct subsidy would likely be the best way to achieve the goals of a voter incentive program.

2. Consider Infrequent Incentives

Policymakers should also think critically about the frequency of benefit provision. The more frequently a government provides a benefit, the more expensive the benefit becomes. Thus, one potential solution to the high cost of this program is to provide an incentive to vote only in certain types of elections. For example, a city may opt to provide the benefit only in general elections and not primary elections²⁴⁷ or in less frequent mayoral elections but not in more frequent city council races.

Another way the government might reduce costs is to provide the benefit based on voting status. By that I mean, governments could incentivize only first-time voters or incentivize voters the first three times they vote. Not only would this save on costs, but it would also help to address concerns raised in Part II.C.2 that a program of this nature would essentially become a recurring handout to more affluent voters who do not need an incentive to cast a ballot. Further,

243. U.S. GOV'T ACCOUNTABILITY OFF., STIMULUS CHECKS: DIRECT PAYMENTS TO INDIVIDUALS DURING THE COVID-19 PANDEMIC (June 29, 2022), <https://www.gao.gov/products/gao-22-106044> [<https://perma.cc/8MBF-8ETH>].

244. See, e.g., *Homelessness*, CITY & CNTY. OF S.F. <https://www.sf.gov/topics--homelessness> [<https://perma.cc/S5DN-FKXH>].

245. See, e.g., *File Your Taxes with NYC Free Tax Prep*, NYC CONSUMER & WORKER PROTECTION, <https://www.nyc.gov/site/dca/consumers/file-your-taxes.page> [<https://perma.cc/RSY3-EACV>].

246. See, e.g., *Access NYC*, CITY OF N.Y., <https://access.nyc.gov/programs/idnyc/#how-it-works> [<https://perma.cc/37DQ-ULTU>] ("All New Yorkers 10 and older, regardless of immigration status, can apply for an IDNYC card. You can apply for an IDNYC card even if you are homeless or formerly incarcerated.").

247. Providing an incentive to vote in closed primary elections would likely implicate the First Amendment. Where, for example, third parties do not have primaries, a voter incentive program would incentivize partisan voting. By contrast, an open primary would not suffer from this problem.

studies have shown that once an individual casts a ballot in one election, their propensity to vote again in the future increases.²⁴⁸ Thus, to appreciate the benefits of greater turnout, it might be sufficient to incentivize voting up to the point at which casting a ballot becomes a habit. That said, there are also risks to providing nonuniversal benefits, namely that segments of the populace who do not receive the benefit may begin to view the subsidy as a form of entitlement program. As the thinking around a voter incentive program grows and evolves, this is an area that ultimately merits further study.

3. *Allow Voters to Cast a Blank Ballot*

Finally, governments should not make receipt of the benefit contingent on voting for a candidate. Instead, the policy should pay so long as a voter files their ballot with the registrar, even if that ballot is entirely blank. Australia takes this approach. Voters can even cast a “marred ballot” as a sign of protest.²⁴⁹

Allowing an option not to vote has critical constitutional significance depending on the level of scrutiny used to analyze the policy. I maintain that this policy is fully constitutional and does not burden any fundamental right.²⁵⁰ But on the off chance that a court does find this policy burdens a right not to vote, that court will eventually proceed to a tailoring analysis in which, depending on the level of scrutiny, the policy must be tailored to meet the government’s interest. If the government’s interest is in increasing participation, then its focus is getting people to the polls, regardless of how they vote. Allowing an option not to vote tailors the policy to that interest. Moreover, for a non-voter who stays home out of protest, an option not to vote arguably makes their message of protest more concentrated and salient.²⁵¹ Under the current system, people stay home for an untold number of reasons, but casting a blank ballot sends a much clearer protest message. Thus, including a “no vote” option brings more voices into the system and offers voters greater choice.

* * *

Policymakers interested in a voter incentive program should start small and explore implementing the program at the municipal level. Incentives should be direct, visible, and perhaps infrequent. Finally, I expect that the most successful programs—and those most likely to withstand constitutional scrutiny—will allow voters to receive the incentive even if they cast a blank ballot.

CONCLUSION

When I first encountered the idea of paying people to vote, I brushed it off. I assumed that such a policy would be illegal, and if it were not, paying people

248. See Gerber et al., *supra* note 80.

249. Rychter, *supra* note 64.

250. See Part III.B, *infra*.

251. See the discussion accompanying *supra* notes 178–181.

to do what many of us consider a civic duty struck me as something that might degrade the collective value that Americans place on democratic participation. But then I considered the reality of the participatory landscape. Many people simply do not vote. Non-voting contributes to an economically imbalanced electorate, which in turn skews policy outcomes. This trend is even more pronounced in local elections, elections that have the most direct impact on our daily lives. And in states like California that have reduced nearly every barrier to voting, many still choose not to vote. Perhaps an extra nudge might do the trick.

I began this Note with a simple question: If I promise to give you \$20, and all you need to do in return is to vote in the next election, would you do it? I am now more curious to know whether you think governments should pay their citizens to vote. My hope is that this Note contributes to the conversation about political participation. Much of my analysis only scratches the surface, and there is so much more work that can be done on this idea. I have demonstrated that a voter incentive program would likely pass statutory and constitutional muster. And with the right policy design—such as starting local and providing direct, visible, and infrequent incentives—a voter incentive policy might in fact bring new voters to the polls. All that remains is whether it is worth the time and the financial and political capital it would take for policymakers to take up such a proposal.