

CHOOSING REPRESENTATIVES BY PROXY VOTING

Andrew Tutt*

People often do not vote, and those who do sometimes unwittingly vote against their interests. That is because voters have little incentive to cast intelligent votes in any given election, even though they clearly have a stake in the intelligent outcome of every election. A simple solution would be to permit voters to delegate their votes—that is, let someone else vote on their behalf in some fashion. Possible delegated voting solutions range from simply voting a “default” straight ticket on one extreme to creating a system in which fiduciaries must vote in a voter’s best interests on the other. This Essay discusses the upsides of delegated voting and the potential practical and constitutional hurdles to its realization. Ultimately, this Essay argues that permitting individuals to delegate their votes might significantly advance many of the core values at the heart of election law without the downsides associated with mandatory voting and campaign finance regulation.

INTRODUCTION

Proposals that the United States adopt some version of compulsory or mandatory voting seem to surface every year. The benefits are thought to be multiple.¹ Mandatory voting, the argument goes, would transform campaigns from efforts to energize the base and “get out the vote” to efforts to engage in substantive political persuasion and would ameliorate nonvoters’ political underrepresentation. But the problems are also well known.² Those compelled to vote may invest little effort in making good political judgments, and the prospect of fining or jailing a poor mother because she did not make it to the polls is less than appealing.

There is another way—one that, to this author’s knowledge, is not used in any American jurisdiction: Let people delegate their votes. Let them do it, perhaps, by designating a person to cast their votes on their behalf. Let them do it, perhaps, by permitting the register of elections to

* Attorney-Adviser, Office of Legal Counsel, U.S. Department of Justice. The views expressed in this piece are the author’s only and do not necessarily reflect the views of the Department of Justice or the Office of Legal Counsel.

1. Note, The Case for Compulsory Voting in the United States, 121 Harv. L. Rev. 591, 596–98 (2007) (listing benefits of compulsory voting, including reducing impact of money in politics and better aligning government policy with preferences of electorate).

2. Richard L. Hasen, Voting Without Law?, 144 U. Pa. L. Rev. 2135, 2174–75 (1996) [hereinafter Hasen, Voting Without Law] (listing reasons against compulsory voting, including inconsistency with America’s commitment to individual liberty and likelihood compelled votes are ill informed).

count their ballots as default straight-ticket votes in favor of one party or another in the event that they do not cast their ballots in the same election. Let them do it when they register to vote. Let them change or abjure their default or designated votes at any time.

Permitting people to delegate their votes would greatly reduce the cost of voting and thus vastly increase political participation without the downsides of mandatory voting. Simple as it may sound, there is much within this proposal to unpack, both practical and legal.³ This piece invites the reader to consider seriously the ways in which such a system of delegated votes might work to successfully ameliorate some problems with the American law of democracy.

Part I of the Essay examines the interests and problems scholars have identified as central to the law of democracy. Part II discusses corporate proxies and other contemporary and historical uses of delegated voting. Part III lays out the case for delegated voting, demonstrates how it could be used to alleviate several problems endemic to American elections, and surveys several counterarguments. Part IV addresses constitutional limitations that might prevent jurisdictions from permitting delegated voting.

I. PROBLEMS IN THE LAW OF DEMOCRACY

Scholars have identified a number of recurrent issues in the law of democracy over the last several decades. Many of those problems are traceable to the transaction costs associated with casting an intelligent ballot, or casting a ballot at all. It is an unfortunate fact that the transaction costs associated with casting an intelligent ballot outweigh the benefits for most voters because each individual vote is so unlikely to change the outcome of the election.⁴ This result holds even though each voter may be intensely interested in the eventual outcome. Put simply, voters have little incentive to cast intelligent votes in any given election, even though they have an interest in the intelligent outcome of every election.⁵ And so, many problems in the law of democracy arise. Consider four.

3. Professor Saul Levmore has written briefly on this topic in the past. Saul Levmore, *Precommitment Politics*, 82 *Va. L. Rev.* 567, 615–18 (1996) (explaining, in context of world in which voters could trade votes, “like-minded voters, forming a subset of all voters in a single election or political jurisdiction, could overcome collective action problems by delegating their franchise to a reliable intermediary”).

4. See, e.g., Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 *U. Pa. L. Rev.* 1, 76–77 (1990) (explaining voting, even when one is highly informed, is “irrational” because any given vote is so unlikely to influence election, but people may vote because of its “expressive” or “symbolic” dimensions).

5. See Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 *Iowa L. Rev.* 1287, 1315 (2004) (“While any one vote has virtually no impact on electoral outcomes . . . , nonvoting by large numbers of citizens could have a substantial effect. Thus, it will often

A. *Lack of Electoral Competition as a Barrier to Political Change*

Many scholars of election law believe that a central task of election law should be “the preservation of an appropriately competitive political order.”⁶ Electoral competition ensures accountability and responsiveness,⁷ each thought to be key to democratic legitimacy.⁸ In ways large and small, however, American elections fail to reflect a competitive political order. Distortions in the composition of the electorate, through certain partisan gerrymanders, and distortions in electoral outcomes, through laws that dampen voter participation or distort public debate, mean that at any given time American elections do not reflect the considered consensus judgment of a majority of the eligible electorate. Much of election law scholarship is focused on determining when these distortions are significant enough to justify judicial intervention in the political process.⁹

be rational for a given individual to forego voting . . . , even though the aggregate effect of similar decisions . . . could have a large impact.”).

6. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *Stan. L. Rev.* 643, 716–17 (1998) (“In our perspective, the crucial issues are not so much ones of individual rights of participation as ones of the preservation of the robustly competitive partisan environment.”); see also, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 *Harv. L. Rev.* 593, 615 (2002) [hereinafter *Issacharoff, Gerrymandering*] (“At the heart of what has been termed the ‘political markets’ approach is a commitment to the competitive integrity of the political process as an indispensable guarantor of democratic constitutionalism.”); Samuel Issacharoff, *Surreply, Why Elections?*, 116 *Harv. L. Rev.* 684, 694 (2002) (“[I]f at some level there is not a commitment to electoral competition, it is hard to fathom why we bother to hold elections”); Michael S. Kang, *Race and Democratic Contestation*, 117 *Yale L.J.* 734, 738 (2008) (“This Article offers democratic contestation as a basic value to be pursued in the law of democracy and the foundation for a theory that helps sort through and reconcile approaches to race, representation, and political competition”); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 *Geo. L.J.* 491, 497–98 (1997) (arguing courts should seek to prevent partisan political majorities from entrenching themselves and their views); Daniel R. Ortiz, *Got Theory?*, 153 *U. Pa. L. Rev.* 459, 485–90 (2004) (showing how gerrymandering damages electoral competition); Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 *Election L.J.* 685, 688 (2004) (“[O]f the various structural goals of democracy, the one courts ought to focus on is ensuring competition and, through it, electoral accountability.”).

7. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1461–62 (2014) (extolling responsiveness and accountability); see also, e.g., *Issacharoff, Gerrymandering*, *supra* note 6, at 615–16 (“Representatives remain faithful to the preferences of the electorate and responsive to shifts in preferences so long as they remain accountable electorally.”); *Issacharoff & Pildes*, *supra* note 6, at 646 (“Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interests and views of citizens.”).

8. See, e.g., Hanna Fenichel Pitkin, *The Concept of Representation* 234–35 (1967) (explaining representative government serves ends of responsiveness and accountability); G. Bingham Powell, Jr., *Elections as Instruments of Democracy* 3–4 (2000) (“There is a widespread consensus that the presence of competitive elections, more than any other feature, identifies a contemporary nation-state as a democratic political system.”).

9. See, e.g., *Issacharoff, Gerrymandering*, *supra* note 6, at 600 (“[T]here should be greater constitutional concern and, correspondingly, greater warrant for judicial

B. *Lack of Voter Participation as Damaging to Democratic Legitimacy and Accountability*

Some scholars see ensuring democratic participation as the law of democracy's core value.¹⁰ Participation legitimates electoral outcomes by fostering a sense of ownership over policy choices and by expanding the pool of individuals whose views elected officials must accommodate. Participation is therefore also key to democratic legitimacy.¹¹ Yet, for a variety of reasons, most individuals do not vote in most of the elections in which they are eligible.¹² Among young voters, African Americans, and Latinos, the participation rates are disproportionately low.¹³ Scholars see the absence of participation by so many eligible individuals as corrosive to the legitimacy of the political order.¹⁴

C. *Political Ignorance as Detrimental to the Development of Sound Policy*

Some scholars see democratic outcomes as irretrievably harmed by the problem of "political ignorance."¹⁵ It is not rational to invest in

intervention when political parties have joined together to squeeze the competitive juices out of the process.”).

10. See, e.g., Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 5 (2005) (noting “Constitution’s democratic nature”); Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 *Hastings Const. L.Q.* 643, 653 (2008) (suggesting courts should “establish[] that the aggregate pattern of voter participation is a proper object of constitutional concern”); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 *Tex. L. Rev.* 1705, 1710–11 (1993) [hereinafter Karlan, *Rights to Vote*] (“[P]articipation claims invoke assertions of anonymous equality: whatever the plaintiff’s individual characteristics, she is entitled to participate fully in community governance by casting a ballot.”); Spencer Overton, *Voter Identification*, 105 *Mich. L. Rev.* 631, 673–74 (2007) (“Voting is also structural to the extent that one believes that ascertaining the will of the citizenry as a whole is a central purpose of self-government in a democracy.”).

11. See, e.g., Elmendorf, *supra* note 10, at 677 (“The aggregate rate of voter participation might be thought an object of constitutional concern insofar as it signifies the legitimacy of the political order.”); Overton, *supra* note 10, at 636, 657 (“[A]ssessing the will of the people as a whole is an essential objective of democracy.”).

12. See, e.g., U.S. Census Bureau, *Statistical Abstract of the United States* 244 (2012), <http://www.census.gov/prod/2011pubs/12statab/election.pdf> [<http://perma.cc/ZNJ5-JVKH>] (showing participation rates ranging from thirty to fifty percent of voting age population in elections for President and congressional representatives between 1932 and 2010).

13. David Gartner, *The Voting Rights Act and the Enduring Challenge of Participation*, 14 *Election L.J.* 278, 279–80 (2015).

14. See, e.g., Karlan, *Rights to Vote*, *supra* note 10, at 1710 (noting participation fosters “sense of connectedness to the community and of equal political dignity; greater readiness to acquiesce in governmental decisions and hence broader consent and legitimacy.” (quoting Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 *Harv. C.R.-C.L. L. Rev.* 173, 180 (1989))); see also *supra* notes 10–11 (noting importance of voter participation to democracy).

15. See, e.g., Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 *Geo. L.J.* 1515, 1548 (2010) (explaining political

acquiring sufficient information to cast an informed ballot. At its most extreme, “it may be the case that virtually all legislation produced by Congress and state legislatures fails to represent the will of ‘the people’ in any meaningfully majoritarian way.”¹⁶ The central problem introduced by political ignorance is that electoral outcomes may not lead to legislative outcomes that enhance the welfare of the electorate. Some theorists have suggested that reducing the complexity and scope of the political decisions individuals make might help to alleviate the problem of political ignorance by making political outcomes marginally more responsive and accountable, even if perfect accountability is unachievable.¹⁷

D. *Misalignment of Legislative and Voter Preferences as Contrary to Democracy’s Majoritarian Premise*

Some scholars view misalignment between the policy preferences of the electorate and the policy preferences of legislators as the appropriate

ignorance means Supreme Court has “little to fear from a public that disagrees with its decisions, because its legitimacy is largely impervious to such disagreement”); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 *Tex. L. Rev.* 441, 460 (2010) (“Most voters know far too little about American government generally—let alone the inner workings of the administrative state—to make informed decisions regarding presidential candidates’ views on specific questions of regulatory policy.”); Somin, *supra* note 5, at 1294 (“The apparent intractability of voter ignorance reinforces the need for theories of democracy and judicial review to take account of this phenomenon.”); Glen Staszewski, *Reason-Giving and Accountability*, 93 *Minn. L. Rev.* 1253, 1266–68 (2009) (“The fact that most citizens lack even basic political knowledge has been almost universally accepted by political scientists for decades.”).

16. Somin, *supra* note 5, at 1330.

17. Two approaches have been proposed. The first involves informational shortcuts, in which cues such as party affiliation are used as proxies. See, e.g., John H. Aldrich, *Why Parties?: The Origin and Transformation of Political Parties in America* 47–49, 170–74 (1995) (identifying methods political candidates use to lower voter decisionmaking costs, including voter registration and mobilization efforts, provision of information, and affiliation with political parties); Anthony Downs, *An Economic Theory of Democracy* 96–141 (1957) (arguing political parties in two-party system spread policies to appeal to broader swaths of voters, in contrast to multiparty systems where political parties reduce ambiguity by having more specific platforms, which may give rise to more severe decisionmaking difficulties among voters); V.O. Key, *Southern Politics in State and Nation* 298–311 (1949) (discussing factionalism and political parties in southern states); Morris Fiorina, *An Outline for a Model of Party Choice*, 21 *Am. J. Pol. Sci.* 601, 601 (1977) (arguing for voting model integrating party identification, retrospective voting, and issue voting into single-decision rule).

The second is a trusteeship model, in which individuals delegate political decisions to individuals whom they trust to vote in their interests. See, e.g., Edmund Burke, *An Appeal from the New to the Old Whigs*, in *Further Reflections on the Revolution in France* 167 (Daniel E. Ritchie ed., 1992) (“To enable men to act with the weight and character of a people . . . [they must] be in that state of habitual social discipline, in which the wiser, the more expert, and the more opulent . . . protect the weaker, the less knowing, and the less provided with the goods of fortune.”).

central concern of the law of democracy.¹⁸ The problem these scholars identify is in the ways in which certain laws (or the absence of laws) distort electoral outcomes.¹⁹ This concern has special resonance in the campaign finance realm, in which there has long been concern that candidates with superior resources can take advantage of people's limited political knowledge and scarce attention to cause them to vote against their interests.²⁰ The problem is that "donors receive exquisitely attentive representation—and . . . voters receive virtually no representation at all."²¹ If it is true that voters can be persuaded to cast ballots that result in policy outcomes that actually harm their interests, representatives will rationally align their interests with those who can get them elected,

18. For example, many scholars have expressed concern over the effect of private contributions on political equality. See, e.g., Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It* 151 (2011); Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 *Tex. L. Rev.* 1751, 1772 (1999) ("Large private contributions raise the danger that officeholders will be too attentive to the interests of donors and prospective donors and insufficiently concerned about the public interest."); Richard Briffault, *On Dejudicializing American Campaign Finance Law*, 27 *Ga. St. U. L. Rev.* 887, 913–17 (2011) ("Political equality is undermined when some individuals or interest groups with greater private wealth than others can draw on [greater] resources to make more extensive appeals to the electorate than can those with fewer resources."); Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 *U. Chi. Legal F.* 111, 138 ("A system that allows wealthy interests to secure influence through unlimited expenditures and contributions may produce a policy skew that favors those interests."); Samuel Issacharoff, *On Political Corruption*, 124 *Harv. L. Rev.* 118, 122, 126 (2010) ("[T]he source of corruption was large expenditures capturing the marketplace of political ideas, and the corrupted entities were, at bottom, the voters who could only succumb to the entreaties of money."); Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 *Va. L. Rev.* 1425, 1428 (2015) ("This Article's thesis is that there is an additional interest, of the gravest importance, that both is threatened by money in politics and is furthered by (certain) campaign finance regulation. This interest is the promotion of *alignment* between voters' policy preferences and their government's policy outputs.").

19. See sources cited *supra* note 18 (providing examples elucidating this concern).

20. See, e.g., Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 *Tex. L. Rev.* 1705, 1727 (1999) ("But the reformers must believe that most voters . . . are 'civic slackers,' who devote little time and less real thought to how to vote. Thus, money, in the guise of spending on substantively vacuous mass media advertising, distorts the election process by influencing how these slackers cast their ballots."); Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 *Stan. L. Rev.* 893, 901–02 (1998) (explaining many reformers believe voters are "disengaged" from politics and choose candidates "on the basis of commercials made possible by money"); see also Owen M. Fiss, *Money and Politics*, 97 *Colum. L. Rev.* 2470, 2479–80 (1997) ("Unlimited spending by rich candidates, even if they are using their own money, creates the risk that some voters will hear only one part of the story and thus be requested to make a choice without full information."); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 *Colum. L. Rev.* 609, 640 (1982) ("Allocation of limited opportunities for speech [via campaign finance restrictions] prevents mutual interference or distortion, and thus enhances the flow of information to listeners.").

21. Stephanopoulos, *supra* note 18, at 1431.

rather than those who actually vote, undermining the majoritarian premise of democracy.

* * *

The foregoing problems are often presented in particular contexts. Electoral competition concerns frequently arise in debates over judicial intervention into redistricting controversies, while misalignment (or antidistortion) often appears in campaign finance. The thesis of this Essay is that all of the foregoing interests can be served, to a greater or a lesser extent, by permitting individuals to delegate their votes.

II. THE BANALITY OF DELEGATED VOTING

Legalizing the delegation of one's vote might seem novel, but in fact it is almost triflingly ordinary. The entire notion of republican government rests on the idea that people delegate to their representatives the authority to vote on their behalf. In this vein, consider three circumstances in which delegating votes is commonplace: (1) corporate proxy voting, (2) not voting, and (3) voting through state legislatures, the electoral college, and constitutional conventions.

A. *Corporate Proxy Voting*

In corporate law, shares come with the right to vote for the board of directors at the annual meeting.²² The right to vote one's shares is thought to be one of "the fundamental rights of the shareholder" and therefore "deserv[ing] of a great deal of respect and protection by law."²³

Yet in every state, individuals are permitted to delegate their votes to "proxies"²⁴ who will vote their shares at the firm's annual meeting.²⁵

22. The right to vote one's shares is a default rule, although it is an important one. See, e.g., Del. Code Ann. tit. 8, § 212(a) (2006) ("Unless otherwise provided in the certificate of incorporation and subject to § 213 of this title, each stockholder shall be entitled to 1 vote for each share of capital stock held by such stockholder.").

23. Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. Davis L. Rev. 407, 409–10 (2006); see also Troy A. Paredes, *The Firm and the Nature of Control: Toward a Theory of Takeover Law*, 29 J. Corp. L. 103, 106 (2003) ("Shareholders . . . retain key residual control rights over the corporation, the most important of which being the right to vote for the board and the right to sell their shares."); Robert B. Thompson & D. Gordon Smith, *Toward a New Theory of the Shareholder Role: "Sacred Space" in Corporate Takeovers*, 80 Tex. L. Rev. 261, 299 (2001) ("Under every theory of the firm . . . shareholder oversight is viewed as crucial to the legitimacy of director power, and the most important medium for shareholder expression is the right to vote.").

24. See 2 James D. Cox et al., *Treatise on the Law of Corporations* § 13:26 (3d ed. 2002) ("A 'proxy' is the authority given by one shareholder to another to vote her shares at a shareholders' meeting.").

25. See Lloyd L. Drury, III, *An Introduction and Practitioner's Guide to the Louisiana Business Corporation Act*, 60 Loy. L. Rev. 425, 449 (2014) ("[E]very state allows and even encourages shareholder voting by proxy . . ."); Melvin Aron Eisenberg, *Access to the Corporate Proxy Machinery*, 83 Harv. L. Rev. 1489, 1492 (1970) ("[T]oday every state permits proxy voting even in the absence of certificate or bylaw provision."); Aleta G.

Proxies can either be limited or unrestricted: “A general unrestricted proxy . . . gives a general discretionary power of attorney to vote for directors and on all ordinary matters that may properly come before a regular meeting,” while a “limited proxy may restrict the authority to vote to specified matters only and may direct the manner in which the vote shall be cast.”²⁶ In both cases, “[t]he proxy holder is . . . in the eye of the law, a fiduciary” who owes to the individual on whose behalf the fiduciary votes a “duty of acting in strict accord with those requirements of a fiduciary relationship which inhere in the conception of agency.”²⁷

Proxy voting was once “generally prohibited at common law as an unlawful delegation of authority,” but as of 1940, “the proxy [was] . . . recognized as essential to shareholder participation in the direction of corporate affairs” and “an indispensable aid in furthering corporate democratization.”²⁸ Proxies are thought “indispensable” because they permit shareholders to surmount the significant transaction costs that arise from attempting to attend the annual meeting to vote their shares.²⁹

If one cleaves to the view that there is a paradigmatic difference between political and economic representation, then the existence of the proxy in corporate law has little relevance to political elections. From another view, however, the existence of the corporate proxy strongly favors the recognition of a similar mechanism for use in political elections—at least, if one is inclined to think that individuals are considerably more interested in economic affairs in which they have a direct and immediate stake than in abstract issues of public policy at potentially a very distant remove from their everyday life.

A tension exists in our conception of individual autonomy if we believe individuals can rationally delegate the authority to make potentially life-altering economic decisions to others but cannot delegate even a fraction of their political autonomy to another to vote on their behalf. Indeed, “[p]roxy voting is such a familiar and unobjectionable

Estreicher, *Securities Regulation and the First Amendment*, 24 Ga. L. Rev. 223, 312 n.366 (1990) (“All states now permit corporations to solicit shareholder votes by proxy, although their regulation of the process is ‘still a virtual void.’” (quoting Louis Loss, *Fundamentals of Securities Regulation* 449 n.1 (2d ed. 1988))); Donald E. Schwartz, *Federalism and Corporate Governance*, 45 Ohio St. L.J. 545, 553 (1984) (“Delaware, like all other states, permits shareholders to vote by proxy, but neither statutes nor rules govern the procedure for solicitation of proxies.” (footnote omitted)).

26. 2 Cox et al., *supra* note 24, § 13:26.

27. *Id.*

28. Note, *The SEC Proxy Rules and Shareholder Participation in Management*, 53 Harv. L. Rev. 1165, 1165 (1940).

29. See Sheldon E. Bernstein & Henry G. Fischer, *The Regulation of the Solicitation of Proxies: Some Reflections on Corporate Democracy*, 7 U. Chi. L. Rev. 226, 226–27 (1940) (discussing evolution of proxy to replace shareholder meeting as publicly traded companies’ stockholders became geographically dispersed).

practice in corporate law that it can be difficult to explain why the rules of corporate law and politics are in this respect so different.”³⁰

The existence of the corporate proxy is really just a subset of the larger dissonance between ordinary agency principles and the nonassignability of votes. Individuals can delegate decisions to others in an incredible variety of situations—some of which are life or death.³¹ One might even regard it as odd that so much authority can be delegated but the right to vote on one’s behalf cannot be.

B. *Not Voting at All*

Millions of individuals in fact already frequently engage in a form of implicit delegation of votes by not voting at all. One view of declining to vote is that those individuals who actively choose not to vote have tacitly delegated their choices to those who do choose to vote.³² Yet unlike a delegation to a particular individual or a limited delegation in which one may place restrictions on the scope of one’s assent, not voting permits individuals to delegate their votes only at extraordinary cost—namely, the cost of giving up any power at all to have a say in who is elected. Even if one were to adopt the charitable view that many nonvoters are active nonvoters, it would enhance the autonomy of active nonvoters to give them the opportunity to define and delimit the scope of their delegations.

C. *The Electoral College, State Legislatures, and Conventions*

Finally, and most readily, much of the structure of American government is founded on the notion that individuals can delegate their political decisions. Individuals do not vote for the President, but rather for electors in the electoral college, who vote for the President on behalf of those who send them.³³ State legislatures were the original institutions that selected senators before the Constitution was amended to provide

30. Levmore, *supra* note 3, at 615.

31. See Mark Fowler, *Appointing an Agent to Make Medical Treatment Choices*, 84 *Colum. L. Rev.* 985, 1009–10 (1984) (explaining life-or-death medical treatment decisions may plainly be delegated).

32. See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *Colum. L. Rev.* 457, 485 & n.105 (1994) [hereinafter Amar, *Consent of the Governed*] (noting viewpoint “that in a properly called election, a majority of those voting—not of those eligible—should prevail”).

33. See Stanley Chang, *Updating the Electoral College: The National Popular Vote Legislation*, 44 *Harv. J. on Legis.* 205, 207–10 (2007) (outlining origins and structure of electoral college); Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 *Ariz. St. L.J.* 1237, 1243 (2012) (same); see also U.S. Const. art. II, § 1, cls. 2–4 (setting forth procedures for electing President by electors from each state).

for their election by popular vote.³⁴ And constitutional conventions, by which the constitutional document itself was ratified and one means by which it can be amended, depend on the notion that individuals can delegate their authority to ad hoc representatives to make discrete political judgments on their behalf.³⁵

Most important of all, every single day, at every level of representative government, individuals permit others to vote on their behalf in fashioning public policy. Permitting individuals to push that decision back only a single step—and to more carefully tailor how they wish to exercise their primary political right to vote—appears entirely consistent with the very foundation on which the edifice of republican government stands.

III. THE PRACTICAL BENEFITS AND DRAWBACKS OF DELEGATED VOTING

Voting by delegation is familiar, built into the fabric of a number of social institutions. It also tends to lessen several of the problems law-of-democracy scholars have identified in American election law. And although several counterarguments could be leveled against delegated voting, there is reason to think that, on balance, its benefits would outweigh its costs.

A. *The Benefits of Delegated Voting*

First, consider the interest in promoting electoral competition and preserving avenues for political change. Permitting individuals to delegate votes could advance that value by increasing the number of individuals (in the form of delegates) who have fiduciary responsibilities to make informed decisions about the issues and who, consequently, have incentives to stay informed about them. The likelihood that partisan political outcomes will be responsive and accountable to people's interests might thereby be enhanced.

Second, and cumulatively, consider the interest in participation. Perhaps the central virtue of delegation is that it significantly reduces the cost of casting a ballot by removing the requirement that individuals actually go to the polls or closely scrutinize every relevant issue at stake in

34. See U.S. Const. art. I, § 3, cls. 1–2 (providing for selection of senators by state legislatures); *id.* amend. XVII (making senators popularly elected, partially superseding Article I, § 3, clauses 1 and 2).

35. See, e.g., Amar, *Consent of the Governed*, *supra* note 32, at 487–88, 502–03 (“[T]he Founders relied on smaller [constitutional] conventions to speak as and for the People. Direct special election for a single purpose would minimize the ‘agency gap’ between convention and electors, but the convention could carry on extended deliberations and discussions that would be difficult in the polity at large.”); see also U.S. Const. art. V.

the election. Thus, permitting delegation is likely to uniformly increase participation by significantly reducing the cost of voting.³⁶

Third, consider the problem of rational political ignorance. Permitting individuals to delegate their votes makes some progress toward reducing the problem of political ignorance by allowing individuals to obtain the beneficial returns to scale that come from delegating the task of carefully studying the issues and the candidates. Changing the relevant choice set from a complex one—in which individuals must personally familiarize themselves with every candidate and issue to make an informed determination—to a simple one—in which individuals must only identify their own general political preferences and determine in general terms who they believe can effectively honor their preferences by casting their votes—can thus help to ensure that political outcomes more closely track individuals' tastes and preferences.³⁷

Fourth, and relatedly, consider the problem of misalignment. To the extent that it is believed that campaigns can take advantage of voters' scarce attention and rational political ignorance to convince them to vote against their own best interests, delegation combats that problem along multiple fronts. To the extent that political parties or candidates wish to persuade voters to change their delegated preferences or vote themselves, the burden of persuasion is higher, and the lead time necessary to persuade voters to do so is likely longer. That is because voters who have delegated their votes can rely on their delegations rather than the limited and sometimes slanted information they receive in the immediate run-up to an election. Additionally, to the extent that campaigns wish to persuade delegates to vote for them, they would not be as able to take advantage of political ignorance and scarce attention because designees have much stronger incentives to stay politically informed (on account of their relatively enhanced voting power and fiduciary responsibility to those who have assigned them their votes).³⁸ Moreover, to the degree that voters would now be inclined to stand by their delegations, rather than cast relatively ignorant ballots, the incentives to engage in get-out-

36. See Levmore, *supra* note 3, at 616 (arguing use of proxies in political elections would increase turnout by reducing collective-action costs).

37. Moreover, two aspects of delegated voting distinguish it from other methods of reducing political ignorance, such as online quizzes, that might help individuals come up with a quick-and-dirty estimate of for whom they should vote. First, such sources are not inherently trustworthy. Some might, for example, be funded by the campaigns or be slipshod and place undue weight on policy promises that candidates cannot possibly fulfill. Permitting individuals to delegate their votes permits them to choose sources and people that they trust. Second, delegated voting removes the cost—however small—of actually casting a ballot. The public-choice literature and the experience of compulsory-voting jurisdictions suggest that even a small ministerial cost associated with casting a ballot dissuades many voters from voting. See Shaviro, *supra* note 4, at 76–77.

38. See Ortiz, *supra* note 20, at 903 (explaining some theorists take view politically disengaged voters are likely to make political choices “by responding to sheer advertising stimulus rather than to issues”).

the-vote efforts targeted at uninformed voters are reduced. The collective result would be to blunt the effectiveness of electioneering that occurs in close proximity to elections, thereby reducing the probability that elections will result in misalignment between voter preferences and legislative preferences.

B. *Counterarguments and Potential Drawbacks*

Several counterarguments could conceivably be raised against permitting delegated voting. Problems with delegated voting include: (1) the problem of ensuring that delegates vote in the interests of their principals, (2) the difficulties with the administrability and expense of tracking delegated votes, (3) the need to police coercion and vote buying masquerading as delegation, and (4) the possibility of partisan entrenchment in delegations. On careful examination, each of these potential practical problems with delegated voting can be addressed through careful choices in design and the use of familiar legal tools imported from other contexts.

First, consider the problem of ensuring that individuals who are delegated the power to vote on another individual's behalf actually vote in that individual's best interests. This problem could manifest itself in two distinct ways. On the one hand, there is the problem of imperfect information. An individual could have a preference for a particular candidate, but for whatever reason that individual's delegate may not know the individual's true preference. The individual's delegate might therefore ultimately cast the individual's ballot for a different candidate than the one that individual prefers. On the other hand, there is the problem of disloyalty. An individual could delegate the individual's vote to someone, but that delegate could vote for someone the delegate knows the individual does not prefer or would not endorse.

Those two principal-agent problems are probably not very significant ones. The degree of potential principal-agent variance would depend on the legal mechanics of the method of delegated voting a jurisdiction ultimately chooses. At one extreme, individuals could choose to set for themselves "default" straight-ticket votes for one party or another. That would remove entirely the possibility of a disloyal agent casting the vote against the voter's interest. At the other extreme, individuals might be granted the right to delegate their votes to anyone on whatever terms, thus maximizing their ability to inform and dictate their delegates' actions.

A right to delegate one's vote to anyone might raise issues of loyalty, but a jurisdiction could reduce them significantly by imposing traditional fiduciary obligations on delegates.³⁹ Or the jurisdiction could make the

39. Such an individual might take on the fiduciary's traditional duties of loyalty and care and therefore shoulder the responsibility to cast both an informed ballot and one that is in the best interest of the principal. See, e.g., *Meinhard v. Salmon*, 164 N.E. 545,

remedy for disloyalty entirely a self-help remedy, providing that individuals withdraw their delegations if they do not like how their agents vote. Moreover, to deal with the problems of imperfect information or disloyal delegates, jurisdictions could even provide highly circumscribed mechanisms for nullifying or correcting miscast votes. Given the probable relative rarity of “miscast” votes, due to mistake or disloyalty, few such legal challenges are likely to matter because they will not affect electoral outcomes in any event. Thus, even a self-help system is likely to prove adequate to account for the possibility of occasional principal-agent disputes.

Second, consider the problem of the administrability and expense of tracking delegated votes. Jurisdictions may encounter a number of challenges in implementing a delegated voting system. They will need to determine how they will effectively verify that an individual in fact possesses the legal authority to vote on behalf of another. They will need to come up with a system for ensuring that ineligible individuals are speedily removed from the voter rolls so that designees cannot continue to vote on behalf of felons and the dead. They will need to come up with a mechanism for ensuring that, in circumstances in which an individual chooses to cast a ballot by voting in person, that individual’s delegated vote (whether a default vote or a vote cast by a delegate) is tossed. Those administrative burdens are potentially heightened by the fact that it is in everyone’s interests that elections be resolved quickly, fairly, and accurately—preferably on the night of the election.

In an earlier era these administrative problems may have proven insurmountable, but with the arrival of the Internet and sophisticated computer technology, they are almost trivial. Ballots and voters can be verified, cross-referenced, and counted in the blink of an eye and at very low cost. If a jurisdiction were interested in obtaining the potentially significant democratic benefits that might accompany delegated voting, administrative complexity and cost are not likely to be significant barriers.

Third, consider the problems of coercion and vote buying. If there is one principle on which everyone would agree, it is that no one should be able to buy votes.⁴⁰ Additionally, individuals should not be intimidated or coerced into casting their votes one way or another. Permitting the delegation of votes possibly increases these risks because it removes the element of secrecy from the casting of the ballot. In other words,

546 (N.Y. 1928) (“A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”); see also John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 *Yale L.J.* 625, 656–58 (1995) (discussing flexibility of fiduciary standards but noting “law of fiduciary administration, the centerpiece of the modern law of trusts, resolves into two great principles, the duties of loyalty and prudence”).

40. See, e.g., Richard L. Hasen, *Vote Buying*, 88 *Calif. L. Rev.* 1323, 1323–25 (2000) (“Laws prohibiting core vote buying must rank among the least controversial election laws in the United States.”).

currently there is little incentive to try to buy or coerce votes because there is no way of ensuring that the voter actually follows through and votes as instructed.⁴¹ That obstacle is removed when votes can be precommitted by delegation or default.

Nonetheless, the risk that delegated voting will significantly increase vote buying or coercion is likely overstated. As an initial matter, the argument that the secret ballot protects from vote buying and coercion is rather weak in an age in which everyone has a cellphone camera. It is relatively easy for would-be coercers and vote buyers to ensure that a voter voted as promised by simply requiring a photograph of the ballot.⁴² Thus, requiring delegates to account to their principals for their votes is not likely to increase the threat of vote buying and coercion much beyond where it stands now. Additionally, criminal remedies can be imposed to guard against vote buying and coercion. Finally, “[m]any elections do not turn on a handful of votes; they turn on thousands or millions.”⁴³ Thus, for there to be an incentive to engage in vote buying and coercion, it must be possible to engage in the practice on a large enough scale to tip the election without getting caught—an unlikely outcome. The possible increased risks that might attend delegated voting are admittedly hard to quantify, but intuitively it seems likely that the risk is rather small.⁴⁴

Fourth, consider the problem of entrenched delegations or entrenched defaults. Here, the issue is human nature. Individual preferences tend to stick when there is even a small cost associated with making a change.⁴⁵ That insight has led to an explosion of scholarship on the topic of nudging, but it also presents a potentially significant problem for the fairness of delegating votes. Voters might tend to permit their delegates or defaults to drift from their actual political preferences over time because of the modest cost of making a change.⁴⁶

The problem of entrenchment is a potentially serious one, but it seems as though it could be overcome through careful design and in any event, would probably lead to elections with outcomes no worse than the present. As an initial matter, the tendency to stick to defaults in any

41. See Levmore, *supra* note 3, at 617–18 (describing incompatibility between proxy voting and secret ballots).

42. Michael D. Gilbert, *The Problem of Voter Fraud*, 115 *Colum. L. Rev.* 739, 746 n.36 (2015) (“Technology might allow corrupt operators to solve this problem. They can require their paid fraudulent voters to prove for whom they voted by photographing their ballot with a mobile phone.”).

43. *Id.* at 745–46.

44. *Cf. id.* (“[T]heory and evidence suggest that in-person impersonation fraud rarely occurs.”).

45. See Cass R. Sunstein, *Deciding by Default*, 162 *U. Pa. L. Rev.* 1, 5–6 (2013) (“[D]efault rules . . . tend to stick.”).

46. See Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 *Yale L.J.* 1826, 1859 (2013) (“[E]ven very small costs . . . may have a significant effect on behavior.”).

particular circumstance is a highly context-dependent matter, and it is unclear how sticky voters' delegations would tend to be in the aggregate. Moreover, jurisdictions that are particularly worried about the possibility of drift could require individuals to periodically reestablish their delegations or else let them lapse, returning them to a circumstance in which a failure to vote would result in casting no vote. Finally, if individuals were permitted to withdraw their delegations at any time, up to and including Election Day, it is difficult to say that it would be worse to count a delegated vote that drifted somewhat from a voter's "true" preference rather than—as is the case now—attribute no vote to that voter at all. The possibility of entrenchment raises tricky questions, but it is not clear that it is an insurmountable problem or even likely to prove much of one.

* * *

A final point might be raised—which is that the novelty of permitting delegated voting should be a strike against it. The answer is multifold.

As a preliminary matter, delegated voting is not actually novel. It was used in several of the original thirteen colonies, including “the Massachusetts Bay and Plymouth Colonies, Connecticut, Rhode Island, Maryland and New Jersey.”⁴⁷ In Massachusetts in the early 1600s, for example, each town “deputed” two or three individuals to represent its interests at the general court.⁴⁸ In Plymouth, “Colonies and Towns” similarly chose “Committees or Deputies” of two to four “freemen” to represent their interests, on account of “the many inconveniences and great expense” of “their continual attendance at the Court.”⁴⁹ These practices were adopted, moreover, without “any formal authorization from the home government.”⁵⁰ And by the late 1600s, Connecticut, Rhode Island, and Massachusetts had amended their charters to provide specifically for proxy voting.⁵¹ Delegated voting predates the Constitution by more than a century.

Additionally, the notion that some individuals vote on behalf of the interests of others was a premise of the Constitution's original design. The Constitution apportioned representation in the national legislature by population (and three-fifths of slaves) but permitted states to restrict who among that population could vote.⁵² The premise of that theory was,

47. Levmore, *supra* note 3, at 617 n.103.

48. Robert Luce, *Legislative Principles* 102 (1930).

49. *Id.* at 103.

50. *Id.* at 107.

51. *Id.*

52. See Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 *Drake L. Rev.* 859, 861 (2007) (mentioning “[c]laims in the past of ‘virtual representation,’ by which some, whether slave owners, husbands, or property owners, exercised their authority purportedly on behalf of their slaves, wives, or workers”); Muller, *supra* note 33, at 1243, 1249 (noting, as originally conceived, “Electoral

even then, that property holders were thought to vote in the interests of the nonpropertied,⁵³ men were thought to vote on behalf of their wives,⁵⁴ and Southern whites were thought to vote (in some fashion) on behalf of slaves.⁵⁵ Folded into the very idea that individuals can be forced to exercise their political rights through virtual representatives (husbands, parents, property owners, slave owners) is the subsidiary notion that individuals might also freely fashion such an arrangement.⁵⁶

Finally, the notion that individuals should be able to delegate their votes—either by assigning someone the authority to vote on their behalf or selecting a default straight ticket to be counted in elections in which they do not vote—is not the most unconventional recommendation that has been put forward in recent years as a potential method of solving problems in the law of democracy. Professor Akhil Reed Amar has argued that state and federal elections could be, consistent with the Constitution, decided by lottery vote rather than majority vote.⁵⁷ Professor Jane Rutherford has argued that parents can be granted addi-

College count[ed] both voters and nonvoters, and . . . it was up to the states to decide who, if anyone, in those states voted for presidential electors”).

53. Richard Briffault, *The Contested Right to Vote*, 100 Mich. L. Rev. 1506, 1509–11 (2002) [hereinafter Briffault, *Contested Right to Vote*] (discussing “[e]volution of the [f]ranchise” in early America).

54. See, e.g., Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 980–81, 994–95 (2002) (discussing arguments against enfranchising women, including idea of virtual representation); cf. Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117, 2129 (1996) (arguing women “did not in fact receive ‘virtual representation’ through male suffrage”).

55. See Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1075 n.117 (1988) (explaining in founding era, “the electorate . . . could . . . speak for the larger society (which included children, incompetents, women, slaves, etc.)”). But see Sanford Levinson, *Who, If Anyone, Really Trusts “We the People”?*, 37 Ohio N.U. L. Rev. 311, 314 (2011) (arguing slaveholding states “lacked any semblance even of ‘virtual representation’ [on behalf of slaves] that was claimed to be present with regard to the mothers, wives, sisters, and daughters who were also denied the suffrage”).

56. One could contend that these virtual arrangements were a product of outdated notions that wives, slaves, and the nonpropertied were “less than” propertied white male individuals (or not even considered persons). That certainly was a prominent current that led to the formation of the concept of virtual representation, but it was not the only current. Many statements from the period show that virtual representation was motivated by a kind of paternalism—that white propertied men would make decisions in the best interests of the whole society. Nonpropertied men could not make principled decisions, for example, because their relative poverty made them manipulable and nonneutral. See, e.g., Briffault, *Contested Right to Vote*, supra note 53, at 1509–10 (explaining problems of manipulability and self-interest thought to afflict nonpropertied). Even today, important subclasses of the population (such as noncitizens) are not entitled to vote even though they are entitled to equal regard and equal dignity.

57. Akhil Reed Amar, Note, *Choosing Representatives by Lottery Voting*, 93 Yale L.J. 1283, 1303–07 (1984) (considering practical and constitutional limits of lottery voting).

tional votes and the authority to vote on behalf of their children.⁵⁸ Professors Bruce Ackerman and James Fishkin have proposed that the United States create a “Deliberation Day” holiday in which voters spend a day deliberating on public policy issues prior to each presidential election.⁵⁹ That people might cast a default vote, rather than no vote at all, is almost quaint by comparison.

IV. CONSTITUTIONAL LIMITS ON DELEGATED VOTING

A critical question, however, is whether permitting individuals to delegate their votes is constitutional. Although various constitutional challenges might be mounted against a law permitting delegation or default voting, there is a strong probability that none would succeed.

A. *Inalienability and Delegation*

The strongest challenge would likely come from an unlikely source—namely, the argument that inherent in the very concept of voting is that individuals cast their own ballots. This challenge is relatively simple to mount because it does not depend on the text of the Constitution. The argument would be that voting is a special sort of civic obligation that cannot be alienated to anyone.⁶⁰ Three flavors of this argument might be made.

First, it might be argued that requiring individuals to cast their own votes protects the public-interest norms associated with voting. An argument in this vein might say that if votes were freely delegable or could be made by default, “we would have a different conception of what voting is for—about the values that it embodies—and this changed conception would have corrosive effects on politics.”⁶¹ Voters “occupy a position of public trust” that requires the exercise of political responsibility.⁶²

58. Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 *Minn. L. Rev.* 1463, 1514–17 (1998) (discussing constitutional implications of parents voting as proxies for children); see also Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Their Children?: Toward A Conversational Understanding of American Democracy*, 94 *Nw. U. L. Rev.* 503, 503–06 (2000) (exploring appeal and drawbacks of idea of proxy voting by parents).

59. Bruce Ackerman & James S. Fishkin, *Deliberation Day* 3–16 (2004) (outlining idea and mechanics of proposed “Deliberation Day”).

60. Alienability refers to the capacity to transfer a legal right or entitlement to another. See Margaret Jane Radin, *Market-Inalienability*, 100 *Harv. L. Rev.* 1849, 1849–50 (1987) (“Sometimes inalienable means nontransferable; sometimes only nonsalable. Sometimes inalienable means nonrelinquishable by a rightholder; sometimes it refers to rights that cannot be lost at all.”). One cannot sell a vote, for example. *Id.* at 1868. One cannot “sell himself into slavery . . . take undue risks of becoming penniless, or . . . sell a kidney.” Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harv. L. Rev.* 1089, 1111–12 (1972).

61. Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 *Mich. L. Rev.* 779, 849 (1994); see also Cass R. Sunstein, *Social Norms and Social Roles*, 96 *Colum. L. Rev.*

Second, and relatedly, it might be contended that requiring individuals to cast their own ballots forces them to deliberate in a manner that permitting them to form only vague or general political preferences does not. Therefore, voting has a reflexive quality. As the voter shapes public policy, so too requiring the voter to engage and deliberate shapes the voter. This conception of voting places a special premium on the ritual of voting. Requiring individuals to step into the booth and pull the lever promotes a sense of personal responsibility and a personal stake in public policy that might in some sense be diminished by permitting individuals to avoid ever having to go vote. Permitting delegation would mean that individuals never have to become politically responsible or engaged at all, perhaps harming the deliberative character of democracy.

Third, it might simply be argued that votes are not something voters have a right to alienate because their votes do not formally belong to them.⁶³ The theory here would be that votes belong to the polity, not individuals, and the ability to delegate or assign a default vote is simply inconsistent with the right itself.

The problem with all of these inalienability arguments is that they are in significant tension with two core features of our democratic order—trust in individual autonomy and recognition of the need to delegate political authority in the interests of aggregate utility. The essentialist argument that votes cannot be delegated should founder on the shoals of these two principles. In a jurisdiction that permits vote delegation, individuals will remain free to be as engaged in politics as they wish to be. Indeed, one could argue that they already are and that the only difference now is that those who are disengaged from the political process cannot express even the most limited preference about the laws under which they would like to live unless they go cast an uninformed ballot.

Moreover, if requiring that individuals have a personal stake in their political choices were really so important, it is unclear how our system of representative government is permitted to place so many layers of bureaucracy between an individual's vote and a political outcome. Individuals who vote might hope that their small contributions to the election will marginally translate into policies they favor—but those who

903, 964–65 (1996) (positing ban on vote selling as having expressive function in “mak[ing] a certain statement about the pricelessness—not the infinite value—of the right to vote”).

62. Pamela S. Karlan, *Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System*, 80 *Va. L. Rev.* 1455, 1466 (1994).

63. *Id.* at 1457; see also Pamela S. Karlan, *Politics by Other Means*, 85 *Va. L. Rev.* 1697, 1709–14 (1999) (“[T]he political process is seen as the antithesis of the market: The very point is that the choice among candidates is not up for sale.”).

care enough already know that a single ballot is a raindrop in the ocean. Voting might be expressive, but it is hard to say that it is significant.⁶⁴

As with all nontextual arguments, however, it is difficult to gauge the likelihood that an inalienability challenge would be successful.⁶⁵ All that can be said with certainty is that the text of the Constitution is silent on the question.

B. *Other Constitutional Challenges*

There might be other constitutional challenges, but none seems plausible. One scours the Constitution's text for an express or implied proscription on vote designation or default voting, but none readily appears.

It might be argued that delegated voting violates equal protection by permitting some individuals to cast more votes than others. But that argument fails because delegated votes belong to the principal, not the delegate. Thus, in a jurisdiction that permitted individuals to cast "default" votes, the argument would fail because the individual casting the vote would technically be the voter—the register would tally the vote as if the absent voter had cast a straight-ticket ballot. And in a delegated voting jurisdiction, the argument would come apart for the same simple reason. Delegates do not have the privilege of casting more votes on their own behalf than anyone else—they are obligated to vote in the best interests of those who delegate their votes to them.

Perhaps an argument could be mounted that permitting delegated or default voting would constitute a form of vote dilution.⁶⁶ But it is unclear how permitting individuals to delegate or precommit to a vote they are already entitled to cast would result in "dilution" of the votes of others, unless there exists an entitlement to the underrepresentation of nonvoting voters.

64. See, e.g., Hasen, *Voting Without Law*, *supra* note 2, at 2136–37 (addressing "paradox of voting").

65. Cases recognizing unenumerated rights, and limits on the alienability of rights, tend to be fact bound and difficult, with unpredictable holdings that are sometimes hard to reconcile with one another. To give one example, the Supreme Court's cases suggest that a woman could not delegate the decision whether to have an abortion to another person, such as to her husband or her father. See Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 *Harv. L. Rev.* 330, 335–37 & n.24 (1985) (noting right to abortion "surely must belong to the individual woman" and is "[s]eemingly not" alienable). Yet the Supreme Court has held that the government has no obligation to ensure that a poor woman can have an abortion. See *id.* Functionally, the outcome in both cases is the same—waiver of the right to an abortion—and yet, formally they pull apart. See *id.* at 335–38.

66. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (invalidating vote dilution on equal protection grounds); *Baker v. Carr*, 369 U.S. 186, 207–08 (1962) (establishing principle of one person, one vote); *Gomillion v. Lightfoot*, 364 U.S. 339, 346–48 (1960) (invalidating racial vote dilution on Fifteenth Amendment grounds).

A claim that delegating votes or default votes violates the Republican Guarantee Clause⁶⁷ might be mounted, but it is hard to see how making it easier to vote would run afoul of the clause. One might say that not requiring individuals to make a particularized judgment in every election somehow fundamentally transforms the nature of republican government. But even if that were true, it is not clear that delegated voting removes the essential ingredient of particularized judgment. Individuals who delegate their votes cannot necessarily be said to cease making particularized judgments. The decision not to cast a ballot could be said to be a judgment that one endorses the decision of one's delegate about how best to cast one's vote in a particular election. The judgment would, in that sense, remain particular. In any event, it is not clear how it would deprive a state of a republican form of government if individuals were permitted to make more general, rather than particularized, judgments about their political priorities.

CONCLUSION

There may remain logistical and political questions associated with permitting individuals to delegate their votes or assign them by default. This piece is only a first cut at a proposal for reform. But in an age when there is much talk of leaving precedent behind and charting a new course in the law of democracy, it is worth pausing, if only for a moment, to consider whether alternative solutions stand just within reach.

Permitting individuals to delegate their votes, or set default straight-ticket votes, might significantly advance many of the core values at the heart of election law while ameliorating many of the perceived ills that come from political ignorance and outsized campaign spending. Delegated voting may present a new and less draconian approach to solving several age-old problems in the law of democracy.

67. U.S. Const. art. IV, § 4 (mandating all states be grounded in republican principles).