

100 YEARS of COMPULSORY VOTING in QUEENSLAND

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OPENING COMMENTS

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Curiously, the centenary of compulsory voting in Queensland and hence Australia is also the centenary of the last Liberal administration (of Digby Denham) before the short-lived Newman Premiership. It is doubly curious because opposition to compulsion today largely comes from libertarians, particularly neo-liberals (and some left libertarians). When the right wing of Australian politics imported compulsory voting from its foothold in places like Belgium, they did it not just afraid of declining turnout affecting governmental legitimacy. They also saw their Labor Party opponents as having an unfair advantage in turning out its supporters, given the union movement's many tendrils and volunteers.

I come in to praise, to demythologise and to bury compulsory voting. In equal parts.

- **To praise compulsory turnout for elections.** We are all in this society together and every elector has a useful opinion on the heuristic questions that tend to decide elections. Are we heading in the right direction? Do you trust Tony or Julia? Are we worse off than 3 years ago? These are *representative* elections. As Chief Justice Barwick said in *Faderson v Bridger*, one of 3 cases unsuccessfully challenging compulsory voting, we all have to have an MP and government on our behalf, so parliament is entitled try to cajole us to make a choice.

- **To demythologise: compulsion has 'c'onservative, not just progressive effects.** Progressives reflexively assume compulsion is good for them; conservatives assume it's bad for them. But is it? Long-term, as a World Bank study in Latin America shows, countries with compulsory turnout may have more inclusive socio-economic policy outcomes. (Although there is some confounding of cause and effect). However each society and era has to be seen on its own terms. Mid-last century, the UK/NZ were at least as egalitarian as Australia, without compulsory voting.

In early 21st century Australia, my hypothesis is that compulsory voting is a 'c'onservative electoral method. It turns out apolitical suburbanites more than 'marginalised' youth, etc. Those suburbanites include 'swinging voters' who in good times – most of the past 30 years – *plump for the status quo* unless they are really grumpy. This stabilises the system. It may also reinforce incumbency: the LNP nationally, Labor at state level. (This is not an absolute rule of course: when governments grow too long in the tooth, or grumpiness levels soar, compulsion may magnify volatility, as in NSW/Qld in 2011-12. But these are exceptions to the rule.). Chief Justice Gleeson twigged to this when he wrote: 'If people are compelled to vote, are not convinced of the necessity of change, and are perhaps not clear as to the reasons for, or consequences of, change, then it is hardly surprising that they vote for the status quo'.¹

- **Bury compulsory voting – for referendums.** Compulsion should not be part of referenda, especially constitutional ones. 'If in doubt, kick it out' is a recipe for constitutional drought. Why do we demand that each elector has a sensible view on constitutional law? Many reforms are technical - judges retiring at 70 was the last successful reform. Many others are important, but inter-governmental issues removed from people's lives. Yes, some constitutional reforms are 'identity' issues. The Republic vote was largely like that. But as Scotland's independence referendum proved, provided the issue has resonance for people, they will turnout. Would voluntary referenda delegitimise constitutional reforms? Why? The Australian Constitution itself was voted on, in the 1890s, under a restrictive, male-dominated, *voluntary* franchise. Turnout in some colonies barely reached 50% of white men.

For more see 'Compulsory Voting: For Elections, Not Referendum' (2011) 18 *Pandora's Box* 19
(Overleaf)

¹ *Mulholland's case* [2004] HCA 41 at par 29.

COMPULSORY VOTING: ELECTIONS, NOT REFERENDUMS

GRAEME ORR*

For decades now, there has been no more written about or analysed issue in the regulation of democracy, or perhaps political science generally, in Australia, than compulsory voting.¹ Whilst compulsion remains a distinctly, though hardly unique, Australian phenomenon, there is burgeoning international interest in it, driven by ongoing concern with declining voter turnout in the west.² Amongst all this debate, scant attention however has been paid to the fundamental consideration of *what* we are asking people to do when we encourage or require them to vote.

Instead, the literature, largely produced by political scientists and economists, has focused on either of two topics. The deeper of the two is an irresolvable normative tussle over the morality of compulsory versus voluntary voting. (A stoush which pits libertarians against communitarians, culminating in a recent piece titled 'It's an Evil Thing to Make People Vote').³ The normative question—about the philosophical justifications for erecting the right to vote as a duty—has been a recurring issue. Latterly, however,

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¹ For a sample of prominent academic literature see LF Crisp, 'Compulsory Voting in Australia' (1950) 4 *Parliamentary Affairs* 84, Colin Hughes, 'Compulsory Voting' in Colin Hughes (ed) *Readings in Australian Government* (UQ Press, 1968), Joan Rydon, 'Compulsory and Preferential: the Distinctive Features of Australian Voting Methods' (1968) 6 *Journal of Commonwealth Political Studies* 183, Neil Gow, 'The Introduction of *Compulsory Voting* in the Australian Commonwealth' (1971) 6 *Politics* 201, Ian McAllister, 'Compulsory Voting, Turnout and Party Advantage in Australia' (1986) 21 *Australian Journal of Political Science* 89, Gary Johns, 'Does Compulsory Voting Distort Electoral Outcomes?' (1998) 5 *Agenda* 367, Ian McAllister and Malcolm Mackerras, 'Compulsory Voting, Party Stability and Electoral Advantage in Australia' (1999) 18 *Electoral Studies* 217, Lisa Hill, 'A Great Leveller: Compulsory Voting' in Marian Sawer (ed), *Elections: Full, Free and Fair* (The Federation Press, 2001), Lisa Hill and Jonathon Louth, 'Compulsory Voting in Australia: Turnout With and Without it' (2005) 6 *Australian Review of Public Affairs* 25. For argument for a general audience see Pádraic McGuinness, 'The Case against Compulsory Voting' and Chris Puplick, 'The Case for Compulsory Voting' in AEC (ed), *The People's Say* (AEC, 1994) 20.

² Concern with turnout and the related question of legitimacy is a perennial. Compulsion was not pioneered in Australia in the early 20th century, but Europe. (Its roots are older still, eg the short-lived Georgian (US) Constitution of 1777, or the 5th century practice of 'roping-in' Athenian citizens to force them to participate in deliberative assemblies in the agora). The revitalisation of interest in compulsory voting in the west in recent times has been traced to an influential address by an eminent political scientist: Arend Lijphart, 'Unequal Participation: Democracy's Unresolved Dilemma' (1997) 91 *American Political Science Review* 1.

³ Derek Chong, Sinclair Davidson and Tim Fry 'It's an Evil thing to Oblige People to Vote' (2005-06) 21(4) *Policy* 10. For an antithetical position see Lisa Hill, 'On the Reasonableness of Compelling Citizens to 'Vote': the Australian Case' (2002) 50 *Political Studies* 80.

scholarship has tended to focus on compulsion's instrumental effects. These effects are mostly analysed as relatively fine-grained empirical questions: To what degree does compulsion improve turnout, and is this achieved mechanically or by engendering a voting norm? Does compulsion make parties lazy or does it force them to appeal broadly, beyond their bases? How does compulsion impact on partisan electoral outcomes and ultimately on policy development?

The normative and empirical questions are not entirely distinct. They unite around an axis of two themes: whether compulsion enhances or detracts from governmental legitimacy and whether it does anything for socio-political egalitarianism. Jurisprudential analysis has added little to either the normative or empirical debates. Instead, jurisprudential interest has centered on two specific legal concerns. One is constitutionality, with the Australian courts accepting that legislating for compulsory voting is within parliamentary power.⁴ Compulsion, it might be noted, is popular in Australia: consistently well over two-thirds of respondents favour it.⁵ The other has been a rather arid, technical debate about whether the law compels voting or merely exhorts it, by compelling turnout at a secret ballot.⁶

What debates and research on compulsory voting have failed to do is to conceptualise *what it is that we ask of people when they vote*. Without making that fundamental inquiry, it is difficult to fully address the question of compulsion versus voluntarism. This question is deceptively simple, or at least not susceptible of any simple definition. A practice as rich as voting, in a public poll following an election campaign, is of an order of complexity greater than, say, presenting consumers with choices between basic products or services. Voting is a multi-dimensional activity. It can be thought of as a communal experience, a mass decision-making mechanism or a liberal means to both individual citizen development and to collective, governmental accountability. Voting richly layers together rituals of communal involvement, aspects of self-expression and tribal loyalty, and elements of choice which mix rational calculations about policy options with intuitive and even irrational instincts about leaders and personalities.

⁴ *Judd v McKeon* (1926) 38 CLR 380; *Faderson v Bridger* (1971) 127 CLR 271.

⁵ Indeed the figure has risen in recent decades: from 63.7% (1987) and 66.8% (1993) to 77.1% (2004) and 76.7% (2007). Support declined to 71.6% in 2010, perhaps due to the lacklustre campaign (which saw a spike in informal voting) and disillusionment over the ousting of Prime Minister Rudd. Over 85% of electors, consistent over time, say they would still vote even without compulsion. (Source of figures: Australian Election Studies, <http://nesstar.assda.edu.au/webview/>).

⁶ Summarising that issue see Graeme Orr, *The Law of Politics* (The Federation Press, 2010) 62-65.

In this short paper, I do not seek to uncover more than a part of that richness. What I wish to argue is that there is a clear dichotomy between general elections and referendums. My argument is that voting at referendums differs from voting at elections in ways that mean compulsion is justifiable for elections, but not for referendums. To summarise the argument which follows, voting at elections invites citizens to make a regular decision about which parties they wish to represent them in parliament. Elections effectively require us to say which leadership team we would prefer in government over the next term; and in most jurisdictions also to reflect on the make-up of the upper house or house of review. In those kinds of broad, political judgments, everyone has an equal stake and everyone's voice is equally valid. Referendums, in contrast, are discrete, questions about enacting particular legal (especially, in Australia, constitutional) measures.⁷ Indeed they are binary questions, in the form 'yes/no'. In those matters, it is unreasonable and probably counter-productive to expect every citizen to have a say.

I THE APPARENT PARADOX OF COMPULSION

At the heart of the seemingly endless debate about compulsory voting lie apparent paradoxes: a paradox about rights and freedoms, and a paradox about legitimacy. To borrow from a Cypriot constitutional judgment, making voting obligatory 'is designed to ensure that political autonomy emanates from the people and as such is a safeguard for the sustenance of democracy'.⁸ The paradox of turning a right to participate into a duty is thus side-stepped by arguing that the liberal promise of popular sovereignty cannot be realised if individuals are left to free-ride on the common good by opting out of electoral participation.⁹ To Engelen:

Both liberalism and democracy are ultimately grounded on and co-originate from the fundamental principle of mutual respect for each person as a free and equal human being. ... [W]ithout popular sovereignty—guaranteed by a democracy in which people participate in the decisions that will bind them—individual rights and liberties remain purely formal and empty.¹⁰

⁷ A distinction is made here between issue-based referendums (whether citizen or parliamentary initiated, legislative or constitutional) and the recall referendum, which is really an inverted electoral procedure.

⁸ *Pingoroas v The Republic* [189] LRC (Const) 201 at 210.

⁹ Critiquing the free-rider argument, see Annabelle Lever, 'Compulsory Voting: a Critical Perspective' (2010) 40 *British Journal of Political Science* 897 at 903.

¹⁰ Bart Engelen, 'Why Liberals Can Favour Compulsory Attendance' (2009) 29 *Politics* 218 at 222.

To opponents of compulsion, however, whilst stronger turnout is desirable (all other things being equal), no-one should be marshalled to the polls with the cattle-prod of legal sanctions. In this conservative, even elitist, view compulsion paradoxically imperils rather than ensures legitimacy, because some votes are more desirable than others. In Rydon's much-quoted phrase:

[W]here the apathetic and ill-informed are forced to the polls by law, it is even more likely that the 'scum and dregs' of political life will decide who is to govern the country.¹¹

There is a deep reason however why we value as large a turnout as possible at representative elections, and it does not rest on legitimacy arguments. After all there is no magic dividing line between legitimate and illegitimate. A parliament elected on a 65% turnout can claim as much legitimacy (understood as constitutional right) as one elected on a 90% turnout.¹² As long as the ground rules of electoral democracy are settled in advance and are well within the bounds of fairness, then the outcome is legitimate as the product of a free and open election. No-one would argue that either compulsion or voluntarism per se is undemocratic. Otherwise countries like the UK and Australia could not be classed together as electoral democracies. For legitimacy—understood as a political rather than constitutional fact—much more important than any choice of voting rule between compulsion or voluntarism is the underlying political culture: the openness and diversity of the media, a level of equality between the key parties, and so on.

Governmental legitimacy is not, then, a product of some empirical fact such as the brute level of turnout. Nor is it reducible to the representativeness of the turnout in a numerical sense. (Certainly disparate turnout of low-economic or social-status groups can undermine social cohesion in the long run. But if the goal were strict numerical proportionality in parliamentary representation, we could just as well save the huge cost of elections and use scientific sampling methods to choose MPs). Instead, as Engelen hints, the reason compulsion is recommended for elections stems from the notion of each person as an equal political being. If democratic government is to be of

¹¹ Joan Rydon, 'The Electorate' in John Wilkes (ed), *Forces in Australian Politics* (Angus and Robertson, 1963) 167 at 184. No less colourfully see McGuiness, above n 1 at 21, equating contemporary politics under compulsory voting with Roman bread and circuses, 'designed to appeal to unthinking but enfranchised plebs who are forced to the polls.' Rydon's 'scum and dregs' was borrowed from Bernard Shaw, and implies that the apathetic and ill-informed can be found at all levels of society (scum floats, dregs sink).

¹² The figures are roughly the average for recent Westminster elections (65%) and Australian national elections (90% consisting of 95% turnout on a 95% comprehensive role). But we could substitute other figures and the argument would be the same.

the people, for the people, then in two senses everyone can be required to have their say.¹³

The first sense is that government is by definition a broad institutional process that touches everyone's life in practice, and in theory envelops the republican ideal of a shared public space, discourse and set of institutions. Not being a mechanical enterprise, government is presided over by people. Elections exist to fill the highest of those roles, by stocking our parliaments with people to form the executive, to vote on laws and to speak for different communities, whether geographic or values based. That republican ideal means that there are strong reasons, both symbolic and constitutive, in favour of compulsion. Whilst we do not go so far as to rope citizens in physically, as in Athens long-ago, it is proportionate to enact administrative penalties for not voting without reasonable excuse. This habituates both the governors and the governed to see voting as the fundamental and equal right of belonging to the community.

The second and related sense is that being ostensibly for all, government under electoral democracy must value each person's say equally. Certainly voluntary voting still permits each to have their say, but only compulsion (under conditions of secrecy allowing people to deliberately vote informally) formally values each elector equally. And it is in this regard that the question of what we ask of people when we ask them to vote is crucial.

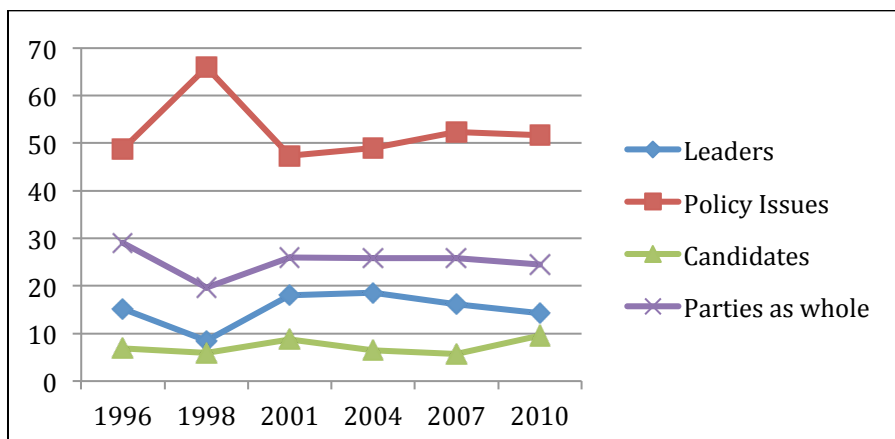
II WHAT IS INVOLVED IN VOTING?

To address this question, researchers could simulate games of electoral choice, or ask electors to reflect on what motivates them when they vote. But such exercises are fraught. The process of forming political and partisan positions is multifaceted and, to a considerable extent, pre-reflective. For many, the evolution of their political leanings occurs sporadically during periods of ideological openness (eg during youth), before settling for a long period. Alternatively, political scientists can and do ask electors to nominate what they perceive as influencing how they vote. For instance, the Australian Election Study has long asked voters emerging from polling booths which of a

¹³ Leaving aside the distinction between compulsory *turnout* and compulsory *marking* of ballots; except to note that the legal guarantee of secrecy permits people to vote informally as a protest, and that such protest is a say in itself. In contrast, the silence of not turning out at all can embrace everything from forgetfulness through confusion to protest. Compare Lisa Hill, 'Informal Voting under a System of Compulsory Voting' in Joo-Cheong Tham et al (eds), *Electoral Democracy: Australian Prospects* (MUP, 2011) 36.

closed-set of factors was 'most important' in determining their vote. The responses generate tables like this:

'Most Important' Factor in Determining Vote (Source: Australian Election Studies)



The results tell us things we could intuit, such as that Australian politics is more leader and party-centred than local and candidate-centred. But the results need to be read with care. Policy debates are important, but whether they are the overwhelmingly dominant determinant may be doubted. Respondents to any survey are inclined to give a response that they perceive is 'acceptable'.¹⁴ Of the four factors offered, 'policy issues' would sound like the most rational response. In reality, political advertising reveals that much less concrete factors are also important in swaying voters. Political advertising centres on projections of a party's brand or 'feel', communicating a sense of vision and the personality or charisma of each leader. Also, we know that many voters are staunchly wedded to a particular party, whether out of a sense of ideology, class or group identity, or simply long-held loyalty. Whilst party loyalty and class-identity may have declined somewhat, they are still strong. Over 70% of Australian electors 'never seriously contemplated' changing their first preference vote in Australian elections over the last 15 years.¹⁵

There are other, more indirect, measures of voting behaviour. The level of 'interest in politics' reported by electors is of particular interest in a compulsory voting milieu. Consistently, since data began in 1987, between 17% and 21% of

¹⁴ Also known as 'social desirability' bias.

¹⁵ Source: Australian Election Studies. For a detailed analysis of these ongoing studies, see Ian McAllister, *The Australian Voter: 50 Years of Change* (UNSW Press, 2011).

electors have reported ‘not much’ or ‘no’ real interest in politics.¹⁶ Whilst that figure may worry opponents of compulsory voting, it would include staunch voters who long ago plumped for a particular party which aligned with their self-interest, values or worldview. A related question concerns ‘when’ electors ‘definitely’ decide how to vote. The proportion which claims it only definitively decides how to vote *during* the campaign has fluctuated between 26.6% and 42.2% since 1987. Although almost certainly overstated,¹⁷ these figures imply that there are two groups who ponder how to vote during the campaign: apoliticals who tend to switch on and decide late in the campaign, and staunches who only need the campaign to decide where to allocate their second and later preferences.

The data can never fully address the question of what people do psychologically when they form electoral preferences, however. But it is clear that different people are susceptible to different factors and processes. And we would expect no less with something as complex as representative politics and parliamentary elections.

III REFERENDUMS CONTRASTED WITH ELECTIONS¹⁸

In their study of the history and nature of referendums in Australia, Williams and Hume comment that:

[B]ecause constitutional changes can alter Australia’s democratic structure, it can be argued that the duty to vote in referendums is greater than the duty to vote in ordinary elections.¹⁹

My thesis is the reverse: it is reasonable to compel voting at elections, but not to compel electors to vote on the rewording of an essentially legal document such as a constitution. There are three ways to argue this. One relates to pragmatics, one to principle, and one to participation. First, to pragmatics.

¹⁶ Source: Australian Election Studies. In 2004 the figure spiked to 24%.

¹⁷ We know the ‘undecided’ figure is much less than this. The figures in the text are undoubtedly inflated by the term ‘definitely’ in the question and a perception that the better answer is to suggest that one’s mind is not closed and that the campaign can make a difference.

¹⁸ This section develops an argument sketched first in Graeme Orr, ‘Electoral Reform as a Tonic for Referenda and Federalism’ (2005) 20(2) *Australasian Parliamentary Review* 83 at 86-90.

¹⁹ George Williams and David Hume, *People Power: the History and Future of the Referendum in Australia* (UNSW Press, 2010) at 49. On referendum law generally see Graeme Orr, ‘The Conduct of Referenda and Plebiscites in Australia: a Legal Perspective’ (2000) 11 *Public Law Review* 117.

It is often pointed out that Australia was founded as a nation through the peaceable means of the ballot box. Whilst the British authorities maintained a strong oversight over colonial affairs, and nothing could happen lawfully without Westminster's statutory authority, the Australian Constitution was adopted after a set of plebiscites in each colony.²⁰ These of course were by voluntary voting (indeed in most colonies by white, manhood rather than universal suffrage). Even more so, the State constitutions have not been adopted at a compulsory ballot, but have evolved through parliamentary amendment. It thus cannot be reasoned from arguments about symmetry that the manner of adoption of our constitutions requires ongoing compulsory voting for their reform.

It is sometimes pointed out that compulsory voting for national referendums predated compulsion for national elections.²¹ It is fairer to note that compulsory voting was adopted first for Queensland elections (in 1914, by a Liberal administration) and then was to be trialled federally by the federal Labor government in 1915. That federal government was disappointed with the loss of eight referendum proposals in 1911 and 1913, for which it felt inclined to blame low turnout.²² The irony is that, if anything, the higher turnout generated by compulsion makes referendums harder to pass.

The simplest way to scuttle reform by referendum is to appeal to uncertainty or apathy. This was neatly captured in two key slogans of the 'no' case in the 1999 Republic referendum: 'If it ain't broke, don't fix it' and 'When in doubt, throw it out'.²³ As Craven argues, 'confusion' is the 'napalm' of constitutional nay-sayers.²⁴ Of course the nature of law is that an onus lies on

²⁰ Glenn Rhodes, *Votes for Australia: How Colonials Voted at the 1899-1900 Federation Referendums* (CAPSM, 2002).

²¹ 1915—on a trial basis—versus 1924 for federal elections. See Williams and Hume, above n 19.

²² These two referendum day had not been held in conjunction with elections, compared to the successful referendums of 1906 and 1910. In truth, the eight proposals were to expand Commonwealth powers, the earlier referendums were less contentious. See Harry Phillips, *Compulsory Voting: the Australian Experiment* (Western Australian Electoral Commission, 2001) 29-30.

²³ AEC, *Yes/No Referendum 1999: Your Official Referendum Pamphlet* (AEC, 1999) at 15 and 17 (http://www.aec.gov.au/Elections/referendums/1999_Referendum_Reports_Statistics/yes_no_pamphlet.pdf) Williams and Hume, above at 253, summarise such arguments as 'don't know, vote No'. Former Chief Justice Mason identified 'ignorance of the Constitution, now a well-documented fact' as an inducement to 'no' cases: Sir Anthony Mason, 'Towards 2001—Minimalism, Monarchism or Metamorphism' (1995) 21 *Monash University Law Review* 1 at 7. It may be that more informed voters are more likely than others to say 'yes' at referendums, but not necessarily more likely to vote 'yes' than 'no': Richard Miles, 'Australia's Constitutional Referendum: A Shield not a Sword' (1998) 35 *Representation* 237 at 230-242.

²⁴ Akin to the tactics of a defence barrister muddying every argument only to remind the jury that the prosecution should prove its case beyond reasonable doubt: Greg Craven, *Conversations with the Constitution* (UNSW Press, 2004) 232-233

proponents of reform to make the case for change: but this does not mean voting on law reform should be compulsory. After all, subject only to minimal requirements of parliamentary quorums, even legislators are entitled to abstain from voting on a bill. Mandating voting at referendums gives a free kick to opponents of reform, when conservatives and progressives alike agree on one thing: the Constitution is not perfect.²⁵

What of arguments from principle? Earlier we noted the observation of Williams and Hume that the Constitution is a fundamental document to governance. Sir Isaac Isaacs said as much when, in writing about the utility of holding referendums on the same day as elections, he claimed that '[t]he election of members of parliament is important, but infinitely less important than the questions with which [a] referendum is concerned'.²⁶ Less prosaically, but echoing the same sentiment, Craven has dismissed the idea of voluntary voting at referendums whilst we have compulsory voting at elections as 'like dressing up for take-away, but wearing thongs to the Savoy'.²⁷ The fashion and food metaphors are inapt. In truth, the idea that a constitution is the Savoy, infinitely more important than representative government itself, is a view that perhaps only a lawyer could hold.

We can have a democracy without a written constitution or a system where electors directly shape the constitution. Indeed that was the Westminster way, and it is still reflected in practice in England and the Australian states.²⁸ But we cannot have a democracy without regular elections for representative governments and parliaments. As Chief Justice Barwick argued, in his defence of compulsory voting at elections, compulsion does not require electors to find a candidate that they 'prefer' in the sense of genuinely liking. Rather, each elector 'is asked to express a preference amongst those who are available for election, that is, to state which of them he prefers, *if he must have one or more of them as Parliamentary representatives, as he must*'.²⁹

Government, as much as taxes and death, is not just inescapable: it affects each of us in our daily lives. To require citizens to attend the polling booth or to lodge a postal ballot, with a view to counting each citizen's view about which party, candidate or leader should be their representative for the next

²⁵ Though they disagree as to what needs rectification: top of the conservative agenda is a revitalised federalism; progressives tend to long for a bill of rights and a republic.

²⁶ Sir Isaac Isaacs, *A Stepping Stone to Greater Freedom* (Pamphlet compiling five articles from the Melbourne Age, 1946) at 8-9.

²⁷ Craven, above n 24, 229.

²⁸ Even allowing that plebiscites have been held on important issues dealing with sovereignty and devolution in the United Kingdom, and a few entrenched matters in state constitutions cannot be undone without a referendum.

²⁹ *Faderson v Bridger* (1971) 126 CLR 271 at [9] (emphasis added).

three years, is not to require some Herculean task, either physically or intellectually. In particular—and contrary to the elitist view summed up in the ‘scum and dregs’ rhetoric—it is to recognise a fundamental principle of democratic equality. One does not have to be a political aficionado or a policy analyst to have a valid say on electoral questions. As I noted earlier, there is no single metric which electors should employ in determining how to allocate their electoral preferences—and it is a good thing too. Because societies are plural and government a broad and complex activity, representative electoral politics is too rich an endeavour for there ever to be a ‘rational’ metric.

This is not to say that electoral outcomes are random. As many commentators have observed, election outcomes often appear to approximate a collective response to broad heuristics, such as ‘are people better or worse off than three years ago?’, ‘is the country heading in the right direction?’ and ‘which leader/party is more trusted?’ These are questions of everyday political opinion, questions on which every citizen’s say is of equal worth. It is this insight that justifies electoral compulsion. In addition, elections serve a ritual purpose. They are seasonal events, the one day of the year (or every three years) when a secular community is brought together.³⁰ Compulsion maps well onto that sense that elections bind the polity together and are not merely moments of partisan jostling.

Referendums to amend the Constitution—unless they go to questions of secession or devolution—are not such moments. The Australian experience is that they have been specific questions, which assume electors are interested in weighing arguments about particularistic amendments to institutional structures. In one sense, to echo Barwick CJ’s reasoning, a constitutional referendum does of course deal with an unavoidable question. Short of emigrating, every elector must live under the constitution, amended or not. But the type of question asked in a referendum is categorically different from the choice presented at an election. This difference justifies referendums being by voluntary voting, but elections by compulsory voting. A constitution is a basic law, but it is a law nonetheless. This is especially so with Australian constitutions, which overwhelmingly deal with questions of institutional structure (the division of powers in a federation, the judicial role and hierarchy) rather than questions of social rights (which dominate bill of rights debates).

The history of Australian national referendums demonstrates that the great majority of questions have indeed been fairly technical ones:³¹ Should the

³⁰ For more see Graeme Orr, *The Ritual and Aesthetic of Electoral Law* (2004) 32 *Federal Law Review* 425.

³¹ For a list of questions and outcomes, see Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (3rd ed, Federation Press, 2002) 1303-1308.

Commonwealth have greater power over industrial relations, monopolies or aspects of transportation or commerce? When should judges retire? Even the handful of rights questions (such as those presented in 1988) could only be understood with a reasonable knowledge of institutional form and legal powers. Only rarely have questions captured a public mood (as in the 1967 question on indigenous affairs) or spoken at a symbolic level (as in the 1999 Republic and preamble questions, although even then, the head of state question was as much a technical one about defining powers and selection processes as it was one about national identity).³² The national votes that have come closest to being earth-shattering or symbolically significant have, ironically, been voluntary plebiscites, not compulsory constitutional referendums. These were the 1915 and 1917 votes on conscription for overseas service (which rent the Labor Party in two) and the 1977 vote on a national song (which sowed the seed for 'Advance Australia Fair' to become the ubiquitous anthem it is today).

This is *not* to say that electors ought to pass some kind of education or intelligence test to vote in a referendum, any more than candidates must pass such a test before they can become law-makers. An educated electorate should be positively encouraged, especially for referendums. Indeed deliberative democratic procedures and better voter education are keys to constitutional reform.³³ Participation, the third consideration after pragmatics and principle, is important. We should encourage high turnout at referendums, but not demand it of electors who do not wish to be constitutionalists. Amending a constitution in a piecemeal, issue by issue fashion, is not the same as voting a new constitution up or down. Indeed when we hold referendums in conjunction with elections, if only for reasons of cost, turnout will be inflated compared to holding referendums as stand-alone events. Some might object that a law compelling electors to collect and deposit an election ballot, but making the referendum ballot voluntary, would be a muddy one in practice. But polling officials could simply say to each elector, 'Here are the ballots for the election, you *need* to complete and deposit them. Do you also wish to vote in the referendum as well? It is not compulsory.'

³² According to one study, the solution to the apparent paradox that Australians favour republicanism, but rejected the 1999 referendum lies in the fact that the referendum asked the 'electorate to make a complex, technical choice about the system of government, in the absence of clear partisan cues': John Higley and Ian McAllister, 'Elite Division and Voter Confusion: Australia's Republic Referendum in 1999' (2002) 41 *European Journal of Political Research* 845 at 845.

³³ See Williams and Hume, above n 19, ch 7 ('Getting to Yes').

IV CONCLUSION

The ballot booth is neither the Savoy nor a take-away outlet. To quote the poet Les Murray, it was conceived, in the Victorian era of enfranchisement and the secret ballot, as a 'closet of prayer'.³⁴ A secular prayer, through which ordinary people would secure some power over their masters. Australia played its role, in spreading the franchise, implementing the untraceable and official ballot, and making respectable the practice of compulsory voting at elections. Compulsion at elections is justifiable, for reasons of egalitarian principle argued here, and because the nature of voting for a representative government is something which implicates everyone. Voting to amend constitutions as technical as ours, state or national, is a categorically different type of democratic activity. When Australia federated, 'the people' (albeit mostly white men) were consulted, but not compelled. If, in that originary moment, it was not necessary to compel everyone to have a say on the drafts of the Constitution, it seems odd that we would today require everyone to have an opinion on the typically legalistic and often abstracted issues of piecemeal constitutional reform.

³⁴ 'My Ancestress and the Secret Ballot, 1848 and 1851' in Les Murray, *Collected Poems* (Duffy and Snellgrove, 2002) 433.