ROWE V ELECTORAL COMMISSIONER – EVOLUTION OR CREATIONISM?

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I INTRODUCTION

The majority judgments in *Rowe v Electoral Commissioner* are extraordinary on a number of grounds. First, they propound a theory of constitutional evolution that rivals both originalism and progressivism as a new form of constitutional interpretation. Secondly, they undermine both the principle of parliamentary sovereignty and the role of the people in constitutional change by effectively permitting the Parliament, through the enactment of legislation, to change the meaning of the Constitution and to entrench laws without a referendum under s 128 of the Constitution. Thirdly, they appear to impose upon Parliament a constitutional obligation to facilitate the breach of valid laws, which on anyone's terms is a very odd outcome.

II BACKGROUND

The case concerned the cut-off date for the enrolment of voters prior to the 2010 election. Since 1911, enrolment has been compulsory for all people eligible to vote at Commonwealth elections.[1] Failure to enrol or to register a change of address within the requisite period is currently a criminal offence.[2] From 1902 until 1983,[3] the Commonwealth electoral rolls were closed upon the date of the issue of the election writs. No new enrolments or change of address of enrolment were dealt with in the period from the evening of the day of the issue of the writs until after polling day. Equally, no challenge could be made to the validity of enrolments during that period. As a matter of practice, from the 1930s, elections tended to be announced some days before the election writs were issued,[4] with the consequence that people had an opportunity to enrol or correct their enrolment details before the writs were issued. This did not affect the application of the law, which closed the roll on the evening of the day the writs were issued, regardless of whether or not there had been a 'grace period' between the election announcement and the issue of the writs.

In 1983, Prime Minister Malcolm Fraser called a snap double dissolution election in the hope of capitalising on the Hayden-Hawke leadership tension. He wanted to hold as short a campaign as possible, so the writs were issued the day after the election was announced. A legal challenge to the closure of the rolls, relying on s 41 of the

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1 *Commonwealth Electoral Act* 1911 (Cth), s 8, inserting s 61C in the *Commonwealth Electoral Act* 1902 (Cth).

2 *Commonwealth Electoral Act* 1918, (Cth), s 101. Note, however, that if a person does subsequently enrol, 'proceedings shall not be instituted against that person for any offence against subsection (1) or (4) committed before the claim was so sent or delivered': s 101(7). Hence an offence has still been committed, but is not to be prosecuted.

3 *Commonwealth Electoral Act* 1902 (Cth), s 64; and *Commonwealth Electoral Act* 1918 (Cth), s 45 (as originally enacted).

4 See: Colin Hughes and Brian Costar, *Limiting Democracy: The Erosion of Electoral Rights in Australia* (UNSW Press, 2006) p 47; and Graeme Orr, 'The Voting Rights Ratchet: Rowe v Electoral Commissioner' (2011) 22(2) *Public Law Review* 83, 84.

Constitution, failed,[5] but it caused the new Hawke Labor Government to change the law so that the rolls were closed seven days after the issue of the writs.[6]

This law was later amended in 2006 under the Howard Coalition Government in accordance with a report of the Joint Standing Committee on Electoral Matters,[7] which gave two grounds for making the change. The first was that permitting last minute changes to the electoral roll, when there is no time for them to be properly checked by the Electoral Commission, is conducive to electoral fraud.[8] Secondly, it was contended that the seven day grace period discourages people from enrolling or changing their enrolment when they are obliged to do so,[9] leading to the Electoral Commission wasting much time and money in attempting to get people to fix their enrolment details.[10] As enrolment figures are also necessary to determine when there needs to be a redistribution of seats,[11] having hundreds of thousands of people waiting until an election is called before they update their enrolment address details has the potential to distort the distribution of seats (creating malapportionment by laziness). The amendments restored the pre-1983 position for new enrolments, providing that the roll closed at 8pm on the day of the issue of the writs. However, it also allowed enrolment changes to be made up to three days after the issue of the writs, being more generous in this regard than the 1902-1983 position.[12]

The 2007 election was conducted on the basis of the revised law. Prime Minister Howard announced on 14 October 2007 that an election would be held and the writs were issued on 17 October 2007, giving three days for people to enrol. It was part of the election platform of the Labor Party to reverse the 2006 changes regarding the date for the closing of the rolls.[13] Once elected, the Rudd Labor Government prepared two green papers on electoral reform. In 2010 it introduced two Bills in an attempt to restore the 7 day period for enrolments and transfers after the issue of the writs, but failed to get them passed in the Senate.[14]

Prime Minister Gillard announced on Saturday, 17 July 2010 that a general election for the House of Representatives and a half-Senate election would be held on 21 August 2010. Curiously, despite the Labor Party policy concerning the need for a grace period before the close of the rolls, the writs were issued two days later on Monday, 19 July. This meant that people had until 8pm that day to make new enrolments. The rolls closed for transfers of enrolments at 8pm on 22 July. One of the plaintiffs, Shannen Rowe had turned 18 on 16 June 2010 and was required to enrol

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5 *Re Pearson; Ex parte Sipka* (1983) 152 CLR 254.

6 *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth), ss 29 and 45, inserting s 43(4) and s 61A respectively in the *Commonwealth Electoral Act* 1918 (Cth). These sections are now renumbered as ss 102 and 155.

7 For the background to this report and for a discussion of previous reports of this Committee, see: Colin Hughes and Brian Costar, above n 4, 48-57.

8 Joint Standing Committee on Electoral Matters, *Report of the Inquiry into the conduct of the 2004 Federal Election and Matters Related Thereto,* (September 2005), para [2.121].

9 Ibid [2.116].

10 Ibid [2.120].

11 *Commonwealth Electoral Act* 1918, (Cth), s 59.

12 Ibid ss 102(4) and (4AA) and s 155.

13 Australian Labor Party, *National Platform and Constitution 2007* (Canberra, 2007), 181 (para 46), 189 <http://pandora.nla.gov.au/pan/22093/200711240102/www.alp.org.au/download/now/2007_national_platform.pdf>.

14 *Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill 2010*; and *Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill (No 2) 2010.* The latter Bill removed some measures from the first that had proved controversial, in an effort to get the roll measures passed. Both Bills lapsed upon the dissolution of Parliament.

within 21 days. She failed to do so. She did not lodge an enrolment form until 23 July, well after the 19 July cut-off date for new enrolments. The other plaintiff, Douglas Thompson, aged 23, was enrolled to vote at his old address but had moved to a new electoral division in March 2010. He did not transfer his enrolment until after 8pm on 22 July, when the transfer form was lodged by fax by his solicitor after the rolls had closed.

Although neither Rowe nor Thompson challenged the validity of the compulsory enrolment provisions or the provision making it an offence not to enrol within a certain period of becoming a qualified voter or moving address, both claimed that the 2006 amendments were invalid and that the 1983 law, which provided seven days after the issue of the writs to enrol or change enrolment details, therefore prevailed.[15] They claimed to be disenfranchised, even though it was their own fault (and choice) not to have enrolled or changed enrolment details at the time they were required by law to do so or within the requisite period after the election had been announced.

III EVOLUTION OF REPRESENTATIVE GOVERNMENT – EARLIER DECISIONS

The majority's reasoning in *Rowe,* finds its roots in the earlier case of *Roach v Electoral Commissioner*.[16] That case concerned the validity of legislation that disqualified prisoners from voting. The Court faced difficulty in applying any of the orthodox methods of constitutional interpretation. From an originalist approach, it was clear that the Constitution was intended to permit a franchise that was less than universal in nature. The initial franchise, until Parliament otherwise decided, was that of the States, which included disqualification (or exclusion from qualification) on a number of grounds, including race, sex, imprisonment, receipt of charitable aid, and even, in some cases, occupation.[17] As the framers could not themselves agree upon a uniform franchise, the matter was left by the Constitution to the Parliament to determine. It was therefore not possible to argue that the original intent of the Constitution was that there must be a universal franchise and that prisoners must be permitted to vote. An alternative approach, based upon the metaphors of the Constitution as a 'living force' or a 'living tree' entails reinterpreting the Constitution in accordance with contemporary standards and understandings of its meaning. This approach was not much help either, at least in relation to the rights of prisoners to vote, as it is fairly likely that public opinion and contemporary standards would not support prisoners being allowed to vote.[18] As Orr and Williams have noted, if 'contemporary standards' rely upon a 'shared understanding', the fact that the Parliament has legislated so as to change and limit those standards suggests that they are 'highly

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15 The plaintiffs did not challenge the validity of the 1983 provisions: *Rowe v Electoral Commissioner* (2010) 273 ALR 1, [138]-[140] (Gummow and Bell JJ), [321] (Crennan J).

16 *Roach v Electoral Commissioner* (2007) 233 CLR 162.

17 See further: Anne Twomey, 'The Federal Constitutional Right to Vote in Australia' (2000) 28(1) *Federal Law Review* 125, 143-6; and Jennifer Norberry, 'The Evolution of the Commonwealth Franchise – Tales of Inclusion and Exclusion' in Graeme Orr, Brian Mercurio and George Williams (eds), *Realising Democracy: Electoral Law in Australia* (Federation Press, 2003) 80.

18 Graeme Orr 'Constitutionalising the franchise and the status quo: The High Court on prisoner voting rights', Democratic Audit of Australia, Discussion Paper, October 2007, 6. Note also that public opinion polling in the UK found 62% were in favour of continuing a ban on prisoners voting: Angus Reid Public Opinion (2010) <http://www.angus-reid.com/wp-content/uploads/2010/11/2010.11.22_Prisoner_BRI.pdf>. It seems reasonably likely that a similar view would be taken in Australia.

contestable'.[19] So a third way needed to be created, if the law prohibiting prisoners from voting was to be struck down. That third way was found in the notion of the 'evolution' of representative government.

Under the theory of the evolution of representative government, evolution only moves in one direction – towards a discrete end. In this case the 'end' nominated was the maximisation of participation in elections, although no justification was given as to why this end was chosen and how it was supported by the text or structure of the Constitution. The consequence is that every time participation is widened by the legislature, this is consistent with the evolution of representative government and sets the new benchmark or baseline for further evolution. Any future step to limit participation in elections, even if it is consistent with changes in community standards and contemporary understandings, is contrary to the evolution of representative government and may be struck down as unconstitutional, with the law then reverting to the prior benchmark of wider participation. Unlike a 'living tree' approach, which relies on contemporary standards which may shift from being conservative to liberal and back again over time, the evolutionary approach permits a one-way movement only, regardless of public opinion. Each liberalising step sets the new benchmark from which there can be no retreat, at least without a substantial reason.

In *Roach,* Gleeson CJ recognised that in 1901 the words 'directly chosen by the people' 'did not mandate universal adult suffrage'.[20] However, he drew an analogy with the development of Australia's independence from the United Kingdom, and concluded that there had been a change in 'facts' that effected a change in the meaning of 'directly chosen by the people'. Gleeson CJ noted that he took 'fact' to refer to an historical development of constitutional significance.[21] He agreed with the comment of McTiernan and Jacobs JJ in *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* that 'universal adult suffrage was a long established fact, and that anything less could not now be described as a choice by the people'.[22] He also accepted the view of Gummow J in *McGinty v Western Australia* that 'we have reached a stage in the evolution of representative government which produces that consequence.'[23]

Yet there is a fundamental difference between the facts concerning the development of Australia's independence and those concerning universal suffrage. Australia's independence was established, not simply by the enactment of ordinary legislation by the Commonwealth Parliament, but also by external developments of constitutional significance, such as Imperial conferences, the enactment of the *Statute of Westminster* 1931 (Imp) and changes in constitutional conventions about responsibility for advice to the monarch.[24] In contrast, the 'facts' involved in the

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19 Graeme Orr and George Williams, 'The People's Choice: The Prisoner Franchise and the Constitutional Protection of Voting Rights in Australia' (2009) 8(2) *Election Law Journal* 123, 136.

20 (2007) 233 CLR 162, [6] (Gleeson CJ).

21 Ibid [7] (Gleeson CJ).

22 Ibid [7] (Gleeson CJ), referring to *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 36. Note that McTiernan and Jacobs JJ were more qualified in their statement, saying that 'it is *doubtful* whether, *subject to the particular provision in s 30*, anything less that [universal adult suffrage] could now be described as a choice by the people' [my emphasis].

23 (2007) 233 CLR 162, [7] (Gleeson CJ), referring to *McGinty v Western Australia* (1996) 186 CLR 140, 286-7 (Gummow J).

24 *Sue v Hill* (1999) 199 CLR 462, 490-503 (Gleeson CJ, Gummow and Hayne JJ). See further: Anne Twomey, '*Sue v Hill* – The Evolution of Australian Independence' in Adrienne Stone and George Williams (eds) *The High Court at the Crossroads,* (Federation Press, 2000) 77; and Leslie Zines, *Constitutional Change in the Commonwealth* (Cambridge University Press, 1991) 5.

establishment of the universal adult franchise concerned the enactment of ordinary legislation that, according to the principles of parliamentary sovereignty, could be amended or repealed in the future. To suggest that the enactment of ordinary legislation by the Commonwealth Parliament amounts to changed facts which require the interpretation of the Constitution to change so that the effect of such legislation is entrenched and cannot be reversed (except with a 'substantial reason' recognised by a court), is to take a radical new approach to constitutional interpretation that is not justified by the text or structure of the Constitution.[25] Just as the Commonwealth Parliament cannot legislate itself into power,[26] nor can it (at least according to orthodox constitutional interpretation) legislate itself out of power by entrenching 'evolutionary' steps in the development of representative government.

It is also worth noting that the passage by McTiernan and Jacobs JJ, upon which both Gleeson CJ in *Roach* and Gummow J in *McGinty* drew their support for the notion of evolution, appears in fact to be based upon the notion of 'contemporary understandings'. They observed that '[i]t depends in part upon the common understanding of the time on those who must be eligible to vote before a member can be described as chosen by the people of the Commonwealth'.[27] They did not seem to contemplate that there was a one-way evolutionary street, but that the words 'chosen by the people' will have to be 'applied to different circumstances at different times and at any particular time the facts and circumstances may show that some or all members are not, or would not in the event of an election, be chosen by the people within the meaning of those words'.[28]

One of the contradictory aspects of the argument concerns the proposition that the Constitution intended 'representative government' to be a dynamic concept and that this is shown by the use of the phrase 'until the Parliament otherwise provides' in order to permit such development. Gummow J noted in *McGinty* that the effect of this phrase 'is to accommodate the notion that representative government is a dynamic rather than a static institution and one that has developed in the course of this century'.[29] A similar view was expressed by Gummow and Hayne JJ in *Mulholland v Australian Electoral Commission,* where they also observed that care must be taken 'in elevating a "direct choice" principle to a broad restraint upon legislative development of the federal system of representative government'.[30] By *Roach,* the notion of the one-way evolutionary track has started to creep into the reasoning, with Gummow, Kirby and Crennan JJ noting that the Constitution 'makes allowance for the evolutionary nature of representative government as a dynamic rather than purely static institution'.[31] Parliamentary choice and 'dynamism' thus start to move on the one-way evolutionary track towards maximum participation, limiting parliamentary choice to reverse or choose another direction and placing dynamism in a straight-jacket.

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25 See also Allan's discussion of the mixture of factual determinations and evaluative moral sentiments involved in making such assessments: James Allan, 'The Three 'R's of Recent Australian Judicial Activism: *Roach, Rowe* and (no) 'Riginalism' (2012) 36 *Melbourne University Law Review* (forthcoming).

26 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 205-6 (McTiernan J); 258 (Fullagar J).

27 *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 36 (McTiernan and Jacobs JJ).

28 Ibid.

29 *McGinty v Western Australia* (1996) 186 CLR 140, 280 (Gummow J).

30 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [156] (Gummow and Hayne JJ).

31 *Roach v Electoral Commissioner* (2007) 233 CLR 162, [45] (Gummow, Kirby and Crennan JJ).

In *Roach,* the judgment of Gummow, Kirby and Crennan JJ appears to draw the requirement of a universal franchise from an interpretation of the phrase 'chosen by the people' that is derived from the evolutionary development of 'representative government'. Their Honours stated:

> In *McGinty* Brennan CJ considered the phrase "chosen by the people" as admitting of a requirement "of a franchise that is held generally by all adults or all adult citizens unless there be substantial reasons for excluding them".[32]

Their Honours then went on to conclude that the 'existence and exercise of the franchise reflects notions of citizenship and membership of the Australian federal body politic' and that such notions are not extinguished by imprisonment. They then asked whether there was a 'substantial reason' for disqualification 'from what otherwise is adult suffrage'.[33] The rest of their judgment was based upon the need to establish a substantial reason for deviation from the now constitutionally mandated universal adult franchise.

What is interesting about this reasoning is that it appears to be more inconsistent, than consistent, with the passage of Brennan CJ upon which it relies. Brennan CJ clearly rejected the use of implications drawn from principles such as representative government, where such a principle was given its content outside of the text and structure of the Constitution. He said:

> The principle of "representative democracy" can be given the status of a constitutional imperative, but only in so far as the meaning and content of that principle are implied in the text and structure of the Constitution. The constitutional question for determination in this case cannot be stated as though it asks whether the distribution of electoral districts or of electoral regions is consistent with a general principle of representative democracy – especially if the content of "representative democracy" is derived from sources outside the Constitution. The constitutional question is whether there is inconsistency with the text and structure of the Constitution.
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> Unaffected by context, the phrase "chosen by the people" admits of different meanings. It might connote that candidates are chosen by popular direct election as distinct from election by an electoral college; or it might connote some requirement of equality or near equality of voting power among those who hold the franchise; or it might go further and import some requirement of a franchise that is held generally by all adults or all adult citizens unless there be substantial reasons for excluding them. Equally, these meanings might be attributed to the notion of "representative democracy". In this case we are not concerned with the mode of election: both the Council and the Assembly are elected by popular direct election. Nor are we concerned with the franchise. But the plaintiffs submit that an equality of voting power is implied in the Commonwealth Constitution.[34]

While Brennan CJ recognised that such a connotation 'might' be drawn, from the phrase 'directly chosen by the people', that is only where it is 'unaffected by context'. The legislative changes that implemented a universal franchise would not appear to fall within the 'text and structure' of the Constitution to which implications, in his view, must be confined.

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32 Ibid [83] (Gummow, Kirby and Crennan JJ).
33 Ibid [84] (Gummow, Kirby and Crennan JJ).
34 *McGinty v Western Australia* (1996) 186 CLR 140, 170 (Brennan CJ).

IV *ROWE* AND THE EVOLUTION OF REPRESENTATIVE GOVERNMENT

In *Rowe* it was accepted by all the Justices in the majority that the powers conferred upon the Commonwealth Parliament to enact laws concerning the franchise and Commonwealth elections were subject to the requirements of ss 7 and 24 that the Members of each House be 'directly chosen by the people'.[35] There was also a general acceptance that the reference to 'choice by the people' contains a 'constitutional notion signifying individual citizens having a share in political power through a democratic franchise'.[36]

The arguments in *Roach* concerning the evolution of representative government were softened in that case by the fact that, at least with regard to the notion of a 'universal adult franchise' (but not the disqualification of prisoners), it would be arguable that such an interpretation of 'chosen by the people' would also be supported by 'contemporary standards', pursuant to a progressive interpretative approach to the Constitution. However, the 'one-way' nature of the evolutionary approach and its troublesome consequences became far more starkly apparent in *Rowe.*

French CJ strongly endorsed the irreversible nature of evolution towards a 'more democratic' franchise. He started this argument by explaining:

> The content of the constitutional concept of "chosen by the people" has evolved since 1901 and is now informed by the universal adult-citizen franchise which is prescribed by Commonwealth law. The development of the franchise was authorised by ss 8 and 30 of the Constitution, read with s 51(xxxvi). Implicit in that authority was the possibility that the constitutional concept would acquire as it did, a more democratic content than existed at federation. That content being constitutional in character, although it may be subject to adjustment from time to time, cannot now be diminished.[37]

This passage contains a number of notable points. First, French CJ identified a 'universal adult-citizen franchise', rather than a universal franchise. This qualification, not justified by reference to the text or structure of the Constitution,[38] avoids the need to justify the qualifications on the franchise in relation to citizenship and age by reference to a 'substantial' reason. If the current Parliament expanded the franchise to those aged sixteen and seventeen or to permanent residents, could a future Parliament reverse it? On the one hand, the argument appears to be that once legislation has effected an expansion in the franchise, it cannot be reversed without a substantial reason. Yet, is that approach only applicable to the 'universal adult-citizen franchise', so that it would not make irreversible a legislative change that expanded the franchise to non-adults or non-citizens? If so, what is the constitutional justification for this distinction? What about limitations on the right of citizens to vote, such as those living overseas?[39] Is a legislative expansion of their voting rights required in order to change

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35 *Rowe v Electoral Commissioner* (2010) 273 ALR 1, [17] (French CJ); [122] (Gummow and Bell JJ); [325] (Crennan J).

36 Ibid [347] (Crennan J). See also: [121] (Gummow and Bell JJ).

37 Ibid [18] (French CJ).

38 Note that s 41 would support the notion of an 'adult' franchise, but the High Court has held that 'adult' in s 41 means 21 years or older: *King v Jones* (1972) 128 CLR 221. Note also that the first franchise was not limited by citizenship, as it extended to subjects of the Queen resident in a colony.

39 See *Commonwealth Electoral Act* 1918 (Cth), s 94. See also: George Williams and Andrew Lynch, 'The High Court on Constitutional Law; The 2010 Term' (2011) 34(3) UNSWLJ 1006, 1012; and Peter Mares and Brian Costar, 'The Voting Rights of Non-Resident Citizens and Non-Citizen Residents' in Joo-Cheong Tham, Brian Costar and Graeme Orr (eds), *Electoral Democracy: Australian Prospects* (Melbourne University Press, 2011) 3, 5-6.

the constitutional conception in ss 7 and 24 of the scope of the franchise so that it cannot be reversed, or could these existing limitations be struck down without the need for an initial legislative expansion?[40]

Second, French CJ appeared to accept that a change to the meaning of 'chosen by the people' has occurred as a consequence of both the conferral of power on the Parliament to determine the franchise and the enactment of legislation to do so. French CJ seemed to find within the conferral of this power on the Parliament an implication that as the franchise becomes more 'democratic' in nature, the power of the Parliament to make laws with respect to it becomes more limited. It is, in effect, a democratic see-saw. By legislating, the Parliament on the one side raises democracy by making the franchise more 'democratic' (by which French CJ presumably meant enacting a wider franchise), with the consequence that democracy is lowered on the other side by limiting the democratic powers of the Parliament to legislate. It is a deficient see-saw, however, as it only works in the one direction. The Parliament cannot effect the reverse by legislating to limit the franchise, as its powers to do so are themselves limited as a consequence of earlier expansion of the franchise. French CJ characterised this process as 'irreversible evolution'.[41]

French CJ attempted to rely on 'durable legislative development of the franchise' as the touchstone for determining the content of 'chosen by the people.' This was because it 'reflects a persistent view by the elected representatives of the people of what the term "chosen by the people" requires.'[42] First, this does not necessarily appear to be the case. It may well be that there is no support for a law from a majority of parliamentarians overall (or, indeed, a majority of the people), but that attempts to change it are thwarted in the Senate where smaller numbers can prevail over the wishes of the larger numbers in the House of Representatives. Many electoral reforms, in practice, fail to pass the Senate.[43]

Second, French CJ's reliance on 'durable' legislative development does not explain why the expansion of the franchise must be irreversible. Indeed, the Parliament has in the past chosen both to expand and diminish the franchise. It is not clear why the diminishment of the franchise, if durable, is not as entrenched and irreversible as its expansion. For example, in 1902, the Commonwealth expanded the franchise with respect to women but diminished it with respect to 'Aboriginal natives of Australia, Asia, Africa or the Islands of the Pacific' (who were able to vote in the first Commonwealth election under most State franchises). This diminishment was durable for many decades, but no argument was made that this 'persistent view by the elected representatives of the people' prevented it from being reversed. Equally, the Keating Government in 1995 expanded the franchise with respect to prisoners so that those sentenced to a term of less than five years imprisonment could vote.[44] This was diminished in 2004 by the Howard Government, so that only those sentenced to less than three years imprisonment could vote[45] and was again diminished in 2006 so that

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40 Note the assertion that this approach provides a shield, but not a sword: Orr and Williams, above n 19, 135.

41 *Rowe v Electoral Commissioner* (2010) 273 ALR 1, [20] and [22] (French CJ).

42 Ibid [19] (French CJ).

43 See, eg: *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill* 2008 and *Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill* 2010.

44 *Electoral and Referendum Amendment Act* 1995 (Cth).

45 *Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Act* 2004 (Cth). Note, that an earlier proposal related the term of disenfranchisement to a term of the House of Representatives, but this was deemed to be impractical: Colin Hughes and Brian Costar, *Limiting Democracy: The Erosion of Electoral Rights in Australia* (UNSW Press, 2006) 82.

no prisoners could vote.[46] In *Roach,* the 2006 amendments were held invalid, but the 2004 amendments, which could hardly be described as 'durable legislative developments', were regarded as valid, despite the fact that they diminished the 1995 franchise and despite the 'evolutionary' nature of the franchise.[47]

There are two primary concerns about this approach to constitutional interpretation. First, it entails the attribution of power to the Parliament to change the meaning of the Constitution. Second, it effectively permits one Parliament to entrench laws that expand the franchise, because a future Parliament cannot repeal them or reverse their effect if this diminishes the franchise or opportunities to exercise it, unless there is a 'substantial' reason to support such change. It ceases to be a matter of policy for the Parliament to decide. One Parliament can therefore constrain the choices and legislative powers of a future Parliament.

French CJ denied that this theory permits the entrenchment of laws. He observed:

> Where a method of choice which is long established by law affords a range of opportunities for qualified persons to enrol and vote, a narrowing of that range of opportunities, purportedly in the interests of better effecting choice by the people, will be tested against that objective. This is not to suggest that particular legislative procedures for the acquisition and exercise of the entitlement to vote can become constitutionally entrenched with the passage of time. Rather, it requires legislators to attend to the mandate of "choice by the people" to which all electoral laws must respond. In particular it requires attention to that mandate where electoral laws effect change adverse to the exercise of the entitlement to vote. In this case it is the alteration of a long-standing mechanism, providing last-minute opportunities for enrolment before an election, that is in issue.[48]

While it is true that the form of entrenchment is not absolute – a law can be amended or repealed if it is replaced by a provision which expands the franchise or opportunities to exercise it further, or if there is some 'substantial' reason for the change that is consistent with the maintenance of the constitutionally prescribed system of representative government – it is still a significant limitation on Commonwealth legislative power. It is very similar to the argument in *Kartinyeri v Commonwealth*[49] that laws may only be enacted for the 'benefit' of Aboriginal people under s 51(xxvi). Indeed, French CJ in *Rowe* used the terms 'beneficial' and 'adverse' or 'detrimental' to assess the validity of laws concerning the franchise.[50] In *Kartinyeri,* it was held that the power to enact a law entails the power to repeal it, subject to any manner and form constraints, but regardless of notions such as benefit and detriment.[51] What was at issue in *Rowe* was the validity or 'invalidity of the repeal effected by the relevant provisions of the 2006 Act'.[52] On the basis of *Kartinyeri,* if the Commonwealth Parliament had the power in 1983 to enact a law that extended the date of the close of the polls from the issue of the writs to seven days later, the Commonwealth Parliament would also have had the power in 2006 to repeal that law, reverting to the previous position of the closure of the rolls upon the issue of the writs. Yet in *Rowe,* the majority held that this

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46 *Electoral and Referendum (Electoral Integrity and Other Measures) Act* 2006 (Cth).

47 *Roach v Electoral Commissioner* (2007) 233 CLR 162, [19] (Gleeson CJ); [98]-[102] (Gummow, Kirby and Crennan JJ).

48 *Rowe v Electoral Commissioner* (2010) 273 ALR 1, [22] (French CJ).

49 *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

50 *Rowe v Electoral Commissioner* (2010) 273 ALR 1, [22] and [25] (French CJ).

51 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [19] (Brennan CJ and McHugh J); [47]-[49] (Gaudron J).

52 *Rowe v Electoral Commissioner* (2010) 273 ALR 1, [85] (Gummow and Bell JJ).

was not the case – the repeal was invalid, leaving the 1983 provisions in force.[53] The law was therefore effectively entrenched.[54]

The rest of the majority was not quite as explicit upon the evolutionary theory of representative government, although their Honours still appeared to accept it, relying largely on its earlier acceptance in the *Roach* case.[55] Gummow and Bell JJ saw the enactment of electoral laws not as 'an end in itself but the means to the end of making elections as expressive of the will of the majority of the community as proper practical considerations permit'.[56] Their Honours concluded that it is 'that understanding which explains the force of the phrase "directly chosen by the people" in ss 7 and 24 of the Constitution, and is determinative of the issues in this litigation.'[57]

It is initially unclear from these comments whether this means that ss 7 and 24 operate as a restriction on legislative power so that the Commonwealth Parliament has no power to enact an electoral law which does not 'make elections as expressive of the will of the community as they possibly can be', or whether this stipulation is simply a permissible 'expression of community will'[58] or a 'legitimate end' against which the validity of a law may be tested. Certainly the authorities relied upon, such as *Judd v McKeon,* merely regard this end as one which the community could properly choose to adopt – not one that is mandated by the Constitution. However, when it came to assessing the validity of the impugned laws, Gummow and Bell JJ concluded that 'the method of choice adopted by the legislation fails as a means to what should be the end of making elections as expressive of the popular choice as practical considerations properly permit'.[59] This leads to interesting questions as to whether the maximisation of participation in elections, as favoured by French CJ, is consistent with or required by the end of 'making elections as expressive of the will of the majority of the community as proper practical considerations permit', and how far these new constitutional implications extend beyond an implication of a universal franchise. Do they require compulsory voting?[60] Do they require that non-citizens and young people be permitted to vote as this would be more expressive of the 'will of the majority of the community'? Do they require changes to voting systems to reduce the number of inadvertently informal votes?[61]

Crennan J, after undertaking a study of colonial electoral laws, concluded that while five of the six states had democratic franchises for the lower Houses at the time of federation (with Tasmania following on 28 January 1901), such arbitrary exclusions from the franchise, based on gender and race, as occurred in some of the colonies at the time of federation would now be constrained by ss 7 and 24 of the Constitution.[62] Her rationale for reaching this conclusion was that ss 7 and 24 were drafted with a view to

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53 Ibid [86] (Gummow and Bell JJ).

54 See also: Williams and Lynch, above n 39, 1012, where they recognized that 'statutory innovation can become entrenched as constitutional principle in the years to come'.

55 *Rowe v Electoral Commissioner* (2010) 273 ALR 1, [123] (Gummow and Bell JJ).

56 Ibid [132] (Gummow and Bell JJ).

57 Ibid.

58 Ibid [133] (Gummow and Bell JJ).

59 Ibid (Gummow and Bell JJ).

60 See the Part below on compulsory voting.

61 See, eg, the argument that the introduction of optional preferential voting at the federal level would reduce the number of informal votes: Peter Brent and Rob Hoffman, 'Electoral Enrolment in Australia: Freedom, Equality and Integrity' in Tham, Costar and Orr (eds), above n 39, 20, 21. Note, however, the view in *Langer v Commonwealth* (1996) 186 CLR 302, 334 (Toohey and Gaudron JJ) that a 'voter does not participate either fully or equally with those who indicate an order of preference for all candidates if his or her ballot paper is filled in in such a way that it is exhausted'.

62 *Rowe v Electoral Commissioner* (2010) 273 ALR 1, [356] (Crennan J).

establishing a democratic (rather than oligarchic) form of representative government. In effect (although this terminology was not used by Crennan J), the 'connotation' of ss 7 and 24 was that a democratic representative government was required. Her Honour then noted that '[w]hat is sufficient to constitute democratic representative government has changed over time, as conceptions of democracy have changed to require a fully inclusive franchise – that is, a franchise free of arbitrary exclusions based on class, gender or race.'[63] Thus the denotation has changed, while the connotation has remained the same. Again, this was seen in 'evolutionary' terms[64] as a 'journey to "representative democracy in its purest form"'[65] with no possibility of 'reversion' to the exclusions from the franchise of the past.[66]

The Justices in minority regarded the majority as begging the question, by making assertions about the need for maximum participation that assumed the answer to the issues at question, without using legal reasoning to determine it.[67] Their Honours expressed concern that the majority was attributing to 'representative government' content that was derived from sources outside the Constitution.[68] Any implications must be drawn from the text and structure of the Constitution.[69] Changes in electoral law that have expanded the franchise do not, by virtue of that fact, become constitutional requirements,[70] nor do they establish new standards that the legislature cannot reverse.[71] If the Parliament is 'chosen by the people' pursuant to ss 7 and 24 of the Constitution, then its laws cannot be struck down as invalid because they do not comply with 'higher' standards established by prior legislation.[72] Parliamentary action has not changed and cannot change the meaning of the Constitution.[73]

The text of the Constitution leaves it to the discretion of Parliament to develop the system of representative government through the enactment of such laws.[74] Hayne J found no textual or other sufficient foundation for a constitutional requirement of maximum participation in the electoral process.[75] Kiefel J concluded that the Constitution does not require maximum participation, but rather gives discretion about such matters to the Parliament.[76] While maximum participation may be a 'desirable civic value' or 'worthy legislative object', it is a matter of choice for the Parliament and is not imposed by the Constitution as a limitation on the power of the Parliament.[77]

V THE BASELINE FROM WHICH CONSTITUTIONAL VALIDITY IS ASSESSED

The question at issue in the *Rowe* case was the constitutional validity of provisions that closed the electoral roll for new enrolments upon the day of the issue of

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63 Ibid [367] (Crennan J).
64 Ibid [326] (Crennan J).
65 Ibid [366] (Crennan J).
66 Ibid [356] (Crennan J).
67 Ibid [191] (Hayne J); [412]-[414] (Kiefel J).
68 Ibid [192] (Hayne J); [416] (Kiefel J).
69 Ibid [192] (Hayne J).
70 Ibid [203] (Hayne J); [292] (Heydon J).
71 Ibid [310] (Heydon J).
72 Ibid [311] (Heydon J).
73 Ibid [221] (Hayne J).
74 Ibid [203] (Hayne J); [420] (Kiefel J).
75 Ibid [203] and [220] (Hayne J).
76 Ibid [415] (Kiefel J). Note, however, that some have characterized Kiefel J's judgment as employing a 'progressivist method' similar to that of the majority. See, eg: Ruth Greenwood, 'A Progressive Court and a Balancing Test: *Rowe v Electoral Commissioner* [2010] HCA 46' (2010) 14 UWSLR 119, 128.
77 *Rowe v Electoral Commissioner* (2010) 273 ALR 1, [222] (Hayne J).

the election writs, and closed it for transfers three days later. The ground upon which such provisions were argued to be unconstitutional was that they breached ss 7 and 24 of the Constitution so that they did not yield Houses that were directly chosen by the people.[78] Curiously, the majority judgments did not directly assess whether a Parliament chosen pursuant to such laws was 'directly chosen by the people'. This may be because if this were found not to be the case, the 2007 Parliament would then not have been one that was 'directly chosen by the people',[79] raising the difficult issues of whether it could validly function and the validity of the laws it enacted.

The majority avoided this issue by instead setting a different baseline from which constitutional validity is to be assessed. First, it identified within ss 7 and 24 a constitutional requirement of a 'universal franchise' which was derived either by reference to the actions of previous Parliaments in expanding the franchise through the enactment of legislation[80] or by reference to changes in historical circumstances, contemporary standards and the contemporary understanding of the democratic requirements of representative government.[81] At this stage there was a division within the majority. French CJ used as his baseline for validity, the 1983 provisions which gave people the opportunity to enrol or change their enrolment details for a period of seven days after the issue of the writs.[82] This entailed an assumption of the validity of these provisions (which were not challenged),[83] even though they too would have resulted in some people being unable to exercise the franchise in the ensuing election. French CJ characterised the 2006 amendments as a departure from the long established law that afforded additional opportunities to vote and concluded that a 'substantial reason' was required to justify its 'adverse' effect.

Gummow and Bell JJ measured the 2006 amendments against the 'end of making elections as expressive of the popular choice as practical considerations properly permit',[84] and then also required that any departure from this standard be justified by reference to a 'substantial reason', involving the application of a form of proportionality test,[85] as had previously occurred in the *Roach* case. Crennan J measured the 2006 requirements against the 'right to vote and the right to participate in choosing parliamentary representatives'[86] which she discerned as flowing from ss 7 and 24. She regarded the 2006 laws as operating 'to disentitle or exclude persons' from that right and as not being 'necessary or appropriate for the protection of the integrity of the rolls'.[87]

In all the majority judgments the first stage of the test, in setting the baseline, took into account the actions of the Parliament and contemporary understandings, while the second stage relied upon an assessment by the Court of what is justified and what is

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78 Ibid [176] and [178] (Hayne J).

79 As noted above, the 2007 election was announced by the Prime Minister on 14 October 2007 and the writs were issued on 17 October 2007, giving three days for people to enrol. While the executive practice of leaving a period of time between the announcement of the election and the issue of the writs could not affect the validity of the legislation, it is notable that neither in practice nor in law did the 2007 election meet the standard set by a majority of the High Court in *Rowe.* Presumably it must be regarded as a Parliament that was not 'directly chosen by the people'.

80 *Rowe v Electoral Commissioner* (2010) 273 ALR 1, [18]-[19] (French CJ).

81 Ibid [123] and [126] (Gummow and Bell JJ); and [367] (Crennan J).

82 Ibid [22] (French CJ).

83 Ibid [138] and [140] (Gummow and Bell JJ); [322] (Crennan J).

84 Ibid [154] (Gummow and Bell JJ).

85 Ibid [167] (Gummow and Bell JJ).

86 Ibid [381] (Crennan J).

87 Ibid [384] (Crennan J).

'arbitrary', without the need to consider contemporary understandings or to defer to the will of the Parliament.

While the steps in this process may, on their face, seem reasonable, the result reached potentially strays a long way from the underlying question of whether the laws are invalid because they breach ss 7 and 24 of the Constitution by yielding a Parliament that is not 'directly chosen by the people'. It is a fair stretch to argue that the Commonwealth Parliament is not 'directly chosen by the people' because some prisoners are unable to vote. It is stretching credulity, however, to argue that the Commonwealth Parliament is not 'directly chosen by the people' because the electoral rolls were closed upon the issue of the writs and did not allow persons, who were in breach of their legal obligations to enrol or transfer their enrolment, a further chance to do so after the election was announced and the writs issued.

The problem in *Rowe* is that the process of reasoning in such cases has now taken primacy over the constitutional question that needs to be determined, to such an extent that the constitutional question is now regarded as irrelevant. This is most explicit in the following passage by French CJ:

> Where, as in the present case, the law removes a legally sanctioned opportunity for enrolment, it is the change effected by the law that must be considered. It is not necessary first to determine some baseline of validity. Within the normative framework of a representative democracy based on direct choice by the people, a law effecting such a change causes detriment. Its justification must be that it is nevertheless, on balance, beneficial because it contributes to the fulfilment of the mandate. If the detriment, in legal effect or practical operation, is disproportionate to that benefit, then the law will be invalid as inconsistent with that mandate, for its net effect will be antagonistic to it. Applying the terminology adopted in *Roach,* such a law would lack a substantial reason for the detriment it inflicts upon the exercise of the franchise. It is therefore not sufficient for the validity of such a law that an election conducted under its provisions nevertheless results in members of parliament being "directly chosen by the people".[88]

French CJ rejected the notion of baselines,[89] but in applying the notion of 'benefit' and 'detriment',[90] he did so by reference to the prior law, being the 'legally sanctioned opportunity for enrolment' that is removed. It was this baseline from which he assessed the detriment imposed by the 2006 amendments. He assumed that there is a constitutional mandate of maximum participation and regarded the 2006 amendments as antagonistic to this mandate. Most startlingly, however, he concluded that it doesn't matter whether the law is one that would still result in members of Parliament being 'directly chosen by the people'. In other words, it doesn't matter that there is no breach of ss 7 and 24, because the process of assessing constitutional invalidity has now overtaken the substance of such an assessment. The ratchet system of one-way evolution requires that every new law be assessed by reference to whether it is 'beneficial' or 'detrimental' in fulfilling the 'constitutional mandate' of maximising participation in elections or making elections as expressive of the popular will as possible.[91] The application of the actual provisions of the Constitution seems to have become lost in this process. This creates a marvellous example of what Brennan CJ

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88 Ibid [25] (French CJ).

89 See also: Ibid [73] (French CJ).

90 See also: Ibid [28] and [78] (French CJ). Note the value-laden assumptions of benefit and detriment which also belabour the current debate about constitutional powers to make laws with respect to Indigenous Australians.

91 Note the observation that the 'ratchet offends originalists': Orr, above n 4, 88. The objection to the ratchet is, however, more complex. It lies in the undermining and limiting of Parliament's legislative power.

complained about in *McGinty*[92] – the drawing of implications from a principle of representative government that is filled by content external from the text and structure of the Constitution and that takes on a life of its own separate from the Constitution, but employs the Constitution's power to limit legislative power. As Brennan CJ stated in *McGinty,* the question must be 'whether this is inconsistency with the text and structure of the Constitution'.[93]

Such criticisms were also made by Hayne and Heydon JJ, in dissent. Hayne J identified as the relevant question whether the impugned provisions will yield Houses of Parliament that are directly chosen by the people.[94] He stressed that the test must be linked back to constitutional bedrock, namely the text of the Constitution.[95] He concluded that an 'election conducted in accordance with the impugned provisions would yield Houses of the Parliament "directly chosen by the people"'.[96] His Honour observed that 'neither the failure to vote by some entitled to vote, nor the failure to claim enrolment by some entitled to enrol' leads to the conclusion that the members of each House are not directly chosen by the people.[97] If this were not so, it would be the case that no House has ever been 'directly chosen by the people', because there are always some who fail to vote and more who fail to enrol. It is estimated that despite compulsory enrolment, 1.4 million people are missing from the electoral rolls.[98] This is a far greater number than those who seek to be enrolled after the rolls have closed before an election. It is not clear how the latter group could affect an election so that the Houses were not directly chosen by the people, while the former group (comprising those who do not seek to enrol at all and those enrolled people who fail to vote) does not.

Hayne J argued that the reliance upon a previous law as setting the baseline for the validity of a succeeding law begs the question because it 'assume[s] the answer to the fundamental question at issue'.[99] It should 'not be assumed that the law, as it stood before the 2006 Act, was constitutionally *required*'.[100]

Hayne J was also critical of the reliance on legislation or 'common understandings' to change the meaning of the Constitution. He concluded that:

> The ambit of the relevant constitutional powers is not set by the political mood of the time, or by what legislation may have been enacted in exercise of the powers. Political acceptance and political acceptability have no footing in established doctrines of constitutional interpretation.[101]

Heydon J was similarly critical of the attempt to use the enactment of legislation as the basis for changing the meaning of a constitutional provision. He observed:

> The constitutional validity of legislation depends on compliance with the Constitution, not on compliance with the "higher" standards established by the course of legislation and by the operation of executive discretion. The question is not whether an impugned legislative provision "regresses" from some "higher" standard established by the status quo. It is only whether it fails to meet a constitutional criterion. Legislative development, durable or otherwise, does not create constitutional validity or invalidity

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92 *McGinty v Western Australia* (1996) 186 CLR 140, 170 (Brennan CJ).
93 Ibid.
94 *Rowe v Electoral Commissioner* (2010) 273 ALR 1, [182] (Hayne J).
95 Ibid [185] (Hayne J).
96 Ibid [223] (Hayne J)
97 Ibid [213] (Hayne J).
98 Ibid [282] (Heydon J). See also: Orr, above n 4, 88.
99 Ibid [191] (Hayne J).
100 Ibid [190] (Hayne J).
101 Ibid [266] (Hayne J).

> which would not otherwise exist. Otherwise the legislature could enact itself into validity.[102]

Indeed, in this case the majority suggests that the legislature has enacted itself out of validity, by expanding the franchise in a way from which there can be no reversion. Heydon J also identified as the relevant question whether or not the legislation yields a House that is directly chosen by the people and concluded that the conduct of 'people who fail to enrol, or, being enrolled, fail to vote, does not prevent the legislature being described as "chosen by the people"'.[103]

VI DISQUALIFICATION V REGULATION OF ENROLMENT

One of the major disagreements between the majority and the minority turned upon whether the laws concerning the close of the rolls could be regarded as laws that disqualify people from voting, or whether they simply regulate enrolment. Added to this was the question of voluntariness. The plaintiffs had every right to enrol to vote and indeed had a legal obligation to do so, which they breached. They were not denied the ability to vote or to enrol to vote. The law in question simply deferred the processing of their enrolment and transfer applications during a period after the writs had been issued for an election, until after polling day. This occurred because the plaintiffs (a) chose not to enrol or change enrolment details when required by law; and (b) still failed to do so, even after the election was announced, within the requisite period. The question therefore ought to have been one concerning the validity of a law that regulates the timing of the processing of claims for enrolment and transfer of enrolment – not a question about the exclusion of any class of person from the ability to vote. There was no legislative exclusion by reason of falling within some class of disqualified voter based on sex, age, citizenship or other status. Moreover, those such as Mr Thompson, who were still on the roll at their old address, could still vote in the electorate which covered their former residence.[104] Hence, they were not denied the ability to vote. They were only affected to the extent that some of them would otherwise have been entitled to vote in a different electorate.

The *Commonwealth Electoral Act* goes to some extremes to maximise participation in elections (with the unwitting effect of reducing Parliament's powers in the process). It allows persons who have not yet turned 18, but who will do so during the election campaign, to enrol on a provisional basis. It also permits persons who are about to become Australian citizens to do so. It even permits the enrolment of persons after the date upon which they were required to enrol and waives prosecution for prior failure to enrol, once enrolment occurs. The only persons whose vote would have been affected by the impugned legislation, other than those who brought their exclusion upon themselves voluntarily, were those who moved residence to a new electorate exactly one month before the period between the 3rd and 7th day after the issue of the writs. The effect upon them would only be that if they had moved to a new electorate, they would have to vote in their old electorate. They would not be denied the ability to vote in the House of Representatives or the Senate. Under the impugned laws, no one was excluded *per se* by the law from voting – the inability of persons to vote was solely a consequence of their failure to act in accordance with reasonable and unchallenged legal requirements.

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[102] Ibid [311] (Heydon J).
[103] Ibid [288] (Heydon J).
[104] Orr, above n 4, 86.

The majority judges, however, regarded the impugned laws as disqualifying people from voting and therefore affecting the franchise and detracting from a universal franchise. French CJ, for example, observed that an 'electoral law which denies enrolment and therefore the right to vote to any of the people who are qualified to be enrolled can only be justified if it serves the purpose of the constitutional mandate'.[105] He regarded the removal of a 'legally sanctioned opportunity for enrolment'[106] as effecting a form of disqualification.

Gummow and Bell JJ rejected the Commonwealth's argument that the impugned laws only concerned procedure, not substance. They concluded that matters affecting the existence, extent or enforceability of a right go to issues of substance.[107] Query, however, whether there is a 'right' to vote? The High Court rendered impotent any 'right' that may have existed as a consequence of the application of s 41 of the Constitution.[108] While ss 7 and 24 may give rise to an implication of a universal franchise, these provisions operate as *limits* upon Commonwealth legislative power.[109] As Kiefel J noted, they do not give rise to a personal 'right' to vote,[110] just as the implied freedom of political communication derived from ss 7 and 24 does not give rise to a personal 'right' to engage in free political communication.[111]

Gummow and Bell JJ took the view that the relationship between enrolment and voting entitlement was such that 'failure to comply with the former denies the exercise of the latter by persons otherwise enfranchised', with the practical effect that the 'requirements operate to achieve disqualification in the sense used in *Roach*'.[112] Their Honours placed particular emphasis on the 'practical operation of the legislation to disqualify the plaintiffs and large numbers of other electors'.[113] They dismissed the relevance of the fact that the plaintiffs' inability to vote was a consequence of their own failure to comply with the law. Their Honours pointed out that the law itself, by waiving the institution of proceedings against people who have made late claims for enrolment, 'is designed to facilitate maximum participation in the electoral process of those otherwise qualified to vote, not to support disenfranchisement'.[114] This harks back to French CJ's argument that the enactment of laws has set a standard that Parliament cannot later resile from.

Their Honours concluded that 'the relevant starting point is to ask whether, *at the time when the choice is to be made by the people,* persons otherwise eligible and wishing to make their choice are effectively disqualified from doing so'.[115] One might well ask why this is so. Surely the laws should be assessed in their context, reading the Act as a whole, in order to ascertain their constitutional validity? Why is it not relevant that the reason why people are not enrolled at the time of the cut-off is not any legislative impediment but the fact that they have chosen not to be? Why is

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105 *Rowe v Electoral Commissioner* (2010) 273 ALR 1, [2] (French CJ).
106 Ibid [25] (French CJ).
107 Ibid [152] (Gummow and Bell JJ), quoting from *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 [99].
108 *Re Pearson; Ex parte Sipka* (1983) 152 CLR 254.
109 *Roach v Electoral Commissioner* (2007) 233 CLR 162, [86] (Gummow, Kirby and Crennan JJ).
110 *Rowe v Electoral Commissioner* (2010) 273 ALR 1, [407] (Kiefel J). See also: *Langer v Commonwealth* (1996) 186 CLR 302, 349 (Gummow J); *Holmdahl v Australian Electoral Commission (No 2)* [2012] SASCFC 110, [26] (Gray J); and Graeme Orr, *The Law of Politics,* (Federation Press, 2010) 51.
111 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.
112 *Rowe v Electoral Commissioner* (2010) 273 ALR 1, [154] (Gummow and Bell JJ).
113 Ibid [158] (Gummow and Bell JJ).
114 Ibid [159] (Gummow and Bell JJ).
115 Ibid [160] (Gummow and Bell JJ) [original emphasis].

voluntariness relevant (i.e. that eligible persons are 'wishing' to make their choice) at the time when the choice is to be made, but not at the period leading up to the making of the choice? Gummow and Bell JJ do not give adequate answers to these questions.

Crennan J contended that the impugned provisions 'operate to disentitle or exclude persons (otherwise legally eligible) from the right to vote and the right to participate in choosing parliamentary representatives for the state and subdivision in which they reside'.[116] Her Honour concluded that in the absence of any evidence of systemic electoral fraud or that reduction of the cut-off period would reduce fraudulent activity, and given the number of people affected, 'the impugned provisions have not been shown to be necessary or appropriate for the protection of the integrity of the rolls'.[117]

The minority, in contrast, recognised that enrolment provisions can be used as a *de facto* means of disqualification if they are made so difficult and complicated to satisfy that they have the practical effect of excluding people from the franchise.[118] However, in this case the method of enrolling and changing enrolment details was quick and easy to satisfy and ample time was given to do so.[119]

Hayne, Heydon and Kiefel JJ stressed that the plaintiffs were not disqualified by the legislation.[120] They had the right to enrol or change enrolment details, and were bound to do so within a requisite period, but failed to exercise that right and duty.[121] It was their 'own inaction and failure to perform their obligations' until after the last minute that caused the impediment to their ability to vote in their electorate at the election.[122] Those who 'fail to enrol or transfer enrolment are the authors of their own misfortunes'.[123]

The plaintiffs accepted the validity of laws providing for compulsory enrolment, but demanded that the Parliament provide further opportunities for enrolment, despite the breach of a valid law, including after the election has been announced and the writs issued.[124] However, the need for a further enrolment period is dependent upon the plaintiffs breaching the law. Heydon J noted that the plaintiffs demand 'an entitlement to continue disobeying the [law] and ignoring the sanction for longer periods than the impugned provisions allow'.[125] If they obeyed the law and enrolled or changed their enrolment details when they were required to do so, there would have been no need for the extra 'grace period'. Hayne J made the fundamental point that the 'constitutional validity of the impugned provisions cannot turn upon the extent to which related statutory obligations have been disobeyed'.[126] Equally, Heydon J observed that the laws concerning enrolment were part of a single integrated scheme and that the 'constitutional validity of some laws in that scheme cannot turn on the number of people who choose to disobey other concededly valid laws enacted as part of that scheme'.[127] The Constitution does not require the facilitation of the breaching of constitutionally valid laws.

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116 Ibid [381] (Crennan J).
117 Ibid [383]-[384] (Crennan J).
118 Ibid [214] (Hayne J).
119 Ibid [220] (Hayne J); and [488] (Kiefel J).
120 Ibid [187] (Hayne J); [283] and [290] (Heydon J); [488] (Kiefel J).
121 Ibid [187] (Hayne J).
122 Ibid [225] (Hayne J); [288] (Heydon J); [488] (Kiefel J).
123 Ibid [287] (Heydon J).
124 Ibid [228] (Hayne J).
125 Ibid [313] (Heydon J).
126 Ibid [252] (Hayne J).
127 Ibid [314] (Heydon J). Note also the observation by Kiefel J at [488] that it 'would be a curious application of a test of proportionality if a law, otherwise valid, was invalid because parliament should recognize that people will not fulfil their statutory obligations'.

The plaintiffs' justification for the constitutional requirement of an extended period for enrolment seemed to be that a legal obligation was not enough to get people to enrol to vote. Nor was the feverish election speculation that precedes the calling of an election (which was certainly in evidence before the 2010 election).[128] Nor was the announcement of an election enough to get people to act. Instead, they needed 7 days (no more and no less) to act after the issue of the writs. The fact that some will be too apathetic to seek to enrol until after day 7, apparently, will not mean that the election yields a Parliament that is not directly chosen by the people, but the exclusion from voting of those too apathetic to seek to enrol until after the day of the issue of the writs but who do so before day 7, will result in a Parliament that is not directly chosen by the people. Looked at in these terms, the choice of one day, three days or seven days is simply arbitrary. As Heydon J noted:

> It is not possible to infer from the requirement in ss 7 and 24 of the Constitution that the Houses of Parliament be "chosen by the people" that these temporal differences are of such crucial decisiveness as to mark the difference between validity and invalidity.[129]

VII COMPULSORY VOTING

One of the sleeping issues in *Rowe* is the effect of the majority's constitutional interpretation of ss 7 and 24 for the status of laws imposing compulsory voting. Compulsory voting has a somewhat precarious constitutional status. On the one hand, some would argue that compulsory voting is invalid to the extent that a person may be compelled to vote for someone against his or her wishes, so that the choice is not a free choice that represents the will of the people.[130] Such an argument, however, is ineffective if the only compulsion is to attend the polling booth and deposit a ballot in the ballot box – rather than a compulsion to mark a valid vote on the ballot paper. The provisions of the *Commonwealth Electoral Act* 1918 are uncertain in this regard. What is compulsory is 'to vote'.[131] Section 233 provides that a voter shall 'mark his or her vote upon the ballot paper'. Sections 239-40 provide how a vote is to be marked on the ballot paper. These provisions therefore suggest that it is compulsory to mark the ballot paper in a manner that gives a valid vote.[132] However, as Gummow and Bell JJ noted in *Rowe*:

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[128] Ibid [216] (Hayne J); and [272] (Heydon J).

[129] Ibid [277] (Heydon J).

[130] Note the failure of similar arguments in *Judd v McKeon* (1926) 38 CLR 380; *Faderson v Bridger* (1971) 126 CLR 271; *Langer v Commonwealth* (1996) 186 CLR 302, 341 (McHugh J); and *Holmdahl v Australian Electoral Commission (No 2)* [2012] SASCFC 110. For a further discussion of compulsory voting and its constitutional validity, see: Anne Twomey, 'Free to choose or compelled to lie? The rights of voters after *Langer v Commonwealth'* (1996) 24 *Federal Law Review* 201, 208-16;

[131] *Commonwealth Electoral Act* 1918, s 245(1) and (15).

[132] Compare *Electoral Act* 1985 (SA), s 85(2) which expressly permits informal voting by leaving a vote unmarked. Some judges have taken the view that compulsory voting requires no more than the deposit of the ballot paper in the ballot box, regardless of whether or how it is marked: *Lubcke v Little* [1970] VR 807, 811 (Crockett J); *Douglass v Ninnes* (1976) 14 SASR 377, 379 (Hogarth J). Others have regarded the casting of a formal vote as compulsory: *O'Brien v Warden* (1981) 37 ACTR 13, 16 (Blackburn CJ). Some have regarded compulsory voting as requiring that the ballot paper be marked before being placed in the ballot box, but not necessarily with a formal vote: *Faderson v Bridger* (1971) 126 CLR 271, 272 (Barwick CJ); and *Evans v Crichton-Browne* (1980) 147 CLR 169, 207-8. In *Holmdahl v Australian Electoral Commission (No 2)* [2012] SASCFC 110, the Full Court of

> The secrecy which attends this system makes the description "compulsory attendance" more appropriate than "compulsory voting", though the latter often is used.[133]

It may be more accurate, on the other hand, to say that while it is an offence not to mark a valid vote on the ballot paper, the provisions regarding the secrecy of voting make it impossible to enforce such a provision where a person has attended the polling station, retired with the ballot paper to a voting compartment and then deposited a ballot in the ballot box. If, however, the person gave sworn evidence that he or she had not marked a valid vote on the ballot paper, or if he or she proceeded directly upon receiving the ballot paper to place it in the ballot box without marking it (or if he or she simply destroyed the ballot paper or left the polling booth with it), then it remains plausible that he or she could be prosecuted for failing to vote, despite having attended the polling booth. This issue may come to a head if electronic voting becomes widespread, as electronic voting machines could be programmed to reject invalid or informal votes.[134]

In *Rowe,* however, the opposite argument implicitly arose – that the Constitution now *requires* a system of compulsory voting. If there is a constitutional imperative within ss 7 and 24 of the Constitution that the franchise be as expressive as possible of the will of a majority of the community, and if there is a form of irreversible evolution in the franchise and electoral laws toward maximum participation in elections, then it is arguable that a law that made voting voluntary would now be constitutionally invalid because it reduces maximum participation in elections without a 'substantial reason'. It would, no doubt, be argued that the resultant reduction in the proportion of enrolled electors who vote would mean that the Parliament was not truly 'chosen by the people'.[135]

Justices Gummow and Bell observed that s 245 of the *Commonwealth Electoral Act,* by imposing a duty to vote, 'furthers the constitutional system of representative government by popular choice'.[136] Crennan J also described the federal electoral process as 'characterized by compulsory enrolment and compulsory voting',[137] although it is not clear whether or not she regarded this now as an essential aspect of the democratic form of representative government in the same way as a 'fully inclusive franchise'.[138] Despite not directly addressing the question of compulsory voting (which was, of course, not directly in issue in the case), the *dicta* of the majority suggested that if maximum participation of the people in elections is a constitutional imperative, compulsory voting has become constitutionalised.

The minority Justices all noted this issue and argued the contrary position. Justice Hayne pointed out that the premise of the plaintiffs' argument relied upon an assumption that compulsory enrolment and compulsory voting are 'constitutionally essential elements of the system'.[139] He noted that from an historical point of view, compulsory voting was not seen as a necessary element of the electoral system when the Constitution was enacted and that while its constitutional validity was upheld by

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the Supreme Court of South Australia held that it was unnecessary to decide whether a formal vote was required by the compulsory voting provisions: [70] (Gray J, with Kourakis CJ and Sulan J agreeing). See also: Lisa Hill, '"A great leveler": Compulsory Voting' in Marian Sawer (ed) *Elections – Full, free & fair* (Federation Press, 2001) 129, 130-1.

133 *Rowe v Electoral Commissioner* (2010) 273 ALR 1, [82] (Gummow and Bell JJ).

134 See further: Orr, above n 110, 63.

135 *Rowe v Electoral Commissioner* (2010) 273 ALR 1, [288] (Heydon J).

136 Ibid [129] (Gummow and Bell JJ)

137 Ibid [382] (Crennan J).

138 Ibid [367] (Crennan J).

139 Ibid [221] (Hayne J).

the High Court in *Judd v McKeon,* this was seen by the Court 'as a matter for the parliament to decide, not as a matter of constitutional necessity'.[140] He considered that simply because 'some who are enrolled to vote, and therefore entitled and bound to vote, do not cast a ballot at an election does not deny that the elected members of each House of the Parliament are "directly chosen by the people"'.[141] Heydon J agreed that the fact that some people 'fail to enrol, or being enrolled, fail to vote, does not prevent the legislature being described as "chosen by the people"'.[142]

Kiefel J also observed that the High Court's judgment in *Judd v McKeon* amounted to a reaffirmation of parliamentary power. The reference in the judgment of Isaacs J to making elections 'as expressive of the will of the community as they possibly can be', related to a legislative choice or ideal, not a constitutional restriction.[143] Like Hayne J, her Honour noted that the 'unstated, but essential, premise for the plaintiffs' argument of maximum participation in the franchise is that all those entitled to vote must vote'.[144] However, Kiefel J rejected this view, arguing that compulsory voting was recognised in *Judd v McKeon* as a legislative choice, not a constitutional requirement. She saw the constitutional intention, expressed in provisions such as ss 8 and 30, as being that such matters are for Parliament to decide.[145]

Kiefel J went further, however, observing with respect to compulsory voting:

> It would be unwise to assume that such a system will continue to be maintained in Australia. Compulsory voting cannot be regarded as essential to our representative government here. It would be wrong to take steps towards effectively entrenching it by requiring that legislation concerning elections ensure the maximum exercise of the franchise. It would be inconsistent with the intention expressed in the Constitution: that Parliament be free to legislate in this area from time to time.[146]

VIII THE STATES AND ELECTION WRITS

There is one other oddity concerning *Rowe* which the Court did not address, presumably because it was not raised in argument because of the haste in which this case was brought and the order determined. Section 12 of the Commonwealth Constitution provides that the writs for a Senate election are issued by the Governor of a State. Section 9 of the Constitution provides:

> The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States. Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing the senators for that State.
>
> The Parliament of a State may make laws for determining the times and places of elections of senators for that State.

Hence the power to make laws about the 'method of choosing' Senators rests with the Commonwealth, and State laws concerning such a 'method' are subject to the Commonwealth's law. However, the power to make laws 'for determining the times

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[140] Ibid [219] (Hayne J).
[141] Ibid [213] (Hayne J).
[142] Ibid [288] (Heydon J).
[143] Ibid [414] (Kiefel J).
[144] Ibid [422] (Kiefel J).
[145] Ibid [422]-[423] (Kiefel J).
[146] Ibid [423] (Kiefel J).

and places of elections of senators for the State' is vested solely in the State. It is not made subject to Commonwealth laws. It is an exclusive State legislative power[147] that is not subject to s 109. This was confirmed by Gummow J in *Re Australian Electoral Commission; Ex parte Kelly,* where he said:

> The second sentence in s 9 subjects State laws prescribing the method of choosing Senators to any federal law, such as the Act, prescribing a uniform method for all the States. The third sentence in s 9 preserves to the States an area of exclusive power that is not subject to Commonwealth legislative preemption. The area so preserved is for laws which make provision "for determining" (i) the times and (ii) the places of, in each case, the election of State Senators. It may be added that the provisions of s 12 of the Constitution repose in State Governors the power to cause writs to be issued for elections of Senators for the States.[148]

It is arguable that all the dates set out in the writs, including the date for nomination, for the close of the rolls, for polling day and the return of the writs, are to be determined under exclusive State legislative powers, as they all form part of the election,[149] even though the 'practice is for those governors to fix times and polling places identical with those for elections for the House of Representatives'.[150] The law governing the close of the rolls with respect to Senate elections is to be found in State laws, rather than the *Commonwealth Electoral Act,* and the validity of those State laws must be assessed by reference to s 7 of the Commonwealth Constitution.

Interestingly, the *Senate Elections Act* 1958 (Vic) provides (and provided at the time the writs were issued for the 2010 election) in s 4(1) that 'The date fixed for the close of the Rolls shall be seven days after the date of the writ'. On this basis, had the plaintiffs lived in Victoria, they could have claimed that the rolls did not close in relation to the Victorian half-Senate election until seven days after the issue of the writs and that they were therefore entitled to be enrolled. The Victorian writ, which was stated to have been issued under s 3 of the *Senate Elections Act* 1958 (Vic), set 22 July as the date for the close of the rolls,[151] contrary to the requirements of s 4 of the *Senate Elections Act.* As the writ conflicted with the terms of the exclusive State law, it was arguably invalid.

Other States also previously had provisions which specified the relevant periods for the close of the rolls, close of nominations and the like. However, after other experiences of problems when those periods got out of kilter with the Commonwealth laws concerning the House of Representatives,[152] they were made more general in nature, merely specifying that the writ 'shall specify the date for the close of the electoral rolls', without specifying its temporal relationship to the issue of the writ.[153]

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147 Constitutional Commission, *Final Report of the Constitutional Commission,* (AGPS, 1988) Vol 1, para 4.448.

148 *Re Australian Electoral Commission; Ex parte Kelly* (2003) 77 ALJR 1307, [13].

149 See the analogy with *Sykes v Cleary* (1992) 176 CLR 77, 100 (Mason CJ, Toohey and McHugh JJ, with Gaudron and Dawson JJ agreeing), where their Honours held that being 'chosen' under s 44 of the Constitution referred to the entire process of being chosen, including nomination.

150 *Rowe v Electoral Commissioner* (2010) 273 ALR 1, [92] and [102] (Gummow and Bell JJ).

151 Victoria, *Government Gazette* No S286, 19 July 2010.

152 See, eg: Anne Twomey, *The Constitution of New South Wales,* (Federation Press, 2004) pp 826-7.

153 See, eg: *Senators' Elections Act* 1903 (NSW), s 3; *Senate Elections Act* 1935 (Tas), s 3(ab); and *Senate Elections Act* 1960 (Qld), s 3.

IX CONCLUSION

On its facts, *Rowe* simply concerned the relatively minor and technical matter of the date upon which the rolls should close prior to an election. Its consequences, however, are far greater. It has the potential to constitutionalise existing features of the electoral system, including compulsory voting.[154] It gives power to a Parliament effectively to bind future Parliaments by expanding participation in elections even further.

Most disturbingly, it gives an imprimatur to a nascent theory of constitutional interpretation – the one-way method of constitutional evolution, under which the discretion conferred by the Constitution on Parliament can only be exercised towards an end identified by the Court, with the validity of each new law being measured against the baseline of the last and its progression towards this judicially determined end. Such a radical approach, which appears to undermine parliamentary sovereignty and be contrary to the plenary nature of the legislative power conferred by the Constitution, has not yet received the attention and the critical scrutiny that it deserves.

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[154] Note also the suggestion of Orr and Williams that the method of evolutionary interpretation might also constitutionalise the secret ballot: Orr and Williams, above n 19, 136.