

A HUMAN IN THE BALLOT BOX

*Kevin Frazier**

AI is already upending democratic processes. Candidates rely on AI avatars to appeal to different voters. Campaigns turn to AI to create and circulate compelling messages. Election administrators use AI to spot fraudulent ballots. This is just the beginning.

As AI agents capable of taking unprompted action on behalf of users become more ubiquitous and socially acceptable, pressure will mount on states to allow voters to delegate AI agents to participate in civic affairs on their behalf. The push for AI voting will follow.

So long as there is a human in the ballot box, some means for the voter to implicitly or explicitly consent to the AI-generated ballot cast on their behalf, then AI voting will not violate the Constitution nor federal law. Whether this is a socially desirable end, though, is another question.

CONTENTS

INTRODUCTION	545
I. THREE POSSIBLE USE CASES OF AI IN ELECTIONS	549
A. <i>Automatic AI Voting</i>	551
B. <i>Opt-out AI Voting</i>	552
C. <i>Opt-in AI Voting</i>	552
II. THE TRENDS CREATING PRESSURE ON STATES TO ALLOW AI AGENTS IN ELECTIONS	552
A. <i>The Normalization and Pervasive Use of AI Agents</i>	553
B. <i>Increased Sophistication of AI Agents</i>	555
C. <i>Increased Use of AI in Democratic Processes</i>	555
D. <i>The Continuation of Democratic Woes</i>	556
III. THE POTENTIAL POSITIVE DEMOCRATIC IMPACT OF AI VOTING	558

A.	<i>Voter Turnout</i>	558
B.	<i>Rational Voting</i>	562
C.	<i>Democratic Downsides to AI Voting</i>	564
IV.	THE LEGALITY OF AI VOTING	566
A.	<i>Guarantee Clause</i>	566
B.	<i>Elections Clause</i>	569
C.	<i>The Twenty-Fourth Amendment</i>	569
D.	<i>Inalienability</i>	569
E.	<i>First Amendment</i>	571
F.	<i>Right to Vote</i>	574
G.	<i>Other Constitutional Inquiries</i>	575
H.	<i>Federal Statutory Limitations on AI Voting</i>	576
I.	<i>The Inevitability of State Regulation on AI Voting</i>	577
V.	CONCLUSION.....	578

INTRODUCTION

Legal scholarship is generally and, in some cases, problematically reactive.¹ This is especially true in the context of emerging technology.² The speed, scale, and societal significance of artificial intelligence (AI) demands a more proactive approach from legal scholars for their scholarship to positively contribute to the development of AI law.³ This Article recognizes that reality and embraces the need to dare to ask and resolve important questions arising from likely uses of AI. Such inquiries, even this one, may seem excessively speculative in hindsight. Yet, the willingness of scholars to narrow the field of relevant inquiry aligns with the profession's broader

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¹ Alicia Solow-Niederman, *Administering Artificial Intelligence*, 93 S. CAL. L. REV. 633, 649 (2020). Scholars may justify the gap between recent events and related scholarship in some instances, such as unanticipated or rapid changes in political institutions. *See, e.g.*, Ronald K. L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 198 (1988) (analyzing the trend of public law scholars producing reactive scholarship in the wake of changes to the character of the federal judiciary). Concern about excessively reactive scholarship relates to another line of scholarship on the question of whether and when legal scholarship contributes to relevant legal and policy matters. Frederick Schauer, *Authority of Legal Scholarship*, 139 U. PA. L. REV. 1003, 1004–05 (1991) (questioning the value of legal scholarship to other members of the profession).

See John S. Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?*, 39 J. LEGAL EDU. 343, 371–72 (1989) (reviewing the conditions under which scholarship may be useful to policymakers); *see also* Philip C. Kissam, *The Evaluation of Legal Scholarship*, 63 WASH. L. REV. 221, *passim* (1988) (analyzing the absence of good means to evaluate legal scholarship); *cf.* Michael Moffitt, *Three Things To Be Against (“Settlement” Not Included)*, 78 FORDHAM L. REV. 1203, 1232 (2009) (“The best examples of legal scholarship are the ones that ask good questions.”); Max Radin, *On Legal Scholarship*, 46 YALE L. J. 1124, 1124 (1937) (observing that lawyers commonly lack awareness of the broader context surrounding the topics they write on and litigate); Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1326 (2002) (“[I]nterdisciplinary legal scholarship is problematic unless subjected to the test of relevance, of practical impact.”).

² Charles Williams, *ND Law Students Launch Journal on Emerging Technologies*, UNIV. OF NOTRE DAME L. SCH. (Feb. 17, 2020), <https://law.nd.edu/news-events/news/journal-emerging-technologies/> [<https://perma.cc/AX44-UD8G>] (sharing Professor Stephen Yelderman's view that “Legal scholarship in the technology space reacts to technologies already in place, far removed from anything that is emerging”).

³ *See* Yonathan A. Arbel et al., *Open Questions in Law and AI Safety: An Emerging Research Agenda*, LAWFARE (Mar. 11, 2024, 1:00 PM), <https://www.lawfaremedia.org/article/open-questions-in-law-and-ai-safety-an-emerging-research-agenda> [<https://perma.cc/ZHK2-86ZY>] (enumerating areas related to AI and the law that would benefit from scholarly attention). Some scholars have already acted on the need for anticipatory AI scholarship. *See, e.g.*, Michael R. Siebecker, *Democracy, Discourse, and the Artificially Intelligent Corporation*, 84 OHIO ST. L.J. 953 (2024).

mandate to further the rule of law,⁴ which benefits from the clarity and stability brought about by anticipating and resolving plausible and significant legal questions.⁵

The use of AI in nearly every aspect of our lives is inevitable.⁶ Many of those uses raise substantial and novel legal issues. The questions prompted by the use of AI in democratic affairs warrants particular attention. Candidates have already used AI to create clones that appeal to specific voters.⁷ Campaigns have relied on AI to generate more compelling messaging.⁸ Administrators may soon deploy AI to detect fraudulent ballots.⁹ The cumulative effect of these uses may transform a key aspect of democratic governance. How, why, and when voters use AI will likewise shape democratic affairs. So, what will AI do for voters?

⁴ Cf. Posner, *supra* note 1, at 1314 (highlighting that some of the earliest legal scholarship explored novel theories).

⁵ Cf. Mark Tushnet, *Post-Realist Legal Scholarship*, 1980 WIS. L. REV. 1383, 1401 (1980) (identifying a tie between study of the law and “prescriptions about the transformation of the society”).

⁶ Josh Taylor, *Rise of Artificial Intelligence is Inevitable but Should Not be Feared*, *Father of AI* says, THE GUARDIAN (May 6, 2023, 20:00 PM), <https://www.theguardian.com/technology/2023/may/07/rise-of-artificial-intelligence-is-inevitable-but-should-not-be-feared-father-of-ai-says> [https://perma.cc/L4HA-ESPW].

This includes substantial use by public officials and offices. The Environmental Protection Agency, for instance, is already studying how to use AI to improve the accuracy of its enforcement actions. *EPA Artificial Intelligence Inventory*, EPA (March 18, 2025), <https://www.epa.gov/data/epa-artificial-intelligence-inventory> [https://perma.cc/V6TX-9TM8].

⁷ Sejeong Lee et al., *From the Metaverse to AI Clones: South Korea’s Presidential Election Goes Digital*, FRANCE24 (Sept. 3, 2022, 16:11 PM), <https://www.france24.com/en/tv-shows/focus/20220309-from-the-metaverse-to-ai-clones-south-korea-s-presidential-election-goes-digital> [https://perma.cc/9DU8-2WUK]; *The Robot Running for NZ Prime Minister in 2020*, STUFF (Nov. 26, 2017, 8:13 PM), <https://www.stuff.co.nz/politics/350619532/the-robot-running-for-nz-prime-minister-in-2020> [https://perma.cc/7LYF-EUUL]; Abigail O’Leary, *Robot to Run for Mayor in Japan in ‘World Fits’ Promising ‘Fairness and Balance’ for all Residents*, MIRROR (Apr. 18, 2018, 5:20 AM), <https://www.mirror.co.uk/tech/robot-run-mayor-japan-world-12377782> [https://perma.cc/7DAS-2AEM]; Vittoria Elliott, *There’s an AI Candidate Running for Parliament in the UK*, WIRED (June 11, 2024, 10:19 AM), <https://www.wired.com/story/ai-candidate-running-for-parliament-uk/> [https://perma.cc/SB36-JY24].

⁸ Shanze Hasan, *The Effect of AI on Elections Around the World and What to Do About It*, BRENNAN CTR. FOR JUST. (June 6, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/effect-ai-elections-around-world-and-what-do-about-it> [https://perma.cc/M45B-BUKP].

⁹ Deepak Padmanabhan et al., *AI Could Help Cut Voter Fraud – But it’s Far More Likely to Disenfranchise You*, THE CONVERSATION (Feb. 8, 2024, 8:21 AM), <https://theconversation.com/ai-could-help-cut-voter-fraud-but-its-far-more-likely-to-disenfranchise-you-221573> [https://perma.cc/9UDP-4R4N]; cf. Sophia Fox-Sowell, *New AI Task Force Convenes State and Local Officials*, STATESCOOP (July 15, 2024), <https://statescoop.com/state-local-government-election-officials-ai-task-force-newdeal/> [https://perma.cc/9FMA-BH7A] (reporting that state and local elected officials recently gathered in D.C. to discuss increased use of AI in government services).

Some voters have already turned to AI as a source of logistical information about upcoming elections.¹⁰ They may soon have the opportunity to rely on AI for much more.¹¹ “Augmented Democracy,” as theorized by MIT Professor César Hidalgo,¹² embraced by Yale Law Professor Hélène Landemore,¹³ and debated by others,¹⁴ would amount to democracy by AI: “AI agents would learn voters’ preferences and then be able to generalise these to direct votes on political and legislative issues.”¹⁵ Given broad popular awareness of Augmented Democracy¹⁶ and that institutions such as the International Monetary Fund have provided a platform for discussion on the topic,¹⁷ it is not a far leap to think about American voters delegating their vote to state-operated AI agents.

This Article discusses three possible types of delegation to AI agents: automatic, opt-out, and opt-in. Under automatic AI voting, voters could instruct AI agents to make certain votes prior to an election but would otherwise be bound by the choices generated by the agent. Under opt-out AI voting, voters would likewise have an opportunity to deliver pre-election instructions, but the choices generated by the AI agent would be reviewable by the voter prior to being finalized. If the AI-generated ballot was not definitively altered or rejected by the voter, then it would be counted by the state. Under opt-in AI voting, a voter would again be afforded a pre-election instruction opportunity, however, state acceptance of the AI-generated ballot would require the voter’s explicit consent.

¹⁰ Daniella Rivera & Annie Knox, *KSL Truth Test: AI Bots, Ballots and the Best Sources for Reliable Election Information*, KSL TV (May 6, 2024, 10:54 PM), <https://ksltv.com/642178/ksl-truth-test-ai-bots-ballots-and-the-best-sources-for-reliable-election-information/> [<https://perma.cc/LFK3-7PHG>].

¹¹ Nardine Alnemr & Rob Weymouth, *Democracy and Artificial Intelligence: Old Problems, New Solutions?*, DELIBERATIVE DEMOCRACY DIG. (Apr. 23, 2024), <https://www.publicdeliberation.net/democracy-and-artificial-intelligence-old-problems-new-solutions/> [<https://perma.cc/C7CU-NQNP>].

¹² TED, *A Bold Idea to Replace Politicians* | César Hidalgo, YOUTUBE (Apr. 3, 2019), https://www.youtube.com/watch?v=CyGWML6cI_k [<https://perma.cc/TSM7-Q5RM>].

¹³ Hélène Landemore, *Fostering More Inclusive Democracy with AI*, INT’L MONETARY FUND FIN. & DEV. MAG. (Dec. 2023), <https://www.imf.org/en/Publications/fandd/issues/2023/12/POV-Fostering-more-inclusive-democracy-with-AI-Landemore> [<https://perma.cc/J6MK-EHAR>].

¹⁴ See, e.g., Alnemr & Weymouth, *supra* note 11.

¹⁵ *Id.* (summarizing Hidalgo’s views).

¹⁶ Hidalgo’s TED Talk on the topic has garnered more than 400,000 views. TED, *supra* note 12. Others have also written about and advocated for some version of Augmented Democracy. See, e.g., Evangelos Pournaras, *Proof of Witness Presence: Blockchain Consensus for Augmented Democracy in Smart Cities*, 145 J. PARALLEL & DISTRIB. COMPUTING 160, *passim* (2020); Jairo F. Gudiño-Rosero et al., *Large Language Models (LLMs) as Agents for Augmented Democracy*, ARXIV (July 30, 2024, 9:51 AM), <https://arxiv.org/abs/2405.03452> [<https://perma.cc/QK5N-AKZ2>].

¹⁷ Landemore, *supra* note 13.

States will face increasing pressure to allow voters to use some form of AI voting as a result of four trends.¹⁸ Voters will become increasingly accustomed to using AI agents in other trivial and non-trivial aspects of their lives.¹⁹ AI will become even more sophisticated with respect to making decisions that reflect the preferences and well-being of their users.²⁰ Government actions and political activities will increasingly be supplemented with or entirely completed by AI.²¹ And, advocates for AI voting will become more persuasive as voter turnout remains low and ongoing irrational voting leads to unresponsive or damaging policy outcomes.²² Each type of AI voting would mark an improvement on this status quo by increasing turnout as well as by assisting voters unsure of how best to vote in line with their interests.

Those potential benefits notwithstanding, the Constitution does not permit the general, unrestricted delegation of a vote to any individual or AI system.²³ A human must always make the affirmative act of casting a ballot.²⁴ This human-in-the-ballot requirement is grounded in the Guarantee Clause²⁵ and the First Amendment.²⁶ Compliance with the human-in-the-ballot requirement, however, does not foreclose an extensive use of AI agents in the electoral process. More specifically, opt-out and opt-in AI voting would likely survive constitutional scrutiny.

Part I explains the three approaches to AI voting in more detail. Part II discusses how advances in AI as well as continued adoption of AI will

¹⁸ Adav Noti, *How Artificial Intelligence Influences Elections and What We Can Do About It*, CAMPAIGN LEGAL CTR. (Feb. 28, 2024) <https://campaignlegal.org/update/how-artificial-intelligence-influences-elections-and-what-we-can-do-about-it> [<https://perma.cc/F86Y-KQND>].

¹⁹ See Julie Weed, *When Your Building Super Is an A.I. Bot*, N.Y. TIMES (June 27, 2024), <https://www.nytimes.com/2024/06/26/business/ai-bots-property-managers.html> (sharing examples of AI bots being integrated into tenant-landlord deliberations and activities); *Teen and Young Adult Perspectives on Generative AI*, COMMON SENSE MEDIA, <https://www.commonsensemedia.org/sites/default/files/research/report/teen-and-young-adult-perspectives-on-generative-ai.pdf> [<https://perma.cc/N4RP-7XAN>] (analyzing use of generative AI by young adults).

²⁰ Kevin Roose, *Personalized A.I. Agents Are Here. Is the World Ready for Them?*, N.Y. TIMES (Nov. 11, 2023), <https://www.nytimes.com/2023/11/10/technology/personalized-ai-agents.html> [<https://perma.cc/Z484-ZPPN>].

²¹ *The Government is Using AI to Better Serve the Public*, AI.GOV (Sept. 1, 2023) <https://ai.gov/ai-use-cases/> [<https://perma.cc/4846-UFDF>].

²² See Alnemr & Weymouth, *supra* note 11 (discussing how AI voting agents could mitigate issues with voter turnout).

²³ See generally *Delegated Voting: Empowering Decentralized Decision-Making*, COLONY, <https://blog.colony.io/delegated-voting-empowering-decentralized-decision-making/> [<https://perma.cc/68KG-9M2A>].

²⁴ *See Guide to Voting*, VOTE.GOV, <https://vote.gov/guide-to-voting> [<https://perma.cc/4EST-XZ7T>].

²⁵ See U. S. CONST. art. IV, § 4.

²⁶ See U. S. CONST. amend. I.

increase pressure on states to consider some form of AI voting. Part III briefly reviews why AI voting could resolve woes with the current election scheme. Part IV analyzes challenges to AI under the Constitution and federal law. The essay concludes by summarizing the constitutional requirement of a human in the ballot box and by querying whether the democratic shortcomings addressed by AI voting should be resolved by less revolutionary measures.

I. THREE POSSIBLE USE CASES OF AI IN ELECTIONS

This Article contemplates three possible use cases of AI agents by states in the electoral setting. Each use case builds off the following assumptions. The first assumption is that states could and would maintain a database with the information most relevant to predicting the vote of each member of the electorate.²⁷ This information includes gender, age, criminal record, income, ethnicity and race, dependents, citizenship status and duration (i.e. how long that individual had that specific status), current and past addresses as well as duration at each address, marital status and duration, preferred and secondary language, tax filings,²⁸ voting history, registration history (i.e. with which political parties, if any, and for how long), and education level. These inputs cover nearly all of the individual-level factors,²⁹ socio-cultural factors,³⁰ and political factors³¹ scholars have identified as influencing voting decisions.³²

²⁷ The electorate here refers to “the entire universe of eligible voters, whether they are registered to vote or not.” Ihaab Syed, *How Much Electoral Participation Does Democracy Require? The Case for Minimum Turnout Requirements in Candidate Elections*, 66 UCLA L. REV. 2024, 2027 (2019).

²⁸ Section 6103(d) of the Internal Revenue Code allows the federal government to share tax administration with state officials upon request. *State Information Sharing*, IRS (Feb. 25, 2025), <https://www.irs.gov/government-entities/governmental-liaisons/state-information-sharing> [<https://perma.cc/M79C-Z8RX>]; I.R.C. § 6103(d).

²⁹ Individual-level factors include income, education, gender, age, political ideology, personality traits, emotional intelligence, policy preferences, and healthcare experiences. See Waiphot Kulachai et al., *Factors Influencing Voting Decision: A Comprehensive Literature Review*, 12 SOC. SCI. 469 (2023), <https://www.mdpi.com/2076-0760/12/9/469> [<https://perma.cc/LJ9D-9VVR>]. Waiphot Kulachai and their co-authors list climate change concerns instead of policy preferences. *Id.* They argue that climate change concerns have become increasingly impactful with respect to influencing voter behavior. *Id.* Given that the significance of any one policy question on voter behavior may change, I have opted to instead list policy preferences among the other subfactors.

³⁰ Socio-cultural factors include social identity, ethnicity and race, religion, media influence, and social networks. *Id.* See also Rob J. Hyndman & Dianne Cook, *You Are What You Vote: The Social and Demographic Factors That Influence Your Vote*, THE CONVERSATION (May 17, 2019, 3:50 AM), <https://theconversation.com/you-are-what-you-vote-the-social-and-demographic-factors-that-influence-your-vote-116591> [<https://perma.cc/4WLE-WEUV>] (analyzing what factors shape how Australians vote). See generally Melissa De Witte, *What Drives American Voters?*, STANFORD REPORT (Oct. 18, 2022), <https://news.stanford.edu/stories/2022/10/drives-american-voters> [<https://perma.cc/QZ8H-KA6J>] (compiling research on factors that shape election participation).

³¹ Kulachai et al., *supra* note 29.

³² *Id.*

Ongoing data collection by the federal government³³ as well as by state governments³⁴ gives little reason to doubt that states, perhaps in consultation with federal partners, could develop such a database.

To the extent certain factors are omitted from a state's database, the included factors may serve as satisfactory proxies. For instance, political ideology, an individual-level factor, differs from party affiliation. Yet, the AI system will likely be able to derive political ideology from party affiliation and other included factors.³⁵ Alternatively, states may (and likely should) opt to formally supplement their databases with omitted relevant factors, such as current economic conditions.³⁶

The second assumption is that states could and would operate and make available AI agents trained to cast votes most likely to align with an individual's preferences and interests.³⁷ This would include giving voters an opportunity prior to the election to provide the AI agent with specific instructions as to how to cast their vote.³⁸ In other words, each voter could make use of this opportunity for pre-election instruction to mandate a vote for a certain party or candidate—akin to voting in a typical election.

If a voter did not want to specify a candidate in one or more races, they could also use this opportunity to deliver more nuanced instructions, such as which policy questions should weigh more heavily in the AI agent's generation of that voter's ballot. A voter concerned with economic growth,

³³ Dell Cameron, *The US is Openly Stockpiling Dirt on All Its Citizens*, WIRED (June 12, 2023, 3:23 PM), <https://www.wired.com/story/odni-commercially-available-information-report/> [https://perma.cc/7MGP-PX3P].

³⁴ Katherine Barrett & Richard Greene, *The Causes, Costs and Consequences of Bad Government Data*, GOVERNING (June 9, 2015), <https://www.governing.com/archive/gov-bad-data.html> [https://perma.cc/VF49-CTTU].

³⁵ See Will Knight, *AI Chatbots Can Guess Your Personal Information From What You Type*, WIRED (Oct. 17, 2023, 7:00 AM), <https://www.wired.com/story/ai-chatbots-can-guess-your-personal-information/> [https://perma.cc/Y4WB-B2HU] (discussing the ability of AI systems to infer certain personal information).

³⁶ States likely should do this in order to incorporate as many influential factors as possible. Economic conditions are certainly one of those factors. See Lydia Saad, *Economy is Top Election Issue; Abortion and Crime Next*, GALLUP (Oct. 31, 2022), <https://news.gallup.com/poll/404243/economy-top-election-issue-abortion-crime-next.aspx> [https://perma.cc/8GP5-JTV2]; Brandon Beomseob Park, *How Does a Relative Economy Affect Voter Turnout*, 45 POL. BEHAV. 855, 856 (2023).

³⁷ States will likely build on open-source models rather than create a bespoke AI system. Cf. Rebecca Heilweil, *State Department Encouraging Workers to Use ChatGPT*, FEDSCOOP (Apr. 19, 2024), <https://fedscoop.com/state-department-encouraging-workers-to-use-chatgpt/> [https://perma.cc/549R-Y586] (discussing several instances of the federal government using privately developed AI systems).

³⁸ The technical process by which voters could provide that additional guidance is beyond the scope of this Article. Presumably, this process would allow voters to provide a range of instructions. General instructions would include the voter's specification of which factors or policies to weigh more heavily than others. Specific instructions would include the voter's choice of a candidate or the candidates of a certain party.

for instance, might direct the AI agent to vote against any policies forecasted to have a negative economic impact. For voters without reliable internet access (of which there are many),³⁹ states could open up public libraries and other state buildings for voters to interact with the AI agent during this pre-election window.⁴⁰ Several weeks before the election, the AI agents would generate a completed ballot for each individual and send a copy of that ballot to the state and the voter. In light of this assumption merely requiring states to deploy some version of their current election infrastructure or emulate the infrastructure of a sister state,⁴¹ this, too, seems like an easily cleared hurdle.

The third assumption is that the state-operated AI agents would work—in other words, that the agents would perform well with respect to matching the preferences and interests of voters with candidates and ballot issues. If the agents continually produced decisions that conflicted with the voters' preferences, their well-being, or both, then the case for operating such systems and agents would collapse. This assumption also seems likely to be met given rapid advances in personalized AI.⁴²

If states satisfy those assumptions, then states could offer each voter an AI agent that is privy to essential information, modifiable in response to a voter declaring their preferences in one or more races, capable of making electoral decisions that align with those interests, needs, and preferences.

A. Automatic AI Voting

The first possible use of such an AI system would be automatic AI voting. Under this approach, voters would have no discretion over the final ballot choices made by the AI agent. Though voters in this case, as with all other forms of AI voting, could make use of the pre-election instruction window; those who failed to do so would have no choice but to accept the ballot choices generated by the AI agent on their behalf.

³⁹ Jochai Ben-Avic, *Don't Let AI Become the Newest Digital Divide*, COUNCIL ON FOREIGN RELS. (Jan. 18, 2024, 1:42 PM EST), <https://www.cfr.org/blog/dont-let-ai-become-newest-digital-divide> [<https://perma.cc/6KPV-GKRZ>].

⁴⁰ See Logan T. Mohs, *The Constitutionality and Legality of Internet Voting Post-Shelby County*, 13 DUKE L. & TECH. REV. 181, 185–87 (2015) (analyzing means for states to provide voters with access to the Internet if states opted to implement Internet voting).

⁴¹ States with mail voting systems, for instance, may share information about how best to safely and timely deliver AI-generated ballots to the electorate. See *States With Mostly-Mail Elections*, NAT'L CONF. STATE LEGISLATURES (Oct. 11, 2024), <https://www.ncsl.org/elections-and-campaigns/table-18-states-with-all-mail-elections> [<https://perma.cc/K6ZQ-HA95>].

⁴² Roose, *supra* note 20.

B. Opt-out AI Voting

The second possible use of such an AI system would be opt-out AI voting. Under this approach, the ballot generated by an AI agent for each eligible voter would be regarded as the official ballot for that voter unless the voter affirmatively made use of alternative means to cast a ballot or informed the state of their intent not to participate in the election.

C. Opt-in AI Voting

The third possible use of such an AI system would be opt-in AI voting. Under this approach, the AI-generated ballot would not count unless affirmatively endorsed by the voter. States would mail two ballots to voters—one blank ballot and one filled in by the AI agent in line with the general state AI system and any specific instructions by the voter. The voter could then elect to turn in their own ballot without consulting the AI-generated ballot, turn in the AI-generated ballot, or use the AI-generated ballot as a guide while completing their own ballot.

These latter two approaches to AI voting have an important thing in common: both guarantee a human in the ballot box. Whereas automatic AI voting makes it possible for a vote to be cast by an AI agent on behalf of an unwilling voter, no vote under opt-out and opt-in voting can be cast without a voter's implicit (opt-out AI voting) or explicit (opt-in AI voting) consent.

II. The Trends Creating Pressure on States to Allow AI Agents in Elections

Emerging technology rarely reverses its integration into relevant activities.⁴³ The rapid adoption of AI tools such as ChatGPT suggests that AI will not be an exception to that general rule. The profound usefulness of AI agents increases the odds of this specific kind of AI becoming a part of day-to-day life as well as a part of more significant activities, such as voting. This part reviews the specific trends that may lead states to adopt some form of AI voting.

⁴³ See Dara Bramson, *Supersonic Airplanes and the Age of Irrational Technology*, THE ATLANTIC (July 1, 2015), <https://www.theatlantic.com/technology/archive/2015/07/supersonic-airplanes-concorde/396698/> [<https://perma.cc/L8FB-Y34E>]. This also discusses some instances in which emerging technology did not continue to progress and reach further into society.

A. *The Normalization and Pervasive Use of AI Agents*

AI agents will soon be a part of every aspect of our lives, including politics.⁴⁴ AI agents differ from the most well-known and commonly used AI systems such as ChatGPT-4, which operate only upon a human prompting the system to take a certain action.⁴⁵ In contrast, AI agents being developed and deployed by AI companies have or will likely soon have the ability to “write notes to itself, store a to-do list and the status of items on the to-do list, and delegate tasks to other copies of itself or other people” and to do all of these and related tasks without prompting.⁴⁶ In more technical words, AI agents are “software entities that can orchestrate complex workflows, coordinate activities among multiple agents, apply logic, and evaluate answers.”⁴⁷

The spread of such AI agents may occur sooner than some expect. In May 2024, Anthropic added new features to its AI system that allow “anyone [to] create an email assistant, a bot to purchase shoes, or other personalized solutions.”⁴⁸ Google, OpenAI, and others are actively working on AI agents with similar features.⁴⁹ Full use of these features, however, is contingent on someone knowing how to code.⁵⁰ Use of new features may also come at a prohibitive cost to most members of the public.⁵¹ Those barriers will come down in the near future, according to McKinsey analysts.⁵²

As the barriers to use of AI agents come down, these tools may take over a litany of tasks and alter norms and customs. Use of AI agents by businesses

⁴⁴ See Bruce Schneier, *How AI Will Change Democracy*, SCHNEIER ON SEC. (May 31, 2024, 7:04 AM), <https://www.schneier.com/blog/archives/2024/05/how-ai-will-change-democracy.html> [https://perma.cc/Z5M2-DJUT].

⁴⁵ Kelsey Piper, *AI “Agents” Could do Real Work in the Real World. That Might Not be a Good Thing*, VOX (Mar. 29, 2024, 9:00 AM), <https://www.vox.com/future-perfect/24114582/artificial-intelligence-agents-openai-chatgpt-microsoft-google-ai-safety-risk-anthropic-claude> [https://perma.cc/86D6-BTQG].

⁴⁶ *Id.*

⁴⁷ Jorge Amar et al., *The Promise and the Reality of Gen AI Agents in the Enterprise*, MCKINSEY & CO. (May 17, 2024), <https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/the-promise-and-the-reality-of-gen-ai-agents-in-the-enterprise> [https://perma.cc/BA6N-MWCK] (Barr Seitz interviewing Lari Hämäläinen).

⁴⁸ Kylie Robison, *Anthropic’s AI Now Lets You Create Bots to Work for You*, THE VERGE (May 30, 2024, 12:00 PM), <https://www.theverge.com/2024/5/30/24167231/anthropic-claude-ai-assistant-automate-tasks> [https://perma.cc/7R5H-822F].

⁴⁹ Shirin Ghaffary, *Tech Companies Bet the World is Ready for ‘AI Agents’*, BLOOMBERG (Feb. 15, 2024, 4:21 PM), <https://www.bloomberg.com/news/newsletters/2024-02-15/tech-companies-bet-the-world-is-ready-for-ai-agents> [https://perma.cc/6ZDF-JXMZ].

⁵⁰ Robison, *supra* note 48.

⁵¹ *See id.*

⁵² Amar et al., *supra* note 47 (Barr Seitz interviewing Jorge Amar, Lari Hämäläinen, and Nicolai von Bismarck).

“could yield \$2.6 trillion to \$4.4 trillion annually in value across more than 60 use cases.”⁵³ This uptick in commercial adoption will likely not only alter the nature of work but also the time allotted to work—many firms suspect that greater integration of AI into workflows will cause a shift to a four-day work week.⁵⁴

Individuals will likely also make extensive use of AI agents.⁵⁵ Microsoft’s “everyday AI companion” may become a model for other agents that can help with tasks at work and at home.⁵⁶ Sensitive decisions affecting an individual’s well-being may likewise be informed by AI agents. Hippocratic AI, a health intelligence company, is working on “healthcare agents” that can assist with follow-up care.⁵⁷ AI agents may also assist individuals and companies attempting to comply with complex legal regimes.⁵⁸

Political actors and entities will predictably incorporate AI agents into various tasks as well. Governments have already assigned substantive responsibilities to AI systems.⁵⁹ Ukraine created an AI-generated foreign ministry spokesperson that will read statements written by humans.⁶⁰ Referred to as Victoria Shi, this AI system is intended to save the government the time and expense of otherwise having humans deliver such statements.⁶¹ Campaigns have likewise signaled a willingness to turn over important tasks to AI systems.⁶² Presidential candidates in South Korea, for instance, created and spread AI clones of their candidates tailored to appeal to specific voter groups.⁶³

As use of AI agents becomes more pervasive, the odds of advocates calling for their use in elections will increase for at least four reasons. First, use of AI agents in an electoral context carries the potential to alleviate many

⁵³ *Id.* (Barr Seitz interviewing Jorge Amar).

⁵⁴ Elizabeth Bennett, *AI Could Make the Four-Day Workweek Inevitable*, BBC (Feb. 26, 2024), <https://www.bbc.com/worklife/article/20240223-ai-could-make-the-four-day-workweek-inevitable> [<https://perma.cc/C8J2-LH65>].

⁵⁵ Ghaffary, *supra* note 49.

⁵⁶ *Id.*

⁵⁷ Rich Johnson, *AI Firms Say ‘Healthcare Agents’ Outperform Humans*, NEWSNATION (Mar. 31, 2024, 05:26 PM), <https://www.newsnationnow.com/business/tech/ai/ai-healthcare-agents/> [<https://perma.cc/V3R2-Z44H>].

⁵⁸ Colleen Newman, *AI Agents and the Law*, VAND. L. SCH. (Apr. 2, 2024, 9:53 AM), <https://law.vanderbilt.edu/ai-agents-and-the-law/> [<https://perma.cc/232H-45YM>].

⁵⁹ *See, e.g.*, Agence France-Presse, *Ukraine Unveils AI-Generated Foreign Ministry Spokesperson*, THE GUARDIAN (May 3, 2024, 17:08 PM), <https://www.theguardian.com/technology/article/2024/may/03/ukraine-ai-foreign-ministry-spokesperson> [<https://perma.cc/ZZY5-K5R6>].

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See e.g.*, Lee et al., *supra* note 7.

⁶³ *Id.*

concerns with contemporary elections.⁶⁴ Second, opposition to such use may be lessened by individuals becoming accustomed to the inclusion of AI agents at work, at home, and in important decision-making processes. Third, the implementation of AI agents in democratic processes by other countries may generate a sort of peer pressure on the states and federal government.⁶⁵ Fourth, and as discussed in the next section, AI agents will become more sophisticated and, by extension, reduce concerns about their use in important processes.

B. Increased Sophistication of AI Agents

AI systems generally excel at summarizing information, explaining things, developing persuasive arguments, predicting outcomes, assessing information, and making decisions.⁶⁶ The latter two factors are especially relevant when considering the use of AI agents in elections. As hypothesized above, an AI agent tasked with voting would be given tremendous information about a voter's preferences as well as a candidate's stances. The agent would then assess that information and make a decision about which candidate would likely further the voter's interests. Currently, AI systems do not excel at assessing, but those systems are "getting better."⁶⁷

The improvement of AI agents is essential to their adoption into processes with substantial personal, commercial, and societal processes. Put differently, pervasive use of AI agents alone would likely not produce pressure for their inclusion in the electoral context. If AI agents suggest flawed treatment plans, book bad travel arrangements, or pursue illegal regulatory compliance strategies, then despite people being accustomed to those agents, they will likely not support its inclusion in elections. This is especially true given widespread skepticism of increased use of technology in the electoral context as a potential source of inaccurate or corrupt results.⁶⁸

C. Increased Use of AI in Democratic Processes

AI has already become a part of democratic processes and will continue to do so.⁶⁹ Bruce Schneier of Harvard contends that AI can already "engage

⁶⁴ See discussion *infra* Part III.

⁶⁵ See discussion *infra* Section II.C.

⁶⁶ See Schneier, *supra* note 44.

⁶⁷ *Id.*

⁶⁸ Derek Tisler & Turquoise Baker, *Paper Ballots Helped Secure the 2020 Election — What Will 2022 Look Like?*, BRENNAN CTR. FOR JUST. (May 10, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/paper-ballots-helped-secure-2020-election-what-will-2022-look> [<https://perma.cc/93XQ-MPQL>].

⁶⁹ Schneier, *supra* note 44.

with voters, conduct polls and fund-raise at a scale that humans cannot—for all sizes and elections.”⁷⁰ What’s more, he suspects that future politicians will soon “start to look and feel more like A.I.”⁷¹ With time, the adoption of AI by more and more politicians and campaigns may lead to the elimination of politicians, as envisioned by Augmented Democracy advocates.⁷² In a world with AI agents honed to the preferences of individual voters, Schneier imagines those agents directly participating “in policy debates on our behalf, along with millions of other personal AIs, and coming to a consensus on policy.”⁷³

A city in Brazil is already realizing Schneier’s future.⁷⁴ The city of Porto Alegre has a governance structure that regularly prevents timely, necessary action.⁷⁵ One of the city’s thirty-six councilors tried to expedite that usually slow process by writing a law with AI, bypassing what otherwise would have been a resource-intensive drafting process.⁷⁶ It passed unanimously.⁷⁷ ChatGPT then wrote the press release.⁷⁸ Voters caught word and many praised the effort.⁷⁹ The *Wall Street Journal*’s report of the whole affair then guaranteed that other jurisdictions would take note.⁸⁰

If Porto Alegre is a signal of what is to come, then Schneier’s vision of AI agents advocating and deliberating on behalf of voters may occur sooner than later. A plausible interim step is the use of AI in the current electoral scheme. If AI voting is indeed on the horizon, states will have to decide sooner rather than later whether they want to adopt some form of AI voting and, if so, how they will do so in a manner that complies with the Constitution.

D. The Continuation of Democratic Woes

Perhaps the strongest source of pressure on states to employ AI voting will emerge from continued dismay with elections. Low turnout continues to be a widespread problem that raises questions about the representativeness and legitimacy of elections.⁸¹ These concerns are particularly pronounced in

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See TED, *supra* note 12.

⁷³ Schneier, *supra* note 44.

⁷⁴ Samantha Pearson & Luciana Magalhaes, *The City That’s Trying to Replace Politicians With Computers (It’s Working)*, WALL ST. J. (Dec. 22, 2023, 8:58 AM), <https://www.wsj.com/tech/politican-ramiro-rosario-artificial-intelligence-brazil-82ca338d> [<https://perma.cc/S6WV-3GNJ>].

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Syed, *supra* note 27, at 2037.

local and state elections.⁸² In 2023, just 35% of eligible voters participated in a runoff municipal election in Chicago.⁸³ An even smaller set of the electorate—about 23% of eligible voters—participated in the 2023 general election in Louisiana.⁸⁴ Lack of participation could not be explained by a lack of serious issues. That election included “races for governor, lieutenant governor, treasurer, secretary of state, attorney general and several local government seats.”⁸⁵ A litany of other cities and states have long documented low voter participation rates.⁸⁶ According to the National Civic League, “[a]cross the U.S., only 15 to 27 percent of eligible voters cast a ballot in their local election.”⁸⁷

Jurisdictions with particularly low turnout rates have rarely taken corrective action.⁸⁸ Even if those jurisdictions opted to implement novel means to increase voter participation, many of those interventions have fallen short of expectations or had mixed results.⁸⁹ The efficacy of automatic voter registration with respect to increasing participation, for example, is debated by researchers.⁹⁰ The persistence of low voter turnout and questions about the representativeness and legitimacy of electoral results led Ihaab Syed of the ACLU to go so far as to call for a minimum turnout requirement in candidate elections.⁹¹ It is relatively easy to imagine that the possibility of resolving these issues via one of the three forms of AI voting will become more attractive as AI advances and voter turnout remains stagnant, at best.

Irrational voting or, perhaps more politely, voting against one’s best interest represents another ongoing and substantial concern that may compel states to consider making AI agents available to voters. For decades, scholars have speculated that partisan bias, a lack of information, a lack of knowledge, or a combination of those and related factors have led voters to cast irrational

⁸² See *id. passim*.

⁸³ Sarah Schulte, *Did You Vote? Only 35% of Chicago Residents Turned Out to Vote in Runoff Election*, ABC 7 CHI. (Apr. 7, 2023), <https://abc7chicago.com/chicago-voter-turnout-2023-mayoral-election-voting-results-in/13096289/> [<https://perma.cc/Y997-535S>].

⁸⁴ LSU Manship Sch. News Serv., *Louisiana’s Low Voter Turnout Attributed to Apathy, Mistrust*, LA. ILLUMINATOR (Dec. 27, 2023, 11:29 AM), <https://lailluminator.com/2023/12/27/louisiana-voter/> [<https://perma.cc/TTT9-WXAD>].

⁸⁵ *Id.*

⁸⁶ See Zachary Roth, *States with Low Election Turnout Did Little in 2023 to Expand Voting Access*, IDAHO CAP. SUN (June 19, 2023, 4:00 AM), <https://idahocapitalsun.com/2023/06/19/states-with-low-election-turnout-did-little-in-2023-to-expand-voting-access/> [<https://perma.cc/2AMC-ZMCZ>].

⁸⁷ Jan Brennan, *Increasing Voter Turnout in Local Elections*, NAT’L CIVIC REV., Spring 2020, at 16, 17.

⁸⁸ See Roth, *supra* note 86.

⁸⁹ *Voting by Mail and Absentee Voting*, MIT ELECTION DATA + SCI. LAB (Feb. 28, 2024), <https://electionlab.mit.edu/research/voting-mail-and-absentee-voting> [<https://perma.cc/9NSS-CG4V>].

⁹⁰ *Automatic Voter Registration*, MIT ELECTION DATA + SCI. LAB (Feb. 16, 2023), <https://electionlab.mit.edu/research/automatic-voter-registration> [<https://perma.cc/NSE4-RB5D>].

⁹¹ Syed, *supra* note 27, *passim*.

votes.⁹² Not all scholars agree with the prevalence or detrimental effects of irrational voting.⁹³ Yet, the use of AI by campaigns to spread increasingly persuasive, inaccurate or misleading information has reinforced and spread concerns about voters casting votes unaligned with their actual preferences and priorities.⁹⁴

Whether misinformation created and spread by AI will actually increase the prevalence of irrational voting remains unclear. Some scholars contend that concerns about AI-generated misinformation are “overblown.”⁹⁵ If, however, retrospective analysis of the 2024 election confirms the fears of those who anticipate negative effects brought on by AI shaping the information ecosystem, then calls for states to offer election AI agents may increase.

III. The Potential Positive Democratic Impact of AI Voting

Even as AI agents become more ubiquitous and advanced, and concerns about the democratic order persist, advocates for AI agents will still need to make the case that their use in elections would mark an improvement on the status quo. This is not a hard case, at least with respect to increasing turnout and reducing irrational voting. A full review of how AI voting could impact the democratic order for better and worse warrants further study. For now, a review of these two important issues suggests that AI voting could facilitate a better democracy.

A. Voter Turnout

Many scholars have detailed the importance of turnout to the democratic order.⁹⁶ To practice what I preach, I will avoid repeating their expert

⁹² See Mattias Agerberg, *The Myth of the (Irr)rational Voter? Theoretical and Methodological Advancements for Studying Voter Rationality*, UNIV. GOTHENBURG (June 10, 2024), <https://www.gu.se/en/research/the-myth-of-the-irrational-voter-theoretical-and-methodological-advancements-for-studying-voter-rationality> [<https://perma.cc/X7SH-N9T2>].

⁹³ Not Another Politics Podcast, *Are Irrational Voters a Threat to Democracy*, CTR. FOR EFFECTIVE GOV'T UNI. CHI. (Nov. 3, 2021), <https://effectivegov.uchicago.edu/podcast/are-irrational-voters-a-threat-to-democracy> [<https://perma.cc/MFL7-XFGB>] (interviewing Ethan Bueno de Mesquita).

⁹⁴ Noti, *supra* note 18.

⁹⁵ Felix M. Simon et al., *Misinformation Reloaded? Fears About the Impact of Generative AI on Misinformation Are Overblown*, MISINFORMATION REV. (Oct. 18, 2023), <https://misinfoeview.hks.harvard.edu/article/misinformation-reloaded-fears-about-the-impact-of-generative-ai-on-misinformation-are-overblown/> [<https://perma.cc/MQW7-RL8Y>].

⁹⁶ See Syed, *supra* note 27 (arguing for a minimum turnout requirement due to the democratic concerns associated with low turnout); Marjorie Randon Hershey, *What We Know about Voter-ID Laws, Registration, and Turnout*, 42 PS: POL. SCI. & POL. 87, 87 (2009) (analyzing the collective problems that

analysis.⁹⁷ The upshot is relatively straightforward: since the Revolution, the consent of the governed has been regarded as central to the legitimacy of American government,⁹⁸ and elections are the primary means for the governed to indicate their consent.⁹⁹ Low voter turnout upends the legitimacy intended to result from elections.¹⁰⁰ A dip in participation may also reduce the odds of elected officials representing the views of the entire community, assuming those who opt not to vote have different policy preferences than those who do participate.¹⁰¹

Voter turnout in the United States has remained low over many decades due to several factors.¹⁰² These factors, according to Syed, include “artifacts of the American system of elections” such as “requiring personal voter registration, permitting staggered timing of local, state, and federal elections, and [using] a first-past-the-post electoral system.”¹⁰³ Syed also cites the level of interest (or lack thereof) in races and questions on the ballot, the extent to which those races are contested, the availability of same-day registration, and the dissemination of electoral information as other relevant factors.¹⁰⁴ Each kind of AI voting would mitigate the turnout-dampening effect of many of these factors. Discussion of the effect of automatic AI voting on turnout begins and ends here: Automatic AI voting would entirely mitigate turnout concerns by virtue of automatically generating and casting a vote for each eligible voter.

result from low turnout); Emilee Booth Chapman, *The Distinctive Value of Elections and the Case for Compulsory Voting*, 63 AM. J. POL. SCI. 101 *passim* (2019) (identifying increasing “[c]oncern about the gap between public opinion and policy outcomes”).

⁹⁷ See Kevin Frazier, *The Law Review Revolution*, 30 VA. J. SOC. POL’Y & L. 150, 205 (2023).

⁹⁸ See THE DECLARATION OF INDEPENDENCE para. 2. (U.S. 1776) (“That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”).

⁹⁹ Chapman, *supra* note 96, at 103; Syed, *supra* note 27, at 2037–38.

¹⁰⁰ See THE FEDERALIST NO. 39 (James Madison) (“It is ESSENTIAL to such a government that it be derived from the great body of the society.”).

¹⁰¹ *But see* Georg Lutz & Michael Marsh, *Introduction: Consequences of Low Turnout*, 26 ELECTORAL STUD. 539, 540 (2007) (challenging the assumption that non-voters and voters have different policy preferences).

¹⁰² *National Turnout Rates*, U.S. ELECTIONS PROJECT, <https://www.electproject.org/national-1789-present> [<https://perma.cc/BMP6-SFGN>]; *but see* Drew Desilver, *Turnout in U.S. Has Soared in Recent Elections but by Some Measures Still Trails That of Many Other Countries*, PEW RSCH. CTR. (Nov. 1, 2022), <https://www.pewresearch.org/short-reads/2022/11/01/turnout-in-u-s-has-soared-in-recent-elections-but-by-some-measures-still-trails-that-of-many-other-countries/> [<https://perma.cc/MDV7-4XC7>] (“One unknown factor, though, is how the many state voting-law changes since 2020 will affect turnout. While some states have rolled back early voting, absentee or mail-in voting, and other rule changes that made voting easier in 2020—or adopted new rules that make voting more difficult or inconvenient—other states have expanded ballot access.”).

¹⁰³ Syed, *supra* note 27, at 2030.

¹⁰⁴ *Id.*

1. Registration

AI voting would render registration unnecessary. As envisioned above, these types of voting would provide access to an AI agent to the entire electorate. The elaborate databases maintained by states for AI agents would render registration duplicitous.¹⁰⁵ Information on a voter's age, criminal record, residency, citizenship status, and other factors traditionally relevant to registration would be updated on a regular basis and shared with other states upon a voter moving to a new jurisdiction. If a voter for some reason is no longer qualified as a member of the electorate, then they simply would not receive a ballot nor access to an AI agent.

2. Staggered Timing

The effect of opt-out and opt-in AI voting on turnout losses caused by staggered elections is less clear. Opt-out AI voting would likely reduce the effect of this factor. Research on defaults suggests that voters would likely accept the AI-generated ballot rather than go through the process of completing and submitting a separate ballot or entirely opting out of the election.¹⁰⁶ It is unclear how opt-in AI voting would impact participation in elections taking place at seemingly random and often inconvenient times. The odds suggest that sending completed ballots to voters would likely boost participation compared to alternative methods, even during runoff and off-year elections.

3. First-Past-The-Post

Under the nation's first-past-the-post electoral system, any vote cast for a candidate that has already received the most votes cast is effectively wasted.¹⁰⁷ In comparison, no vote goes to waste in a proportional voting representation scheme that ties the number of seats awarded to a party to the percentage of votes earned.¹⁰⁸ The former scheme reinforces the idea that a

¹⁰⁵ *Voter Registration*, ELECTION OBLIGATIONS & STANDARDS DATABASE, ELECTION STANDARDS CARTER CTR., <https://eos.cartercenter.org/parts/11> [<https://perma.cc/3ETL-CPPS>] (setting forth eligibility as one of the main goals of registration).

¹⁰⁶ See Craig N. Smith et al., *Choice Without Awareness: Ethical and Policy Implications of Defaults*, 32 J. PUB. POL. & MKTG. 159, 160–61 (2013) (discussing the effect of defaults on consumer actions).

¹⁰⁷ Cf. Syed, *supra* note 27, at 2030 n.23 (discussing the mechanics of different vote counting schemes).

¹⁰⁸ Cf. *id.*

single vote does not matter, which decreases turnout.¹⁰⁹ Whether opt-out or opt-in AI voting would reduce the turnout drain caused by first-past-the-post dynamics depends on whether use of either approach would increase the electoral chances of third parties. If such approaches merely reinforce the two-party status quo, then voters will likely have no increased incentive to change their behavior. If, however, voters observe that use of either system has made elections more competitive among more parties, then they may actively make sure their vote is cast and in line with their desired result.¹¹⁰

4. Interest In The Election

Under an opt-out AI voting system, turnout would likely remain high even in “boring” elections that involve few important or controversial races or issues.¹¹¹ Voters, already susceptible to the strong pull of a default ballot,¹¹² will be even less likely to alter or retract their ballot if they have not been paying attention to the election or lack an opinion on the candidates and policies up for consideration. Widespread voter inattention and apathy, even in important elections, would likely cause turnout to increase for similar reasons. That said, the total magnitude of increased participation might be lower in important elections because some voters, aware of the stakes of such an election but unsure of how or whether to participate, may affirmatively opt out and refrain from participating.¹¹³ Similar dynamics would likely play out in an opt-in approach. Though to a lesser extent than the opt-out approach, an opt-in system lowers the barriers to participation for those who might otherwise sit out.

The general uptick predicted to occur via opt-in AI voting receives support from empirical research on a related intervention. In states where voters automatically receive a ballot via the mail, voter participation tends to

¹⁰⁹ Dylan Difford, *Does Proportional Representation Lead to Higher Turnout?*, ELECTORAL REFORM SOC’Y (Feb. 10, 2022), <https://www.electoral-reform.org.uk/does-proportional-representation-lead-to-higher-turnout/> [<https://perma.cc/92X2-6N2Q>].

¹¹⁰ See Damien Bol & Ria Ivandic, *Does the Number of Candidates Increase Turnout? Causal Evidence From Two-Round Elections*, 44 POL. BEHAV. 2005, 2023–24 (2022) (analyzing the positive effects of turnout resulting from the inclusion of a third party).

¹¹¹ See Dan Walters, *California Made Primary Elections Boring. Voter Participation Reflects That*, CALMATTERS (Feb. 29, 2024), <https://calmatters.org/commentary/2024/02/primary-elections-boring-voter-participation/> [<https://perma.cc/U77D-533Z>] (discussing voter responses to “boring” elections).

¹¹² Cf. *Ballot Effects*, MIT ELECTION DATA + SCI. LAB (Apr. 20, 2022), <https://electionlab.mit.edu/research/ballot-order-effects> [<https://perma.cc/F3W4-B9XV>] (examining the effect of ballot design on voter behavior).

¹¹³ Alexandria Symonds, *Why Don’t Young People Vote, and What Can Be Done About It?*, N.Y. TIMES (Oct. 8, 2020), <https://www.nytimes.com/2020/10/08/upshot/youth-voting-2020-election.html> [<https://perma.cc/T69R-8FUU>].

increase.¹¹⁴ Given that opt-in voting would further reduce the friction to participating by not only sending voters a ballot but also sending one completed ballot, this approach would likely cause an additional spike in participation.

5. Dissemination of Relevant Information

Though none of the AI voting mechanisms would directly result in the dissemination of relevant election information, greater use of AI voting could reduce the spread of hyperpartisan information by campaigns. This outcome could marginally impact turnout under opt-out and opt-in AI voting. A hyperpartisan atmosphere has been cited as a cause for distrust and disengagement in elections.¹¹⁵ The more that voters defer to AI agents, the lesser the need for campaigns to create and share partisan content. Campaigns would be better served by issuing more objective, clear policy content. This sort of information may alter the ballots generated by AI agents. If an AI agent lacks information on how a candidate might approach a policy issue of particular importance to a voter, then the agent might be less likely to recommend a vote for that candidate.

In sum, each AI voting mechanism would likely cause a spike in voter participation. This increase would also address concerns about the views of non-voters often being omitted in electoral results. AI voting might even reveal differences among voters that would not otherwise unfold even with an uptick in participation. Many voters often vote the party line, selecting to support whichever candidate has earned the endorsement of that voter's party.¹¹⁶ AI agents might vary recommendations based on more nuanced analysis of the candidates and the likely effect of their election on the interests of a specific voter.

B. Rational Voting

The pervasive view is that voter ignorance represents a problem for democracies.¹¹⁷ Voters lacking accurate information or holding inaccurate

¹¹⁴ Eric McGhee et al., *Vote-by-Mail Policy and the 2020 Presidential Election*, 9 RSCH. & POL. 1, 1–2 (2022).

¹¹⁵ David Winston, *The Price of Hyper-Partisanship: Confidence in Elections Undermined*, ROLL CALL (Apr. 10, 2024, 6:00 AM), <https://rollcall.com/2024/04/10/the-price-of-hyper-partisanship-confidence-in-elections-undermined/> [<https://perma.cc/LQ9N-ETLR>].

¹¹⁶ Carroll Doherty et al., *Large Shares of Voters Plan To Vote a Straight Party Ticket for President, Senate and House*, PEW RSCH. CTR. (Oct. 21, 2020), <https://www.pewresearch.org/politics/2020/10/21/large-shares-of-voters-plan-to-vote-a-straight-party-ticket-for-president-senate-and-house/> [<https://perma.cc/CWY4-TT4Q>].

¹¹⁷ Adam F. Gibbons, *Is Epistocracy Irrational?*, 21 J. ETHICS & SOC. PHIL. 251, 251 (2022).

views about how the democratic order functions and how various policies may affect that order can cast votes that directly conflict with their ideals and aims.¹¹⁸ Tremendous fear of the possible negative effects of irrational voting has caused some to go so far as to call for “mitigat[ion of] the harm caused by voter ignorance by allocating comparatively greater amounts of political power to citizens who possess more politically relevant knowledge.”¹¹⁹

Though the Founders did not explicitly embrace a right to vote,¹²⁰ they expected that those propertied men afforded the privilege to vote would use their independence from financial concerns and their interest in the stability and well-being of the community to elect quality representatives.¹²¹ In short, they designed an electoral apparatus focused more on the ends—an effective government made up of responsible stewards of the people’s power¹²²—more so than the means, which they trusted the states to figure out.¹²³

Contemporary voters tend not to incorporate neutral, fact-intensive analysis of electoral matters into their ballot decisions.¹²⁴ This latter trend has substantial, negative effects on governance. Bryan Caplan, author of “The Myth of the Rational Voter: Why Democracies Choose Bad Policies,” observed that “popular misconceptions, irrational beliefs, and personal biases held by ordinary voters” are “[t]he greatest obstacle to sound economic policy.”¹²⁵ Per Caplan, bad policies can be attributed to bad voting, for lack of a better phrase.¹²⁶

¹¹⁸ *Id.*

¹¹⁹ *Id.* (discussing works by Jason Brennan and Garrett Jones).

¹²⁰ Michael Wines, *Does the Constitution Guarantee a Right to Vote? The Answer May Surprise You.*, N.Y. TIMES (Oct. 26, 2022), <https://www.nytimes.com/article/voting-rights-constitution.html> [<https://perma.cc/DB9S-HVBF>].

¹²¹ *Cf.* THE FEDERALIST NO. 68 (justifying the electoral college as a means to confine selection of the president only to those men “most likely to possess the information and discernment requisite to such complicated investigations”).

¹²² *Cf.* Andrew Tutt, *Choosing Representatives by Proxy Voting*, 116 COLUM. L. REV. SIDEBAR 61, 78 (2016) (contending that delegations of “political authority in interests of aggregate utility” represents a “core feature[] of our democratic order”).

¹²³ U.S. CONST. art. I, § 4.

¹²⁴ Stefanie Stantcheva, *Why People Vote Against Redistributive Policies That Would Benefit Them*, MIT PRESS READER (Nov. 20, 2021), <https://thereader.mitpress.mit.edu/why-do-we-not-support-redistribution/> [<https://perma.cc/VV8A-NZKM>]. Allegations of irrational voting have long been levied against voters. William Whatley Pierson Jr., *Is There a Republican Form of Government*, 2 N.C. L. REV. 14, 24 (1923) (“Democratic republics have been described as being unduly fickle with reference to men and principles, as being too susceptible to eloquence, as being too much given to mob-rule, faction, caprice, and impulsive social action, and as being unreasonably skeptical of experts in applied politics.”).

¹²⁵ *Id.* (quoting BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* (Princeton U. Press 2008) (quoting the abstract)).

¹²⁶ *Id.* (quoting BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* (Princeton U. Press 2008) (quoting the abstract)).

AI voting could be adopted in a way to reduce the prevalence of irrational voting. Automatic AI voting would, if the aforementioned assumptions hold, totally prevent irrational voting unless a voter had previously directed the AI agent to vote in a specific manner. Opt-out AI voting would likewise reduce the odds of irrational voting by providing all members of the electorate with a default rational ballot, a default that most would likely accept. Opt-in voting would likewise aid voters in voting in line with their objective well-being. Even if voters overrode the AI's recommendation for certain races, they may defer to the AI's suggestions on down ballot races that voters commonly know less about,¹²⁷ or seemingly care less about,¹²⁸ but that nevertheless may have the greatest impact on the daily lives of voters.¹²⁹

C. Democratic Downsides to AI Voting

AI voting of any sort could have unintended, negative long-term consequences on the democratic order. One concern that quickly comes to mind is the initiation of an unstoppable integration of AI into sensitive and societally important tasks.¹³⁰ This line of thinking taps into a slippery-slope argument that once AI becomes a part of something as important as elections, society may become problematically willing to turn over more decisions to AI. The net result of this AI transition could look like the sorry state of humanity depicted in WALL-E, the animated movie in which humans have become passive actors in a world dominated by robots.¹³¹

There is quite some distance between that worst case scenario and AI voting, especially in its weaker forms, such as opt-in AI voting. Still, the popular spread of this WALL-E concern suggests that some members of the public would prefer not to risk any action that leads society closer to this

¹²⁷ See generally Charles Angelucci et al., *Media Competition and News Diets*, SSRN (June 4, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3537040 [<https://perma.cc/K3TU-HRDP>].

¹²⁸ Zach Montellaro, *Some Voters Skip Down-Ballot Elections Entirely. Are They the Key to Victory in November?*, POLITICO (Apr. 22, 2024, 10:00 AM), <https://www.politico.com/newsletters/weekly-score/2024/04/22/some-voters-skip-down-ballot-elections-entirely-are-they-the-key-to-victory-in-november-00153543> [<https://perma.cc/JMS9-2YAF>].

¹²⁹ See Jordyn Reiland, *DU Political Science Professor on Why Local Elections Matter*, DENVER UNIV. COLL. OF ARTS, HUMANITIES & SOC. SCI. (May 4, 2023), <https://liberalarts.du.edu/news-events/all-articles/du-political-science-professor-why-local-elections-matter> [perma.cc/JMS9-2YAF] (interviewing Seth Masket, discussing low voter turnout and the impact it can have on daily life).

¹³⁰ Cf. Siebecker, *supra* note 3, *passim* (reviewing the potential effects that integration of AI into corporate affairs may have on democracy).

¹³¹ See *AI Threats: Can The Matrix and Other Sci-Fi Films Anything?*, BBC (June 3, 2023), <https://www.bbc.com/news/technology-65786964> [<https://perma.cc/43LJ-BZ3K>] (“The organisers of the warning statement—the Centre for AI Safety (CAIS)—used Pixar’s WALL-E as an example of the threats of AI.”).

slippery slope.¹³² This concern aligns with the broader finding that “democracies in decline usually experience a slow but steady erosion. The process is often incremental and episodic. Each step is only partial.”¹³³ AI voting could mark a partial step in the wrong direction.

Delegation of some individualized decision-making power to AI agents might also diminish human dignity. If voting is conceived as an activity of self-expression that permits voters to declare their views on fairness, equity, and other broad, important societal values,¹³⁴ then delegation of that power might infringe on human dignity. An increasingly automated electoral process would also hinder the deliberative spirit that the Founders anticipated would inform civic discourse.¹³⁵

AI voting, especially automatic AI voting, also raises transparency concerns. Given the prevalence of concern about election interference, use of AI agents that cannot fully and clearly explain how and why a specific ballot was generated will likely be met with broad skepticism.¹³⁶ Kevin Roose of the *New York Times* summarized this concern when he asked, “[i]f powerful AI systems start to disobey or deceive us, how can we stop them if we can’t understand what’s causing that behavior in the first place?”¹³⁷ This source of skepticism may dissipate in the near future. Researchers have made *some*

¹³² See *id.* (“I think AI will transform a lot of sectors from the ground up, [but] we need to be super careful about rushing to make decisions based on feverish and outlandish stories where large leaps are assumed without a sense of what the bridge will look like.”) (quoting Nathan Benaich from Air Street Capital).

¹³³ Vanessa Williamson, *Understanding Democratic Decline in the United States*, BROOKINGS (Oct. 17, 2023), <https://www.brookings.edu/articles/understanding-democratic-decline-in-the-united-states/> [<https://perma.cc/U2X9-7N3R>] (“The electoral road to breakdown is dangerously deceptive . . . People still vote. Elected autocrats maintain a veneer of democracy while eviscerating its substance. Many government efforts to subvert democracy are ‘legal,’ in the sense that they are approved by the legislature or accepted by the courts.”) (quoting STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 5 (Crown, 2019)).

¹³⁴ See Stantcheva, *supra* note 124 (discussing the importance of such values to shaping popular opinion on societal affairs); see also Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J. L. & PUB. POL’Y 143, 145 (“[T]he right to vote is part of our ethos for what it means to be an American.”).

¹³⁵ See, e.g., THE FEDERALIST NO. 68 (Alexander Hamilton), No. 10 (James Madison). In Federalist No. 68, Hamilton discusses the electoral process as requiring “deliberation” and “judgment” to select qualified leaders. In Federalist No. 10, James Madison emphasizes the importance of deliberation in mitigating factionalism.

¹³⁶ See Cynthia Rudin & Joanna Radin, *Why Are We Using Black Box Models in AI When We Don’t Need To? A Lesson From an Explainable AI Competition*, HARV. DATA SCI. REV. (Nov. 22, 2019), <https://hdsr.mitpress.mit.edu/pub/f9kuryi8/release/8> [<https://perma.cc/JY2R-W7WB>] (discussing the reasons why individuals may be skeptical of black box models).

¹³⁷ Kevin Roose, *A.I.’s Black Boxes Just Got a Little Less Mysterious*, N.Y. TIMES (May 22, 2024), <https://www.nytimes.com/2024/05/21/technology/ai-language-models-anthropic.html> [<https://perma.cc/8XY7-PHR7>].

progress in figuring out how AI systems operate.¹³⁸ AI interpretability, though, is still a ways off.¹³⁹

An additional area of concern could emerge if the process for instructing AI agents in the pre-election window did not operate as intended. Best intentions in election administration are not the same as best practices.¹⁴⁰ Some states have struggled in implementing initiatives that require even basic technological competence.¹⁴¹ If pre-election instruction of an AI agent was not readily available then AI voting would be susceptible to many of the same arguments against the current voting scheme, which caters to the interests and norms of a certain segment of the population.

Even if proponents of AI voting manage to rebut these downsides, they must still show that AI voting can survive inevitable and substantial legal challenges.

IV. The Legality of AI Voting

Constitutional and statutory hurdles may prevent the use of AI voting. Automatic AI voting, in particular, seems unlikely to withstand constitutional scrutiny. Opt-out and opt-in AI voting adopted in line with the prior assumptions run into fewer constitutional and statutory hurdles. This Article does not explore all possible constitutional and statutory arguments against AI voting. Further analysis as to how AI voting may violate state constitutional law warrants attention as well.

A. Guarantee Clause

The Guarantee Clause has long been the subject of scrutiny by jurists and scholars.¹⁴² For just as long, a consensus has yet to form around a single

¹³⁸ See *id.* (“There are lots of other challenges ahead of us, but the thing that seemed scariest no longer seems like a roadblock”) (quoting Chris Olah, anthropic research leader).

¹³⁹ See *id.* (“Even if researchers were to identify every feature in a large A.I. model, they would still need more information to understand the full inner workings of the model.”).

¹⁴⁰ Many interventions intended to increase voter turnout often produce mixed results or fall short of expectations. Even the institution of compulsory voting does not typically result in a massive change in voter turnout; see, e.g., *Compulsory Voting*, INT’L IDEA, <https://www.idea.int/data-tools/data/voter-turnout-database/compulsory-voting> [<https://perma.cc/75M2-7CCQ>] (reporting a 7.4% difference in turnout between nations with and without compulsory voting).

¹⁴¹ See, e.g., Jason Millman, *How Oregon Wound Up Nation’s Worst Obamacare Website*, WASH. POST (Mar. 21, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/03/20/how-oregon-wound-up-with-the-nations-worst-obamacare-website/> [<https://perma.cc/2PF5-2WCQ>] (providing an overview of how and why the State of Oregon failed to launch an Obamacare website).

¹⁴² U.S. CONST. amend. IV, § 4; see, e.g., *Calder v. Bull*, 3 U.S. 386, 387 (1798) (“All the powers delegated by the people of the United States to the Federal Government are defined, and NO

interpretation of the Clause.¹⁴³ Application of leading interpretations of its terms suggest that automatic AI voting would fail constitutional scrutiny under this Clause. The constitutional fate of opt-out and opt-in voting is less clear.

Under one persuasive interpretation of the Guarantee Clause,¹⁴⁴ the entirety of the federal government has an obligation to ensure states maintain a republican form of government.¹⁴⁵ Textual analysis of similarly worded treaties supports this broad mandate.¹⁴⁶ Additional evidence for this interpretation comes from the shared desire of the Founders to ensure “ultimate control [of the government] by the citizenry,” prevent undue concentration of power such as in a monarchy or aristocracy, and advance the rule of law.¹⁴⁷ More generally, the Founders appear to have expected states to maintain a system of government made up of “equal, active, and independent citizens.”¹⁴⁸

Automatic AI voting would likely rob the states of those active, independent citizens.¹⁴⁹ Many voters may find themselves willing to defer to the vote generated by the AI agent. Many may also divert whatever attention they currently turn to democratic affairs to other matters, given the assurance that some vote will be cast in their name. These troubling outcomes would

CONSTRUCTIVE powers can be exercised by it, and all the powers that remain in the State Governments are indefinite[.]”); *Minor v. Happersett*, 88 U.S. 162, 175 (1875) (“It is true that the United States guarantees to every State a republican form of government.”); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 2 (1988) (arguing that the Guarantee Clause limits federal power by ensuring states retain autonomy to maintain republican government); G. Edward White, *Reading the Guarantee Clause*, 65 U. COLO. L. REV. 787, 789–90 (1994) (arguing that the Guarantee Clause should be viewed as a historical text reflecting its authors’ intent, with language, epistemology, and time shaping its interpretation); Hardy Myers, *The Guarantee Clause and Direct Democracy*, 34 WILLAMETTE L. REV. 659 (1998) (discussing the effects of the Guarantee Clause on state government); Jason Mazzone, *The Incorporation of the Republican Guarantee Clause*, 97 NOTRE DAME L. REV. 1435 (2022) (explaining that an incorporated Guarantee Clause informs the meaning of the Thirteenth, Fourteenth, and Fifteenth Amendment rights, which should be understood in the context of republicanism).

¹⁴³ See Myers, *supra* note 142, at 659–60 (explaining that Guarantee Clause law is not well developed because the U.S. Supreme Court has held that such issues are nonjusticiable in federal courts and instead, a question determined by Congress) (citing *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912)).

¹⁴⁴ U.S. CONST. art. IV, § 4.

¹⁴⁵ Ryan C. Williams, *The “Guarantee” Clause*, 132 Harv. L. Rev. 602, 631–32 (2018).

¹⁴⁶ See generally *id.* (discussing how the Guarantee Clause aligns with eighteenth-century treaty practices).

¹⁴⁷ Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 TEX. L. REV. 807, 814 (2002).

¹⁴⁸ Gordon S. Wood, *Classical Republicanism and the American Revolution*, 66 CHI.-KENT L. REV. 13, 23 (1990); see THE FEDERALIST NO. 43 (James Madison) (arguing that aristocratic and monarchic developments are antithetical to republicanism).

¹⁴⁹ Cf. Sarah Kreps & Doug Kriner, *How AI Threatens Democracy*, 34 J. DEMOCRACY 122, *passim* (2023) (reviewing means by which AI could undermine citizen participation in democratic affairs).

probably also manifest under opt-out AI voting, though perhaps to a lesser extent due to each voter having a chance to review the AI agent's recommendation prior to their ballot being finalized. Whether the inactivity and dependence of voters in either of these regimes would trigger the Guarantee Clause warrants further debate. At a minimum, though, the Guarantee Clause might prevent the use of automatic and opt-out AI voting.

All of the AI voting approaches could face scrutiny under the interpretation of the Guarantee Clause as a shield against "innovations." Ricardo Cordova, a staff attorney at the Nevada Supreme Court, defines innovations as "novel changes to the structure of government."¹⁵⁰ He sees a throughline of opposition to innovations from William Blackstone to the Founders and contends that the Founders realized that opposition through the Clause.¹⁵¹ AI voting in any form, regardless of how pervasive AI agents become in other settings, seems likely to qualify as a "novel" alteration to state governance that should trigger the Clause.

One more obvious violation of the Guarantee Clause may arise from the fact that the Founders never contemplated republican governance including decisions made or informed by AI. Though the Supreme Court has yet to precisely define the Clause, it has acknowledged that each of the states at the time of ratification had some form of republican government.¹⁵² Every distinguishing trait from those forms of government strengthens the argument that the government in question is no longer republican. Assuming that republicanism mandates human involvement,¹⁵³ then automatic AI voting would likely violate this interpretation of the Clause as a marked departure from those accepted forms of governance. Though automatic AI voting would allow people to provide instructions to the AI agent prior to the election, in the likely event that the vast majority of voters opted not to do so, the election would be decided by the AI agents. Given that "when an AI takes over a human task, the task changes,"¹⁵⁴ such an outcome would conflict with human control being essential to republicanism.

¹⁵⁰ Ricardo N. Cordova, *Unleashing the Guarantee Clause Against the Spirit of Innovation*, 32 WM. & MARY BILL RTS. J. 437, 440 (2023).

¹⁵¹ *Id.* at 450.

¹⁵² See *Minor v. Happersett*, 88 U.S. 162, 175 (1875) ("It is true that the United States guarantees to every State a republican form of government.").

¹⁵³ The importance of human participation in electoral affairs to republican governance receives support from interpretations of the Guarantee Clause by state courts. The Kansas Supreme Court, for example, has held that a republican form of government "is premised upon the fact that the people cannot speak in mass, and the right to choose a representative is every citizen's portion of sovereign power." *Harris v. Shanahan*, 192 Kan. 183, 204 (1963).

¹⁵⁴ Schneier, *supra* note 44.

B. Elections Clause

The Elections Clause likely does not prevent states from using any form of AI voting. States have the authority to determine the “Times, Places, and Manner of holding Elections for Senators and Representatives,” absent Congress specifying otherwise.¹⁵⁵ A textual argument that this broad grant of authority to states would prevent AI voting would fail. AI voting qualifies as a manner of voting. A historical argument also stands on shaky ground. As recounted by Justice Joseph Story, members of the Founding Generation feared that Congress would undemocratically manipulate elections, which bolstered support for leaving such details to states.¹⁵⁶ In other words, many Founders regarded states as the most faithful stewards of the people’s electoral participation.¹⁵⁷ Presumably such stewardship covers a state’s decision to alter its voting mechanisms.

C. The Twenty-Fourth Amendment

The Twenty-Fourth Amendment likely does not reach AI voting. The plain text of the Amendment only prevents states from denying or abridging the right of citizens to vote for federal officials “by reason of failure to pay any poll tax or other tax.”¹⁵⁸ Opponents of AI voting could argue that the time required to instruct an AI agent, including possible travel to a public library, for example, would amount to a tax on people’s time. Such an argument seems likely to fail given that voting generally requires some expenditure of time, travel, or both.¹⁵⁹

D. Inalienability

Though not explicitly set forth in the Constitution, some scholars have theorized voting as “civic obligation that cannot be alienated to anyone”¹⁶⁰ or, presumably, any *thing*, such as an interest group or AI agent. Courts have

¹⁵⁵ U.S. CONST. art. I, § 4.

¹⁵⁶ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 814 (1833). Most recent scholarship also supports the idea that the Constitution mandates a certain amount of breathing space for states to organize their own affairs. See Merritt, *supra* note 142, at 2 (“[S]tates cannot enjoy republican governments unless they retain sufficient autonomy to establish and maintain their own forms of government.”).

¹⁵⁷ *But see* THE FEDERALIST NO. 59 (Alexander Hamilton) (pointing out that states might alter election logistics in an undemocratic fashion).

¹⁵⁸ U.S. CONST. amend. XXIV, § 1.

¹⁵⁹ Mohs, *supra* note 40, at 187–88.

¹⁶⁰ Andrew Tutt, *Choosing Representatives by Proxy Voting*, 116 COLUM. L. REV. SIDEBAR 61, 77 (2016).

chipped away at that rigid stance.¹⁶¹ Though federal and state statute prohibiting the sale of votes have been upheld as constitutional,¹⁶² the Ninth Circuit in *Porter v. Brown* permitted voters to “swap” votes with another voter.¹⁶³

That case involved a website that paired individuals who might be good trade partners via a “vote-swapping mechanism” and then facilitated further communication between those voters to finalize the deal.¹⁶⁴ The Court reasoned that such swaps, unlike vote buying, received protection under the First Amendment because the exchange conveyed a “message other than the parties’ willingness to exchange votes for money.”¹⁶⁵ In terms of the content of that message, the Court speculated that a vote trade would include some discussion of the political preferences of the voters.¹⁶⁶ In short, there was some form of expression associated with the vote transfer.¹⁶⁷

If AI voting is framed as the delegation of a vote to an AI agent intended to further certain personal and political interests, then it likely lands on the constitutional side of the bright line against vote selling and buying. This idea is reinforced by the fact that “party tickets,” ballots pre-filled by parties or interest groups then handed to voters for submission, have never been declared unconstitutional.¹⁶⁸

It was no secret that under party ticket voting voters effectively ceded “[c]ontrol over the written ballot” to partisan actors.¹⁶⁹ Voters did not lose all control in such a system, however.¹⁷⁰ Savvy or particularly passionate voters could accept a party ticket and then “scratch off names on tickets, or add names to them.”¹⁷¹ Once the main means of electoral participation,¹⁷² states have since banned party tickets despite the practice remaining

¹⁶¹ *Porter v. Bowen*, 496 F.3d 1009 (9th Cir. 2007).

¹⁶² *Id.*; *Brown v. Hartlage*, 456 U.S. 45 (1982); see Voting Rights Act of 1965, 42 U.S.C. § 1973(c) (1988).

¹⁶³ *Porter*, 496 F.3d at 1019–20.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1020.

¹⁶⁶ *Id.* at 1019.

¹⁶⁷ *Id.*

¹⁶⁸ Derek T. Muller, *Weaponizing the Ballot*, 48 FLA. ST. U. L. REV. 61, 96–97 (2020).

¹⁶⁹ *Id.* at 97.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² See Elissa Berger, *A Party That Won’t Spoil: Minor Parties, State Constitutions and Fusion Voting*, 70 BROOKLYN L. REV. 1381, 1387–88 (2005); Rodney A. Smolla, *Regulation of Political Apparel in Polling Places: Why the Supreme Court’s Mansky Opinion Did Not Go Far Enough*, 2017–2018 CATO SUP. CT. EV. 225, 235 (2018) (remarking that in the “olden days” voters commonly submitted ballots that parties had pre-filled); cf. Steven H. Steinglass, *Constitutional Revision: Ohio Style*, 77 OHIO ST. L.J. 281, 302 (2016) (highlighting a relatively short period in which Ohio voters used party tickets but noting that the practice was in place when major constitutional revisions took place).

constitutionally valid.¹⁷³ Adopting the phraseology of the *Porter* Court, perhaps the act of a voter accepting a party ticket can be thought of as the voter expressing a preference for the views expressed by the creator of that ticket, even if most voters rarely took the time to review that ticket.¹⁷⁴

Assuming the constitutionality of party ticket voting and leaning on the parallels between party ticket voting and AI voting, there is a strong case that absent conflicting state law, AI voting could be upheld as a constitutional delegation of a voter's ballot decision making to a *thing*. Even accepting those conditions, automatic AI voting may fail for another reason, namely the prohibition on compelled speech under the First Amendment.

E. First Amendment

A range of First Amendment claims could arise upon state adoption of AI voting.¹⁷⁵ This essay focuses on the claim that AI voting might amount to compelled speech. Some of the U.S. Supreme Court's "leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling the people what they must say."¹⁷⁶ Examples of such mandated speech include a state requirement that students stand, salute the American flag, and repeat the Pledge of Allegiance.¹⁷⁷ The Court likewise prevented government officials from requiring parade organizers to include a gay and lesbian group.¹⁷⁸ More broadly, the Court has recognized constitutional protection for "individual freedom of mind,"¹⁷⁹ which includes both the right to speak as well as the right to refrain from speaking.¹⁸⁰ Under this expansive view of compelled speech doctrine the Court sided with a man who was punished by the state for covering a portion of his license plate that restated the state's motto, "Live Free or Die."¹⁸¹

Opt-in AI voting that requires a voter to review and adopt the AI agent's generated ballot seems unlikely to raise any relevant concerns in this regard. This process would more or less mirror a voter receiving a voting guide from

¹⁷³ See, e.g., OHIO CONST. art. V, § 2a (banning party tickets).

¹⁷⁴ *Daniel v. Simms*, 39 S.E. 690, 694 (W. Va. 1901) (observing that under a party ticket system "[a] voter, coming upon the ground and desiring to vote the Democratic ticket, might have one of these fraudulent tickets placed in his hands, and, without examining it closely, deposit it, and thus be defrauded out of his vote as to that particular office in which he felt most deeply interested").

¹⁷⁵ Freedom of Association claims may be particularly worthy of further investigation. See, e.g., *Fusion Candidacies, Disaggregation, and Free of Association*, 109 HARV. L. REV. 1302, 1302–03 (1996).

¹⁷⁶ *Rumsfeld v. F. for Acad. & Institutional Rts.*, 547 U.S. 47, 61 (2006).

¹⁷⁷ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 627–29 (1943).

¹⁷⁸ *Hurley v. Irish-Am. Gay Grp.*, 515 U.S. 557, 559–60 (1995).

¹⁷⁹ *Barnette*, 319 U.S. at 637.

¹⁸⁰ *Id.* at 645 (Murphy, J., concurring).

¹⁸¹ *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

a political party or interest group and then filling in their ballot accordingly.¹⁸²

A state aiming to steer clear of any concerns about the AI-generated ballot amounting to compelled speech could make a slight change in the opt-in voting procedure. As described above, voters would receive the ballot generated by the AI agent as well as a blank ballot, both of which would be valid upon return by the voter. The provision of a valid, pre-filled ballot by the state-operated AI agent to the voter could be the subject of a compelled speech claim. A simple bypass of this issue would be to share the AI agent's recommended ballot via something other than an official ballot. In other words, the voter could not simply return the AI-generated ballot to the state but would have to physically copy those recommended votes onto an official ballot.

Compelled speech concerns arising from opt-out voting would be trickier to avoid. Under this approach, it is possible that the AI-generated ballot cast on behalf of the voter would be counted simply due to inaction by the voter. Advocates for this approach could insist that the option for voters to vote via other mechanisms means that they were not *compelled* to adopt the government's speech. A review of relevant decisions suggests that compulsion is a threshold inquiry.¹⁸³ Where individuals have some means to avoid the state's preferred speech, the law in question may withstand compelled speech analysis.

Whether the Court would find that opt-out AI voting affords sufficient opportunity for voters to avoid becoming unwilling speakers is unclear given the current ambiguity in its case law.¹⁸⁴ Professor Eugene Volokh has identified two strands of compelled speech doctrine, both of which could tilt the scales against opt-out AI voting depending on the interpretation by the

¹⁸² All states have bans on certain activities at polling stations. *Electioneering Prohibitions Near Polling Places*, NAT'L CONF. STATE LEGISLATURES (Sept. 31, 2024), <https://www.ncsl.org/elections-and-campaigns/electioneering-prohibitions> [<https://perma.cc/9NFA-523N>]. Use of direct mail by interest groups and political groups to influence voters is common, though perhaps ineffective. Emma Green, *Most Campaign Outreach Has Zero Effect on Voters*, THE ATLANTIC (Sept. 30, 2017), <https://www.theatlantic.com/politics/archive/2017/09/campaigns-direct-mail-zero-effect/541485/> [<https://perma.cc/R8UU-X66Y>]; see also Ben Christopher, *Slated for Deception? Beware of All Those Glossy Mailers Telling You How to Vote*, CAL MATTERS (Oct. 23, 2020), <https://calmatters.org/politics/2020/10/slate-mailers-vote-california/> [<https://perma.cc/7XP5-VAHL>] (discussing the use of "slate mailers" in California).

¹⁸³ See, e.g., *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797–98 (1988); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995); *Hurley*, 515 U.S. at 581.

¹⁸⁴ David S. Han, *Compelled Speech and Doctrinal Fluidity*, 97 IND. L.J. 841, 844 (2022) ("[C]ompelled speech jurisprudence has sprawled into a doctrine of great breadth and complexity, extending well beyond the context of direct ideological speech compulsions.").

Court.¹⁸⁵ The first strand is a ban on “speech compulsions that also restrict speech.”¹⁸⁶ Opt-out AI voting might violate this strand if the Court finds that provision of the AI-generated ballot amounts to compulsion and hinders the ability of the voter to fully express their intended views.¹⁸⁷ The second “forbids some ‘pure speech compulsions.’”¹⁸⁸ Opt-out AI voting may fail under this strand if the Court, again, determines the voter is being compelled and that compulsion “unduly intrude[s] on the compelled person’s autonomy.”¹⁸⁹

A state using opt-out AI voting could try to further diminish the odds of a successful First Amendment challenge by surrendering control of the AI agent to a private actor. This maneuver would, in theory, undermine the argument that the AI-generated ballot constituted speech recommended or compelled by the state itself. If the Court assumed that position in practice, then all forms of AI voting might avoid First Amendment scrutiny. There is also an argument to be made that the “uncontrollability, incomprehensibility, and unexplainability” of AI prevents AI-generated ballots from being regarded as the state’s speech.¹⁹⁰

Assuming that the AI agent was operated by the state and regarded as state speech, automatic AI voting would likely have to squeeze through a narrow window to avoid going beyond constitutional bounds. The narrower window is the product of several factors. First, the degree of compulsion under automatic AI voting is heightened by voters only having an opportunity to instruct their AI agent prior to the election. If a voter does not instruct their agent to vote a certain way, then the voter will be forced to accept the AI-generated ballot as their own. Second, automatic AI voting does not allow for voters to fully sit out an election. These two factors together would amount to an especially chilling form of compulsory voting in which voters could not only sit out but might also have no say over their vote. Given that traditional forms of compulsory voting may qualify as compelled speech,¹⁹¹ this version seems even more likely to do so. On the whole, automatic AI

¹⁸⁵ Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 358 (2018).

¹⁸⁶ *Id.*

¹⁸⁷ *See id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *See Roman Yampolskiy on the Uncontrollability, Incomprehensibility, and Unexplainability of AI*, FUTURE LIFE INST. (Mar. 20, 2021), <https://futureoflife.org/podcast/roman-yampolskiy-on-the-uncontrollability-incomprehensibility-and-unexplainability-of-ai/> [https://perma.cc/74BK-FR2Q] (interviewing Roman Yampolskiy, Professor of Computer Science at the University of Louisville).

¹⁹¹ John R. Vile, *Compulsory Voting*, FREE SPEECH CTR. (July 2, 2024), <https://firstamendment.mtsu.edu/article/compulsory-voting/> [https://perma.cc/ZC94-KM72]; Andy Craig, *Mandatory Voting Is a Bad and Unconstitutional Idea*, CATO INST. (June 17, 2022), <https://www.cato.org/commentary/mandatory-voting-bad-unconstitutional-idea> [https://perma.cc/EX3A-4CH2].

voting would restrict speech in violation of the first doctrinal strand identified by Volokh and infringe on autonomy in violation of the second.¹⁹²

F. Right to Vote

The Constitution contains a fundamental right to vote.¹⁹³ As a fundamental right, any infringement upon it must survive strict scrutiny review.¹⁹⁴ Yet what the fundamental right to vote covers and, thus, when it is triggered remains unclear.¹⁹⁵ What is certain is that not every regulation pertaining to elections infringes the fundamental vote.¹⁹⁶ Regulations that “merely impact voters indirectly,” according to Professor, then-clerk Joshua A. Douglas, “should enjoy a lower level of scrutiny so long as the laws do not impose a ‘severe burden.’”¹⁹⁷ Douglas says such regulations qualitatively differ from those that impose “direct burdens” on voters by altering the value of their vote or their eligibility, for instance.¹⁹⁸ If AI voting, as outlined here, does not directly burden voting rights by, for example, diminishing the “value of one’s vote” or “[limiting] who is eligible for the franchise,” then it will likely be reviewed under a lower level of scrutiny.¹⁹⁹

A conception of the right to vote as necessarily allowing for individual expression, though, could subject automatic AI voting to strict scrutiny review. Fundamental rights subject to strict scrutiny analysis include “particular forms of expression, action, or opportunity perceived as touching more deeply and permanently on human personality” and, therefore, are “regarded as the constituents of freedom.”²⁰⁰ The right to vote has occasionally been framed with this emphasis on humanity, for lack of a better phrase.²⁰¹ Professor Lani Guinier, for instance, conceives of the right to vote

¹⁹² See Volokh, *supra* note 186.

¹⁹³ *Wesberry v. Sanders*, 376 U.S. 1, 5 (1964).

¹⁹⁴ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997); see *Reno v. Flores*, 507 U.S. 292, 301–02 (1993). See generally Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007). *Contra* James E. Fleming & Linda C. McClain, *The Myth of Strict Scrutiny for Fundamental Rights*, 12 DARTMOUTH L.J. 1, 6 (2014) (citing Justice Holmes’s conception of the Due Process Clause and contending that there is no “list of fundamental rights or isolated points pricked out in the text of the Constitution”).

¹⁹⁵ Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J. L. & PUB. POL’Y 143, 145 (2008).

¹⁹⁶ See *id.* at 145, 158.

¹⁹⁷ *Id.* at 145.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 770 (2d ed. 1990).

²⁰¹ See *id.* at 565–66.

as “a claim [to] the fundamental right to express and represent ideas.”²⁰² Under an automatic AI voting regime, some voters may have this expression unwillingly usurped by the AI agent. This infringement likely would not survive strict scrutiny review given the availability of alternative AI voting approaches. Moreover, this inquiry may be duplicative of the prior analysis of automatic AI voting under the First Amendment. A court would likely decide the issue on those slightly more settled grounds.

G. Other Constitutional Inquiries

A full examination of the results of a collision between AI voting and the Constitution is best saved for future scholars and more detailed proposals. The prior analysis shows that the letter of the Constitution likely permits some form of AI voting. Whether the spirit does is another question.

Though the spirit of the Constitution evades precise definition, the Supreme Court has at times expressed what may lie between the lines of its text. The Court in *Gray v. Sanders* located the constitutional support for political equality by looking to “the Declaration of Independence, to Lincoln’s Gettysburg Address, [and] to the Fifteenth, Seventeenth, and Nineteenth Amendments[.]”²⁰³ From that creative constitutional stitchwork, the Court created the basis for the “one person, one vote” requirement.²⁰⁴ Political equality also informed decisions by the Court to strike down state laws that unduly entrench the current dominance of the two major parties.²⁰⁵

AI voting, by selecting the candidate most likely to further the voter’s interests rather than the candidate that shares the voter’s party affiliation (unless instructed to do so by the voter), would benefit third-party candidates. This increase in competition would align with a spirit of political equality.

Likewise, AI voting builds on “one person, one vote” by increasing the odds that the vote will be cast and in a way that aligns with that person’s interests. In fact, this outcome may represent the full ideal of political equality. The *Gray* Court asserted that “‘we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.”²⁰⁶ In practice, the current electoral system, despite theoretically offering all voters the same opportunity to

²⁰² LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 93 (1994).

²⁰³ *Gray v. Sanders*, 372 U.S. 368, 384 (1963).

²⁰⁴ *Id.* at 381.

²⁰⁵ See *Fusion Candidacies, Disaggregation, and Free of Association*, 109 HARV. L. REV. 1302, 1302–03 (1996) (reviewing Supreme Court case law).

²⁰⁶ *Gray*, 372 U.S. at 380.

participate, has maintained a system that disproportionately favors certain classes of voters. As reported by Syed,²⁰⁷

[T]he demographic distribution of current voters does not reflect the diversity of American society. Voters are disproportionately whiter, higher income, more educated, and older than the potential electorate as a whole. White people are more likely to vote than are people of color. Rich people vote in significantly higher numbers than poor people, as do people with higher education levels compared to those with less formal education, and people without disabilities vis-à-vis individuals with disabilities. And, despite the lowering of the voting age from 21 to 18, youth are notoriously low-propensity voters.²⁰⁸

This is an unsustainable incongruence. “Voting for political representatives is arguably the most important context in which adequate representation should be ensured,” as explained by Syed,²⁰⁹ “the very legitimacy of a democratic system of government depends on it.”²¹⁰

H. Federal Statutory Limitations on AI Voting

The key federal laws on voting, the Voting Rights Act (VRA), the National Voter Registration Act (NVRA), and the Help America Vote Act (HAVA), have limited scopes and likely would not be interpreted by courts to reach AI voting as described here.²¹¹

The VRA deals predominantly with “locating and terminating discriminatory practices.”²¹² Passage of the Voting Rights Act marked “the first time since Reconstruction, [that] the federal government adopted legislation to vigorously enforce the Fifteenth Amendment.”²¹³ Given the focus of that Amendment on racial discrimination and the absence of any obvious discriminatory effects of AI voting, the VRA seems unlikely to shape the adoption of AI voting.²¹⁴

The NVRA does not prevent AI voting but might stifle its intended impact. Also known as the motor voter law, this Act “sets forth certain voter

²⁰⁷ Syed, *supra* note 27, at 2043.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 2047.

²¹⁰ *Id.*

²¹¹ *See id.* at 2033–36.

²¹² *Voting Rights Act of 1965*, 1966 DUKE L.J. 463, 468 (1966).

²¹³ Paul Finkelman, *The Necessity of the Voting Rights Act of 1965 and the Difficulty of Overcoming Almost a Century of Voting Discrimination*, 76 LA. L. REV. 181, 182 (2015).

²¹⁴ *Cf.* Mohs, *supra* note 40, at 188–94 (arguing that the Voting Rights Act would not prohibit internet voting).

registration requirements with respect to elections for federal office.”²¹⁵ States must offer specific means of registration to comply with the NVRA, such as allowing for voter registration at state motor vehicle agencies.²¹⁶ If AI voting played out as described above—upending the need for registration—then Congress would likely need to repeal the NVRA to ensure smooth legal sailing for the applicable AI voting approach. If Congress opted not to do so, then the AI voting approach selected by a state could be adjusted to ensure continued compliance with the NVRA. This would reduce the intended impact of AI voting by rendering it applicable only to registered voters rather than all members of the electorate. This reduction would still mark an improvement on turnout and the representativeness of that turnout.²¹⁷

The HAVA attempts to mitigate the voting irregularities that created chaos during the 2000 election.²¹⁸ More specifically, the Act establishes some standard practices related to “provisional voting, dissemination of information to voters, updated and ungraded voting equipment, development and maintenance of statewide registration databases, voter identification procedures, and processing of administrative complaints.”²¹⁹ Perhaps most importantly with respect to AI voting, the Act also makes funds available to states for improving their election infrastructure.²²⁰ These funds could aid the implementation of AI voting in states with fewer technological resources and expertise. A litany of other federal statutes may also affect the implementation of and legality of AI voting.²²¹

I. The Inevitability of State Regulation on AI Voting

State constitutional and statutory provisions may also alter the use and implementation of AI voting. A recently enacted law in North Dakota that explicitly precludes “person” from referring to “environmental elements, artificial intelligence, an animal, or an inanimate object” exemplifies that

²¹⁵ *The National Voter Registration Act of 1993 (NVRA)*, U.S. DEP’T OF JUST. (Nov. 1, 2024), <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra> [<https://perma.cc/YW9F-LUBV>].

²¹⁶ *Id.*

²¹⁷ See Aaron Mendelson, *What Voter Turnout Shows, and Hides, About Elections*, CTR. FOR PUB. INTEGRITY (Nov. 18, 2022), <https://publicintegrity.org/politics/what-voter-turnout-shows-and-hides-about-elections/> [<https://perma.cc/5X9T-GL28>] (analyzing the difference in participation vis-à-vis “eligible voters, registered voters, and Americans of voting age”).

²¹⁸ *The Help America Vote Act of 2002*, U.S. DEP’T OF JUST. (May 15, 2024), <https://www.justice.gov/crt/help-america-vote-act-2002> [<https://perma.cc/7MFL-ZWZ7>]; *Help America Vote Act of 2002*, 52 U.S.C. §§ 20901–21145 (2002).

²¹⁹ Syed, *supra* note 27, at 2035–36.

²²⁰ See U.S. DEP’T OF JUST., *supra* note 218.

²²¹ See R. SAM GARRETT & L. PAIGE WHITAKER, CONG. RSCH. SERV., IF12291, *ELECTIONS AND VOTING: POLICY AND LEGAL ISSUES FOR THE 118TH CONGRESS* (2023).

state legislatures are actively taking steps to prevent AI from seeping into certain areas of the law.²²² Other state AI regulatory efforts have focused on creating commissions to study AI, extend consumer protections to AI, and to generally address discrimination concerns raised by AI.²²³

It may be inevitable that states have to adopt explicit regulations related to the use of AI in democratic processes, perhaps including voting. According to Andreas Jungherr, a political scientist at the University of Bamberg, “A.I. has begun to touch the very idea and practice of democracy.”²²⁴

V. Conclusion

The Founders could not and did not anticipate how the American republic would evolve. The nation today is unhelpfully (with respect to governance) large in population,²²⁵ unpredictably distributed geographically, unexpectedly diverse in demographics, unimaginably advanced technologically, and unfortunately beset by democratic discord. The scale of the nation need not imperil the Constitution’s spirit. The ambiguity in the letter of the Constitution and the discretion afforded to states to fill in some of the gaps all signal an ongoing responsibility of the American people to adjust the republic in response to new conditions.

Some integration of AI into our democratic processes could close representation gaps that have sown the seeds of pervasive distrust among the people and of ineffectiveness within the government.²²⁶ Many Americans believe that elected officials aim only to enrich themselves, rather than to advance the well-being of the collective.²²⁷ AI voting would make such self-centered governance much more difficult for elected officials to pursue because every election would give a more robust indication of the public’s priorities relative to today’s election scheme.

²²² The definition of person; and to declare an emergency, H.R. 1361, 68th Gen. Assemb. Reg. Sess. (N.D. 2023).

²²³ See Laura Malugade et al., *2024 AI State Law Tracker*, HUSCH BLACKWELL (Jan. 16, 2025), <https://www.huschblackwell.com/2024-ai-state-law-tracker> [<https://perma.cc/6GKU-ZFFH>]; Lawrence Norden & Benjamin Lerude, *States Take the Lead on Regulating Artificial Intelligence*, BRENNAN CTR. FOR JUST. (Nov. 6, 2023), <https://www.brennancenter.org/our-work/research-reports/states-take-lead-regulating-artificial-intelligence> [<https://perma.cc/9NXS-2M2B>].

²²⁴ Andreas Jungherr, *Artificial Intelligence and Democracy: A Conceptual Framework*, SOCIAL MEDIA + SOC’Y, July–Sept. 2023, at 1, <https://journals.sagepub.com/doi/epub/10.1177/20563051231186353> [<https://perma.cc/92TG-6M4Y>].

²²⁵ See Paul Finkelman, *Who Counted, Who Voted, and Who Could They Vote For*, 58 ST. LOUIS U. L.J. 1071, 1082 (2014) (flagging the decision to cap the House of Representatives at 435 while still expecting its members to interact with “the people” as an “absurdity in American law”).

²²⁶ See Syed, *supra* note 27, at 2047–50.

²²⁷ Stantcheva, *supra* note 124.

Adoption of some form of AI voting would also align with the idea that if there are better means to comprehensively and accurately assess the public interest and gather public input, then the government ought to adjust to include those means as a part of its larger mandate to act on behalf of the whole. Such means exist, including but not limited to some form of AI.²²⁸ Economist Stefanie Stantcheva has extensively studied how greater use of surveys and experiments can provide meaningful insights into the views of inconsistent voters.²²⁹ It seems blatantly wrong to acknowledge that such views are relatively easily discoverable but to nevertheless persist with an electoral system that predictably will omit those views. That is why AI voting marks an improvement on ad hoc and informal surveys and experiments—the ballots informed by AI agents would go toward the formal process of selecting and instructing elected officials.

The Constitution does not provide many limits on state election systems. Still, automatic AI voting seems likely to fail scrutiny under the First Amendment’s prohibition on compelled speech as well as under the Guarantee Clause, assuming that a republican form of governance requires a more active form of human participation than allowed under this approach. The other forms of AI voting, however, do not blatantly run into constitutional red lines. Applicable federal laws may complicate the implementation of AI voting or reduce its scope but otherwise seem to allow for this novel evolution in democratic participation.

Whether states decide to move forward with AI voting, though, should not be grounded simply in legal analysis. What is legal and what is good for the nation’s democratic order do not always overlap. Schneier’s world may be technically feasible and legally permissible but carry disastrous consequences. Human-led democracy has failed on many fronts and is in need of reform. A revolutionary turn to AI voting, even with a human in the ballot box, may unleash unexpected and irreversible harms.

²²⁸ *Id.*

²²⁹ *Id.*