

Is there a Right not to Vote?

HEATHER LARDY*

Abstract—When the possibility of instituting compulsory voting arises for consideration by politicians and by the public it is commonly met with the assertion that there is a right not to vote, which would be violated by the introduction of some form of legal obligation to vote. This claim, rather than being regarded as a contribution to the debate, often functions instead to foreclose it, trumping the arguments of those who advocate compulsion with the presentation of a protected right not to participate. For that reason, it demands examination, despite the fact that it is not an argument advanced seriously by those scholars who address the issue of compulsory voting. This article examines the claim of the right not to vote, arguing that it is based on a flawed interpretation of the idea of the right to vote, an interpretation which mistakes the sort of liberty which the right to vote represents and which overlooks the centrality to that right of the value of active electoral participation. There may be convincing arguments against compulsory voting, but the suggestion that there is a right not to vote is not one of them.

1. *Introduction*

The merits of instituting some form of compulsory voting have been raised recently in public debate about the problem of sharply declining rates of electoral participation in the United Kingdom.¹ In response, the claim that there is a

* University of Aberdeen. I would like to thank an anonymous referee for helpful comments on a draft. Thanks also to Kevin Walton, and to colleagues at the Scottish Law Faculties Conference 2002. I am grateful also for the assistance of David Baillie and Angus Campbell.

¹ The turnout figure at the 2001 general election was 59.4 per cent, the lowest since the equal enfranchisement of women in 1928. See *Election 2001: The Official Results*, Report of the Electoral Commission (2001), ch 2 (available at www.electoralcommission.gov.uk). A Private Member's Bill instituting compulsory voting was introduced by Gareth Thomas MP in November 2001, see HC Deb vol 375 cols 860–863, 27 November 2001. It proceeded no further than First Reading. The Scottish Parliament's Local Government Committee is to consider compulsory voting, *The Scotsman*, Monday 12 January 2004; the Electoral Commission has expressed its intention to assess compulsion as one of a range of potential methods of increasing turnout, see Alan Beith MP, answering questions on behalf of the Commission, HC Deb vol 380 col 437–438, 25 February 2002; the Commission did not however address the topic in its report *Voting for Change: An Electoral Law Modernisation Programme*, June 2003. See also T. Watson and M. Tami, *Votes For All: Compulsory Participation in Elections* (Fabian Society, 2000). Perhaps unsurprisingly, systems with compulsory voting report significantly increased rates of voter participation, which are attributed directly to the voters' awareness of a legal obligation to vote. These increased rates of participation do not seem to depend entirely on vigorous enforcement of the law, suggesting that mere awareness of the existence of a legal obligation is enough to encourage voters to turn out. See R.L. Hasen 'Voting Without Law', 144 *U Pa L R* 2135 at 2169–72 (1996); A. Lijphart 'Unequal Participation: Democracy's Unresolved Dilemma', 91 *Am Pol Sci Rev* 1 at 8–10 (1997); M. Hooghe and K. Pelleriaux 'Compulsory Voting in Belgium: An Application of the Lijphart Thesis', 17 *Electoral Studies* 419 (1998); R.W. Jackman 'Political Institutions and Voter Turnout in the Industrial Democracies', 81 *Am Pol Sci Rev* 405 at 407 (1987); G.B. Powell 'Voting Turnout in Thirty Democracies: Partisan, Legal and Socio-Economic Influences' in R. Rose (ed.), *Electoral Participation: A Comparative Analysis* (Sage, 1980); M. Mattila 'Why Bother? Determinants of turnout in the European Elections', 22 *Electoral*

right not to vote has been made regularly by opponents of compulsion.² The assertion that non-voting is a right seems, at least at first sight, to be an effective rejoinder to the arguments of those who favour some form of compulsion.³ This is so because the idea of a right not to vote has a strong intuitive appeal: it accords with our understandings of desirable democratic practice, which tend to include the belief that voting ought not to be a forced act. The associations between ideas about voting and about liberty, however imperfectly articulated in the mind of the individual voter, help to establish an attractive and apparently plausible link between the act of not voting and the existence of a right not to vote. This article seeks to challenge that connection, arguing that there is no right not to vote. There may be plausible arguments against the institution of compulsory voting, but the notion that electors possess a right not to vote is not one of them.

It may seem that this is to take a merely putative right far too seriously: the right not to vote may in fact be no more than a pithy slogan coined by opponents of compulsion, who have no real need to attend to its conceptual consistency. Perhaps they do not seriously mean that there is a right not to vote, just that they object to the notion of compulsion in voting, and do so for a range of reasons which may be effectively communicated in political argument by using the language of rights. That is, someone may indeed argue for a right not to vote for reasons which have very little, or nothing at all, to do with her conviction that non-voting is a right (properly so called), and more to do with an astute intuition that claims to freedom are today made most effectively in the language of individual rights.⁴ Claims about rights have a privileged position in political debate,

Studies 449 (2003). See also IDEA (Institute for Democracy and Electoral Assistance), *Voter Turnout Since 1945: A Global Report* at 105–10, available at www.idea.int/publications/index.htm.

² See, for example, the remark by Alan Whitehead MP during a Commons debate on the low turnout at the June 2001 general election: 'democracy brings with it the right not to take part. I am not sure that compulsory voting sits easily with that principle', HC Deb vol 370 col 362, 22 June 2001. See also the comment of Tony Benn (then MP) about the loss of the right not to vote, made in response to a suggestion by the engineering union AEEU that compulsory voting be instituted, 'Special Report: Elections', *The Guardian*, Tuesday May 30, 2000. See also the same comment by Brian Micklethwaite of the Libertarian Alliance, 'Should we be forced to vote?', *The Guardian*, Saturday 19 June 1999.

³ A legal obligation to vote may be phrased in a variety of ways, and may permit the voter to register a formal abstention on the ballot paper. It might also be possible to invite the elector to provide a short statement of the reason for the abstention. The law might further permit voters to cast 'write-in' ballots, adding the names of their preferred candidates to the printed list and voting accordingly. However the law is phrased, the voter who objects to the use of compulsion retains the ability to offer a spoilt or unmarked ballot paper in protest. A weaker system of compulsion would require only that voters attend the polling station, permitting them to refuse to receive a ballot paper. Such a scheme might prove at least partially effective: it would seem likely that many voters attending under compulsion would decide to cast a ballot once there, with only those determinedly opposed to participating exercising their entitlement to refuse. This might not be enough to satisfy the claims of those who assert a right not to vote, however, as penalties (usually fines) would still attach to any failure to attend the polling station. The discussion which follows does not presume any particular scheme of compulsion, but deals rather with the broad idea of attaching penalties of some sort to an individual voter's failure to participate on election day in whatever manner has been officially prescribed.

⁴ See M. Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart, 2000) ch 13. There is also, as Lamond observes, a 'tempting misconception' to think that 'the question of legitimization [of coercion] only arises when what is threatened would violate some right of the party against whom the pressure is directed'. G. Lamond 'The Coerciveness of Law' (2000) 20 *OJLS* 39 at 50. It may perhaps be this misconception which encourages opponents of compulsory voting to frame their concerns in the form of a putative right not to vote, rather than engaging in a more general debate about the issues surrounding compulsion.

as in legal practice, an authoritative aura which increases the burden of explanation and justification borne by the advocates of the challenged measures. Difficulties may arise, then, if novel claims about rights are taken too much at face value in political argument. Whereas opportunities exist in the courts for the rigorous testing of rights-based reasoning, political debate offers less developed processes for assessing fully the relative merits of claims encoded in assertions about rights. Novel claims about rights, like that of the right not to vote, may threaten to stifle political debate about possible reform rather than stimulating or sustaining it. This is especially so when the claim is made in an attempt to deny the legitimacy of holding the debate in the first place. The possibility of instituting compulsion might be pushed out of the picture entirely by claims that it would violate an individual right of voters not to participate in elections. The strength of the argument that compulsion would violate a right not to vote must, then, be examined, regardless of whether it is made mainly for strategic or for rhetorical reasons, and irrespective of the strength or sincerity of the claimants' convictions that non-voting is actually a right properly so called. The mere assertion that it is, and that it forecloses a law compelling voting, merits attention. Left unattended to, there is a risk that the suggestion that there is a right not to vote might illegitimately restrict discussion about possible responses to the problem of low voter turnout, supplying over-simplified answers to difficult questions about the use of compulsion with its ultimately superficial appeal to the sanctity of individual choice.⁵

2. Reading the Right Not to Vote

The right not to vote is an argument against the use of coercion in relation to voting. That general claim seems in turn to contain several more specific arguments. It may, for example, encompass a range of demands from entitlement to perpetual abstention to a more limited right of partial (occasional or selective) abstention. Perpetual abstention claims are effectively about opting out of electoral participation completely. The more limited claim to partial abstention endorses the freedom of voters to decide not to vote on an occasional basis if, for example, no candidate appeals, or if it is particularly inconvenient to get to the polling station on election day. The claimant appeals to the right not to vote to protect the freedom to decide whether and when to participate in elections, rather than, as in the stronger case of perpetual abstention, to assert a right never to vote. Laws compelling voting might be drafted in such a way as to meet some of the concerns of those claiming partial abstention: the ballot paper may, for

⁵ It should be noted that an opponent of compulsion might claim a right not to vote without implying a personal preference for non-participation on her part. So, a person might assert the existence of a right not to vote consistently with holding a firm belief in the value of voting voluntarily and with her personal participation in elections on a regular and committed basis. It is also possible that a person might endorse a right not to vote while believing that there is a moral duty to vote: she might, that is, oppose only the use of the law to enforce that duty. Conversely, it is possible to argue, as here, for a legal obligation to vote without invoking the existence of a moral duty: it is suggested below that the liberty protected by the right to vote can supply a sufficient basis for the creation of a legal duty.

example, provide a box for voters to register formally their abstention in the event of no candidate or party appealing.⁶ Postal voting and other facilities may ease the burden involved in attending a polling station during a restricted range of hours on election day. However, no compulsory voting law can meet all the concerns of those who wish to cast no ballot at all, either occasionally or perpetually.⁷ Compulsory voting takes from the voter the decision about whether to vote, and although this may have most impact on a person who wishes to make a genuinely voluntary choice to abstain permanently, it has implications for all who would on occasion prefer to be free to rank the comforts of home over a cold walk to the polling station.

Just as it is unclear whether the right not to vote refers either to perpetual or to partial abstention (or to both), it is uncertain whether its core claim is about the imposition of sanctions for non-voting, or about the effect which compulsion might have in undermining the practice of voluntary voting.⁸ The former interpretation is concerned solely with ensuring that individuals who choose not to vote do not thereafter suffer the imposition of a penalty prescribed by law. The latter reading, however, claims a broader right to be free from the inhibiting awareness of the possibility of sanctions at the stages of deciding whether to vote, and of subsequently voting. Whereas the former interpretation renders the presence or absence of penalties for non-voting determinative, the latter regards the absence of penalties only as a means (albeit a central means) to the end of guaranteeing voluntary voting. The first interpretation is essentially an argument about individual liberty; the second is about preserving a desirable democratic practice for its own sake. The argument about individual liberty insists on freedom from official interference with individual decision-making and action. The argument about democratic practice insists instead on the qualitative advantages of an electoral system in which ballots are cast without compulsion. Those advantages might be thought to include an election result which reflects more accurately the considered preferences of voters, by excluding the votes of those presumed to be too apathetic or ill-informed or uncommitted to vote voluntarily. In addition to this perceived institutional advantage, voluntary voting may also be thought to have some benefit for the individual voter, generating a rewarding sense of discharging a civic duty, which sense may be argued to be diminished or removed by the institution of compulsion.

⁶ The Electoral Commission, although not currently persuaded of the merits of such a scheme, has mooted the possibility of introducing a so-called 'positive abstention' or 'none of the above' option onto the ballot paper (which would be offered without any element of compulsion to vote). It plans to conduct further research into the effect of such an option on electors' motivation. See its report *Ballot Paper Design*, June 2003, paras 5.1–5.9, available from www.electoralcommission.gov.uk. A more sophisticated option might permit voters to record on the ballot paper a brief statement of their reasons for abstaining.

⁷ Even a system which permits formal 'conscientious objection', such as that advocated by L. Hill 'Compulsory Voting: Residual Problems and Potential Solutions', 37 *Australian Journal of Political Science* 437 (2002) would, as she notes, likely leave some determined non-participants dissatisfied with the obligation to meet even the minimal bureaucratic formalities which such a scheme would require.

⁸ Voluntary voting occurs when electors make their decision whether to vote in the awareness that they are not subject to measures, such as compulsion, designed to influence this decision.

The idea of the right not to vote, then, embraces two distinct sorts of argument: one about preserving individual liberty, the other about maintaining a preferred democratic practice. Although these two arguments tend to be rendered indistinct by the general language of the right not to vote, their distinctiveness is clear when the hypothetical case of a law offering a small inducement to voters is considered. Such a proposal would not be inconsistent with the interpretation of the right not to vote which emphasizes liberty from sanctions, but might well be in conflict with the notion of a right not to vote as an expression of a fundamental commitment to the voluntariness of the act of voting. Inducement, no less than a fine for non-voting, might arguably affect both the voluntary nature of the decision to vote and the character of the subsequent act of electoral participation.⁹ This would be of little or no consequence to a proponent of a right not to vote modelled on the absence of sanctions, for whom the availability of a reward for voting would presumably be unobjectionable.

The liberty argument and the voluntary voting claim are considered separately in the following discussion. Throughout the discussion it is assumed that the idea that there is a right not to vote derives from the established notion that the act of voting is itself a right. That is, the putative right not to vote is considered as an argument for a particular interpretation of the right to vote as protecting a corresponding right to possess the franchise without exercising it. This reading of the right not to vote accords with the manner in which that idea is used in political argument, namely as a means of protecting the right of voters to retain their possession of the franchise passively. The argument of the right not to vote is that qualified electors have a freedom to choose to move between active and passive participation at will. It is not an argument that non-voters be relieved, by whatever means, of the unwelcome burden represented by the possession of the franchise. For this reason, the idea of the right not to vote only makes sense when viewed as a corollary of the right to vote. That said, supplementary arguments for a right not to vote could be made on the basis of liberties other than voting, such as freedom of conscience and expression. Although this issue is not central to the argument of this paper, it is considered briefly below.¹⁰

It remains to mention here why advocates of the right not to vote use this language to make their claim, rather than simply arguing directly that non-voting

⁹ Nor is the idea of inducements an entirely abstract suggestion: during the Commons debate on voter turnout following the 2001 election, Graham Allen MP referred to the possibility of voters receiving a small tax, or council tax, credit in return for voting. See HC Deb vol 370 col 358, 22 June 2001 (such a scheme might, however, discriminate against non-taxpayers).

¹⁰ The argument that non-voting represents one manifestation of a general right to liberty, distinct from the idea and practice of the right to vote itself, is not discussed. Leaving aside the implausibility of such a general right to liberty, this argument would not connect convincingly to the political uses to which the notion of the right not to vote is put. The latter right is premised upon the possession by its holders of the right to vote itself. To seek to derive a right not to vote from a more general liberty right enjoyed by all (including those with no entitlement to vote) would mean describing those who are formally disenfranchised (and so immune from compulsion) as possessing a right not to vote. To avoid this, it would need to be argued that the right not to vote, although an aspect of a general liberty right, is mediated through possession of the right to vote. This would undermine entirely the argument about a general liberty right, which is premised on a theory of freedom inconsistent with that which founds the right to vote. See the discussion of liberty and the right to vote in section 3.

is a practice protected by the right to vote itself. Perhaps it is because the language of the right to vote has traditionally served to further struggles for extension of the franchise to groups of people whose willingness to be active electoral participants has been clear. This is not to say that all those enfranchised by electoral law reform have subsequently used their votes, simply that debates about extension of the franchise, in which the rhetoric of the right to vote has played a part, have always proceeded from the assumption that the active exercise of the franchise is a corollary of possession of the right to vote. Opponents of franchise reform have correspondingly tended to found much of their opposition on concerns about the potential political impact of high rates of electoral activity by the newly enfranchised. As a device for political argument, then, the right to vote is perhaps too closely associated with the phenomenon of active voting to be of much use as a means of arguing directly for the right of voters to enjoy the undisturbed and purely passive possession of the franchise.

There is another reason why the language of the right not to vote may be more appealing to opponents of compulsion than that of the right to vote. It is clearly possible, as a matter of legal and political practice, for a constitutional system to recognize a right to vote and yet employ some measure of compulsion to make voting happen. Systems which use compulsion guarantee the right to vote against official incursions such as discrimination, corruption or fraud in just the same ways as in systems in which compulsion is absent. Yet in such systems, the right to vote does not carry a right not to vote. It is feasible, then, as a matter of constitutional law and political practice to frame a coherent and effective conception of voting rights which excludes non-voting from the list of acts protected by the right to vote. Indeed, it is argued below that the idea of the right to vote compels such a construction.

3. *Liberty, Non-voting and the Right to Vote*

Viewed as an argument about the absence of sanctions for non-voting, the right not to vote is essentially a claim about so-called negative liberty.¹¹ Theories of negative liberty proclaim the ultimate importance of restraining governmental authority from interfering in the lives and decisions of individuals. Protecting freedom, on this view, demands an absence of constraint, and a guarantee of continuing restraint on the part of those in a position to interfere. Proponents of the right not to vote assert that the use of compulsion would constitute an illegitimate governmental interference with the individual's decision whether to vote. On this account, the freedom to decide whether to vote represents the same sort

¹¹ For the classic exposition of the distinction between negative and positive liberty see I. Berlin, 'Two Concepts of Liberty' in *Four Essays on Liberty* (Oxford University Press, 1969). See further G. McCallum 'Negative and Positive Freedom', 76 *Phil Rev* 312 (1967); C. Taylor, 'What's Wrong with Negative Liberty?' in A. Ryan (ed.) *The Idea of Freedom: Essays in Honour of Isaiah Berlin* (Oxford University Press, 1979); J. Gray 'On Negative and Positive Liberty' (1980) 28 *Pol Stud* 507; Q. Skinner, 'The Idea of Negative Liberty: Philosophical and Historical Perspectives' in R. Rorty, J.B. Schneewind and Q. Skinner (eds), *Philosophy in History* (Cambridge University Press, 1984).

of liberty as the freedom to decide whether, for example, to practise a religion or to bear a child. Just as the latter types of freedom are protected by rights to freedom of religion and to privacy so, it might be argued, the decision not to exercise the franchise is protected by a right not to vote. Individuals who choose not to vote are protected by this right from the imposition of sanctions; compulsory voting would violate that right.

The difficulty with this reasoning is that the idea of the right to vote itself, upon which the claim about a right not to vote is founded, is not purely, or even predominantly, about negative liberty.¹² Throughout the course of the 20th century, the increasing emphasis on doctrines of individual rights cemented the emergent status of voting as a right. It is a regular feature of constitutional texts and international human rights treaties, protected by accompanying legislation and by courts empowered to review alleged rights violations.¹³ It perhaps seems now, in all outward respects, just like the other rights granted to individuals by constitutional law: it is regularly described as a civil liberty, or even as a human right.¹⁴ Yet its assimilation to other rights does not mean that it shares the same core identity. The central function of the right is to guarantee the entitlement of all *qualified* individuals to cast a vote. In this it differs from other rights, which are generally distributed to individuals without reference to their abilities or qualifications to perform the activity protected by the right. Those other rights are universal in the sense that they are generally enjoyed by all within the jurisdiction which has authority to enforce them.¹⁵ The right to vote, despite the prevalence of the popular myth of universal suffrage, is not a universal right. Generally

¹² Clearly, the right may be exercised by an individual committed to a belief in the value of voting as a protector of negative liberty. An individual may, for example, cast her vote with the explicit aim of opposing a set of proposed policies which she perceives would interfere with her freedom to make certain related, private choices. That said, the attitudes and ideas which inform a particular voter's exercise of the right to vote do not determine the sort of freedom which the right, as an institution, actually represents.

¹³ See, e.g. the recent incorporation by the Human Rights Act 1998 of Protocol 1, Article 3, ECHR, guaranteeing the right to free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the people in the choice of the legislature. See also *Mathieu-Mohin & Clerfayt Case*, 2 March 1987, Series A, No 113; *Matthews v UK* (1999) 28 EHRR 361. Note also Article 21, Universal Declaration of Human Rights (1948): 'Everyone has the right to take part in the government of the country, directly or through freely chosen representatives'; Article 25, International Covenant on Civil and Political Rights (1976), guaranteeing the 'right to vote and to be elected by genuine periodic elections which shall be by universal and equal suffrage'; Article 12, African Charter on Human and Peoples' Rights (1986), granting every citizen the right to participate in government. Although the US Constitution does not contain an express guarantee of the right to vote, the Supreme Court has fashioned a wide-ranging voting rights doctrine, principally on the basis of the 14th Amendment's equal protection clause, see A. Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (Perseus, 2000); J.A. Gardner 'Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote', 145 *U Pa L R* 893 (1997).

¹⁴ It is highly questionable whether it is appropriate to consider voting a human right, despite the tendency of current constitutional thought to categorize it in that way. For an argument about the need to demarcate boundaries between 'civil liberties' (freedoms to engage politically) and 'human rights' (essentially, freedoms from interference with personal liberty and private property) see K.D. Ewing and C.A. Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain 1914-1945* (Oxford University Press, 2000) ch 1.

¹⁵ There are some important qualifications to this, e.g. that the free speech of aliens is limited by some legal systems, see Article 16, ECHR. This restriction is, however, related to the goal of limiting the active participation of non-citizens in political life, the same aim which underlies the denial of the right to vote. R. Alexy 'Discourse Theory and Human Rights' (1996) 9 *Ratio Juris* 209 at 210, n 1, suggests that voting be described as a 'relative' human right because it operates only between members within legal communities, unlike 'absolute' human rights, which apply universally.

speaking, only citizens qualify for the right to vote, and even then may be required to satisfy other requirements concerning residence, capacity, and good behaviour. The right to vote is a central instance of what has been termed a constitutive right, a right which 'openly grants benefit only to some', thereby constituting a special social group of rights-holders.¹⁶ In consequence of this selective distribution of the right, those who possess it share a formal status denied to their disenfranchised neighbours. This status denotes the formally equal standing of electors and elected, a standing which is protected by the shared enjoyment of the right to vote, and by the superior electoral power which the voters may combine periodically to assert over their rulers.

The heritage of the idea of the right to vote is a mixed one. Although the right has developed as a feature of 20th century liberal constitutionalism, it remains fundamentally distinct from the other rights which form part of the standard constitutional catalogue. The civil and political freedoms of assembly, speech, religion and association function within liberal democracies to address deficiencies within the functioning of the democratic processes. Those rights serve to protect the political freedoms of individuals against the potential incursions of electoral majorities and their chosen governors. Such liberties work to compensate for those features of the electoral system which tend to place particular groups—and the corresponding electoral minorities—under threat. The right to vote is different; it is not just another antidote to perceived flaws in democratic functioning although it can, of course, perform that role, for example in cases in which an electoral majority is illegitimately interfering with the suffrage of a minority.¹⁷ The core of the idea of the right to vote, however, is about ascribing democratic authority to electors; about declaring their formally equal standing as qualified participants.¹⁸ Interference with or denial of the franchise will only be regarded as wrong if it is thought illegitimate in the circumstances to deny democratic authority to the individual in question.¹⁹ The other civil and political rights operate in a distinct doctrinal realm in which, although individuals are indeed political actors, they need not always be the possessors of the full democratic authority which accompanies the right to vote. A convicted prisoner, for

¹⁶ See E.J. Mitnick 'Constitutive Rights' (2000) 20 *OJLS* 185. Such rights are selectively distributed but impose general duties of non-interference. So, non-citizens may be denied the right to vote but are nonetheless under an obligation not to interfere with the free exercise of the right by citizens. This is one of the features of such constitutive rights which lead Mitnick to call for a public debate about them and their 'necessarily normatively ambiguous' status; *ibid* at 200.

¹⁷ See, e.g. *Gomillion v Lightfoot* 364 US 339 (1960) (US Supreme Court invalidated districting plan excluding all black voters from a city constituency); *Baker v Carr* 369 US 186 (1962) and *Reynolds v Sims* 377 U.S. 533 (1964) (US Supreme Court decisions establishing the need for equally populated electoral districts in order to protect the right to vote of those electors in over-populated districts); *Matthews v UK* (1999) 28 EHRR 361 (European Court of Human Rights upheld challenge by resident of Gibraltar to the denial of the right to vote in European Parliamentary elections).

¹⁸ This is not to insist that the right necessarily confers real political power; nor is it to suggest that this formal authority is something which individual voters necessarily regard as especially important or valuable.

¹⁹ See e.g. *R (on the application of Pearson, Hirst & Martinez) v Secretary of State for the Home Department* [2001] EWHC Admin 239; [2001] HRLR 39, in which it was argued (ultimately unsuccessfully) that the denial of the right to vote to convicted prisoners is illegitimate, and in violation of Protocol 1, Article 3, ECHR. The case has now been taken to Strasbourg, where it has been declared admissible: *Hirst v UK* App. No. 74025/01.

example, may still enjoy a right to free speech despite being stripped of the right to vote. A 17 year old woman has the right to associate for political ends, although not yet a bearer of the right to vote.²⁰ This is not only a consequence of the categories of rights-holders being different for the right to vote and for the other political rights. It is because the idea of the right to vote is based upon a different theory of liberty from that which founds the traditional civil liberties. Those latter rights are essentially about guaranteeing liberty in the sense of non-interference by officialdom with individual choice and action. This theory of negative liberty forms, however, only a tangential part of the idea of the right to vote, and is always subsidiary to its essential concern with establishing and maintaining the democratic authority of voters. This authority constitutes a permission to participate in elections. It does more, though, than merely license voters to cast ballots if they so choose, as proponents of the right not to vote effectively suggest. The democratic standing which the right to vote confers is fully intelligible only as the award of an entitlement to participate actively, rather than as a merely passive possessor of the franchise. This is so because of the nature of the theory of liberty which the idea of the right to vote represents.²¹

According to the traditional negative-positive liberty dichotomy, a reading of the right to vote based on the idea of positive liberty would emphasize the facility which suffrage provides for self-realization and development through a process of deliberation about and engagement with the issues presented to the electorate for decision.²² Voting in elections is, however, as theorists of more deliberative models of democracy would attest, a notoriously ineffective means of attaining such personal and collective benefits.²³ Even if it were realistic to assume that

²⁰ This example illustrates a distinction drawn by Ewing and Gearty, above n 14, between primary and secondary civil liberties: 'The former include rights of direct political participation, such as the right to vote. These have depended upon Parliament which has been the principal guarantor of political liberty in Britain. The latter include rights of political influence which may exist with or without the franchise'. Ibid at 34.

²¹ This line of argument is extended from the right to vote to all 'primary' civil liberties (those pertaining to participation in the political process whether as voter, candidate or representative) by Ewing and Gearty, above n 14, who call for a doctrinal distinction to be maintained between theories of civil liberties and accounts of human rights: '[t]he main purpose of civil liberties is to promote political participation and as such it is a discipline which encourages the development of an active political culture: it is about freedom *to* rather than freedom *from*. Seen in these terms the discipline is designed to promote and reinforce popular participation in political life and as such to underpin the power of the franchise and the capacity for reform of a wide and varied kind'. Ibid at 33.

²² This would accord with so-called developmental theories of democracy, articulated in classic form by J.S. Mill, *Considerations on Representative Government* (1861) and by J.J. Rousseau, *The Social Contract* (1762). See also C.B. McPherson, *The Life and Times of Liberal Democracy* (Oxford University Press, 1977) ch 3; D. Held, *Models of Democracy*, ch 3 (Polity Press, 2nd edn, 1996).

²³ On the limitations of electoral democracy, and the corresponding advantages of revised or alternative models see, e.g. the following (proposing more or less radical alternatives): R.E. Goodin, *Reflective Democracy* (Oxford University Press, 2003); B. Ackerman and J. Fishkin 'Deliberation Day' (2002) 10 *Journal of Pol Phil* 129; A. Gutmann and D. Thompson 'Deliberative Democracy Beyond Process' (2002) 10 *Journal of Pol Phil* 153; M. Cooke 'Five Arguments for Deliberative Democracy' (2000) 48 *Pol Stud* 947; G. Smith and C. Wales 'Citizens' Juries and Deliberative Democracy' (2000) 48 *Pol Stud* 51; I. Young, *Democracy and Inclusion* (Oxford University Press, 2000); P. Pettit, 'Republican Freedom and Contestatory Democratization' in I. Shapiro and C. Hacker-Cordon, *Democracy's Value* (Cambridge University Press, 1999); J. Cohen and C. Sabel 'Directly-Deliberative Polyarchy', 3 *ELJ* 313 (1997); A. Phillips, *The Politics of Presence* (Oxford, Clarendon, 1995); G. Brennan and P. Pettit, 'Unveiling The Vote' (1990) 20 *British Journal of Political Science* 311; J. Burnheim, *Is Democracy Possible?: The alternative to electoral politics* (Polity Press, 1985); A.R. Amar 'Choosing Representatives by Lottery Voting', 93 *Yale L J* 1283 (1984).

voting might have this value for electors, there are as a matter of principle objections to describing self-development as part of the normative content of the right to vote. For one thing, it would risk connecting the right to vote to the capacities of individual voters for engagement with and deliberation about the principal election issues. This would clearly be wrong. A central and wholly legitimate component of voting rights doctrine throughout the 20th century has been the stripping away of laws denying the franchise to persons whose capacities for reflection and reasoned exchange are limited or impaired. So, for example, literacy tests for voting have fallen out of use, and laws disenfranchising individuals with mental impairments have been relaxed.²⁴ This trend reflects a developing awareness of the need to distinguish democratic standing from the variable critical and reflective capacities of individual voters. To re-insert such a notion into modern voting rights doctrine would be a retrograde step. More fundamentally, it would be wrong to insist upon a construction of the right to vote which stressed the potentially transformative possibilities of its exercise because that would be to deprive voters of the freedom to make their own assessments of the relative value to them of electoral participation. The right to vote protects the freedom of individuals to hold opinions about the value of voting which differ from those which are favoured either by the majority or by officialdom. The idea of the right to vote is inconsistent with the notion that there is some sort of orthodox faith about the value of voting to which all electors are required to subscribe. Individuals are protected in their participation in democratic practices, regardless of the values and beliefs about those practices which they bring to them. The freedom to regard voting as worthless is a consequence of the idea that voting is a right belonging to individuals who share a formally equal democratic standing. That equal standing would be diminished by an idea of the right to vote which insisted upon a certain developmental value being attached to it. The right authorizes individuals to vote, but is neutral as to the attitudes which they bring to the act of voting.

It might be thought to follow from this that the right to vote necessarily protects also the freedom of individuals not to vote; after all, if the right preserves the liberty of an elector to consider voting meaningless, then surely it ought also to extend to the decision by that elector not to cast a vote at all. Compelling people to vote, it might be argued, violates the liberty which the right to vote protects just as much as (or more than) ascribing to the right the benefits of participating in an exercise in developmental or deliberative democracy. This, however, does not follow. As argued above, the liberty which the right to vote protects is concerned essentially with guaranteeing the formally equal democratic standing of all electors. This standing is not undermined, and may even be

²⁴ See, e.g. the Representation of the People Act 2000, permitting psychiatric in-patients (including those detained under mental health law) to use the hospital as an address for purposes of electoral registration. See also *Harper v Virginia State Board of Elections* 383 US 663 (1966), in which the US Supreme Court held that a state law requiring voters to pay a poll tax was unconstitutional, as in violation of the equal protection clause of the 14th Amendment.

enhanced, by the circulation of conflicting ideas and beliefs about the value and meaning of individual electoral participation. Both a fierce critic of current electoral structures and someone who is either agnostic or positive about them may take part in elections as formal equals, and neither will suppose that her assessment of the system's democratic credentials either enhances or diminishes her standing as a formal political equal of the other. However, the practice of non-voting does threaten to undermine the formally equal democratic status of electors. Non-voting is not only a matter of public concern; it is, like voting itself, a public act. It marks out non-voters, whose numbers are calculated and considered in the discussions of turnout which follow every election. It results in the attribution of extra weight to the votes of those who do participate, vesting them with a disproportionate influence. It is this which leads to the risk that active voters will come to dominate those who possess the franchise passively. Compulsion would not undermine the formally equal standing of voters, and would in fact be likely to do much to enhance it. This is so because it would trigger participation by individuals whose non-voting threatens to place them in a position in which they are vulnerable to attempts by the voting majority to ignore or override their interests. A compulsory voting law would have the effect of requiring political parties and leaders to take account of the electoral preferences of those groups of individuals currently experiencing the sort of political exclusion which accompanies persistent non-participation. This is necessary because, over time, it becomes all too easy for the voting public, and its elected governors, to overlook the unexpressed preferences of non-voters, falsely regarding their passivity as a purely private and personal choice. This danger would threaten the essential liberty which the idea of the right to vote represents. The right to vote is about freedom in the sense of non-domination, an idea articulated by Pettit as a central strand of this theory of republicanism.²⁵ Liberty as non-domination requires an absence of arbitrary interference (or the threat of such interference). In this, it differs from freedom as non-interference, the standard presentation of negative liberty, which identifies *any* interference as a potential threat to individual freedom. Under freedom as non-domination, interference by public authority with individual liberty may well be consistent with the ideal of promoting a position in which all individuals can enjoy security from domination by others:²⁶

²⁵ P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1997) (hereafter referred to as *Republicanism*). See also P. Pettit 'Republican Freedom and Contestatory Democratization', above n 23. See also Q. Skinner, 'The Republican Ideal of Political Liberty' in G. Bock, Q. Skinner and M. Viroli (eds), *Machiavelli and Republicanism* (Cambridge University Press, 1990)

²⁶ 'Non-domination may be advanced . . . through people coming to have equal powers or through a legal regime stopping people from dominating one another without itself dominating anyone in turn'. *Republicanism* at 273. Although he does not develop the idea at length, Pettit does mention the compatibility of compulsory voting with the democratic scheme envisaged in the republican state: 'If there is a minority of electors who find it difficult or unattractive to register and vote, let alone to stand for office, then it may be desirable to introduce a system of compulsory registration and voting', *ibid* at 191. The democratic system he theorizes, and within which such compulsion would operate, is a deliberative one, based on the notion of 'contestability', which insists on the power of voters to contest official decision-making and on the availability of mechanisms for deliberating about the various positions put forward in those contestations. See *Republicanism*, ch 6.

Freedom as non-domination promises, not exemption from intentional interference, but exemption from intentional interference on an arbitrary basis: specifically, exemption from a capacity on the part of others for arbitrary interference. It is consistent, unlike freedom as non-interference, with a high level of non-arbitrary interference of the sort that a suitable system of law might impose.²⁷

Pursuing freedom as non-domination reduces the amount of uncertainty individuals must live with, by reducing the capacity of authorities to interfere on an arbitrary basis. When non-interference is the ideal, individuals may be encouraged to promote that goal in inhibiting ways, such as, for example, displaying special deference or flattery to those in power.²⁸ Further, the awareness that the more powerful retain the ability to interfere in an arbitrary fashion in the lives of the less powerful taints the freedom which the latter enjoy with a sense of insecurity. The 'shared awareness of the asymmetry of power' renders their status unequal, even if they are currently enjoying similar levels of freedom as non-interference.²⁹ Freedom as non-domination avoids this danger by promoting the equal standing of all.³⁰ The idea of the right to vote is similarly about individuals asserting a shared standing as formal political equals, which status carries an entitlement to participate in the choice of those who will exercise political power. Those they so choose have the potential thereafter to dominate those whom they rule. This risk is in part checked by general public acknowledgement of the formally equal status of voters and those whom they elect. Of course, this is an imperfect restraint: elected governments do dominate; and voters may come to accept this domination as just another undesirable feature of the imperfect practice of democracy. While it might be deemed quaint or just fanciful to suggest that voters are actually self-governing, their status as political equals, with a right not to be dominated by other voters (especially those elected to rule) expresses their possession of a liberty which exceeds the narrow vision of freedom as non-interference. The right to vote represents a freedom which cannot be diminished by being compelled because any exercise of the right, however it is initiated, contributes to the practice of freedom as non-domination. By voting, a person registers her status as a political equal, a full member of the democratic community. She does this even if she votes reluctantly or apathetically, or because compelled to do so by law. On this account, non-voting brings with it a serious risk of domination by those classes which do vote regularly, and by the governors whom they elect. To prevent this, voting may be compelled consistently with the idea of liberty as non-domination, and, therefore, with the idea of the right to vote.

²⁷ *Republicanism* at 85.

²⁸ *Republicanism* at 87.

²⁹ *Republicanism* at 88.

³⁰ 'Freedom as non-domination is not just an instrumental good . . . it enjoys also the status, at least in relevant circumstances, of a primary good'. *Republicanism* at 91. Non-domination is a value which the state should try to promote, not a constraint that it has to honour.

The right to vote is concerned about the virtue of electoral participation and identifies this virtue in the mere act of voting, without more.³¹ A reluctant voter, or one who is compelled by law to do so, nonetheless exercises the office of voter. Simply by voting, she displays the principal virtue with which the right to vote is concerned, namely active participation. From the perspective of the right to vote, it does not matter whether voting is done voluntarily or under compulsion. The act of casting a vote is enough: the right to vote does not require that it be done after thoughtful reflection or with an activist's zeal. Those who argue for a right not to vote presume an underlying theory of liberty as non-interference. They assume this perhaps because the right to vote tends to be presented as an ordinary negative liberty, protecting against interferences by agencies of state. It has been argued here that compulsory voting may only be represented as an interference with liberty by mischaracterizing the sort of freedom which the right to vote represents. The right to vote is about freedom as non-domination. It is for those who oppose compulsion to demonstrate how it would threaten the liberty to which the right to vote relates. The liberty which the right not to vote asserts can provide only an inaccurate and impoverished account of the relation between freedom and voting. The liberty which the right to vote represents protects individual decisions about how to vote, and about what value to attach to the act of voting. It does not, however, grant those whom it recognizes as electors a freedom not to vote at all.

4. The Value of Voluntary Voting and the Right not to Vote

The claim that there is a right not to vote is not only an argument about individual liberty, but also an argument about democratic practice. In particular, it is a claim about the value of voluntary voting, that is, voting carried out in an awareness of the absence of measures designed to influence the decision about whether to vote. This may be regarded as a valuable practice because it ensures that only those voters with some level of interest and motivation participate in elections: in the absence of compulsion, the disinterested and uninformed will tend to abstain. Further, voluntary voting provides the individual voter with a worthwhile sense of having discharged a civic responsibility by participating freely in the election. Both of these reasons for valuing voluntary voting as a practice are suspect. The first is flawed both by its premise that voluntary voters *are* all informed and by its assumption that the abstention of the disinterested or de-motivated is voluntary. It wrongly assumes that the votes of those who choose voluntarily to exercise their right are somehow qualitatively superior to those which would be cast by electors responding to compulsion. It does not follow, however, that the quality of the democracy would be diminished by the inclusion of votes cast by the less politically motivated or aware. Arguably, it would be enhanced, both by the fact of higher rates of participation, and by the

³¹ This is not to say that a more deliberative approach to voting is not desirable, just that it is not demanded by the theory of the right to vote.

likelihood that many of those individuals compelled to vote would be spurred into acquiring sufficient political knowledge to make the act of voting in some sense meaningful.³² A further difficulty with the argument about the desirability of voluntary voting is that it rests on the implausible assumption that all those who do not vote are making a genuinely voluntary decision to abstain. It seems far more likely that, as empirical research suggests, many of those who do not vote are individuals experiencing high levels of social disenfranchisement.³³ Poverty, unemployment and social exclusion generate a sense of political alienation which might well make the decision not to vote a less than genuinely free one.

The second reason for valuing voluntary voting stresses the worth to the individual of participating in elections without compulsion. The sense of discharging a civic duty attaches to voluntary participation. This may indeed be true for some, if not all, voters. It does not follow, however, that compulsion would necessarily deprive voters of this sense. An individual called to serve as a juror might well experience a sense of performing a social and civic duty, despite her awareness of the existence of a measure of compulsion requiring her attendance. Similarly, a highly-paid individual voting for a political party pledged to raise income taxes substantially might do so in the expectation of enjoying a heightened sense of acting for the public good should such a law raising taxes ultimately be passed; this sense need not be diminished by the existence of a corresponding legal obligation to pay the taxes. If this is so, then one might ask why the positive sense of discharging a civic duty by voting ought to be reserved for those (often socially and politically advantaged) individuals who currently vote without compulsion. It would perhaps be fairer to spread this sense by passing a law compelling voting, a law which might go some way towards countermanding the internal pressures which operate on those individuals who tend not to vote, and possibly creating for them also a sense of civic reward. It is simply false to contend that all instances of non-voting are considered choices to abstain, when in fact many will be neither considered nor freely chosen.

The argument about voluntary voting is centrally about the desirability of promoting one particular form of active participation (that which is done voluntarily). Passive possession of the franchise is, on this view, an acceptable consequence of maintaining a commitment to voluntary voting. Such passive possession may even be regarded as a good in its own right, representing the voter's full membership of the political community, whether or not she chooses to vote on election day. Being an inactive, or passive voter is, then, preferable to being excluded entirely from the community of voters.³⁴ The status of being a

³² This assumes that non-voters lack this political knowledge, an assumption which probably holds only for a minority of non-voters (and which might be applied equally to substantial numbers of those who do vote).

³³ See Lijphart, above n 1. See also A. Wertheimer, 'In Defense of Compulsory Voting' in J.R. Pennock and J.W. Chapman (eds), *Participation in Politics: Nomos XVI* (New York, 1975) at 289–91.

³⁴ This status-based value of the right is likely to be much greater for a highly motivated and active voter, but may exist, to some extent, even for those who are inactive voters: such individuals would, that is, presumably object if proposals were made to remove their right to vote, and would probably do so on the basis that they are entitled to retain the standing which accompanies the right, even if they do not exercise it.

voter arguably gives to electors a more secure political position, renders them slightly less vulnerable to the unfriendly policy initiatives which tend to threaten formally disenfranchised groups.³⁵ The difficulty with this argument is that it mistakes the sort of democratic standing which the right to vote confers. That standing, while it may have a status-based component, is essentially about authorization to act. To be a voter is to be authorized to take part in elections; it is not to possess an authorization to decide whether to vote. The status-based aspect of the right derives from the *exercise* of the office to which electors are appointed. Even in the absence of a law formally compelling voting, the idea of the right to vote might fairly be described as imposing on voters an element of obligation.³⁶ The office of elector is conferred in the expectation that it will be exercised. The idea of the right to vote is not indifferent to the active or passive quality of the role of individual electors. The entire orientation of the institution of the right to vote is towards active participation. This being so, active participation, whether voluntary or compelled, is to be preferred to non-voting. The fact that many constitutional systems, including our own, do not currently impose sanctions on non-voting does not mean that such passive participation is protected by the idea of the right to vote. The right to vote emphasizes active participation because voters must be active in order to assert their democratic authority in the face of the threat posed by a dominant electoral majority. This is, of course, an imperfect constraint, but it is preferable to an approach which attempts to attach to the practice of voluntary voting a higher value than that which is ascribed to the act of voting itself. Voluntary voting may be argued to be a good thing, but it is not safe simply to assume that it is and that its virtues ought to prevail over measures which would vastly increase rates of active participation, the feature with which the right to vote is principally concerned.

The idea of the right to vote is not inconsistent, then, with the imposition of a legal obligation to vote. It cannot be so because its overriding commitment is to the value of active participation; to safeguarding the exercise of the office of voter. Participation, then, may be active (voting) or passive (non-voting). If passive, the inactive voter may of course retain the right to vote, but it does not follow that she may rely on the possession of that right to preserve or to guarantee her inactivity. That is, the passive participant may retain the right to vote, but cannot claim a right not to vote in its name. This is because the right to vote, serves only to protect the value of being an active voter and to prevent the removal or diminution of that status. The right to vote cannot protect the passive participation which accompanies the practice of voluntary voting without

³⁵ Such as, for example, resident non-citizens, who are subject to all the laws but have no hand in the selection of legislators. See H. Lardy 'Citizenship and the Right to Vote' (1997) 17 *OJLS* 75.

³⁶ L. Hill 'On The Reasonableness of Compelling Citizens to "Vote": The Australian Case' (2002) 50 *Pol Stud* 80 at 93–95 describes this obligation as being owed—horizontally—to other citizens, rather than—vertically—to the state, a perspective which emphasizes the collective nature of the act of electing rather than the individualism which dominates many accounts of the right to vote. Whether this obligation might properly be described as a moral duty to vote is a distinct question and beyond the scope of this paper. See, e.g. L. Lomasky and G. Brennan 'Is There a Duty to Vote?' (2000) 17 *Social Philosophy and Policy* 62.

undermining its commitment to active voting. It cannot, that is, accommodate a right not to vote without yielding its central characteristic as guardian of opportunities for active exercise of the office of elector.

5. *Non-voting and the Freedoms of Expression, Conscience and Thought*

Despite the particularity of its language, it is possible that the right not to vote might be a claim to a liberty which forms part of an established political right other than voting. So, just as the right to speak freely in support of particular political policies at election time is protected by freedom of speech, perhaps the right not to vote forms part of freedom of thought or of conscience. Those freedoms might be argued to protect the liberty of a voter to abstain, either on grounds of principle or for mundane reasons. Additionally, it might conceivably be argued that the right not to vote is a part of freedom of expression, as non-voting is an expressive act, communicating the non-voter's disenchantment with, or alienation from, the electoral process.

Brief answers are possible to these claims. Taking the last first, it is strongly arguable that non-voting *per se* expresses nothing at all. Given that the reasons for the voter's abstention are not known, the mere act of abstaining constitutes, at best, a very garbled form of communication.³⁷ It cannot be known whether indecision, unconcern or even a sudden domestic crisis prevented the voter from reaching the poll. It could be argued that a system of compulsory voting would address this problem more effectively than a purely voluntary system. This is so because the ballot paper could be designed to permit the voter to register a reasoned abstention, giving the disenchanted elector the opportunity to supply her reasons for refusing to support any of the alternatives on offer.³⁸ A similar response could be given to the argument about freedom of conscience: a voter with conscientious objections to voting might, with a sufficiently sensitive system, acknowledge those on the ballot paper. Alternatively, she could simply spoil it. Another option would be to permit applications to be made to the electoral authorities for exemption from the obligation on grounds of conscience.³⁹ Even if such options were not thought sufficient to protect the freedom of someone genuinely and deeply opposed to all and any participation in democratic life, it must be remembered that the right to freedom of conscience does not provide individuals with a blanket immunity from sanctions for acting on their conscientiously held beliefs. It ensures instead only that they have some reasonable opportunities to voice and to act upon those beliefs, subject to certain limits. There is no reason to conclude that that freedom should protect a right not to vote.

³⁷ See Hill above n 36 at 85–6.

³⁸ Additionally, the law should allow a defence for unavoidable failure to vote as, for example, the Australian system does. See Australian Electoral Commission, Electoral Backgrounder 8: Compulsory Voting at www.aec.gov.au.

³⁹ But see above n 7.

Does freedom of thought protect a right not to vote? Freedom of thought protects the individual's liberty to form and to hold thoughts, opinions and beliefs. A voter might form the belief that voting is a waste of time, and desire to give effect to that belief by not voting. Freedom of thought does not, however, extend to protect all acts giving expression to thoughts. And, in any event, the voter in this case remains free to communicate her disenchantment with electoral democracy in other (and arguably far more effective) ways, such as writing or speaking about its shortcomings, or becoming engaged in alternative protests or campaigns. She remains at all times free to hold and to express the belief that voting is pointless, but it does not follow that she has, as part of that freedom, a right to insist upon immunity from sanctions for non-voting.⁴⁰ The right not to vote cannot find a secure foundation on the basis of the freedoms of thought, conscience and expression.

6. Conclusion

The suggestion that there is a right not to vote is, initially at least, intuitively appealing. It is a cleverly conceived rhetorical device which plays on the prized place of rights in political debate to claim specific protection for the practice of non-voting. The problem is that this type of argument threatens to thwart debate about the issues surrounding compulsion by simply asserting the status of non-voting as a right. The debate about the legitimacy of compulsory voting ought not to take place exclusively through the prism of rights, and would in fact be better illuminated by a wider discussion about the place of compulsion in theories of liberty and of democracy. Rights issues are important, in particular how the right to vote of the many who are currently informally disenfranchised by social and economic conditions might be made more meaningful. But rights issues are just one part of a larger and much more complex discussion than it has so far been possible to have. In part, this is due to the distorting influence of the claims of those who allege the existence of a right not to vote. The challenge which remains is to debate the merits of a compulsory voting law in a manner which admits the possibility of such compulsion being justified convincingly, given that 'our liberal commitment to the minimization of legal coercion is so pervasive that we cannot even contemplate the idea of compulsory voting, much less defend it'.⁴¹

Those who support the institution of compulsory voting must defend the use of compulsion by appealing to justifications which can satisfy the concerns about

⁴⁰ Although there may be a right (protected by the freedoms of conscience and of expression, and perhaps also by the right to vote itself) to insist upon the availability of a mechanism for recording formally on the ballot paper one's objections to voting under compulsion. This might take the form of a general abstention box, perhaps with space permitting the elector to record her reasons for abstention. See above n 6.

⁴¹ Wertheimer, 'In Defense of Compulsory Voting', above n 33 at 278. Among the possible benefits of compulsion, in addition to raising turnout, are that it might reduce the influence of money in politics by largely removing the need for political parties to spend large sums simply getting out the vote, see Lijphart, above n 1 at 10. The effect on the electoral prospects of the political parties is difficult to predict, see e.g. B. Highton and R.E. Wolfinger

the apparent loss of liberty which such a law might involve.⁴² A compulsory voting law might infringe liberty, given one interpretation of that value. It would not, however, interfere with liberty as non-domination, indeed would contribute to the strengthening of liberty in this sense. Compulsion might thereby be justified in terms of its contribution to securing wider participation overall or preventing the informal disenfranchisement often attendant on prolonged social or economic deprivation. Much would also depend on the details of any proposed law, particularly on the means it might adopt to accommodate the preferences of voters wishing to register an abstention, and on what sort and severity of penalty would be attached to non-voting.⁴³

It is worth emphasizing that there is no need to ascribe to coerced voters, acting in response to a compulsory voting law, unlikely outlooks about their role as voters or about the act of voting itself. There is no need to assume that such people would approach the ballot box with sudden enlightenment about the positive value of being a voter, or about the blessings of democratic life. It is very probable that many of those who would be compelled into voting would do so reluctantly, concerned simply to comply rather than to contribute. Yet the act of voting may be expressive of liberty as non-domination even if those participating under compulsion privately regard it as an interference. This is so because the participation of many of those previously informally disenfranchised would lessen the risk of their interests being perpetually disregarded by the elected, who could no longer bank on the 'voluntary' non-participation of this group. Candidates and representatives would have to address more directly the needs and concerns of those individuals and groups brought into the electoral arena by the compulsory voting law. It is especially important that such individuals are re-enfranchised, whether by a compulsory voting law or some other means.⁴⁴ Their

'The Political Implications of Higher Turnout' (2001) 31 *British Journal of Political Science* 179 (arguing, in the context of the US system, that outcomes would not change if everyone voted); M. Mackerras and I. McAllister, 'Compulsory Voting, Party Stability and Electoral Advantage in Australia', 18 *Electoral Studies* 217 (1999) (arguing that compulsory voting system advantages left wing and minor parties); Lijphart suggests that 'compulsory voting can be regarded as a natural extension of universal suffrage . . . After universal suffrage the next aim for democracy must be universal or near-universal use of the right to vote', above n 1 at 11. See generally M. Feeley 'A Solution to the "Voting Dilemma" in Modern Democratic Theory', 84 *Ethics* 235 (1974), advocating the institution of compulsion, and Wertheimer, above n 33 at 292 suggesting that 'compulsory voting would, in a sense, liberate us from the domination of elections and render us free to contemplate more meaningful forms of political participation'.

⁴² Although it is the focus here, individual liberty is not the only issue raised by the debate about compulsion, nor perhaps—despite its prominence—is it necessarily the most important one. See, e.g. Hill, above n 36 addressing the reasonableness of compulsion as a form of state coercion from a range of perspectives which do not all presume liberty to be the starting point. Any comprehensive defence of compulsory voting would have to extend beyond the questions about liberty and voting rights addressed here. This article is limited to suggesting how initial resistance to compulsion based on the notion of a right not to vote might be countered.

⁴³ Two further features, advocated by Hill, would increase the acceptability of a compulsory voting law: a clear limitation of the legal obligation to attending the polling station and receiving a ballot paper (and not to actually using it to cast a vote); and the inclusion of an exemption scheme for 'conscientious objectors'. See Hill above n 7 at 443–49.

⁴⁴ Although care must be taken to ensure that any methods proposed do not discriminate illegitimately between categories of non-voters. Note for example the highly discriminatory proposal by Labour MP Phil Woolas that benefits be withheld from individuals who are not registered to vote (with no corresponding penalty appearing to attach to defaulting electors who do not claim benefits), see 'Cut benefits to electoral roll dodgers to boost turnout', *The Guardian*, 2 April 2001.

exclusion from electoral politics, while it might loosely be termed voluntary, permits governors to overlook their interests. If no measures are taken to re-enfranchise such people, their liberty—in the sense of non-domination—will be threatened. Chronic non-use of the right to vote will inevitably result in the formation of groups of electoral exiles, whose democratic standing, although still formally equal to that of active voters, will slide inexorably towards the diminished status of the formally disenfranchised.

Non-voting is a serious problem for any democracy.⁴⁵ There are probably very good reasons why individuals who possess the right to vote are not exercising it, and such non-voting ought not to be condemned in the language of failure or of irresponsibility. Indeed, perhaps the only virtue in the idea of a right not to vote is that it presents those who do not participate in elections in a relatively positive light, casting them as holders of a right to abstain, rather than as democracy's delinquents. This analysis is, however, ultimately unsustainable. The right to vote expresses a theory of liberty which requires active participation by electors. The imposition of sanctions for non-voting would not be inconsistent with liberty in this sense. Further, the practice of voluntary voting, prized by advocates of the right not to vote, would not necessarily be undermined by the institution of compulsion; it might even be enhanced by the participation of electors for whom a legal obligation to vote would provide merely an extra—and determining—incentive rather than their sole motivation for casting a ballot. The institution of compulsory voting is entirely consistent with the emphasis of the idea of the right to vote on active electoral participation. The suggestion that there is a right not to vote is inconsistent both with the theory of liberty which the right to vote represents and with the value which voting has within that theory. The right to vote does not encompass a right to possess the franchise passively, and there is no other feasible basis for the claim that there is such a right. Non-voting may be a familiar democratic tradition, but it is not a practice which the franchise authorizes, nor one which political liberty prescribes.

⁴⁵ Some older democratic theory argues that high levels of non-voting do not pose a problem, reflecting a tacit acceptance on the part of the non-voters of the policies and qualifications of their existing governors. See, e.g. W.H. Morris-Jones 'In Defense of Apathy' (1954) 2 *Pol Stud* 25; H.B. Mayo 'A Note on the Alleged Duty to Vote', 21 *J Pol* 319 (1959). This view improperly characterizes abstention as a 'voluntary' decision, when in fact the non-voter might not even perceive it as a decision at all, simply regarding voting as belonging to a realm so distant from her real concerns that it has no meaning for her. Further, the trend of much modern democratic theory is to recommend widening and deepening forms of participation, implicitly rejecting the idea that non-voting represents passive approval, see n 23. The Electoral Commission reported in August 2002 on the experiments with alternative voting methods in local elections, such as telephone voting and increased postal voting, see *Modernising Elections: A Strategic Evaluation of the Electoral Pilot Schemes*, available from www.electoralcommission.gov.uk. The Commission is generally positive about these schemes although they have produced only limited increases in turnout. It is arguable also that, due to a consequent de-emphasis on attendance at polling stations, they may diminish the voter's sense of participation in a public event. See H. Lardy, 'Modernising Elections: The Silent Premises of the Electoral Pilot Schemes' [2003] *PL* 6.

Copyright of Oxford Journal of Legal Studies is the property of Oxford University Press / UK and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.