

2007

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Recommended Citation

Swenson, Katherine M., "Sticks, Carrots, Donkey Votes, and True Choice: A Rationale for Abolishing Compulsory Voting in Australia" (2007). *Minnesota Journal of International Law*. 108.
<https://scholarship.law.umn.edu/mjil/108>

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Note

Sticks, Carrots, Donkey Votes, and True Choice: A Rationale for Abolishing Compulsory Voting in Australia

Katherine M. Swenson*

—Very nice. But do me a favor—read this for me.

—“It doesn’t matter who you vote for. Make sure you vote.”

—I like the sentiment, but the thing is I think it *does* matter who you vote for.¹

In 1992, the Commonwealth of Australia prosecuted an Aborigine lawyer named Michael Mansell for failing to comply with a compulsory voting law.² He was ordered to pay a fine or face three days in prison.³ Outside the courthouse, Mansell proclaimed that he would not pay the fine because he was “a member of the aboriginal nation and not the Australian one.”⁴ In 1999, Melissa Manson of Victoria, Australia, was jailed for contempt of court after refusing “on principle” to pay fines punishing her failure to vote in two federal elections.⁵ “[T]here

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1. *The West Wing: Game On* (NBC television broadcast Oct. 30, 2002), <http://www.westwingtranscripts.com/search.php?flag=getTranscript&id=73> (emphasis added).

2. Lisa Hill, *Democratic Assistance: A Compulsory Voting Template* 8 (2002), available at <http://auspsa.anu.edu.au/proceedings/2002/hill.pdf>; *Aborigine Refuses to Vote in “White” Elections*, REUTERS NEWS, July 30, 1992, available at LEXISNEXIS, Library Meganw, File Reunws.

3. *Aborigine Refuses to Vote in “White” Elections*, *supra* note 2.

4. *Id.*

5. HILL, *supra* note 2, at 18 n.17.

were no candidates worth voting for," she explained.⁶ In May 2004, Bill Smithies was arrested for failure to pay a non-voting fine of \$461.⁷ These sanctions can be imposed in the Commonwealth of Australia because eligible citizens have a legal duty to vote.⁸

This Note argues that voluntary voting should be restored to Australia. Part I outlines compulsory voting in an international context and discusses the Australian law bearing on the duty to vote. Part II analyzes whether compulsory voting is incompatible with broad theories of democracy, whether political expression involved in non-voting should be allowed, and the possible consequences of abolishing compulsory voting in Australia. This Note concludes that Australia's compulsory voting law is incompatible with democracy because it stifles the expression of political dissent. Furthermore, the current law punishes only those who fail to attend the polls, not those who intentionally spoil their ballot or cast a blank one. Though voter turnout likely will decrease in the wake of abolishing compulsory voting in Australia, restoring voluntary voting will strengthen democracy by allowing voters to make a true choice on Election Day.

I. A PRIMER ON COMPULSORY VOTING AND AUSTRALIAN ELECTORAL LAW

A. COMPULSORY VOTING WORLDWIDE

The act of voting is often hailed as the cornerstone of political participation in a democracy.⁹ After all, "democracy"

6. *Id.*

7. *Counterpoint: Compulsory Voting* (Australian Broadcasting Corporation radio broadcast May 24, 2004), available at <http://www.abc.net.au/rn/talks/counterpoint/stories/s1117921.htm>. The fine levied against Smithies for not voting was "the largest fine ever imposed on a[n Australian] non-voter." *Id.* All references to dollars in this Note refer to Australian dollars.

8. Compulsory voting applies to elections at the national, state, territorial, and local levels in Australia. Legal Information Access Center, *Compulsory Enrolment and Voting*, http://www.austlii.edu.au/au/other/liac/hot_topic/hottopic/2001/4/4.html (last visited Feb. 7, 2007). The exceptions are South Australia, Western Australia, and Tasmania, which have voluntary voting for local elections. *Id.*; see MARK N. FRANKLIN, *VOTER TURNOUT AND THE DYNAMICS OF ELECTORAL COMPETITION IN ESTABLISHED DEMOCRACIES SINCE 1945*, at 231 (2004).

9. See, e.g., BEDE HARRIS, *A NEW CONSTITUTION FOR AUSTRALIA* 36 (2002); PENN KIMBALL, *THE DISCONNECTED* 289 (1972); Alan Wertheimer, *In Defense of*

means “rule by the people,”¹⁰ and voting is how the people choose their leaders.¹¹ Thirty-two countries have compulsory voting laws¹² that create a legal duty to vote and, in some cases, establish penalties for failure to do so.¹³ Penalties for failure to meet this duty range from having to provide a legitimate reason for not voting, to paying a fine, to being culled from the voting rolls, to being imprisoned.¹⁴ Several countries that once utilized compulsory voting (including Italy, the Netherlands, and Venezuela) no longer have compulsory voting laws, or have ceased to enforce them.¹⁵

Bolstering voter turnout is a major rationale for instituting compulsory voting laws.¹⁶ The reasoning is that low voter turnouts undermine the legitimacy of a democratic government, while large voter turnouts enhance it.¹⁷ The greater the

Compulsory Voting, in 16 PARTICIPATION IN POLITICS 276, 277 (J. Roland Pennock & John W. Chapman eds., 1975).

10. “Democracy” comes from the Greek *dēmokratia*: *dēmos* (the people) and *kratein* (to rule). WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 375 (David B. Guralnik ed., 2d ed. 1970); see also President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), available at <http://www.ourdocuments.gov/doc.php?doc=36&page=transcript> (referring to democracy as “government of the people, by the people, for the people”).

11. See JOHN HIRST, AUSTRALIA’S DEMOCRACY: A SHORT HISTORY 327 (2002) (stating that “compulsory voting relates to . . . how governments themselves are created”).

12. See Memorandum from Tim Evans, Dir., Elections Sys. & Policy, Austl. Electoral Comm’n, Compulsory Voting in Australia, at 6 (Jan. 16, 2006), available at http://www.aec.gov.au/_content/What/voting/compulsory_voting.pdf (stating that nineteen of the thirty-two countries with such laws enforce them, and that nearly ten percent of the world’s population is governed by such laws).

13. See Sean Matsler, Note, *Compulsory Voting in America*, 76 S. CAL. L. REV. 953, 962–67 (2003).

14. See Maria Gratschew, Programme Officer, International Institute for Democracy and Electoral Assistance, Compulsory Voting (Apr. 2001), http://www.idea.int/vt/compulsory_voting.cfm. The level of enforcement varies, and imprisonment is usually due to failure to pay a fine imposed by a court of law. *Id.*

15. See *id.*; Matsler, *supra* note 13, at 967.

16. See Gratschew, *supra* note 14. Worldwide, participation rates in elections have dropped. See Arend Lijphart, *Unequal Participation: Democracy’s Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1, 1 (1997) (“The problem of inequality can be solved by institutional mechanisms that maximize turnout. One option is the combination of voter-friendly registration rules The other option, which can maximize turnout by itself, is compulsory voting.”). See generally FRANKLIN, *supra* note 8. In Australia, turnout for the federal Senate election, reported by total votes as a percentage of enrolled voters, jumped from 57.95% in 1922 to 91.31% in 1925 with the establishment of compulsory voting. Australian Electoral Commission, Voter Turnout 1901-Present, http://www.aec.gov.au/_content/What/voting/turnout/index.htm (last visited Feb. 7, 2007).

17. See, e.g., Don Aitkin & Michael Kahan, *Australia: Class Politics in the New World*, in ELECTORAL BEHAVIOR: A COMPARATIVE HANDBOOK 437, 445–49 (Richard

percentage of the populace that votes, the "more accurately [the government reflects] the 'will of the electorate.'"¹⁸ If making sure that each person gets only one vote sets a ceiling on political participation, compulsory voting can be seen as establishing a floor.¹⁹ Such a ceiling and floor together minimize disparities in voter participation.²⁰ Decisions are made by those who show up; if everyone shows up, then the decision is truly democratic.²¹ The institution of compulsory voting is associated with increases in the number of votes cast, as well as increases in blank ballots as a proportion of the whole.²² In the Commonwealth of Australia, voter turnout usually reaches ninety-five percent.²³ However, compulsory voting may not be the only factor driving this high turnout. Over several generations, voting in Australia appears to have become not only a legal norm, but a social norm as well.²⁴ Additionally, Australia has mandatory voter registration, which is also associated with increased voter turnout.²⁵

Another rationale for compulsory voting is that casting a ballot is a duty that the State can compel its citizens to fulfill,

Rose ed., 1974); KIMBALL, *supra* note 9, at 289; Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2137 (1996); Matsler, *supra* note 13, at 965. *But see* Robert W. Jackman, *Political Institutions and Voter Turnout in the Industrial Democracies*, 81 AM. POL. SCI. REV. 405, 418 (1987) (summarizing the argument that low voter turnout might "reflect[] satisfaction with the political status quo and is therefore a good thing").

18. Australian Electoral Commission, *Compulsory Voting*, http://www.aec.gov.au/_content/What/voting/compulsory_voting.htm (last visited Feb. 7, 2007).

19. SIDNEY VERBA, NORMAN H. NIE & JAE-ON KIM, *PARTICIPATION AND POLITICAL EQUALITY: A SEVEN-NATION COMPARISON* 6-8 (1978).

20. *Id.*

21. *Id.*

22. *See* Wertheimer, *supra* note 9, at 278.

23. Paul Tait, *Howard's Government Favoured as Australians Vote*, REUTERS NEWS, Oct. 8, 2004, available at LEXISNEXIS, Library Meganw, File Reunws. One of the rationales for instituting compulsory voting in Australia was to "overcome . . . a decreasing turnout." DEAN JAENSCH & MAX TEICHMANN, *THE MACMILLAN DICTIONARY OF AUSTRALIAN POLITICS* 51 (3d ed. 1998).

24. *See* John McCarthy, *General Principles of Australian Electoral Law*, 19 AUSTL. B. REV. 1, 5 (2000), available at 2000 ABR LEXIS 2; Hasen, *supra* note 17, at 2137 (discussing norm theory and voting).

25. Australia has both mandatory voter registration and compulsory voting; some countries (e.g., the United Kingdom) have the former but not the latter. *See* Sian Clare, *Compulsory Voting Call*, PRESS ASS'N (United Kingdom), Nov. 27, 2001. For an argument that voter registration laws have had a strong negative effect on U.S. voter turnout, see Jason P. W. Halperin, Note, *A Winner at the Polls: A Proposal for Mandatory Voter Registration*, 3 N.Y.U. J. LEGIS. & PUB. POL'Y 69 (2000).

similar to paying taxes, serving on a jury, sending children to school, or registering for military service.²⁶ Because elections provide leaders who distribute benefits to their constituents,²⁷ elections are a public good; citizens who do not vote are considered "free riders."²⁸ Free riders reap the benefits of elections without participating, and they also fail to do their part in providing the public good to others.²⁹

A third rationale for compulsory voting is the effect it has on political parties and their role in the electoral system. Compulsory voting lessens the part money plays in elections.³⁰ It eliminates the need for "get out the vote" movements, which are often funded by political parties.³¹ In theory, more money and time can then be spent focusing on issues instead of convincing constituents to attend the polls.³² Furthermore, compulsory voting may discourage candidates from using attack advertisements.³³ In Australia, compulsory voting benefits the two major parties by reducing the uncertainty of voter turnout; this yields a large amount of safe seats and allows parties to focus on wooing undecided voters.³⁴

26. See HENRY J. ABRAHAM, *COMPULSORY VOTING* 12, 33 (1955); Lijphart, *supra* note 16, at 11.

27. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 36-37 (1957).

28. See RUY A. TEIXEIRA, *WHY AMERICANS DON'T VOTE: TURNOUT DECLINE IN THE UNITED STATES 1960-1984*, at 5 (1987) ("Although it is true that the outcome of an election may have a substantial impact on a person's life, the individual citizen does not have to participate in the election to obtain these benefits. They are available to everyone, voter and nonvoter alike." (citation omitted)); Lijphart, *supra* note 16, at 11; Wertheimer, *supra* note 9, at 280.

29. See Wertheimer, *supra* note 9, at 285. Wertheimer argued that "it may be preferable to tolerate this injustice if the alternative is to introduce unnecessary legal coercion, especially when those who do take on the burden of providing the public good do not seem to mind doing so." *Id.*

30. See Lijphart, *supra* note 16, at 10.

31. See, e.g., JAENSCH & TEICHMANN, *supra* note 23, at 51.

32. See BILL BRUGGER & DEAN JAENSCH, *AUSTRALIAN POLITICS: THEORY AND PRACTICE* 203 (1985) (pointing out that political parties "have been relieved of the task of 'getting out the vote', and have been able to concentrate on the second problem—that of getting the vote to them"); Memorandum from Tim Evans, *supra* note 12, at 13.

33. Lijphart argued that such advertising becomes moot under compulsory voting because it works by "selectively depressing turnout among those not likely to vote for the attacker." Lijphart, *supra* note 16, at 10 (discussing the findings in STEPHEN ANSOLABEHERE & SHANTO IYENGAR, *GOING NEGATIVE: HOW ATTACK ADS SHRINK AND POLARIZE THE ELECTORATE* (1995)).

34. See BRUGGER & JAENSCH, *supra* note 32, at 203 ("Assured of the votes of their committed followers, parties seek support among the 'swinging' voters."); *Counterpoint: Compulsory Voting*, *supra* note 7 (containing a statement by Sen. Nick Minchin that "if . . . everybody is going to vote because they're forced to vote, you

B. AUSTRALIAN ELECTORAL LAW

1. *The Right to Vote?*

a. Constitutional Provisions and "Choice"

The Australian Constitution³⁵ does not directly bestow a "right to vote," although the document does mention voting.³⁶ Section 41 prohibits the Commonwealth from preventing voting by any "adult person who has or acquires a right to vote at elections."³⁷ Sections 7 and 24 provide that the senators and representatives, respectively, shall be "directly chosen by the people."³⁸ The choice referred to in Sections 7 and 24 has been found to imply a "freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors."³⁹ The choice must be "a true choice,"⁴⁰ but Parliament has the power "to determine how that 'choice' is to be made, including whether attendance to make such a 'choice' is compulsory."⁴¹

b. Implied Freedom of Political Communication

Established in *Australian Capital Television Proprietary*

concentrate your communications on the undecided voters in a few swinging seats").

35. COMMONWEALTH AUSTRALIAN CONSTITUTION ACT.

36. See, e.g., Ann Twomey, *The Federal Constitutional Right to Vote in Australia*, 28 FED. L. REV. 125, 125 (2000) (explaining that "the right to vote for those who govern is not entrenched in the Commonwealth Constitution").

37. COMMONWEALTH AUSTRALIAN CONSTITUTION ACT § 41; see also GEORGE WILLIAMS, HUMAN RIGHTS UNDER THE AUSTRALIAN CONSTITUTION 96 (1999) (noting that Section 41 "is worded as a restriction [that] does not vest any individual entitlement" and "is the closest that the Constitution comes to expressly conferring a right to vote in federal elections," though it does not do so directly).

38. COMMONWEALTH AUSTRALIAN CONSTITUTION ACT § 7 ("The Senate shall be composed of senators for each State, *directly chosen by the people* of the State, voting . . . as one electorate." (emphasis added)); *id.* § 24 ("The House of Representatives shall be composed of members *directly chosen by the people* of the Commonwealth" (emphasis added)).

39. *Lange v. Austl. Broad. Corp.* (1997) 189 C.L.R. 520, 560. The choice referred to would be infringed, for example, by a law stating that only a single candidate could appear on a ballot. WILLIAMS, *supra* note 37, at 159.

40. *Austl. Capital Television Proprietary Ltd. v. Commonwealth* (1992) 177 C.L.R. 106, 187.

41. WILLIAMS, *supra* note 37, at 161; see *Langer v. Commonwealth* (1996) 186 C.L.R. 302, 340.

*Ltd. v. Commonwealth*⁴² and *Nationwide News Proprietary Ltd. v. Wills*,⁴³ the implied freedom of political communication has been narrowly construed by the High Court.⁴⁴ The implied freedom is a negative right.⁴⁵ The High Court in *Levy v. Victoria* contrasted the Australian Constitution with that of the United States, stating that the former does not “create rights of communication.”⁴⁶ Australia’s implied freedom of political communication provides “freedom *from* laws” rather than “a freedom *to* communicate.”⁴⁷ Furthermore, Sections 7 and 24 “do not confer personal rights on individuals;” the emphasis is on what the government may *not* do.⁴⁸ The freedom is not absolute, but “is limited to what is necessary for the effective operation of that system of representation and responsible government provided for by the Constitution.”⁴⁹

42. *Austl. Capital Television*, 177 C.L.R. at 227 (“[T]he proper conclusion to be drawn from the terms of sections 7 and 24 of the Constitution is that the people of Australia have constitutional rights of freedom of participation, association and communication in relation to federal elections.”).

43. *Nationwide News Proprietary Ltd. v. Wills* (1992) 177 C.L.R. 1, 72–73 (“[T]here is to be discerned in the doctrine of representative government which the Constitution incorporates an implication of freedom of communication of information and opinions about matters relating to the government of the Commonwealth.”).

44. This freedom should not be confused with a broader concept of freedom of expression. Rather, it is a “highly specific freedom to engage in communication about political matters. The right thus does not extend to freedom of artistic expression or to communication in relation to anything other than the political.” HARRIS, *supra* note 9, at 35.

45. See *Cunliffe v. Commonwealth* (1994) 182 C.L.R. 272, 327 (“The implication is negative in nature: it invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control.”).

46. *Levy v. Victoria* (1997) 189 C.L.R. 579, 622; see, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (declaring voting to be a fundamental right); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (stating that the “right to vote freely for the candidate of one’s choice is of the essence of a democratic society”); *Dixon v. Md. Admin. Bd. of Election Laws*, 878 F.2d 776, 782 (4th Cir. 1989) (stating that the freedom of choice in an election “includes the right to say that no candidate is acceptable”). But see *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (finding that states may ban write-in voting).

47. *Levy*, 189 C.L.R. at 622.

48. *Lange v. Austl. Broad. Corp.* (1997) 189 C.L.R. 520, 560. But see Dan Meagher, *What Is ‘Political Communication’? The Rationale and Scope of the Implied Freedom of Political Communication*, 28 MELB. U. L. REV. 438, 450 (2004) (arguing that “a broader range of communicative experiences and opportunities must be accorded constitutional protection before” the act of voting “can be said to be meaningful”); Adrienne Stone, *Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication*, 25 MELB. U. L. REV. 374, 398 (2001) (stating the possibility that “the freedom of political communication could . . . require[] some protection of personal autonomy”).

49. *Lange*, 189 C.L.R. at 561.

In *Lange v. Australian Broadcasting Corp.*, the High Court articulated a two-part test to determine whether a law impermissibly infringes upon the implied freedom.⁵⁰ The test is as follows: first, "the object of the law [must be] . . . compatible with the maintenance of the constitutionally prescribed system of representative and responsible government . . . second[,] . . . the law [must be] . . . reasonably appropriate and adapted to achieving that legitimate object or end."⁵¹ Despite these limitations, "[t]he freedom to receive and disseminate information concerning government and political matters is not confined to election periods."⁵² In *Levy*, the High Court applied the *Lange* test and, while sustaining the regulation in question, acknowledged that the implied freedom of political communication may extend to political communication in the form of symbolic conduct.⁵³

c. Other Implied Constitutional Principles

Another relevant Constitutional principle that bears on voting is the implied principle of representative democracy.⁵⁴ As discussed above, there is no explicit right to vote in the Constitution of the Commonwealth of Australia.⁵⁵ While it is possible that an implied right to vote may be found in the Constitutional requirement that members of the commonwealth

50. *Id.*

51. *Id.* at 561–62. However, "[t]he fine line drawn between a legitimate and illegitimate burden must inevitably be a value-laden process. Hence the judges when they apply the 'reasonably appropriate and adapted' test may not necessarily reach the same conclusion." H.P. Lee, *The 'Reasonably Appropriate and Adapted' Test and the Implied Freedom of Political Communication*, in *LAW AND GOVERNMENT IN AUSTRALIA* 59, 75 (Matthew Groves ed., 2005).

52. *Lange*, 189 C.L.R. at 520.

53. See *Levy*, 189 C.L.R. at 579; see also HARRIS, *supra* note 9, at 35–36; WILLIAMS, *supra* note 37, at 193. For a discussion on voting as expressive conduct, see generally Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330 (1993). See also DOWNS, *supra* note 27, at 119 (explaining that abstention can be a rational strategy for extremist voters "willing to let the worse party win today in order to keep the better party from moving toward the center, so that in future elections it will be closer to them"); cf. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (finding that license plate with motto "Live Free or Die" compelled petitioners to express an idea they found objectionable); *United States v. O'Brien*, 391 U.S. 367, 382 (1968) (concluding that government can punish burning of draft card, even when done as a political statement); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that compelled flag salute is unconstitutional).

54. See *McGinty v. Western Australia* (1996) 186 C.L.R. 140, 198; Theophanous v. Herald & Weekly Times Ltd. (1994) 182 C.L.R. 104, 121.

55. See *supra* notes 35–41 and accompanying text.

Parliament be directly chosen by the people at periodic elections,⁵⁶ this issue is “moot so long as universal adult suffrage is conferred by the Commonwealth Electoral Act of 1918.”⁵⁷

2. *The Duty to Vote*

a. What Exactly Does the Commonwealth Electoral Act Require?

Compulsory voting was first adopted at the Commonwealth level in 1925, though it had been instituted in Queensland elections ten years earlier.⁵⁸ Section 245 of the Commonwealth Electoral Act (CEA) governs compulsory voting, giving voters “the duty . . . to vote at each election,”⁵⁹ and making failure “to vote at an election without a valid and sufficient reason” an offense.⁶⁰ Failure to vote “involves a failure to attend [the polls], accept the ballot paper and having marked it, to put it in the ballot box. Of course there is no offence committed by not marking the ballot paper in such a fashion that the elector’s vote is in law a valid vote.”⁶¹ It is impossible to enforce the casting of a valid vote because ballots are to be marked in private.⁶²

b. What Are “Valid and Sufficient” Reasons?

Nowhere are all “valid and sufficient” reasons for failure to

56. See COMMONWEALTH AUSTRAL. CONST. ACT §§ 7, 24; see also *supra* Part I.B.i.a.

57. HARRIS, *supra* note 9, at 37.

58. See James Allan, *Paying for the Comfort of Dogma*, 25 SYDNEY L. REV. 63, 65 n.8 (2003). The first nine federal elections were held under a system of voluntary voting. See Memorandum from Tim Evans, *supra* note 12, at 5.

59. Commonwealth Electoral Act, 1918, § 245(1) (Austl.), <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/frameLodgmentAttachments/E8D0AFD85E700F53CA2572490011A9AB>.

60. *Id.* § 245(5)(b).

61. *Faderson v. Bridger* (1971) 126 C.L.R. 271, 272. Under this line of reasoning, handing in a blank ballot (i.e., not marking it at all) would not be an offense. No Australian court has held that the ballot paper must be marked. See JAENSCH & TEICHMANN, *supra* note 23, at 51; McCarthy, *supra* note 24, at 15.

62. See Commonwealth Electoral Act, 1918, § 233 (Austl.), <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/frameLodgmentAttachments/E8D0AFD85E700F53CA2572490011A9AB>. In fact, Australia was the first country to introduce the secret ballot, starting in the 1850s. See, e.g., JAENSCH & TEICHMANN, *supra* note 23, at 16. As this practice spread throughout the world, it was often referred to as “the Australian Ballot.” *Id.*

vote enumerated. One such reason is set forth in the CEA: a voter is allowed to abstain from voting if he or she "believes it to be part of his or her religious duty" to do so.⁶³ Failure to vote because one's chosen political party's candidates are not on the ballot is not a "valid and sufficient reason,"⁶⁴ nor is it a valid excuse that one finds all candidates objectionable.⁶⁵ The Australian Electoral Commission (AEC) list of guidelines used to evaluate each claim is confidential,⁶⁶ but AEC publications hint that "it would be unlikely, for example . . . [to] impose a fine for not voting on the elderly and frail, women in late pregnancy, or the intellectually disabled."⁶⁷ Enrolled voters who do not attend the polls are notified by the AEC, setting the enforcement process of the compulsory law in motion.⁶⁸

Australia also has a system of preferential voting,⁶⁹ which requires voters to rank Senate and House candidates on the

63. Commonwealth Electoral Act, 1918, § 245(14) (Austl.), <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/framelodgmentattachments/E8D0AFD85E700F53CA2572490011A9AB>. Section 116 of Australia's Constitution protects the freedom of religion, but it also "protect[s] the right of a man to have no religion." *Adelaide Co. of Jehovah's Witnesses v. Commonwealth* (1943) 67 C.L.R. 116, 123. The State cannot "impose any religious observance"; it must tolerate the absence of religion. *Id.*

64. *Judd v. McKeon* (1926) 38 C.L.R. 380, 384 (dismissing appellant's reason for his failure to vote as "no more than the expression of an objection to the social order of the community in which he lives").

65. *Faderson*, 126 C.L.R. at 273 ("To face the voter with a list of names of persons, none of whom he may like or really want to represent him and ask him to indicate a preference amongst them does not present him with a task that he cannot perform.").

66. Legal Information Access Center, *supra* note 8.

67. Australian Electoral Commission, *Electoral Backgrounder No. 17*, at 3 (Aug. 2004), available at http://www.aec.gov.au/_content/How/backgrounders/17/EB_17_Compulsory_Voting.pdf.

68. The initial notice requests an explanation of the apparent failure to vote, or payment of a twenty-dollar fine. See Commonwealth Electoral Act, 1918, § 245(5)(c)(iii) (Austl.), <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/framelodgmentattachments/E8D0AFD85E700F53CA2572490011A9AB>. Failure to vote is a strict liability offense unless the voter has a valid and sufficient reason for the failure. *Id.* § 245(15A)-(15B). This penalty increases to fifty dollars should the voter take her case to court and lose. *Id.* § 245(15). Making a false or misleading statement in response to such a penalty statement is also punishable by a fifty-dollar fine. *Id.* § 245(15C). Court costs may also be assessed. See Australian Electoral Commission, *Voting Within Australia: Frequently Asked Questions*, http://www.aec.gov.au/_content/what/voting/faq_general.htm (last visited Feb. 7, 2007).

69. Preferential voting is also called "alternative voting." Richard Rose, *Elections and Electoral Systems: Choices and Alternatives*, in *DEMOCRACY & ELECTIONS: ELECTORAL SYSTEMS AND THEIR POLITICAL CONSEQUENCES* 20, 32 (Vernon Bogdanor & David Butler eds., 1983).

ballot.⁷⁰ Where there are only two candidates, a voter is allowed to leave one box blank; where more than two candidates are on the ballot, a voter must fill each box with a number indicating preference, without repetition (“1” for the most preferred candidate, “2” for the next, and so on).⁷¹ Write-in candidates are not accepted.⁷²

Ballots that are left blank or filled out improperly are designated as “informal” or “invalid.”⁷³ It is estimated that about five percent of ballots are informal, whether by mistake or design.⁷⁴

Overwhelmingly, those who fail to vote in Australia are *not* penalized. The 1993 federal elections saw a nationwide average turnout of 96.22% and 95.75% of enrolled voters for the Senate and House races, respectively.⁷⁵ The non-voters numbered

70. Commonwealth Electoral Act, 1918, §§ 239–40 (Austl.), <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/framelodgmentattachments/E8D0AFD85E700F53CA2572490011A9AB> (stating that in both House and Senate elections, voters must “writ[e] the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference; and . . . writ[e] the numbers 2, 3, 4 (and so on, as the case requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person’s preference for them”). *Langer v. Commonwealth*, (1996) 186 C.L.R. 302, 321, addressed an ambiguity in a previous version of the law, which did not explicitly prohibit a voter from ranking one or more candidates equally (e.g., “1,” “2,” “3,” “3”). Preferential voting works in the following way:

If the most popular candidate has achieved an absolute majority (at least one more than 50 per cent) then he or she is declared elected. If no candidate has an absolute majority, the candidate with the fewest first preference votes is excluded from the count, and his votes are distributed among the remaining candidates according to second preferences. The process continues, with the least supported candidates being excluded and the next available preferences distributed until one candidate does achieve an absolute majority.

JAENSCH & TEICHMANN, *supra* note 23, at 161.

71. See Commonwealth Electoral Act, 1918, §§ 239–40 (Austl.), <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/framelodgmentattachments/E8D0AFD85E700F53CA2572490011A9AB>.

72. See *id.* § 162 (“No person shall be capable of being elected as a Senator or a Member of the House of Representatives unless duly nominated.”).

73. See JAENSCH & TEICHMANN, *supra* note 23, at 106; Legal Information Access Center, *supra* note 8.

74. See JAENSCH & TEICHMANN, *supra* note 23, at 106. In the 2004 federal election, 5.2% of ballots nationwide for the House were informal. Manuel Álvarez-Rivera, Federal Elections in Australia: House of Representatives Results Lookup, Election Resources on the Internet, <http://www.electionresources.org/au/house.php?election=2004> (last visited Nov. 15, 2006). In the same election, 3.8% of ballots for the Senate were informal. *Id.*

75. Australian Electoral Commission, 1993 Federal Election Voter Turnout by

around half a million, 94% of whom gave acceptable reasons for their failures to vote; 23,320 voters immediately paid the twenty-dollar penalty, while 4,412 voters went to court.⁷⁶ Of these half-million non-voters, 41 people were jailed.⁷⁷ For the past 80 years, Australian voters have faced this system of penalties if they fail to vote. This Note now turns to an analysis of the arguments for and against mandatory voting, and finds that Australia should restore voluntary voting.

II. VOLUNTARY VOTING WILL STRENGTHEN DEMOCRACY

A. COMPULSORY VOTING IS INCOMPATIBLE WITH DEMOCRACY

Although compulsory voting would seem to bolster “the democratic ideals of participation and equality,” compelling a person to cast a ballot is antithetical to the democratic value of individual freedom.⁷⁸ Indeed, Australia’s “freedom of political expression” rings rather hollowly when the right to make a choice does not include the right *not* to make that choice.⁷⁹ The late Frederick Jonas Dreyfus defined the word “vote” as “a sacred offering of patriotic service at the altar of one’s country.”⁸⁰ Therefore, he argued, compulsion causes it to “lose[] all sanctity and become[] valueless.”⁸¹ There certainly is a

Division, http://www.aec.gov.au/_content/What/voting/turnout/1993.htm (last visited Feb. 7, 2007).

76. See TOM WATSON & MARK TAMI, POLICY REPORT NO. 50, VOTES FOR ALL: COMPULSORY PARTICIPATION IN ELECTIONS 8 (2000). It is not known how many of these non-voters were convicted. *Id.*

77. See HIRST, AUSTRALIA’S DEMOCRACY, *supra* note 11, at 321.

78. See Lijphart, *supra* note 16, at 11; Australian Electoral Commission, Compulsory Voting, *supra* note 18.

79. See KIMBALL, *supra* note 9, at 289–90 (“The right not to take part in a selection process offering no acceptable choice is a precious part of democracy.”); Anne Twomey, *Free to Choose or Compelled to Lie?: The Rights of Voters after Langer v the Commonwealth*, 24 FED. L. REV. 201, 214–15 (1996); see also *supra* Part I.B.i.a.

80. ABRAHAM, *supra* note 26, at 4 (quoting Abraham’s interview with Dreyfus). Abraham notes that the word “vote” comes from the Latin *votum*. *Id.* The word “vow” shares that same Latin root word, and its definition as “a solemn promise or pledge . . . dedicating oneself to an act, service, or way of life” illuminates Dreyfus’s concept of a civic offering. See WEBSTER’S NEW WORLD DICTIONARY, *supra* note 10, at 1594.

81. ABRAHAM, *supra* note 26, at 4 (quoting Abraham’s interview with Dreyfus). *But see* Hasen, *supra* note 17, at 2135 (relating practice of election officials forcibly rounding up Athenian citizens in the agora).

tension between the idea that citizens *choose* to have a democratic government, and the idea that they *must* cast a vote. Several authors have compared compulsory voting to “forcing a man to be free.”⁸² This cuts to the heart of the conflict: once people stop choosing democracy of their own free will, and are forced to choose it, we are no longer talking about rule by the people.⁸³

1. *Distinguishing Voting from Other Obligations*

Under Australian electoral law, voting is a legal duty of every eligible voter.⁸⁴ Therefore, part of examining whether compulsory voting should be abolished involves distinguishing the duty to vote from other civic duties that a democratic state often compels, including military service, education, taxation, and jury service.⁸⁵ There are various arguments distinguishing these duties from voting; for example, military service might be considered more necessary than the franchise to the existence of a state.⁸⁶ The best argument regarding this question of civic duty is an overarching one: all of the various obligations discussed above are secondary to voting. Voting is inextricably linked to the creation of government by citizens;⁸⁷ it is what

82. See, e.g., ABRAHAM, *supra* note 26, at 33; see also Wertheimer, *supra* note 9, at 278. These sources paraphrase Jean Jacques Rousseau’s famous quote that “the social compact . . . tacitly includes the undertaking . . . that whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free”). JEAN JACQUES ROUSSEAU, *The Social Contract: Or Principles of Political Right*, in *THE SOCIAL CONTRACT AND DISCOURSES* 177 (G.D.H. Cole trans., Everyman’s Library 1973) (1762), available at http://www.constitution.org/jjr/socon_01.htm#007.

83. See *supra* notes 10–11 and accompanying text.

84. See *supra* Part I.B.ii.

85. See ABRAHAM, *supra* note 26, at 33; see also *supra* text accompanying note 26.

86. See, e.g., ABRAHAM, *supra* note 26, at 13–15 (“A large-scale turnout at the polls is eminently desirable, but not *a priori* mandatory for the life and death of a government. Taxation is! . . . Military service is a necessity to the very physical existence of the state; voting, although eminently desirable, is not of a similar necessity.”).

87. See John Hirst, Senate Occasional Lecture: The Distinctiveness of Australian Democracy 3 (Sept. 10, 2004) (transcript available at http://www.apf.gov.au/senate/pubs/occa_lect/transcripts/100904.pdf) (“Of course governments compel citizens, but compulsory voting relates to another issue altogether: how are governments themselves created. According to liberal principles, citizens create governments; governments don’t force people to be citizens.”); see also HIRST, AUSTRALIA’S DEMOCRACY, *supra* note 11, at 321, 327.

"makes all other political rights significant."⁸⁸ It is the bedrock upon which a government's decisions to compel its citizens to serve in the military, pay taxes, sit on a jury, or send their children to school depend.⁸⁹

2. *Voting as Expression*

Voting is a form of expression.⁹⁰ Australia has no general right to freedom of expression,⁹¹ but even the narrowly-construed implied freedom of political expression encompasses how a voter marks her ballot.⁹² A vote can express duty toward the community;⁹³ support for a cause, party, or candidate;⁹⁴ or a communication of one's perceptions, desires, judgments, and beliefs.⁹⁵ Casting a ballot, then, is a form of political expression. But what—if anything—does non-voting express?

Before examining the answer to that question, it is worth noting the different ways in which one is considered to have failed to cast a formal (valid) vote in Australia. The first way is not to attend the polls at all. The second way is to cast an informal ballot, which is simply a ballot that is (by design or accident) left blank or completed in such a way as to be invalid.⁹⁶ An informal ballot may be the result of a voter

88. FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE* 3 (1988).

89. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (stating that "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights"); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (hailing voting as "a fundamental political right, because preservative of all rights").

90. See, e.g., ABRAHAM, *supra* note 26, at 22; Winkler, *supra* note 53, at 331; cf. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 42 (1948) (stating that voting is a form of "speech-action").

91. See, e.g., HARRIS, *supra* note 9, at 35 (describing the freedom as "highly specific" and limited to "communication about political matters"); see also *supra* Part I.B.i.b.

92. See *supra* note 46.

93. See TEIXEIRA, *supra* note 28, at 6.

94. See *id.*; Winkler, *supra* note 53, at 334.

95. See Winkler, *supra* note 53, at 333-35. Winkler argued that expressive voting has two roles: (1) a means of communication between the voter and others, and (2) a means of "exert[ing] and shap[ing] one's identity without any corresponding desire to convey messages." *Id.* at 333, 339.

96. In *Judd v. McKeon*, the High Court hinted that it would likely uphold a hypothetical law allowing for the prosecution of a voter who intentionally casts an informal vote, because such a voter would be refusing to make a choice. *Judd v. McKeon* (1926) 38 C.L.R. 380, 383. The court stated:

intending to cast a formal vote and making a mistake, or it may be the result of a voter intentionally spoiling or leaving his ballot blank.⁹⁷ However, only failure to attend the polls can be punished by law, because it is impossible to determine who casts an informal ballot.⁹⁸

3. *Non-Voting and Political Expression*

There are many expressive possibilities behind the failure to cast a formal vote. One type of situation discloses the possibility of non-voting as being expressive in the manner discussed above: the voter made an honest mistake, but intended to cast a formal vote in accordance with the law.⁹⁹ However, voters who leave their ballots blank, intentionally spoil them, or do not attend the polls arguably are expressing themselves through their failures to cast a formal vote.¹⁰⁰

One possible explanation is that voters are apathetic toward their civic duty—they do not feel that casting a formal vote is worth the effort, so they do not attend the polls, or they turn in a blank ballot.¹⁰¹ Expression of apathy might also include a

In common parlance “to choose” means no more than to make a selection between different things or alternatives submitted, to take by preference out of all that are available. As an illustration of the meaning of the corresponding noun “choice” the Oxford Dictionary quotes the phrase “I have given thee thy choice of the manner in which thou wilt die,” and this use of the word seems to exclude the idea that a right of choice can only be said to be given when one or other of the alternatives submitted is desired by the person who is to exercise the right, or, in other words, to choose between them.

Id. But see Twomey, *Free to Choose or Compelled to Lie?*, *supra* note 79, at 214–15 (pointing out that “a number of judges have concluded that . . . voters may still choose to cast an informal ballot”). *Langer* did not reach the question of whether it is an offense to vote informally. *Id.* at 210.

97. There is rarely (if ever) a “none of the above” option on an Australian ballot. See Wertheimer, *supra* note 9, at 279.

98. See Memorandum from Tim Evans, *supra* note 12, at 4.

99. A voter might make such a mistake by writing “1, 2, 3, 3, 4” instead of “1, 2, 3, 4, 5.”

100. It should be noted that some voters who fail to vote fall under the “valid and sufficient reason” exception. See *supra* Part I.B.ii.b. A voter who has a car accident on her way to the polls, for example, is not expressing anything through her failure to vote. See Jeffrey A. Blomberg, Note, *Protecting the Right Not to Vote from Voter Purge Statutes*, 64 *FORDHAM L. REV.* 1015, 1019 (1995) (“Willful abstention could result from . . . factors . . . beyond the voter’s control.”).

101. See DOWNS, *supra* note 27, at 260 (“[E]very rational man decides whether to vote just as he makes all other decisions: if the returns outweigh the costs, he votes; if not, he abstains.”). This idea of apathy is also described in terms of inertia or alienation. See, e.g., ABRAHAM, *supra* note 26, at 22; Blomberg, *supra* note 100, at

voter's decision that some other task, such as working, was more important than casting a vote. Another possible reason behind abstention is that a voter has no preference for any candidate or does not feel adequately informed to make a choice. For example, a voter may deem all of the candidates undeserving of her vote.¹⁰² Voters may also abstain from voting due to dissatisfaction with the system in a broader sense.¹⁰³ The particular reason (or reasons) why a voter abstains is truly known only to the individual voter; and the message conveyed by failing to cast a formal vote can be ambiguous.¹⁰⁴ What is certain is that abstention can involve political expression or communication,¹⁰⁵ and that a number of Australians have professed that their refusal to vote is due to disagreement or dissatisfaction with the political process.¹⁰⁶

4. *Reasons for Allowing the Political Expression of Not Voting*

As discussed above, failure to cast a formal ballot (whether by abstaining from voting at all or by intentionally casting an informal ballot) can be a means of political expression. Even under the narrow confines of Australia's implied freedom of political communication, the political expression of not voting should be allowed for four reasons.

First, the political expression of not voting should be allowed because abstention from voting has political effects. Henry J. Abraham pointed out that by intentionally not casting

1019; Jackman, *supra* note 17, at 418. A voter might also express apathy by casting a "donkey vote." JAENSCH & TEICHMANN, *supra* note 23, at 76. Donkey votes are formal ballots wherein the preferences are filled out in perfect sequence (e.g., "1, 2, 3, 4, 5" or "5, 4, 3, 2, 1"). *Id.* A donkey vote may correspond with a voter's political choice, or it may be "a manifestation of ignorance or exasperation." Memorandum from Tim Evans, *supra* note 12, at 9. Approximately two to three percent of the total votes cast in Australian elections can be described as donkey votes. JAENSCH & TEICHMANN, *supra* note 23, at 76.

102. See ABRAHAM, *supra* note 26, at 22. *Faderson v. Bridger* forecloses this as a "valid and sufficient reason" for failure to vote. See *supra* note 61.

103. See *supra* notes 2-4 and accompanying text (describing Michael Mansell's refusal to vote); see also HILL, *supra* note 2, at 7 ("Some people have indicated that they wish to abstain according to the rationale that elections are merely occasions to forge consent. Others refer to prior or conflicting political commitments that would be impugned by their voting for candidates of whom they disapprove.").

104. See Blomberg, *supra* note 100, at 1017 n.16. Blomberg stated that no matter the subjective reason a registered voter may have for not voting, the message in doing so "is clearly one of dissatisfaction with the political system." *Id.*

105. See *id.* at 1016-17.

106. See *supra* notes 2-7 and accompanying text.

a formal vote, a voter “figuratively lends additional votes to those who cast ballots since, in a sense, the latter vote will have added affirmative weight.”¹⁰⁷ A voter might also seek to sacrifice her vote at the present time to gain a political effect in the future. In his *Economic Theory of Democracy*, Anthony Downs described how voters might strategically abstain to keep their party from moving toward the center: essentially, voters allow an opposing party to win by withholding their votes entirely.¹⁰⁸ Abstention can be used as a bargaining chip to keep a party in line with the views of a group of voters.¹⁰⁹ Other scholars suggest that voters perceive abstention as a check against the tyranny of the majority.¹¹⁰ Not voting can also influence other participants in the political system.¹¹¹ Consider the case of Mr. Langer,¹¹² who was imprisoned for encouraging others to mark their ballots in a way that would make them likely to become exhausted votes.¹¹³ The public controversy surrounding Mr. Langer’s actions (and the Commonwealth’s response to them) was at least one possible cause contributing to the increase of exhausted votes¹¹⁴—from 7,325 in 1993, to 48,979 in 1996.¹¹⁵ By failing to cast a formal ballot, a would-be voter can influence an election, other voters, and the political system

107. ABRAHAM, *supra* note 26, at 2. This author is reminded of her college professor who, on the morning of Election Day, encouraged his students not to vote so that his vote would have the added weight of their non-votes.

108. DOWNS, *supra* note 27, at 119.

109. *Id.*

110. See, e.g., Blomberg, *supra* note 100, at 1023 (citing JAMES M. ENELOW & MELVIN J. HINICH, *THE SPATIAL THEORY OF VOTING: AN INTRODUCTION* 90–95 (1984)).

111. Absent a compulsory voting requirement, this form of protest may prove less effective.

112. See generally *Langer v. Commw.* (1996) 186 C.L.R. 302; Twomey, *Free to Choose or Compelled to Lie?*, *supra* note 79.

113. Exhausted ballots are those that must be set aside after all the chosen preferences are eliminated due to the system of preferential voting. See Electoral Commission Queensland, *Terms and Definitions, Virtual Tally Room Guide*, <http://www.ecq.qld.gov.au/elections/state/state2006/vtr/terms.htm> (last visited Nov. 16, 2006).

114. The law has changed since *Langer*, when “1,2,3,3,3” was a formal vote that could become exhausted; today such a vote would be informal and not counted at all. See *supra* note 70. Mr. Langer was trying to convince people to cast their votes in a way that, while apparently legal, was not legal to persuade others to do. Under the new law, this would be comparable to convincing others to cast informal ballots intentionally—something a voter could do in the secrecy of the polling booth, but that the State might punish him for advocating. See Twomey, *Free to Choose or Compelled to Lie?*, *supra* note 79, at 203.

115. Twomey, *Free to Choose or Compelled to Lie?*, *supra* note 79, at 204.

in general. The fact that actual political effects arise from this form of political communication strongly suggests that such expression should be allowed.¹¹⁶

A second reason to allow voters to abstain entirely is that under the current system of compulsory voting, the ballots of voters who wish to abstain¹¹⁷ are grouped with the ballots of voters who intend to cast a formal vote but fail to follow the instructions.¹¹⁸ Australia does not have an opportunity for voters to choose "none of the above," other than breaking the law.¹¹⁹ There should be an electoral avenue for voters to communicate their dissatisfaction with the system in general or the selection of candidates on the ballot without breaking the law by leaving a ballot blank, marking it incorrectly, or failing to attend the polls.¹²⁰ Although other means of communicating dissent can be effective,¹²¹ an electoral avenue allows for the expression of an especially powerful form of political dissent.

Third, the political expression of not voting should be allowed because political expression through abstention is inextricably intertwined with the question of whether a democracy is legitimate. Refusing to vote arguably attacks the very foundation of a democratic government; abstention can be considered "radically subversive speech," defined by Steven D. Smith as expression that "challenges government at the core by denying the very legitimacy of the existing legal order."¹²² This is comparable to the view that Michael Mansell expressed through his refusal to vote.¹²³ Assuming that voting is a

116. See, e.g., ABRAHAM, *supra* note 26, at 3 (arguing that non-voters "constitute] a force, however negative, to be reckoned with in the political arena").

117. Voters who wish to abstain might, for example, cast blank ballots or intentionally spoil their ballots.

118. See Wertheimer, *supra* note 9, at 279.

119. Cf. Blomberg, *supra* note 100, at 1017 n.16 ("A protest nonvoter may seek to express his or her viewpoint by being counted among the reported percentage of registered voters who fail to vote."); *id.* at 1025-26 (arguing that abstention from voting is a choice that allows voters to express many forms of dissatisfaction that are not expressed by casting an invalid vote).

120. See *id.* at 1031 (describing how non-voters can "pool [their] discontent . . . to express dissatisfaction and send a message to the political system").

121. Other means of communicating dissent might include writing to elected officials, protesting, or utilizing the media.

122. Steven D. Smith, *Radically Subversive Speech and the Authority of Law*, 94 MICH. L. REV. 348, 348 (1995).

123. See *supra* notes 2-4 and accompanying text. Smith emphasized that such speech entails something more extreme than "argu[ing] that the government has erred in adopting this or another particular policy or that some discrete feature of the existing political regime is unjust or ill-advised." Smith, *supra* note 122, at 348.

cornerstone of democracy, however, the best way to preserve the system does not lie in forcing people to vote.¹²⁴ Individuals should be allowed to communicate dissent through non-voting. This form of dissent, radical though it may be, should be allowed because democracies are based not only upon the casting of ballots, but upon the idea that citizens should constantly examine whether the State is legitimate. The casting of ballots is a necessary condition for a working democracy, but it is not a sufficient one. The choice of whether or not to cast such a ballot is also an ingredient of paramount importance to democracy, which is fundamentally a system chosen by the people. When the people are forced to choose democracy, it is no longer a choice.

Fourth, the political expression of not voting should be allowed because the current situation punishes people who can be described as conscientious objectors.¹²⁵ Australia allows for conscientious objectors to be relieved of their duty of military service,¹²⁶ and the CEA specifically allows for people to be relieved of their duty to vote if such duty conflicts with religious obligation.¹²⁷ At minimum, conscientious political objection

Instead, radically subversive speech “argues . . . that the government itself is fundamentally illegitimate and should be repudiated or overthrown.” *Id.* at 349. Because Mansell did not recognize the Commonwealth’s authority over him *at all*, his protest of compulsory voting as a part of a system he found inherently unjust fits within this category of radical expression. *See id.* at 350; *Aborigine Refuses to Vote in “White” Elections*, *supra* note 2.

124. *Cf.* THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 50–51 (1970) (arguing that suppression of anti-democratic groups is not a good way to maintain democracy).

125. *See* HILL, *supra* note 2, at 7 (defining conscientious objectors as “those who wish to be excused . . . not because voting is inconvenient or boring but because of politically principled reasons”).

126. *See* Defence Act, 1903, § 61(A)(1)(h)–(i) (Austl.) (exempting “persons whose conscientious beliefs do not allow them to participate in war or warlike operations” or “a particular war or particular warlike operations”). *See generally* Moira Coombs & Laura Rayner, Research Note, *Conscientious Objection to Military Service in Australia*, 31 DEPT OF THE PARLIAMENTARY LIBR. (2003), available at <http://www.aph.gov.au/library/pubs/RN/2002-03/03rn31.pdf>. Paradoxically, in light of its history of compulsory voting, the Commonwealth of Australia has a strong anti-conscription tradition. *See* HIRST, *AUSTRALIA’S DEMOCRACY*, *supra* note 11, at 284 (“Australia is the only democracy in the world where there has been a strong movement against conscription on the basis that conscription is antidemocratic.”).

127. *See* Commonwealth Electoral Act, 1918, § 245(14) (Austl.), <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/frame lodgment attachments/E8D0AFD85E700F53CA2572490011A9AB>; Australian Electoral Commission, *Electoral Background No. 17*, *s. supra* note 67, at 3. Voting by mail is another concession to religious duty that conflicts with attending the polls. *See* JAENSCH & TEICHMANN, *supra* note 23, at 161.

should be considered a "valid and sufficient reason" for failing to vote.¹²⁸ When people are punished for "reasons that are politically principled in nature,"¹²⁹ it is a perversion of a law that is supposed to foster democracy and freedom of political communication.¹³⁰ The injustice is made especially clear when a person who casts a blank ballot or intentionally spoils one cannot possibly be caught due to the secret ballot law. It is deeply disturbing that a person who holds fast to their belief that voting is somehow objectionable or unjust should be punished, while a person who writes down a vote that is a lie has followed the law.¹³¹

5. *Alternate Rationales Behind Compulsory Voting*

Due to the CEA requirement that voting is to be done by secret ballot,¹³² what electors actually are compelled to do is attend the polls and place a ballot in the box.¹³³ Furthermore, abstainers are rarely penalized.¹³⁴ While one of the rationales

128. See HILL, *supra* note 2, at 8 ("[T]here is something troubling about compelling people . . . to participate in a political process to which they have sincere and sustained objections; thus, a properly functioning democratic society should seek to find some way of accommodating dissenters of this type.")

129. *Id.* at 7.

130. *Id.* (noting that while a high turnout is good, "there are some people . . . who find compulsion so objectionable that it is counterproductive to try and compel her/him to vote[,] and the resulting punishment when these people "stand on principle" is "bad both for the people concerned and for democracy in general"); *id.* at 8-9 (arguing that compulsory voting can be reconciled with allowing conscientious objectors to abstain because (1) compulsory voting fights apathy, and conscientious objectors are not apathetic; and (2) subjecting conscientious objectors to penalties "can only harm the reputation of compulsory voting and . . . the likely effect would be to provoke antipathy among the electorate"); *id.* at 9 (stating that to ignore the plight of conscientious objectors "is to miss the whole point of democracy").

131. See *id.* at 7 (acknowledging that some voters claim being forced to choose among objectionable candidates is "tantamount to a compulsion to lie"); *cf.* Twomey, *Free to Choose or Compelled to Lie?*, *supra* note 79, at 216 (arguing that compulsory voting treats "a vote which is a lie . . . as being of greater importance to the system of representative democracy, than one which truly represents a person's political opinion").

132. See Commonwealth Electoral Act, 1918, § 233 (Austl.), <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/framelodgment/attachments/E8D0AFD85E700F53CA2572490011A9AB>.

133. See ABRAHAM, *supra* note 26, at 25, 32; BRUGGER & JAENSCH, *supra* note 32, at 202; *supra* Part I.B.ii.a.

134. Most incidents of failure to vote are resolved through penalty notices, which notify the elector that:

- (a) the elector appears to have failed to vote at the election; and (b) it is an offence to fail to vote at an election without a valid and sufficient

for compulsory voting—that it increases voter turnout¹³⁵—withstands this combination of impossibility of enforcement in some situations and lax enforcement across the board, an examination of the politics behind compulsory voting raises the possibility that the purpose of securing high turnout is to advance the interests of political parties rather than the ideal of ensuring that every elector's voice is heard.¹³⁶ Compulsory voting was adopted in 1924 at the Commonwealth level¹³⁷ not only to increase voter participation, but also to decrease campaign expenses for political parties.¹³⁸ Ten years earlier, compulsory voting was established in Queensland when the Liberal government feared it would lose the upcoming election to the Labor party.¹³⁹ Both parties favored compulsory voting because it would negate the need to convince voters to attend the polls.¹⁴⁰ One of the most striking incentives for present-day politicians to support compulsory voting is financial: after

reason for the failure; and (c) if the elector does not wish to have the apparent failure to vote dealt with by a court, the elector may, within the prescribed time: (i) [explain that the elector did vote]; or (ii) . . . give . . . a valid and sufficient reason for the failure; or (iii) pay . . . a penalty of \$20.

Commonwealth Electoral Act, 1918, § 245(5) (Austl.), <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/framelodgment/attachments/E8D0AFD85E700F53CA2572490011A9AB>; see also HILL, *supra* note 2, at 5; *supra* notes 75–77 and accompanying text. Punishments beyond imposing fines are at the discretion of the court. See Legal Information Access Center, *supra* note 8.

135. See, e.g., WATSON & TAMI, *supra* note 76, at 7 (citing an estimate that compulsory voting accounts for a difference in turnout of seven percentage points compared to nations without it).

136. See, e.g., HIRST, AUSTRALIA'S DEMOCRACY, *supra* note 11, at 325 (arguing that compulsory voting has not been eliminated in Australia "because it suits the interests of the parties"); JAENSCH & TEICHMANN, *supra* note 23, at 51 (concluding that "compulsory voting" is supported by both major parties primarily because such a system is in their interests").

137. Compulsory voting was not actually applied at the Commonwealth level until the election held the year following its adoption. See Memorandum from Tim Evans, *supra* note 12, at 5; Australian Electoral Commission, Timeline: 1900-Present, http://www.aec.gov.au/_content/When/history/history1900.htm (last visited Mar. 20, 2007).

138. See Australian Electoral Commission, *Electoral Backgrounder No. 17*, *supra* note 67, at 1.

139. See Legal Information Access Center, *supra* note 8. Labor volunteers were very effective in getting out the vote. See *id.*

140. *Id.*; see also Frank Devine, *Voluntary Voting Would Be a Legacy to Be Proud of*, AUSTRALIAN, Oct. 7, 2005, at 15. The Liberal party's plan *did* increase turnout, but it did so for both sides; the plan backfired, and Labor won. See Legal Information Access Center, *supra* note 8.

obtaining a threshold of four percent of the total formal votes counted in an election, candidates are rewarded with funding based on how many votes they received.¹⁴¹ It is clearly in the interest of a politician to support a high turnout via compulsory voting. The interaction of the above pragmatic considerations and political motivations behind compulsory voting raises the possibility that it is more about ensuring a high head count than about giving each eligible citizen a true choice.

B. POSSIBLE REPERCUSSIONS OF ABOLISHING COMPULSORY VOTING IN AUSTRALIA

1. *Decline in Turnout*

The general rule is that introduction of compulsory voting increases turnout,¹⁴² while introduction of voluntary voting decreases it.¹⁴³ Most likely, a decline in turnout will follow a return to voluntary voting in Australia, though it is extremely unlikely that turnout will fall to the level where "the system collapses because no government is chosen."¹⁴⁴ Several other countries have abolished their compulsory voting laws¹⁴⁵ with results that have not been catastrophic.¹⁴⁶ Although turnout is

141. See Memorandum from Tim Evans, *supra* note 12, at 13. After meeting the threshold percentage, the rate per formal vote is \$1.95. *Id.* The public funding total for the 2004 election was \$41,926,158.91. *Id.*

142. The initial increase in turnout in Australia, for example, was thirty percent among women and eighteen percent among men. See G. BINGHAM POWELL, *CONTEMPORARY DEMOCRACIES: PARTICIPATION, STABILITY, AND VIOLENCE* 114 (1982). Promulgation of sanctions against non-voters increased Costa Rica's turnout by about fifteen percent. See WATSON & TAMI, *supra* note 76, at 7. In 1971, Uruguay's turnout jumped seventeen percent upon introduction of compulsory voting. See POWELL, *CONTEMPORARY DEMOCRACIES*, *supra*, at 114.

143. For example, when the Netherlands ceased penalizing citizens for not voting in 1970, turnout fell by sixteen percent. See FRANKLIN, *supra* note 8, at 73 n.15; *id.* at 231; POWELL, *CONTEMPORARY DEMOCRACIES*, *supra* note 142, at 114. Venezuela removed sanctions in 1993 (but still retained compulsory voting), and turnout dropped thirty percent. See WATSON & TAMI, *supra* note 76, at 7, n.19.

144. See DOWNS, *supra* note 27, at 261 (expounding a worst-case scenario where turnout is zero).

145. Some nations have left the rule of compulsory voting in place but abolished sanctions. See *supra* note 15 and accompanying text; *supra* note 124.

146. See, e.g., POWELL, *CONTEMPORARY DEMOCRACIES*, *supra* note 142, at 114 (stating that voter turnout levels in the Netherlands have stabilized at about ten percent under the country's turnout levels when voting was compulsory). Franklin stated that the decline in turnout "incidental to the removal of compulsory voting . . . will not continue beyond the number of years it takes to replace the electorate of the countries concerned." FRANKLIN, *supra* note 8, at 221.

generally higher in countries with compulsory voting,¹⁴⁷ many democracies have high levels of turnout without compulsory voting.¹⁴⁸ While compulsory voting is certainly one way to yield a high turnout, it is not necessary to do so.¹⁴⁹

One possible safeguard against a democracy-imperiling plummet is Australia's system of mandatory voter registration.¹⁵⁰ In most democracies, voter registration is an affirmative obligation undertaken by the government.¹⁵¹ The United States, notorious for low voter turnout,¹⁵² is one of only a few democracies where registration is voluntary.¹⁵³ However,

147. See FRANKLIN, *supra* note 8, at 137 ("A country with compulsory voting will see turnout more than 11 percent higher. . . than a country without compulsory voting . . ."); POWELL, CONTEMPORARY DEMOCRACIES, *supra* note 142, at 114 (citing a study in which "average turnout, by any measure, was about 10 percent higher in the countries with [non-voting] penalties").

148. The democracy with the highest turnout is voluntary-voting Malta. See FRANKLIN, *supra* note 8, at 92; Lijphart, *supra* note 16, at 9–10 (pointing to Malta as an example of "near-universal turnout without compulsory voting"). Other countries with high turnout and voluntary voting include the United Kingdom (77%), France (79%), Germany (87%), and New Zealand (90%). See Rex Jory, *Voting Must Be a Right, Not an Enforced Law*, THE ADVERTISER, Feb. 21, 2003, at 20.

149. See Lijphart, *supra* note 16, at 9, 10 (listing as other important variables: "automatic registration, a highly proportional electoral system, infrequent elections" and "a highly politicized environment").

150. See Commonwealth Electoral Act, 1918, § 101(1) (Austl.), http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/frame1odgment_attachments/E8D0AFD85E700F53CA2572490011A9AB ("[E]very person who is entitled to be enrolled . . . and whose name is not on the Roll, shall forthwith fill in and sign a claim and send or deliver the claim . . ."); see also JAENSCH & TEICHMANN, *supra* note 23, at 51; G. Bingham Powell, *American Voter Turnout in Comparative Perspective*, 80 AM. POL. SCI. REV. 17, 21 (1986).

151. PIVEN & CLOWARD, *supra* note 88, at 17; POWELL, CONTEMPORARY DEMOCRACIES, *supra* note 142, at 14.

152. About two-thirds of eligible voters in the United States fail to vote. See POWELL, CONTEMPORARY DEMOCRACIES, *supra* note 142, at 13. However, thirty-five to forty percent of these eligible voters are not registered, and thus are not allowed to vote. See Deborah S. James, Note, *Voter Registration: A Restriction on the Fundamental Right to Vote*, 96 YALE L. J. 1615, 1615 (1987); Mark Thomas Quinlivan, Comment, *One Person, One Vote Revisited: The Impending Necessity of Judicial Intervention in the Realm of Voter Registration*, 137 U. PA. L. REV. 2361, 2363 (1989). Democracies with similar turnout rates to the United States include India, Jamaica, Switzerland, and Turkey; democracies with the highest turnouts include Australia, Austria, Belgium, Denmark, Italy, the Netherlands, and Sweden. See POWELL, CONTEMPORARY DEMOCRACIES, *supra* note 142, at 13. Australia, on the other hand, is a country "where virtually everyone votes." FRANKLIN, *supra* note 8, at 3.

153. France and Jamaica (after 1962) also rely on voters to register themselves. See POWELL, CONTEMPORARY DEMOCRACIES, *supra* note 142, at 114. However, in France such registration is assisted by having a single department oversee voter registration and mandatory citizen identity cards. See PIVEN & CLOWARD, *supra* note 88, at 21; Powell, *American Voter Turnout in Comparative Perspective*, *supra*

the voting registration laws in the United States are often blamed for low registration, and hence, low turnout.¹⁵⁴ In fact, when U.S. voter turnout is calculated using registered voters (as opposed to eligible ones), "the rate . . . is comparable to rates in other democracies with more or less automatic registration systems."¹⁵⁵ According to Frances Fox Piven and Richard A. Cloward in *Why Americans Don't Vote*, "once people are registered, they overwhelmingly vote."¹⁵⁶

Another safeguard against a drastic drop in turnout is a possible social norm in favor of voting.¹⁵⁷ One possible explanation for Australia's high voting rate is norm-based:

[W]hen the law requires that people should vote, and specifies penalties for failure to do so, the norm of universal participation is generated and reinforced. People don't necessarily vote to avoid penalties but because universal participation is the norm and it is the norm because it is the law.¹⁵⁸

However, a social norm's effect on turnout may be overshadowed by political institutions and electoral law.¹⁵⁹

note 150, at 21.

154. See POWELL, CONTEMPORARY DEMOCRACIES, *supra* note 142, at 114 (explaining that voting requires a double effort when citizens must register themselves, affecting turnout); Halperin, *supra* note 25, at 17; James, *supra* note 152, at 1360 (noting that turnout in the United States "declined significantly as states began to introduce personal registration requirements" in the late 1800s).

155. PIVEN & CLOWARD, *supra* note 88, at 18.

156. *Id.* at 18. For example, eighty percent of U.S. registered voters turned out at the polls in 1980. *Id.*; see also *id.* at 260 ("Nonvoting is almost entirely concentrated among those who are not registered."). Furthermore, in the United States, "[t]he number of people who get to the right voting place and attempt to vote, but whose ballots are not counted or who are not permitted to vote in the first place, is itself considerable." *Id.* at 262. Even registered voters may be turned away due to bureaucratic snafus. *Id.*; see also Halperin, *supra* note 25, at 95. See generally Robert S. Erikson, *Why Do People Vote? Because They Are Registered*, 9 AM. POL. Q. 259 (1981).

157. See WATSON & TAMI, *supra* note 76, at 8 (noting that "a wide range of social and institutional factors" have a role in voter turnout); Hasen, *supra* note 17, at 2151 (explaining that if a norm for voting exists, it results in social sanctions, social rewards, and self-sanctioning).

158. HILL, *supra* note 2, at 5; see also Hirst, Senate Occasional Lecture, *supra* note 87, at 3 ("Australian voters accepted compulsion."); Matsler, *supra* note 13, at 963 ("Voting is now a part of Australia's social ethos."); McCarthy, *supra* note 24, at 5 (describing compulsory and preferential voting as "an accepted social and legal norm in Australia").

159. See Jackman, *supra* note 17, at 405; see also FRANKLIN, *supra* note 8, at 147 (declaring that "[t]urnout change is not brought about by changes in the character of society or of its members" but "because elections change their character"); *id.* at 171 ("[C]ommentators who see in falling turnout a reflection on the civic-mindedness of citizens, or on their commitment to democracy, appear to be mistaken."). *But see*

While turnout will most likely decline in the wake of the re-establishment of voluntary voting, there are possible institutional and societal checks upon a devastating drop. An additional option for Australia to consider is instituting a system of incentives to vote—substituting a “carrot” approach for the current “stick” approach.¹⁶⁰ Incentives for voting are not unheard of; the government paid ancient Athenians to vote.¹⁶¹ As Richard Hasen explained, however, there are a few problems with paying people to vote.¹⁶² In addition to the expense of such a program,¹⁶³ Hasen doubted that carrots would carry the same message of “moral authority or social consensus” that sticks do.¹⁶⁴ There is also the possible line-drawing problem between being paid to vote and being paid to vote a certain way.¹⁶⁵ Incentives do not have to be monetary, however. Consider the Italian example of helping pay transportation costs for voters,¹⁶⁶ or Kentucky’s plan to post voters’ names as a way to recognize civic participation.¹⁶⁷ With a little creativity, perhaps an incentives program could help protect Australia’s turnout rate.

2. *The Free Rider Problem*

Another possible effect of abolishing compulsory voting is that more people will be “free riders” who benefit from elections without participating.¹⁶⁸ However, it should be noted that under Australia’s current program of compulsory voting, the problem

Powell, *American Voter Turnout in Comparative Perspective*, *supra* note 150, at 36 (acknowledging that while “voting is particularly influenced by institutional factors,” attitudes of the citizenry are also relevant).

160. See Lijphart, *supra* note 16, at 11 (“A logical alternative to compulsory voting is to use rewards for voting instead of penalties for nonvoting.”).

161. This program was “apparently the biggest item in the budget” for Athens, according to Hasen. Hasen, *supra* note 17, at 2172; see Lijphart, *supra* note 16, at 11.

162. Hasen, *supra* note 17, at 2172.

163. For example, a program that pays voters instead of selectively prosecuting non-voters. See *id.*

164. *Id.*

165. For more on arguments that voluntary voting may increase voter fraud, see *infra* note 180 and accompanying text.

166. See Ivor Crewe, *Electoral Participation*, in *DEMOCRACY AT THE POLLS: A COMPARATIVE STUDY OF COMPETITIVE NATIONAL ELECTIONS* 216, 241 (David Butler et al. eds., 1981) (“Italy makes generous concessions on train fares available to those who have to return to their home constituency to vote.”).

167. See Richard Wilson, *State Elections Board Will Distribute Lists of Those Who Voted*, *COURIER-J.* (Louisville, Ky.), Aug. 25, 1995, at B2.

168. See *supra* notes 28–29 and accompanying text.

of free riders is not solved because voters may spoil their ballots.¹⁶⁹ Such voters fail to cast valid ballots, but gain the benefits of the election. Furthermore, the free rider problem is not fatal to voluntary voting; instead, it is countered by the democratic agreement to abide by the laws, even when one does not agree with them, and even when one chooses not to vote for the representatives that make them.¹⁷⁰ As Alexander Meiklejohn elucidated: "At the bottom of every plan of self-government is a basic agreement . . . that all matters of public policy shall be decided by corporate action, that such decisions shall be equally binding on all citizens, whether they agree with them or not."¹⁷¹ Making voting voluntary will not change the underlying plan of self-government that Meiklejohn described; those who choose not to vote will still be bound by the laws made on behalf of the electorate.¹⁷²

It could also be argued that compulsory voting merely adds an immediate fiscal cost to failure or refusal to fulfill one's civic duty to more theoretical costs that may not be incurred in such a timely manner.¹⁷³ The response to this argument is that while the government uses the threat of fines and possible imprisonment to persuade people to vote, the secret ballot provision of Australia's electoral law¹⁷⁴ means that no person can be forced to cast a formal vote.¹⁷⁵ As it is within the bounds of the law for a person intentionally to cast an informal ballot, such a person is obtaining the benefits of an election without paying his civic due—he is a free rider, just like a person who refrains from attending the polls at all. The free rider problem is therefore not solved by compulsory voting in Australia.

169. See *supra* Part I.B.ii.a.

170. A system of objective balancing is outside the scope of this Note.

171. MEIKLEJOHN, *supra* note 90, at 9. Meiklejohn noted that "[p]olitical freedom does not mean freedom from control," but rather "self-control". Not everyone will agree with decisions the government makes, but such decisions are binding. *Id.*

172. See VERBA, NIE & KIM, *supra* note 19, at 53 (noting that voting's "scope of . . . outcome is very broad, affecting all citizens").

173. Cf. DOWNS, *supra* note 27, at 36–37 (discussing benefits voters derive from government and suggesting that abstention may mean that such benefits are not gained by the populace).

174. See Commonwealth Electoral Act, 1918, § 233 (Austl.), <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/frameLodgmentAttachments/E8D0AFD85E700F53CA2572490011A9AB>; *supra* notes 61, 130.

175. See *supra* note 61 and accompanying text.

3. *Speculative Changes to the Workings of Political Parties*

Many things about elections and politics are likely to remain the same even with a change to voluntary voting. For example, making voting voluntary would probably not favor either of the major parties in Australia.¹⁷⁶ While compulsory voting has several positive political aspects to it,¹⁷⁷ there are countering negative aspects that could be alleviated by the institution of voluntary voting. Voluntary voting will probably not make it as easy as compulsory voting does for parties to identify marginal electorates. It may force politicians to broaden the scope of their efforts to convince voters to elect them.¹⁷⁸ The argument that voluntary voting would lead to an increase in corrupt practices surrounding elections¹⁷⁹ is mitigated by the fact that Australia has many laws (with far harsher penalties than failing to vote) to deter and punish electoral offenses.¹⁸⁰

CONCLUSION

The problem of compulsory voting is deeply important to the meaning of democratic government. Australia's system of compulsory voting should be abolished, but a few caveats should be stressed. The first is that different individuals and different nations will come to different conclusions about this issue. Over 30 countries have a program compelling their citizens to vote; others make voting a voluntary exercise of a right. This Note takes the view that allowing conscientious objectors to express

176. See Memorandum from Tim Evans, *supra* note 12, at 14 (mentioning that "there is no empirical evidence" that such a shift would give a major party an edge over another). *But see* Phillip Coorey, *Lets Seek Voluntary Vote*, THE ADVERTISER, Apr. 27, 2005, at 28 (containing statement of a politician's belief that conservatives would benefit disproportionately from voluntary voting).

177. See *supra* Part I.A.

178. See Australian Electoral Commission, *Compulsory Voting*, *supra* note 18; BRUGGER & JAENSCH, *supra* note 32, at 203; Memorandum from Tim Evans, *supra* note 12, at 10; *Counterpoint: Compulsory Voting*, *supra* note 7 (containing statement of Bill Smithies that compulsory voting allows parties to "factor out uncertainty" as to voter turnout, leading to unbalanced concentration on marginal electorates); *id.* (containing statement of Senator Nick Minchin that this tendency of compulsory voting "adds to the paucity of the political process" in Australia).

179. See, e.g., Coorey, *supra* note 176.

180. See Australian Electoral Commission, *Electoral Offences*, http://www.aec.gov.au/_content/How/procedures/offences.htm (last visited Feb. 9, 2007). For example, attempting to influence another person's vote through bribery can be punished by two years in prison, a \$5,000 fine, or both. *Id.*

political dissent outweighs a high voter turnout. With a different baseline assumption, the analysis may have gone very differently. A second consideration is the secret ballot provision of Australian electoral law.¹⁸¹ The requirement that voting be done in secret is what makes Australia's compulsory voting program even remotely defensible. Its power means that compulsory voting can only be enforced through the proxy of compelled attendance at the polls. The presence of this provision, and minimal enforcement of the duty to vote, may abrogate the offensiveness of compulsory voting, but voluntary voting is a much stronger option for democracy. As new democratic governments are created, and older ones strive to reach greater and more meaningful citizen participation, it is important to remember that democracies are created and maintained by the consent of the governed, and that voting is the means by which the will of the people is harnessed. The right to vote is the right to make a political choice; for some, refusal to cast a valid ballot is a form of sincere political expression. At a fundamental level, democracy ceases when people are forced to choose it. Voluntary voting should be restored to Australia because, while the act of voting is important, it *does* matter whom one votes for.

181. See *supra* note 62.