

FOREWORD

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Liberal representative democracies require a lot from their elections. Most obviously, the declaration of a result gives an at least temporary answer to deeply contested arguments about who should be in charge of the nation's lawmaking and governing institutions. This dispute settlement function involves translating individual votes into representational outcomes. Doing so may be apparently straightforward (as with first-past-the-post voting) or so deeply complicated that only a handful of 'preference whisperers' really seem to know how it works (as with the above-the-line/group vote ticket system used in conjunction with the single transferable vote for elections to Australia's Senate). And, of course, choosing representatives by way of voting may then be just the first step in apportioning lawmaking and governmental power, as with the process of coalition negotiation that regularly occurs in nations with proportional representation electoral systems in place.¹

This 'votes into representational outcomes' aspect of elections obviously is very important. There is a large amount of literature on the different ways that the translation can take place, as well as on the consequences for a nation's governing processes of choosing one voting process over another.² It is an issue that, on occasion, grips a nation's political class, and can even excite the general public. Current debates over reform of the voting system used to fill seats in Australia's Senate illustrate the former, while New Zealand's referendums on electoral reform in 1992–93 (but less so in 2011) are an example of the latter.³ When such debates arise, the focus inevitably tends to be on who will win and

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1 See, eg, Jonathan Boston, *Governing under Proportional Representation: Lessons from Europe* (Institute of Policy Studies, 1998); Kaare Strøm and Wolfgang C Müller, 'The Keys to Togetherness: Coalition Agreements in Parliamentary Democracies' (1999) 5 *Journal of Legislative Studies* 255.

2 See, eg, Douglas W Rae, *The Political Consequences of Electoral Laws* (Yale University Press, 1967); Arend Lijphart, *Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies, 1945–1990* (Oxford University Press, 1994); Pippa Norris, *Electoral Engineering: Voting Rules and Political Behaviour* (Cambridge University Press, 2004); David M Farrell, *Electoral Systems: A Comparative Introduction* (Palgrave Macmillan, 2nd ed, 2011).

3 Andrew Geddis, 'New Zealand's Vote To Keep Proportional Representation' (2012) 23 *Public Law Review* 3.

who will lose as the result of any proposed change.⁴ Insofar as elected politicians have any say over what the methods used to give them power look like, partisan considerations will never be far away. And the voting public, too, will not be insensible to the likely political outcomes of tinkering with (much less drastically reworking) their country's electoral system. Nevertheless, interacting with such calculations are deeper questions about the form that the nation's government should take. Is it better to have strong, stable single-party governments that may be elected by less than a majority of the population, or highly representative, fractured governments that closely reflect the voting public's expressed preferences? Should individual representatives be closely responsive to the demands and judgments of the immediate voters who elected them, or should party cohesion and unity be the primary goal? As different electoral systems are more or less likely to produce each outcome, a choice has to be made about what is the 'best' form of government for the country to have in place.⁵

However, settling the 'who rules here' question is but one purpose that an electoral system fulfils. It ultimately may be what an election is for, but it certainly is not all that an election is about. Rather, the rules that govern a nation's elections and the practices that occur during them tell a host of stories and carry a plethora of meanings. Some of these emerge out of what one of the contributors to the thematic component of this Issue, Graeme Orr, has previously called the 'ritual and rhythm' of elections.⁶ The very manner in which we cast our ballots, the places we vote in, the rules governing polling place behaviour, the set timetable of proceedings and so on establish elections as a set of recurrent, ritualised proceedings that 'simultaneously represent, and play out, certain values and social meanings'.⁷ Seen through this lens, electoral processes are not just a technocratic or instrumental means of mechanically translating individual preferences into representational outcomes. They, instead, are an important avenue for generating a collective social experience that can help bind the political community together. In this way, the existence of electoral rituals and rhythms underpins the system's role as an at least temporary resolver of political disagreement. For this reason, we need to see elections as more than just the chance to cast a vote: how, why, where and when we do so can matter just as much.

Then, there are normative judgments that deliberately are inserted into a nation's electoral rules as a form of what Mark Tushnet has called 'constitutional expressivism'; that is, 'a way of understanding [a nation's people] as political beings'.⁸ For example, decisions about who may (and who may not) vote at an

4 See, eg, André Blais (ed), *To Keep or To Change First Past the Post? The Politics of Electoral Reform* (Oxford University Press, 2008); Alan Renwick, *The Politics of Electoral Reform: Changing the Rules of Democracy* (Cambridge University Press, 2010).

5 G Bingham Powell Jr, *Elections as Instruments of Democracy: Majoritarian and Proportional Visions* (Yale University Press, 2000).

6 Graeme Orr, *Ritual and Rhythm in Electoral Systems: A Comparative Legal Account* (Ashgate, 2015).

7 Ibid 14, citing David Kertzer, *Ritual, Politics and Power* (Yale University Press, 1988) 8.

8 Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale Law Journal* 1225, 1228.

election are an important means of signalling membership of a nation's political community. Laws controlling the use of money to try and influence the election outcome, or restraining the form that political communication may take during an election campaign, demonstrate a national commitment to a particular way of making collective decisions.⁹ Restrictions on the types of parties that may contest an election, as found in places such as Turkey, Spain and Belgium, send an explicit message about the kind of political future that each polity finds unacceptable.¹⁰ When a society is deciding whether and how to regulate such matters, it is making fundamental value judgments about the manner in which it should self-govern. Those value judgments may then differ markedly from those adopted by other liberal representative democracies – witness, for example, the very different regulatory regimes that apply to political financing in the United States and Canada,¹¹ or the contrasting treatment of prisoner voting rights in New Zealand and Denmark.¹² Such differences then speak to national character; they are a way of signalling that in *this* place, *this* is how we think we ought to govern ourselves.

Because a nation's electoral law encompasses all of these aspects, it is constitutional law at its most literal; it *constitutes* the relevant polity and sets the terms by which it then both governs and is governed. Furthermore, the various purposes that an election serves make the field of electoral law a rich one in which to till. It lends itself easily to cross-disciplinary study, reaching into the fields of politics,¹³ sociology,¹⁴ economics¹⁵ and even marketing,¹⁶ psychology¹⁷ and philosophy.¹⁸ The very wide range of differing practices amongst liberal

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- 9 Andrew C Geddis, 'Democratic Visions and Third-Party Independent Expenditures: A Comparative View' (2001) 9 *Tulane Journal of International and Comparative Law* 5, 7.
 - 10 Tim Bale, 'Are Bans on Political Parties Bound To Turn Out Badly? A Comparative Investigation of Three "Intolerant" Democracies: Turkey, Spain, and Belgium' (2007) 5 *Comparative European Politics* 141.
 - 11 Compare *Harper v Canada (AG)* [2004] 1 SCR 827 with *Citizens United v Federal Election Commission*, 558 US 310 (2010); *McCutcheon v Federal Election Commission*, 188 L Ed 2d 468 (2014).
 - 12 In New Zealand, all sentenced prisoners have been prohibited from voting since 2010 despite a judicial finding that this measure breaches the right to vote: *Taylor v Attorney-General of New Zealand* [2015] NZHC 1706. In Denmark, prisoners retain the right to vote irrespective of the crime committed or the length of the sentence imposed.
 - 13 See, eg, Kenneth Benoit, 'Electoral Laws as Political Consequences: Explaining the Origins and Change of Electoral Institutions' (2007) 10 *Annual Review of Political Science* 363; Spencer Overton, 'Political Law' (2013) 81 *George Washington Law Review* 1783.
 - 14 See, eg, Orr, above n 6; Rainer Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting' (2007) 75 *Fordham Law Review* 2393.
 - 15 See, eg, Steven G Calabresi, 'Political Parties as Mediating Institutions' (1994) 61 *University of Chicago Law Review* 1479; Samuel Issacharoff and Pamela S Karlan, 'The Hydraulics of Campaign Finance Reform' (1999) 77 *Texas Law Review* 1705.
 - 16 See, eg, James A Gardner, *What Are Campaigns For? The Role of Persuasion in Electoral Law and Politics* (Oxford University Press, 2009).
 - 17 See, eg, Vivian E Hamilton, 'Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority' (2012) 77 *Brooklyn Law Review* 1447.
 - 18 See, eg, Colin Feasby, '*Libman v. Quebec (A.G.)* and the Administration of the Process of Democracy under the Charter: The Emerging Egalitarian Model' (1999) 44 *McGill Law Journal* 5.

representative democracies cries out for comparative examination.¹⁹ Electoral law is thus perfectly suited to just the sort of thematic collection that the Editor has brought together in this Issue's pages. The range and quality of the contributions also are exemplary and attest to a vibrant scholarly community studying these matters in Australia. This is to be welcomed, as the perspective of United States' scholars traditionally has dominated the electoral law field. Establishing a distinctively Australian focus on the subject thus is an important step in strengthening and broadening it in a truly international way.

There are five papers in this thematic collection, contributed by nine different authors. The first contribution, provided by Graeme Orr and Ron Levy, looks at an increasingly pressing issue in all democracies: the ever-expanding polling of voters' intentions in the lead-up to an election. They do so from what I will call a 'pro-deliberation' perspective, in that they believe voters ought to decide how to vote based on 'an exchange of reasons in which participants persuade each other based on what Habermas termed the "force of the better argument."' Viewed through this lens, Orr and Levy identify four 'pathologies' in relation to intention polling: it turns elections into a 'horse race' in which discussion of substantive issues is sidelined; it may influence final outcomes by encouraging tactical voting; it causes representatives to focus less on the long-term common good and more on the immediate demands of the median voter; and, it is open to manipulation by politicians, lobbyists and an activist media seeking their own political outcomes. To combat such dangers, some degree of polling regulation may therefore be required. Orr and Levy then examine where such regulation has been applied and the judicial response when it is challenged on the grounds that it limits constitutionally-protected freedom of speech rights. Their conclusion is that the judicial response generally has been too quick to adopt a simplistic view that voters ought to be able to access opinion poll information if they wish to and insufficiently open to the deliberative benefits of removing it as an influence during the election campaign. Consequently, they advocate a ban on publishing the results of 'pure electoral opinion polling' (but not 'issues-based opinion polling') during the election campaign period.

Narelle Miragliotta and Zim Nwokora examine what they call a 'secondary' electoral law – the provisions designed to 'save' ballots that have been completed other than in accordance with the instructions given to voters. Such savings provisions, which permit a vote to count despite some failure to meet formal requirements, are common in liberal representative democracies as the result of two presumptions. The first is that an election result should, as far as possible, accurately reflect the preferences of those who voted. The second is that, as far as possible, the expressed preference of every voter ought to be treated equally. Therefore, a failure to strictly adhere to formal requirements when marking the ballot paper should not in and of itself lead to the substantive outcome of the vote

19 See, eg, Nicholas Aroney, 'Democracy, Community, and Federalism in Electoral Apportionment Cases: The United States, Canada, and Australia in Comparative Perspective' (2008) 58 *University of Toronto Law Journal* 421; Nicholas O Stephanopoulos, 'Our Electoral Exceptionalism' (2013) 80 *University of Chicago Law Review* 769.

being cast aside. However, as Miragliotta and Nwokora explain, savings provisions designed to avoid this consequence may be *broad* (in that they permit informal votes to be counted whenever the voter's intent is discernable) or *enumerated* (in that they identify only certain specific errors that will not in themselves render the vote invalid). Their article then explores whether the sort of voting system a nation adopts determines the form of savings provision put into place in a simple cause and effect manner. They find this explanation insufficient, however, and instead provide an in-depth historical review of how Australia's federal voting systems and savings provisions have developed in tandem. This review leads them to posit a broader theory regarding the manner in which secondary electoral laws, such as savings provisions, evolve in response to changes to primary electoral laws that are adopted primarily for partisan political purposes.

Orr and Levy's concerns about the information used when making electoral decisions find an echo in the article by Paul Kildea and Rodney Smith. They focus on the concept of 'informed voting' in relation to referendums, which are a requisite feature of constitutional change in Australia. After exploring how the sorts of information a voter may require differs between representative elections and referendums, Kildea and Smith outline three conceptions of how voters can become informed about the issues involved in a referendum. The first involves voters independently assessing information about the referendum issues and forming their own views on the matter. The second involves the use of a heuristic technique such as reliance on the views of 'trusted information sources that have proved good predictors of their positions on past political issues'. Finally, voters may answer the referendum question based on a judgment about its proposer rather than the issue itself. Of the three, it is clear that Kildea and Smith believe the first 'independent thinker' model is most desirable, as they then examine how present legal regulation of the referendum process in Australia enables (or, rather, fails to enable) it to take effect. Their article then looks to available empirical evidence, including evidence from the authors' own focus group studies, on how well informed voters are in fact about referendum issues, before concluding with some reform proposals to help improve this state of affairs.

Electoral law's role in defining a political community forms the basis for Alexander Reilly and Tiziana Torresi's contribution. They make an argument that voting rights in Australia should be expanded from adult citizens to encompass adult permanent residents as well. While only a few other countries have such liberal franchise rules in place – New Zealand being the *exemplar nonpareil* – Reilly and Torresi claim that it would fit both with the compulsory nature of voting in Australia and the nation's history of progressive electoral reform. After reviewing the approach of the High Court of Australia, they conclude that there is no impediment to including non-citizens amongst those electors who exercise the powers of 'the people' under the *Australian Constitution*. Indeed, a variety of theoretical approaches to defining who should participate in deciding matters of collective concern point in favour of including non-citizens who have the right to reside permanently in a polity. Reilly and Torresi conclude by addressing some specific flow-on concerns from

enfranchising permanent residents at federal elections, such as whether it would undermine the status of citizenship and the implications for other democratic processes of the state.

The final contribution from Elisa Arconi continues the theme of exclusion and inclusion by examining how elections and matters of electoral law are absolutely central to the Australian constitutional order. The *Australian Constitution* speaks in terms of ‘the people’ as constituting the Commonwealth of Australia and then exercising ongoing powers in the structures of representative government thereafter. However, as Arconi notes, the *entire* Australian people have not in practice exercised this role; rather, it is only those recognised as ‘electors’ who have done so. She then traces how these two concepts – the people and electors – have increasingly merged over time, focusing on the inclusion of women over time as fully equal members of the polity. That merging then has important consequences for the power of legislatures to act in ways that remove or dilute voting rights. Arconi examines a series of High Court decisions that have invalidated electoral legislation which sought to define who is an elector and how they may participate in elections on the basis that the law fails to accord ‘the people’ an adequate choice regarding who will represent them. In doing so, the Court has created a ratchet effect in relation to electoral law, whereby legislatures may expand the range of groups recognised as electors far more easily than they may constrict them. Arconi then turns to examine whether this approach may have implications for limits on the federal parliament’s power to amend the grounds for citizenship, including a postscript that addresses recent legislation that does just this.

As already noted, these five contributions superbly demonstrate the breadth and depth of electoral law as a stand-alone field. They provoke much thought and I hope they will serve as a prompt for further investigative scholarship. I commend the *UNSW Law Journal* and its Editor for their efforts in putting this themed collection together, and the authors for their contributions to it. As we say in New Zealand, *ka pai*.