

LOW VOTER TURNOUT IN THE UNITED STATES

IS COMPULSORY VOTING A VIABLE SOLUTION?

Lisa Hill

ABSTRACT

America's turnout problem is among the worst of any of the established democracies. Even a reform as sweeping as the NVRA (Motor Voter Act) has failed to remedy it. Adopting an empirically informed normative approach, the author proposes and defends an ambitious solution: compulsory voting. Anticipating considerable resistance to this proposal, the article explores likely cultural, practical, political and legal barriers to its introduction and, in some cases, suggests strategies for overcoming them. It is concluded that most of the likely impediments are not technically, but rather, culturally and politically intractable. Yet, compulsory voting could have many benefits. Not only could it improve turnout more effectively than any other measure, but it could also close America's yawning SES voting gap, limit some of the problems associated with campaign finance and break the cycle of low efficacy, alienation, non-participation and exclusion that characterizes American politics. Finally, compulsory voting can serve and protect such important democratic values as representativeness, legitimacy and political equality.

KEY WORDS • compulsory voting • low turnout • SES voting gap • political exclusion • rational abstention

Introduction

It hardly needs mentioning that the United States has a voter turnout problem. Presidential elections typically garner turnouts in the low 50s (VAP); the mid-term Senate and Congressional election figure usually hovers between 30 and 40 per cent while state gubernatorial elections may achieve voting participation as low as 23 per cent. The US has been experiencing a secular trend in voting levels for some time and, despite the four-decade high of 60.7 per cent (VAP) at the Presidential election of 2004 (which was in all likelihood temporary),¹ there is no reason for assuming that it will

1. The recent result was probably an anomaly generated by the massive mobilization drives coupled with the unusual salience and closeness of the election.

abate in the near future. Even if levels *were* to remain in the 60 per cent range, this is hardly cause for complacency – let alone celebration.

The United States is not alone in experiencing a decline in voter turnout. Rather, steadily decreasing turnout has become a nearly universal phenomenon in advanced democracies globally. Nevertheless, the American case draws special notice because its voting levels are the worst of any of the well-established democracies (Franklin, 2004: 11).² For reasons that will be rehearsed presently, it is accepted that high turnout is preferable to low turnout, but the main purpose of this article is to propose a solution to low turnout. This solution is compulsory voting, or to be more accurate, compulsory voting *attendance*.³ Well aware that this proposal will meet with considerable resistance, not only for practical reasons but also for cultural, constitutional, and political ones, the author seeks to provide answers and, in some cases, solutions to any potential impediments. Illustrative evidence is drawn from a number of existing compulsory voting regimes but, for obvious methodological reasons, these are limited to those operating within established democracies with developed economies and modern, integrated infrastructures (Australia, Belgium and The Netherlands⁴). Australia, Belgium and The Netherlands are also cases of particularly well-tolerated and well-administered regimes suitable for adoption or imitation by an advanced industrialized democracy like America.

Is Low Turnout Really a Bad Thing?

Of course, not everyone regards low turnout as a problem. Some even regard it as indicative of general satisfaction with government and politics.⁵ But we know that American non-voters tend to be considerably less satisfied than voters about the state of their democracy (Wattenberg, 1998a: 14). Low turnout does seem to indicate that something is amiss.

2. Though on Grofman's (2000) reckoning, Switzerland's turnout is even worse.

3. It should be noted that the term 'compulsory voting' is a misnomer. Due to the secret ballot it is only registration and attendance at a polling place (entailing having one's name marked off the roll, collecting the ballot papers and putting them in the ballot box) that is compulsory in places like Australia, Belgium and, before 1970, The Netherlands.

4. The Netherlands had compulsory voting for more than 50 years. It was abandoned in 1970.

5. Political apathy has even been described as a 'political virtue' that 'may... have a beneficial effect on the tone of political life' by providing an 'effective counter-force to the fanatics who constitute the real danger to liberal democracy' (Jones, 1954: 36–7). Speaking of low turnout in the USA specifically, Russell Hardin (1998) has suggested that, at the very least, it is 'evidence that government has not engendered grievous distrust and opposition' (p. 24).

Others suggest that it is debatable whether low turnout is a problem since higher turnout would not substantially alter political outcomes. For example, Highton and Wolfinger (2001) assert that, since voters' 'preferences differ minimally from those of all citizens', it would make no differences to election 'outcomes' if 'everyone voted' (p. 179). Even if we could be certain that this would be the case if everyone voted, it does not give grounds for the conclusion that low and unequal turnout is of no consequence. The electoral outcomes argument is a separate issue from the issue of what kinds and levels of voting participation confer democratic legitimacy on elections. In addition, the issue of the result of elections is not only separate from, but *secondary* to the question of how the result is achieved. It is not by the 'what if' principle that democratic legitimacy is conferred but by embodied principles which express the will of the governed, such as universal suffrage and one vote, one value. Further, such claims about likely outcomes are largely speculative. We cannot really predict how people will behave and think under conditions radically different to those that currently prevail. In other words, in a political culture characterized by persistently high and equal turnout one could reasonably expect changes in political attitudes and behaviour to occur over time.

Low turnout creates problems for American democracy on a number of levels. The first is on the level of values. Low turnout impugns a number of fundamental democratic values such as popular sovereignty, legitimacy, representativeness, political equality and minimization of elite power. Majority will is central to democratic rule, therefore lamenters of low turnout often argue that the more completely the preferences of the majority are registered, the more democratic the system will be. When a government's mandate is informed by incomplete information about the wishes of the electorate, the legitimacy of its decisions may be in doubt.⁶

Perhaps the most important value that is undermined by high levels of non-voting is political equality. Political inequality strikes at the heart of liberal democracy because of its effective particularism, on the one hand, and its violation of the core principle of one vote, one value, on the other (which will be discussed later).

Because there are strong correlations between turnout and socioeconomic status, turnout levels provide an indirect indicator of political equality (Lijphart, 1999: 284). The United States exhibits an unusually strong relationship between socioeconomic status and voter turnout (see, for example, Burnham, 1987: 99; Hicks and Swank, 1992; Lijphart 1997; Verba et al.,

6. It has been noted, for example, that President Clinton's mandate was often questioned because in 1992 he received only 43 per cent of the votes cast (amounting to fewer than 25 per cent of all eligible voters; Lijphart, 2001: 74).

1995: 186–227).⁷ Non-participation in the USA disproportionately affects the poor as well as other marginal groups like the young.⁸ This is a problem, not only because it undermines the principle of one vote, one value, but because non-voting can have material consequences. Quaile Hill and Leighley (1992) have shown that class bias in US state electorate policy and spending consistently reflects the degree of low-income group non-participation.⁹ According to Arend Lijphart (2001), low and unequal turnout makes it easier for politicians ‘to reduce government aid to the poor than to cut entitlement programs that chiefly benefit the middle class’ (p. 75).

Significantly, the SES gap in the United States is the worst of any of the established democracies (Brians and Grofman, 1998: 1). One recent attempt to close this gap (via the National Voter Registration Reform Act of 1993) failed to achieve the dramatic increase in turnout that many expected.¹⁰

Finally, if it is true that non-voting is a form of free-riding, then compulsory voting is a reliable way of ensuring that every citizen bears their share of responsibility for the election of representatives.

Improving Turnout

Easier registration procedures are not the only answer. Other institutional means by which to improve turnout include: reducing the frequency and complexity of elections to address the problem of voter fatigue, moving election day to a Saturday or else declaring it a national holiday,¹¹ providing for automatic registration and absentee voting (Lijphart, 2001: 74; Wattenberg, 1998a: 22), siting polling places in shopping malls to reduce the opportunity

7. For example, ‘[i]n Presidential elections from 1952 to 1988, turnout among the college educated was 26 percentage points higher than that among the population as a whole; the turnout for people without a high school diploma was 16 percentage points lower’ (Lijphart, 2001: 75; see also Wattenberg, 1998a: 10–11).

8. The age bias is becoming worse over time. In 1996 the ‘turnout rate for people under 25 was about 40 percent below the national average’. Even increasing education levels among this population is unable to stem the tide. Generation X is one of the best educated generations in history and yet ‘only 27 per cent of [Chelsea Clinton’s class of 2001] said that keeping up with politics was an important priority for them, compared with 58 per cent among the class of 1970 with whom Bill and Hilary Clinton attended college’ (Wattenberg, 1998a: 12).

9. See also Meuller and Stratmann (2003) and Hicks and Swank (1992).

10. For a detailed account of the history and effects of the Motor Voter Act see Wolfinger and Hoffman (2001).

11. Or as Wattenberg (1998a: 6–7, 23) suggests, combining it with Veterans Day. The 1996 Census Bureau survey reported that the most cited reason for not voting in US elections is inability to take off time from work or school. According to a study conducted by Mark Franklin (1996) countries which conduct elections on a weekend or holiday have 6 per cent higher turnout than would otherwise be expected.

costs of voting or else extending voting over two or more days (Grofman, 2000). Alternatively, voters could be offered incentives to vote. In parts of California voters receive 'a voting stub which entitles them to a free half-dozen "Yum-yum" doughnuts or a discounted spinal adjustment by a chiropractor'.¹²

Changing the character of elections can also affect turnout. The 'character' of elections refers to how competitive, salient and consequential they are: when elections are closely fought between distinctive parties and where the 'the winner is empowered to put campaign promises into effect' turnout will be higher (Franklin and Marsh, 2002: 28). Because turnout is affected 'by the motivations of voters to affect the course of public policy' institutional structures such as divided government and the separation of powers have a tendency to depress turnout. The reason is that such structures dilute the strength (or perceived strength) of the relationship between voting and policy consequences (Franklin and Hirczy, 1998).¹³ Lack of salience at American elections is also partly a product of federal arrangements that blur lines of responsibility and generate doubt in voters' minds about the sanctioning power of their vote.

The salience of American elections is also affected by the choice-restricting effect of a simple plurality system. Richard Rose (1978) has noted that: 'American voters are offered less choice than voters in any other Western nation' since 'only two parties have a chance of winning congressional seats or the White House, and there is far less variation in party labels at the state level in America than, say, in neighbouring Canada'. Accordingly, he suggests the introduction of proportional representation as a remedy for this lack of choice and as a means for enabling voters in a minority to 'secure *some* representation' (pp. 45–6).¹⁴

Cynicism about politics and lack of trust in politicians is yet another hypothesized cause of voting abstention. Parties and politicians could, of course, attempt to address the problem themselves by, for example, resisting the temptation to run negative campaigns or being more scrupulous about keeping election promises. But reforming the whole culture of political campaigning would be difficult to achieve, not least because the reforms would need to be bilateral, and since conservative parties have little to gain by them, reform seems unlikely.

12. 'Such incentives are legal in California elections as long as they are not offered to induce a voter to vote or refrain from voting for a particular candidate or ballot measure, but they are illegal in elections involving candidates for federal office'. It should be noted that these 'carrots' are not state-sponsored initiatives. Neither do they work particularly well, at least not as well as the sticks approach (Hasen, 1996: 2136, 2169).

13. For a discussion that problematizes this relationship see Franklin (2004: 100–5).

14. For an integrated assessment of these hypothesized depressants of turnout see Franklin (2004) *passim*.

It is clear that altering the character of American elections would be an extremely complex exercise to engineer. For example, it is unlikely that anyone in America would be willing (let alone able) to dismantle either federalism or the institutional arrangements that support the separation of powers on the off chance that it would improve turnout.¹⁵ But in the unlikely case that all, or even some of these reforms were adopted, turnout rates approaching 90 per cent would be a real possibility (Lijphart, 2001: 74).¹⁶ Yet there is one cheaper and more elegant solution that is capable of raising turnout higher than all these reforms put together: compulsory voting. Compulsory voting is the only institutional mechanism that can achieve turnout rates of 90 per cent and above on its own (p. 74) as evidenced in a number of settings where compulsory voting has been well established and systematically administered.¹⁷ In Australia turnout is usually around 95 per cent of registered voters (RV) while Belgium's turnout rate averages 93 per cent (RV). The Netherlands used compulsory voting for 53 years (1917–70) during which time its turnout consistently hovered above the 90 per cent (RV) mark (Irwin, 1974: 293).

Benefits and Advantages

In addition to its capacity to significantly improve turnout, compulsory voting is also capable of definitively closing the SES voting gap. Studies conducted in a number of settings confirm this empirically. In Belgium socio-economic status is 'effectively erased' as a variable for non-voting under a system of compulsion (Aekaert and De Winter, 1996; Hooghe and Pelleriaux, 1998). Studies conducted in The Netherlands provide similar results (Irwin, 1974; Smeenk et al., 1995) which are especially compelling because before-and-after effects are more easily gauged there due to the abandonment of the system in 1970. There is a paucity of data for the Australian case for the simple reason that compulsory voting works so effectively at maintaining high turnout here that it has 'rendered the *study* of turnout in Australian elections virtually irrelevant' (Jackman, 1997: 5). But the few studies that *have*

15. The only possible solution to this problem would be to launch major publicity at election time aimed at educating the public about relevant responsibilities in the hope that this would translate into increased turnout.

16. Because many of these conditions hold in voluntary voting Malta turnout there consistently hovers around the 90–5 per cent mark (Hirczy, 1995).

17. 'Properly' or 'systematically' administered denotes regimes where attendance is actively encouraged and facilitated, avoidance is systematically pursued and penalties are applied. Or to be more accurate, compulsory voting works well in industrialized, well-established democracies (Norris, 2002: 75) where it is properly and uniformly administered.

addressed the question of how turnout would look under a voluntary regime suggest that a class bias would most likely benefit the more conservative Liberal party (McAllister, 1986; Mackerras and McAllister, 1999). Compulsory voting keeps this bias in check, ensuring that elections are competitive and closely fought. Because of its capacity to close the SES gap, Arend Lijphart (2001) has advocated the introduction of compulsion in the American context as a partial solution to the problems of the *de facto* discrimination perceived to be brought on by voluntarism.

Apart from its capacity to decisively close the SES gap (and thereby serve and enhance a whole range of liberal democratic *desiderata*), compulsory voting has the capacity to solve, or at least ameliorate, a number of otherwise intractable problems associated with low turnout. One is the problem of 'rational abstention'.¹⁸

Though rational choice theory does not satisfactorily explain why so many people *do*, in fact, bother to vote (considering the high transaction, information and opportunity costs relative to the impact of an individual vote)¹⁹ it has usefulness in explaining abstention at the margins, provided that the explanation is combined with a social norms approach. The norm of voting that prevails among educated, white and older populations, has failed to become firmly established among poorer, less well-educated and younger populations. Here it is normal *not* to vote. Where social norms discourage a particular form of behaviour, it may be irrational to conflict with the norm, even where the norm has maladaptive long-term consequences. Members of non-voting minorities many indeed make the quite reasonable calculation that it would be irrational to be the only member of their social group to bother voting²⁰ and even if they do not make this calculation, it would nevertheless be true.

18. For a fuller discussion see Hill (2000). Malcolm Feeley (1974) has argued that, because abstention produces externalities, compulsory voting is a 'reasonable, although not ideal, solution' to the problem of rational abstention. He also suggests that compulsory voting 'would produce policies more closely attuned to citizen preferences' (p. 241).

19. One explanation given is the alleged 'expressive' enjoyment that voters get from the voting act (see, fn 22 and Lomasky, 1992). But, as with explaining abstention, the rational choice approach does better when combined with a social norms explanation. For example, it is rational for middle-class Americans to vote but only because the social norm of voting among the middle class enables it to form a critical mass of electoral power. The social norm acts as a surrogate for direct communication about intention to vote between the group members.

20. It is worth bearing in mind that in Verba et al.'s (1995) study of political inactivity, the most cited reasons for inactivity were: lack of time (39%), a belief that self and family came before politics (34%); that politics had 'nothing to do' with the important aspects of the respondents life (20%); that politics 'can't help with my personal or family problems' (17%); 'as an individual I don't feel I can have an impact' (15%) and 'for what I would get out of it, politics is not worth what I would have to put into it' (14%) (p. 129).

Because compulsory voting ensures full turnout, it is able to overcome two of the most common causes of 'rational abstention': informational uncertainty about other potential voters' intentions, on the one hand, and the transaction and opportunity costs of voting, on the other. Compulsion enables voters to overcome the problem of insufficient information, not only about the real value of an individual vote but also about the intentions of other voters.²¹ When a poor, unemployed, agoraphobic African-American woman abstains from voting in American elections she is behaving both rationally and irrationally. While it would be rational in one sense for her to vote (because doing so would protect her interests and those of others like her) at the same time, it will only be rational for her to vote if she can be sure that everyone else in similar circumstances to hers will have the same idea (in fact, she knows they probably won't). Because the voluntary system evokes irrationality, in this case, the mass abstention of those most in need of the protection voting can afford, it will be rational for her to stay at home and preserve her scarce resources, knowing as she does that others like her will most likely make the same calculation. So she 'rationally abstains' (see, for example, Downs, 1957).²²

Mandatory voting takes this 'prisoner's dilemma' aspect out of the decision about whether or not to bother voting, thereby resolving a key collective action problem. Compulsion removes the problem of insufficient information simply by virtue of its existence; knowing that other voters with similar interests to mine are going to vote overcomes any uncertainty about the value of my vote and frees me from having to weigh 'opportunity costs' against benefits in an environment where resources and information are scarce. Rather than perceiving the compulsion as yet another unwelcome form of state coercion, compulsory voting may be better understood as a

21. Insufficient information includes: underestimating real, or at least potential, political clout; underestimating the adverse effect of abstention on welfare; and finally, the uncertainties which give rise to prisoner's dilemmas.

22. According to rational choice theory, even if the subject in question *did* know that large numbers of those in his or her social group were intending to vote, it would still be rational for him or her to abstain in order to free-ride. I dispute that free-riding, strictly understood, is the best way of understanding voting abstention, particularly among minority groups (and also that it would be, in fact, rational for the subject in question to abstain) (Hill, 2002a). But, assuming that free-riding is the issue here, compulsory voting would prevent this from happening. Further, a great number of people who *are* fairly sure that others in their social group intend to vote still *do* vote. Rational choice theorists sometimes associate this behaviour with the 'expressive' function of voting which is alleged to be analogous to the pleasure we get from cheering on our favourite football team. It doesn't really do much to help our team win but it feels good; it is 'cheering for its own sake' or having our say (Lomasky, 1992: 2). The intention of the voter is not to affect outcomes' but rather to 'cheer' on her political side (Brennan and Lomasky, 1989: 50). I dispute that this is the only or primary reason (Hill, 2002a).

coordination necessity in mass societies of individuated strangers unable to communicate and coordinate their preferences. The single votes of traditional non-voters are no longer isolated drops in oceans. They now have much greater value because such voters are already organized into meaningful blocs of electoral power.²³

Compulsion also has a tendency to remove many of the opportunity and transaction costs that normally discourage voters. This is not because of any inherent properties of compulsion but because in well-administered regimes, governments have recognized that they have an obligation to ensure that this imposed duty is not difficult or impossible to perform (in much the same way that governments provide public schools in order to ensure that the obligation of compulsory school attendance does not place an undue burden on parents). In compulsory systems like Australia and Belgium electoral commissions usually take on most of the work associated with registration and voting so that voting is a relatively painless process.²⁴ The state assumes a high degree of responsibility for making feasible what it requires of voters. It thus makes little sense to use the concept of rational abstention in compulsory settings because compulsion automatically removes the problem of insufficient information simply by virtue of its existence; meanwhile, the opportunity and transaction costs are almost all offset by the state. In fact, it would be *irrational* (though obviously possible) to abstain in compulsory systems because it is much easier to vote than to provide letters of excuse or pay fines in these regimes (see Hill, 2002b).

Some who have considered compulsory voting as a solution to low turnout in the United States have rejected it according to the rationale that compulsory voting only addresses the *symptom* rather than root cause of non-participation (Abraham, 1955a: 8, 1955b: 30; Franklin, 1999). Apart from the potentially misplaced assumption that low turnout is only a *symptom* rather than a bad thing in itself, this type of argument fails to consider the effects of voting participation on the nature of politics and voters, and on the relationship of citizens to representatives.

23. For a fuller discussion of voting as a collective action problem analogous to other collective action problems like taxation and compulsory schooling see Hill (2002a).

24. The obligation imposed on the citizen to 'vote' is met by an even stronger commitment by the state to ensure that the performance of this imposed duty is feasible for all voters. No electoral commission in a voluntary setting goes to nearly this much trouble. In Australia, no one, including the infirm, imprisoned, ill or isolated is expected to meet the potentially high transaction and opportunity costs of voting which the state would be unlikely to offset were voting voluntary. Since Australian electoral commissions actively seek and assist with registration and because polling booths are generally close at hand, elections are held on a Saturday and absent voting, mobile polling and postal voting are readily available, voters don't have to forgo too much in terms of opportunities for work or leisure in order to vote.

Compulsory voting can get to some of the root causes of voting abstention by providing a circuit breaker to the cycle of neglect and non-participation that occurs in voluntary settings. It is thought that a major cause of abstention in non-compulsory regimes is low levels of internal and external efficacy (Teixeira, 1987; Utter and Strickland, 1997: 13). Yet abstaining exacerbates the situation since it appears that voting generates a subjective sense of political efficacy in individual subjects.²⁵ We also know that abstainers tend to perceive government as unresponsive and, believing that their vote will be ignored, they abstain.²⁶ Not surprisingly, relative to voters, non-voters *are*, in fact, ignored (Martin, 2003; Wattenberg, 1998b: 6). Abstainers thus become locked into a self-fulfilling cycle of quiescence, alienation and government neglect.²⁷ But when everyone votes the cycle breaks down. At the risk of waxing tautological (bear in mind that this is a *cycle* I'm talking about) in this way pork-barrelling becomes less rewarding for politicians because universal voting participation encourages incumbent governments to protect everybody's interests regardless. So, apart from its ability to 'kick start' the dynamic of increased efficacy and increased participation, compulsory voting can be seen as a guard against internal corruption, bias and other knavish activities on the part of interested and partial politicians.

Campaign finance is another issue that causes concern in the American context. According to Jack Hitt (2001), the campaign-finance system in the United States 'has lapsed into legalised corruption'. Most polls have indicated that the American electorate 'strongly favor[s] reform'. Compulsory voting can provide relief here because it tends to reduce the role of money in politics. Since full participation is assured parties and candidates no longer have to expend resources on mobilizing voters (Lijphart, 2001: 76). Compulsion may also cushion the impact of vested interests on political agendas because universal participation has a tendency to water down the influence of wealthy, extremist or sectional groups (Healy and Warden, 1995). In this way politics is less likely to degenerate into conflicts fought exclusively between elites and elite interests.

But however effective compulsory voting laws might be in overcoming turnout-associated problems in the American context, there are a number of (potentially insurmountable) barriers to their introduction.

25. In his study of the 1989 election in Sao Paulo, Moises (1993) found that exposure to the political campaign and the act of voting itself increased by 50 per cent the number of citizens with some degree of efficacy. Steven Finkel's (1985) study found that, while voting did not appear to improve the degree of subjects' internal efficacy, it was shown to positively benefit their sense of external efficacy. For a more sceptical view here see Abrahamson and Aldrich (1982), Clarke and Alcock (1989) and Shaffer (1981).

26. See, for example, Kimball (1972: 17) and Parenti (1974: 160).

27. Whereas members of traditional voting groups are engaged in the obverse cycle of high efficacy, participation, and state inclusion.

Potential Objections

Practical Barriers

One barrier sometimes cited is the size and complexity of the American electorate. According to Henry Abraham (1955a), 'the improbability of rigid enforcement of a compulsory voting law in a country the size and complexity of the United States' would mean that the 'practical difficulties of enforcement of compulsory voting legislation in the United States would be Herculean' (p. 20; see also 1955b: 29).

Compared to the population of the United States (270 million) Australia's and Belgium's population figures are very small (19 million and 10 million respectively). While it is true that 'the geographic size of a state is positively related to non-compliance with mandatory voting' this finding does not hold as strongly in systems with advanced economies, national integration and 'modern infrastructure' (Power and Roberts, 1995: 819). Obviously, the United States is such a case. Even a developing nation like Brazil, which has a population of around 170 million, experiences high levels of illiteracy²⁸ and has considerable geographical barriers,²⁹ the government still manages to administer compulsory voting with reasonable effectiveness. In the case of an industrialized, well-resourced nation with a fully developed and integrated infrastructure, it is difficult to conceive how population size should matter, all things being equal. If it did, imposing, calculating, collecting and regulating taxation (a far more complex enterprise) would be impossible.

Abraham (1955a) has also suggested that 'Australia and Belgium have found the cost and administrative burdens [of compulsory voting] heavy' (p. 32). This is not really true. In fact, the conduct of Australian elections is a relatively straightforward affair that does not place a heavy financial burden on the public purse (the Australian Electoral Commission estimates that Australian elections cost around five dollars per vote).³⁰ One reason for this economy is that, even in systems where sanctions are real and compliance high, abstainers are, in fact, rarely fined or prosecuted. Most cases of

28. Only about a quarter of Brazilians finish the fourth grade. In 1985 'illiterates were enfranchised for the first time since 1881, expanding the potential electorate by 30 per cent'. Though voting is optional for illiterates most do vote (Power and Roberts, 1995: 819).

29. In fact, it is the world's largest electorate subject to compulsory voting (Power and Roberts, 1995: 819). Brazil achieves turnouts in the mid to high seventies (VAP) which, while not ideal, is nevertheless impressive given the numerous constraints mentioned.

30. Personal correspondence with Gay Young, information officer at the Australian Electoral Office, 17 May 2002. Even if compulsory voting *were* burdensome and expensive, this would not be a sufficient reason to reject it out of hand as a low turnout solution since most democrats take it as given that democracy is an expensive and often cumbersome business and yet well worth the price.

non-compliance in Australia are dealt with via 'please explain' letters. This is an honour system whereby abstainers are invited to give reasons for their abstention. If the reasons are deemed to be 'valid and sufficient' no penalty is applicable.³¹ Well below 1 per cent of the Australian electorate is ever faced with a fine or court attendance in any given election period (Mackerras and McAllister, 1999: 224) while in Belgium less than a quarter of a per cent of non-voters are ever prosecuted (Hasen, 1996: 2170; Lijphart, 2001: 75).

So, why do Belgium and Australia enjoy such high rates of compliance?

There are two possible explanations for this: the first is that voting is so easy in these well-regulated systems that failure to vote is far more burdensome than voting. It is much easier to drop in at any of the numerous and conveniently located polling places on your way to the mall than it is to provide an excuse for failure to do so. The second is a norm-based explanation. When 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 just to avoid penalties but because universal participation is the norm and it is the norm because it is the law.

Richard Hasen (1996) has referred to low turnout and its attendant dysfunctions as a case of 'social failure'. 'Social failure' occurs when a social norm that would otherwise maximize a group's welfare fails to emerge. In such cases, it may be necessary to introduce a law to institute such a norm. Such laws (in this case, compulsory voting laws) represent 'pathway[s]' rather than 'obstacles' to the emergence of adaptive social norms. Laws can 'cure' social failure not only by applying sanctions that issue in new behaviour but more subtly and consequentially, by 'shaping preferences' and 'changing tastes' (pp. 2167–8).

On this view people comply, not for fear of sanctions but out of respect for the law itself and a belief that it is a reasonable one. The law thus 'represents some kind of social consensus about acceptable behaviour in much the same manner as social norms'. Strict enforcement may be unnecessary because the institution of the law has caused people to internalize a preference for the behaviour embodied in the law (Hasen, 1996: 2168). In Belgium, penalties are extremely lenient and yet, when the law was first introduced absenteeism dropped immediately from between 16 to 30 per cent (1884 and 1892 respectively) to a mere 6 per cent (Reed, 1925: 355–6) and has remained low ever since. Similarly, in Australia, the penalties for failure to attend a polling

31. 'Valid and sufficient' reasons include: 'physical obstruction, whether of sickness or outside prevention, or of natural events, or accident of any kind'. One might also imagine cases where an intending voter on his or her way to the poll was diverted to save life, or to prevent crime, or to assist at some great disaster, as a fire, in all of which cases, in my opinion, the law would recognize the competitive claims of public duty (AEC 1999).

booth are fairly mild yet compliance is high. In fact, most Australians approve of compulsory voting³² and could be said to consent to this obligation to vote, not merely because they feel bound to obey the laws of a relatively just society but because they regard this particular law and its entailed obligations as a reasonable imposition on personal autonomy, in much the same way that people feel obligated to stop at red lights. People are normally happy to stop on red, not simply because the law requires it, but because it is also a good idea, not only for safety reasons but because of the way traffic lights provide a system utility to the business of driving cars. The norm of stopping on red was initially generated by positive law but is habitually (almost reflexively) observed because it has been internalized as both reasonable and sensible by most drivers.

The veracity of this view of the relationship between law and norms has been demonstrated in two industrialized settings where before and after effects of compulsory voting have been detected and assessed. Before the compulsory voting law was repealed in 1970, The Netherlands experienced high voting turnout despite the fact that the fine was quite modest (around US \$5) and only a tiny percentage of abstainers were prosecuted in the aftermath of any given election.³³ But because the law decreed that people should vote, people did, in fact, vote. As soon as the law was repealed turnout fell immediately and drastically.³⁴ Similarly, in her study of Swiss cantons where compulsory voting laws were reinforced by only mild and 'hardly enforced' fines, Funk (2004: 1) found that, once the law was repealed, average turnout declined 'significantly'. In both cases, the penalty seems to have acted as a symbolic reminder that voting attendance was compulsory. As Irwin (1974: 294) puts it, voting attendance 'was simply recognition that that was the law and the law should be obeyed'. Thus, in cases where it is applied systematically but without zealotry, a compulsory voting law can act as an effective surrogate for the social norm of voting (Hasen, 1996; Hill, 2000, 2004).³⁵

32. Poll figures show that levels of public tolerance for compulsory voting in Australia are high and have remained stable for many years. The latest poll indicates that around 70 per cent of Australians approve of compulsory voting (Bean et al., 2002: 44).

33. 'Only 577 of a potential 400,000 non voters were even brought to court in 1966' (Irwin, 1974: 294).

34. In the most recent provincial and European parliamentary elections turnout was 50 per cent and 36 per cent respectively (Lijphart, 2001: 76).

35. Yet, it is worth noting that the law alone will not ensure turnout; it must be accompanied by penalties, however mild. Democratic regimes that impose penalties for non-voting have turnout of around 10 to 13 points higher than those which do not (Hirzy, 1994: 64–5). It seems that the law is best recognized as obligatory once penalties, even negligible ones, are prescribed. For a fuller discussion of the idea that mild penalties, though only symbolic, still work to elicit compliance see Funk (2004).

Federalism and the likely resistance of state governors could constitute another major practical barrier to the smooth operation of a national compulsory voting regime. In order for compulsory voting to operate well within a federal structure (as in the case of Australia) there need to be uniform voting standards, a highly integrated system of effective and independent electoral commissions and high levels of cooperation between tiers of government (Hill, 2004: 486). These conditions do not, at present, hold in the American context. The chances of them holding in the future do not seem particularly bright either, if the recent report of the National Commission on Federal Election Reform is any indication. The bipartisan commission, headed by former Presidents Carter and Ford, urged Congress to create a new electoral commission for establishing voting standards for states but, mindful of the traditional role of states in this area, the Commission did not call for mandatory federal election standards (National Governors Association, 2002: 3). This sensitivity to states' rights does not auger well for the success of a far more ambitious and far-reaching reform like compulsory voting. Relatedly, a universal voting regime requires universal registration. The difficulties of compiling and maintaining such a register in the United States would be considerable because of the likely resistance to any scheme that was perceived to expand the Federal Government's sphere of influence and control.

Martin Wattenberg (1998a: 20), who has briefly considered the potential for compulsory voting to address America's turnout problem, concluded that 'it is debatable' whether it is really desirable to 'force' turnout rates into the 90 per cent and above range. His main concern is that 'people with limited political knowledge' would tend to vote in a fashion which Australians call 'donkey voting', that is, thoughtlessly numbering their ballot from 1 in descending order.³⁶ Notwithstanding the error in assuming that 'donkey voting' is 'a perversity peculiar to compulsory voting',³⁷ in fact, the level of the donkey vote is not high in Australia (estimated at between 1 and 3 per cent) (Goudie, 2000) and certainly not high enough to threaten the legitimacy of the system. A related concern is that compulsory voting will lead to higher levels of invalid or 'informal' voting. Though it is true that systems with compulsory voting do have higher levels of invalid voting than voluntary regimes, this increase is lower than the gain in participation (Hirczy, 2000: 46). Yet, Clive Bean (1986: 61) has argued that

36. In Australia, 'in order to prevent exploitation of this practice the ballot is rotated. . . Instead of all ballot papers being the same, different ballot papers have the candidates' names and affiliations listed in different orders. Each candidate will appear near the top of some ballot papers and near the bottom of others. This virtually eliminates the effect of the "donkey vote"' (ACT Electoral Commission, 2001).

37. As opposed to its simply being a function of 'positional advantage' (Orr, 2002: 577).

informal voting in Australia (which hovers at around 2.7 per cent) has more to do with the preferential system of voting than with the compulsion.³⁸

Cultural and Ideological Resistance

Probably the most intractable barrier to the introduction of compulsory voting is a deep-seated cultural and ideological aversion to state interference with individual autonomy. Though Richard Hasen (1996) has advocated the use of compulsory voting as an effective 'preference-shaping mechanism' to address the problem of declining and biased turnout, he is pessimistic about its chances of enactment in the American context for this reason. He also suggests that calls for compulsory voting would be construed as 'a failure of the democratic experiment' which Americans hold so dear (p. 2177). Martin Wattenberg (1998a) agrees: America's Lockean individual rights culture would lead most to assert strenuously 'that they have an inviolable right to *not* vote' (p. 20).³⁹ Such indeed were the arguments used against its attempted introduction in Oregon in the early part of last century.⁴⁰

However, there have been enthusiastic advocates of compulsory voting in early and even recent American history. Many of them have been politicians.⁴¹ Arend Lijphart (1997) has been a vigorous sponsor of the idea (see also Wertheimer, 1975) while more recently, Tom Mann (2000), after visiting Australia on a political fact finding tour, commented that he wished he had a way of bringing compulsory voting to America. In fact

38. Along similar lines, McAllister and Makkai (1993) argue that informal voting in Australia is not a form of protest against the compulsion but rather a result of the 'interaction between compulsory voting. . . the complexity of the electoral system and. . . the presence of large numbers of immigrants within the electorate'.

39. Alan Wertheimer (1975) wrote: 'Compulsory voting is a good idea. It is a good idea whose time is either past or has not yet come. It is certainly not a good idea whose time is at hand. The very reasons that account for the failure of political thinkers to consider compulsory voting also preclude its adoption. Our latent belief in a type of liberal anarchism has made us resistant to legal coercion, even when such coercion makes sense, that I doubt if this society could even discuss the proposal seriously' (p. 293).

40. In 1915 the Oregon legislature passed something like a 'compulsory voting' act to the effect that people who failed to vote at least once in two years could not vote again without pre-registration or swearing in her/his vote at polling places. In 1919 the legislature 'submitted a constitutional amendment to the voters empowering the legislature to provide for both compulsory registration and compulsory voting, but the measure was defeated by a large majority at the election of 1920. Fines or temporary disenfranchisement were the penalties generally anticipated' (Barnett, 1921: 265-6).

41. 'Among them were Governors Hill (New York), Butler (Massachusetts) and Folk (Missouri); Cabinet Members Wickenham (Taft) and Daniels (Wilson); US Senators Capper (Kansas), Langer (North Dakota), Myers (Pennsylvania) and Vandenberg (Michigan); US Representatives Klein and Javits (New York)' (Abraham, 1955b: 29).

there have even been a number of serious attempts to introduce the practice in America; the more successful ones have long since fallen into abeyance.⁴²

In any case, the complaint that compulsory voting laws derogate from individual liberty misses the point that, technically, only registration and attendance are compulsory. Because of the secret ballot, voters cannot be compelled to either mark their ballot or vote formally. Voters always have the option of returning blank or spoiled ballots. And when compulsory attendance is compared to other problems of collective action solved by mandatory means such as schooling, taxation, jury duty, military service and even garbage separation, it doesn't seem all that intrusive (Feeley, 1974: 241; Lijphart, 2001: 77).

Even so, it is still fair to say that compulsory registration and attendance *do* infringe the liberal-democratic principle of choice but this is only a compelling argument against compulsion if it is granted that choice is more important than a whole range of other important liberal democratic values and *desiderata* that compulsion may serve, among them: legitimacy, representativeness, political equality, majority will and minimization of elite power.

Putting choice first not only sacrifices democratic values, it also sacrifices another important liberal right: equality of political *opportunity*. Bear in mind that it is only registration and attendance at a polling place (entailing having one's name marked off the roll, collecting the ballot papers and putting them in the ballot box) that is compulsory. This distinction between *actual* participation and *access* to participation is important because the former has controvertible value (since the costs and benefits are disputed) whereas the value of equality of political opportunity is generally undisputed by liberal democrats.

Furthermore, there are a number of other ways by which the libertarian objections could be offset. The first is to permit conscientious objections or abstentions. Although it is preferable if everyone votes, there are some people who will find compulsion so objectionable that it would be counter-productive to try and compel them to vote. Fining them will do little good because they will be apt to stand on principle, refuse to pay the fine and either end up in jail or have their assets seized. This is bad both for the

42. 'Georgia and Virginia experimented with compulsory voting laws in the eighteenth century'. In the case of Virginia, fines were only rarely levied and in the case of Georgia no evidence exists that the fine was ever levied. 'One municipality (Kansas City) used compulsory voting until it was declared to be unconstitutional by the state Supreme Court (Hasen, 1996: 2173-4 and n. 154, 2174). Three American states actually passed 'constitutional amendments making mandatory voting possible, subject to the adoption of a single enabling act by the legislature of the state. Popular referenda subsequently approved two of these amendments (South Dakota and Massachusetts) but rejected the third (Oregon). In excess of 30 bills, calling for some form of compulsory voting, have been introduced in nine of the United States' (Abraham, 1955b: 29).

people concerned and for democracy. Provided that they apply for exemption prior to the election conscientious objectors should be permitted to abstain without penalty. Since such applications would entail far more effort than voting itself, the numbers of conscientious objectors would be kept reasonably low.⁴³

Another way of meeting the charge that compulsion limits democratic choice would be to provide ballot papers that capture a wider than usual repertoire of political responses. The ballot paper could offer options that record disaffection or could contain an open category: 'protest vote', with a blank space for respondents to write their own comments. Formal voters could also use the space to register comments and protest. Such provisions are not unprecedented: a compulsory voting Bill sponsored by British Labour MPs in November 2001 contained the provision that voters would be able to 'register their abstention on a new slot on the ballot paper' (Hedley, 2001). In Russian Presidential elections voters are offered the option: 'Against All'. In the March 2000 election 1.88 per cent of the electorate chose this option (RFE/RL Newsline, 6 April 2000).⁴⁴

A further means for maintaining public tolerance towards compulsory voting is to limit it to first-order elections, thereby avoiding the problem of voter fatigue. Finally, if voting were relatively easy, as it should be wherever it is mandatory, public antipathy could be contained.⁴⁵

Political Obstacles

Another likely barrier will be Republican resistance. It is generally believed that low turnout in the United States benefits the more conservative Republican Party. Accordingly, it is anticipated that any moves to introduce compulsory voting laws will be met with vigorous resistance by Republicans (Lijphart, 2001: 77).⁴⁶ There is good reason for this view, since Republicans rallied to oppose the Motor Voter Act on the belief that it would mobilize Democrat supporters (Calvert and Gilchrist, 1993: 695–6).

It is possible that the idea of compulsory voting just takes some getting used to. After all, conservative parties were vigorously opposed to universal

43. For more detail on this proposal see Hill (2002b).

44. The British Electoral Commission of 2001 considered the possibility of providing an entry on ballot papers for 'positive abstention' whereby voters could vote for 'none of the above' (The Electoral Commission of 2001).

45. For a fuller discussion here see Hill (2004).

46. Piven and Cloward (1988) note that, in the case of registration, the 'more obvious danger' existed for Republicans. Nevertheless, both sides had an interest in resisting the liberalization of the registration system 'because that could lead to a restructuring of political parties' especially their approach to policy (p. 869).

suffrage and yet, over time, they came to accept it as right and proper. In the same way, Arend Lijphart (2001) believes compulsory voting should come to be accepted as an uncontroversial and natural 'extension of universal suffrage' (p. 77). But the likelihood of this happening seems low given the cultural and political constraints mentioned earlier.

Constitutional and Legal Barriers

Potential constitutional barriers are also an obvious concern. It does seem inevitable that compulsory voting laws would meet with vigorous court challenges by both individuals and states. State governments are particularly sensitive to federal laws that are seen to impinge on their sphere of influence, as in the case of the states rights challenge that emerged to oppose the National Voter Registration Act (Piven and Cloward, 1996: 41).

Constitutionally speaking, the first question would doubtless be whether or not Congress has the power to compel election attendance. Although Article I Section IV of the United States constitution grants Congress the power to 'make or alter' regulations regarding the time, place, or manner of federal elections, governors in the NVRA challenges claimed that under the Tenth Amendment this power is 'reserved to the states'. So far, the courts have not agreed, and have 'flatly affirmed the primacy of Article 1 section 4 over the Tenth Amendment' (p. 41).⁴⁷

Even though the principle at stake is technically the same, the Courts may not look so favourably upon legislation of a considerably more controversial nature. Nevertheless, it is conceivable that the broad power of Congress to regulate the manner and holding of elections could be 'stretched by the necessary and proper clause' to grant Congress authority to compel attendance just as Congress asserted its right to impose the draft in order to enact its mandate to raise armies (Wattenberg, 1998a: 20). The Supreme Court has consistently upheld the constitutionality of this latter right (Abraham, 1955a: 14).

Because of its supposed restrictions on personal freedom, opponents will undoubtedly argue that compulsory voting is unconstitutional because it violates First Amendment Rights (see, for example, Abraham, 1955a: 31). But according to Martin Wattenberg (1998a: 20), mandatory attendance has a good chance of passing 'constitutional muster'. Since compulsory attendance laws do not typically require citizens to mark the ballot but merely show up at the polls, any claims of infringement on the (as yet to be established) right to abstain would be misplaced.

47. The courts in question were 'Federal district courts in Pennsylvania, South Carolina, Virginia, California and Illinois, as well as appellate courts in the latter two states' (Piven and Cloward, 1996: 41).

Although the Federal Supreme Court has never been faced with the task of determining the constitutionality of mandatory voting, in 1896 the Supreme Court of Mississippi struck down a penalty tax imposed by the City of Kansas for failure to vote. In *Kansas v Whipple* (1896) Chief Justice Brace argued (without mentioning any specific constitutional violations) that the tax was 'obnoxious to the provisions of the organic law which secures to every citizen protection against partial and discriminative taxation, and against invasion of his sovereign right of suffrage' (Hasen, 1996: 2176). In delivering the Court's opinion Judge Brace noted that 'voting is not such a duty as may be enforced by compulsory legislation, that it is distinctly not within the power of any legislative authority, national or state, to compel the citizen to exercise it' (Abraham, 1955a: 31). It is debatable whether the US Supreme Court would uphold this reasoning, particularly since it is not clear why voting is 'not such a duty'.⁴⁸

Hasen (1996) has suggested that the only 'plausible' ground for ruling against the constitutionality of mandatory voting under the First Amendment would be to argue that it violates the guarantee of free speech insofar as it could be interpreted as an attempt to require speech. In fact, the Court has already rejected the claim that voting is a form of speech. In the 1992 case of *Burdic v Takushi*, the Court upheld Hawaii's ban on write in votes, ruling against a voter's claim that the ban deprived him of the right to cast a protest vote for Donald Duck. According to the Court, elections are about choosing representatives not about self-expression (Hasen, 1996: 2176).

So, is there a fundamental right *to vote*?

The United States Constitution does not explicitly guarantee a right to vote but it *does* proscribe abridgements of 'the right to vote' (Amendments XV and XIX). In addition, the constitutional guarantee of a republican form of government has sometimes been cited as evidence of such a right (Abraham, 1955a: 5).⁴⁹ In any case, the Supreme Court has recognized that voting is a fundamental right due to its 'centrality to the political process' and its critical status as a 'preservative of all rights' (*Yick Wo v Hopkins*, 1886).⁵⁰

48. Lijphart (2001) suggests that, 'even if mandatory voting were to be found unconstitutional, a constitutional amendment permitting it could be adopted – a difficult, but not impossible, prospect' (p. 77).

49. The guarantee of a republican form of government could also conceivably be invoked in *defence* of compulsory voting.

50. The decision in *Reynolds v Simms* first established the 'any restriction' standard: 'since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, *any alleged infringement* of the right of citizens to vote must be carefully and meticulously scrutinised' (James, 1987: 1626, n. 61).

More to the point, then, is there a fundamental right *not* to vote?

In general, the question of a right to abstain has attracted little attention, most likely because, unless mandatory voting is simply being used as a mechanism to forge consent (as was the case in single party states that enforced voting), few citizens are anxious to divest themselves of such an important and often hard-won right. Nevertheless, this 'right' has been indirectly tested a number of times via constitutional challenges to voter purge statutes. Almost all have been unsuccessful⁵¹ including one that explicitly argued that voter purge statutes violate the right not to vote and thereby express political dissatisfaction (*Hoffman v Maryland*, 1991) (Hasen, 1996: n. 163, 2176).⁵² It might be pointless to bring such arguments to bear under a mandatory regime since, as I have emphasized, only attendance at a polling place would be compulsory. Voters could avoid voting for candidates they positively dislike by depositing a blank ballot or else they could use the compulsory attendance as an opportunity to express their satisfaction via protest votes and 'none of the above' type options, far more eloquent and unambiguous expressions of political discontent than mere abstention.

According to the Senate Committee on Rules and Administration, the right not to vote has equal value to the right to vote. However even in *Hoffman v Maryland* the Court refused to determine whether both rights deserved the same level of constitutional protection. Unlike restrictions on the right to vote, restrictions on the right *not* to vote do not yet attract strict scrutiny (Blomberg, 1995: 1018–20).

Compulsory voting laws might also stand a good chance of passing constitutional muster on the ground that they provide reliable protection against political exclusion. The constitutionality of excluding members of the voting population has already been examined by the Supreme Court. In a number of voting-related cases (reapportionment, voter qualification, and candidate ballot access) it was established that 'any restriction' on the right to vote triggers heightened scrutiny (James, 1987: 1624–5). *Phoenix v Kolodziejewski* (1970) affirmed that 'when all citizens are affected in important ways by a governmental decision' it violates equal protection to exclude otherwise qualified citizens from the franchise (James, 1987: n. 81, 1633). And if

51. Unsuccessful: *Ortiz v City of Phila.* (1994), *Hoffman v Maryland* (1991), *Brier v Luger* (1972); *Williams v Osser* (1972). Successful: *Michigan State UAW Community Action Program Council Program Council v Austin* (1972), *Beare v Smith* (1971), *Beare v Briscoe* (1974). For fuller details see Blomberg (1995: 1017–18, n.18).

52. Even in Australia, only a few have insisted on their 'right' *not* to vote. Some rare examples include Senator Nick Minchin (1996) who has asserted that 'compulsory voting is a fundamental breach of. . . civil liberties' and Professor Joan Rydon (1997) who claims that 'genuine democracy requires that citizens be free to vote or not vote'.

Dean John Hart Ely is correct in arguing that 'unblocking stoppages in the democratic process is what judicial review ought pre-eminently to be about' (cited in James, 1987: 1621) then unblocking the invisible barriers to voting experienced by poorer, younger and less educated sectors of the electorate might conceivably be an argument acceptable and persuasive to the courts.⁵³

Compulsory voting legislation might also be defended on the ground that it is an effective mechanism for realizing the principle of one vote one value (established in *Reynolds v Sims*, 1964)⁵⁴ that is currently being compromised, not only by low and biased turnout, but by the influence of well-financed, special interest groups. Because American arrangements make voting a fairly cumbersome business, the system almost seems geared to discourage people from voting, particularly those on the political margins like the poor, the homeless, the infirm and housebound, people with inflexible working hours, and women with small children. But well-organized compulsory systems are geared to make voting a fairly painless experience with almost no opportunity or transaction costs to individual voters. Most importantly, as argued earlier, compulsory universal attendance removes a major impediment to voting in voluntary systems: its irrationality.

Unconditional rights like the right to vote, require a 'lower threshold of injury before applying strict scrutiny' (James, 1987: 1625). If there is an unconditional right to vote and if that right is the sovereign right that protects all other rights, then it seems unlikely that an untested right like the alleged right to abstain could trump it (provided, of course, that the court accepted the argument that voluntary voting is an *obstacle*). If compulsory voting were able to remove all the major impediments to voting normally experienced by non-voters, then the courts might conceivably accept the infringement of the 'right' to abstain as a reasonable trade-off.

But there is a major hitch here because, in determining the applicable standard, the courts have drawn a distinction between the removal of formal or state imposed barriers, on the one hand, and the provision of affirmative efforts to facilitate voting, on the other.⁵⁵ Under the equal protection clause only state imposed 'obstacles to fundamental rights are subject to

53. Low and skewed turnout in the USA has been described as the 'functional equivalent' of undemocratic discriminatory qualifications such as were proposed by Aristotle (with his property qualification) or Mill (with his status and educational qualifications) (Lijphart, 1997: 6).

54. *Reynolds v Sims* was a malapportionment case. 'The one-person, one vote rule laid down ... has both absolute and relative dimensions. While each qualified voter holds an entitlement to no more and no less than any other voter, she also has a positive entitlement to one vote per se' (James, 1987: 1622).

55. For example, in *McDonald v Board of Election Comm'rs of Chicago* (1969) allowing only certain sectors of electorate to use absentee ballots was deemed 'affirmative because there is no constitutional right to absentee ballot' (James, 1987: n. 59, 1626).

strict scrutiny'.⁵⁶ On this view, in order for the existing (and effectively discriminatory) voluntary regime to attract strict scrutiny it would have to be argued convincingly that voluntary voting is a state-imposed barrier and that the state's failure to ensure political equality through universal participation is a function of its failure to make voting compulsory. This isn't as perverse as it sounds because, as Deborah James (1987) has argued with respect to registration obstacles, 'as long as the infringement stems from state action, the obstacle would be subject to strict scrutiny even if some persons would be able, with effort, to surmount it'.⁵⁷

Conclusion

Compulsory 'voting' can't do much to cure cynicism about politicians, nor can it overcome the problems of unresponsiveness associated with federalism, divided government and first-past-the-post voting. But it does have the potential to ameliorate some of the electoral problems that plague American politics. It can decisively remedy America's bad and worsening turnout problem and thereby close its gaping SES voting gap; it can increase the salience of elections and make voting more rational and meaningful and it can enhance and protect such values as representativeness, legitimacy and political equality. It also has the potential to break the counterproductive cycle of low efficacy, alienation, non-participation and state neglect that has led to an increasingly moribund political culture. It may even limit some of the problems associated with campaign finance.

However, the idea of being compelled to vote is anathema to many Americans and it would undoubtedly meet with vigorous resistance on a number of fronts, most of which, as we have seen are not technically intractable; rather, cultural and political resistance would probably be the greatest obstacles to the introduction of compulsory voting.

56. Whereas 'the state's failure to extend a privilege as an "affirmative" step, need only meet the rationality test' (James, 1987: 1625-6). Low and unequal turnout patterns are so entrenched now that the problem is probably beyond the reach of affirmative action measures, therefore the voluntary system would need to attract strict scrutiny.

57. 'The fact that by individual volition an obstacle can be surpassed does not necessarily lower the applicable standard and appropriate remedy. The court has subjected state imposed obstacles to strict scrutiny and imposed broad remedies even when persons affected were unwilling, though not necessarily unable, to overcome the obstacle'. See *Bullock v Carter* (1972) (James, 1987: 1626 and n. 60, 1626).

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LISA HILL is a Senior ARC Fellow in Politics at the University of Adelaide. Her interests are in political theory, intellectual history and issues in electoral law. She has published work on compulsory voting in *Political Studies*, *Journal of Sociology*, *Federal Law Review* and *Australian Journal of Political Science*. Dr Hill is currently working on a book about Adam Smith's social thought and has just published *The Passionate Society: The Social, Political and Moral Thought of Adam Ferguson* (Springer, 2005). *The Politics of Women's Interests: New Comparative Perspectives* (Routledge), co-edited with Louise Chappell, is forthcoming in 2006. ADDRESS: School of History and Politics, University of Adelaide, SA 5005, Australia [email: lisa.hill@adelaide.edu.au].