

# A PROPORTIONATE BURDEN: REVISITING THE CONSTITUTIONALITY OF OPTIONAL PREFERENTIAL VOTING

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*In Day v Australian Electoral Officer (SA), the High Court unanimously upheld the constitutional validity of the Senate voting reforms legislated by the Commonwealth Parliament in the lead-up to the 2016 federal election, which allowed for optional preferential voting. The clarity of the Court's judgment obscures the fact that the plaintiff in Day failed to prosecute the best case possible against the reforms, making full use of the judgments in Roach v Electoral Commissioner and Rowe v Electoral Commissioner. That argument is that the likely incidence and effect of vote exhaustion under optional preferential voting constituted an effective burden upon the franchise. This article elucidates and then assesses that argument. Ultimately, it is concluded in light of the actual outcomes of the 2016 federal election and the Court's recent decision in Murphy v Electoral Commissioner that the argument would not have succeeded, optional preferential voting being proportionate to the empowerment of voters and the simplicity and transparency of the Senate electoral system.*

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## I INTRODUCTION

For its devising and early adoption of numerous innovations in electoral system design, Australia has been dubbed the world's 'democratic laboratory'.<sup>1</sup> The 2016 federal election saw the conduct of its latest experiment: optional preferential voting. As at every federal election since 1984,<sup>2</sup> the Senate ballot was bisected horizontally, with parties listed above the line and their candidates listed beneath.<sup>3</sup> The novelty lay in the voting method: as a minimum, voters were instructed to rank-order six parties or 12 candidates.<sup>4</sup> Their vote could only contribute to the election of those parties for which, or candidates for whom, they expressly intended to vote.

<sup>1</sup> These innovations include the secret ballot, compulsory voting, universal adult suffrage and the widespread of preferential voting systems: see, eg, David Farrell and Ian McAllister, *The Australian Electoral System: Origins, Variations and Consequences* (UNSW Press, 2006) 47.

<sup>2</sup> This being the first election held under the *Commonwealth Electoral Act 1918* (Cth) as amended by the *Commonwealth Electoral Legislation Amendment Act 1983* (Cth), which commenced on 21 February 1984.

<sup>3</sup> *Commonwealth Electoral Act 1918* (Cth) s 210.

<sup>4</sup> *Ibid* s 239(1)–(2).

Previously, full preferential voting was required. Voters numbered every box below the line or employed the shortcut introduced in 1983,<sup>5</sup> numbering one box for a party above the line. In the latter case, voters' preferences would flow according to predetermined group voting tickets, after which this system was dubbed 'ticket voting'. Given the sheer mechanical laboriousness involved in casting a valid below the line vote,<sup>6</sup> the vast majority voted above the line.<sup>7</sup> 'Faceless' party executives, holding de facto, if not de jure, power over the determination of their parties' group voting tickets,<sup>8</sup> were thus given the ability to determine how the lion's share of preferences flowed, both within and between political parties.

Consequently, parties entered into labyrinthine preference-swapping arrangements, including numerous small parties<sup>9</sup> conglomerated under the banner of the 'Minor Party Alliance'. Alliance members placed other members ahead of non-members on their group voting tickets, such that upon the elimination of one, votes would flow to another. The cumulative effect of this 'preference harvesting' was expected to result in one amongst them being elected to the Senate.<sup>10</sup> In fact, the Alliance was successful on two fronts: in Victoria, the Motoring Enthusiast Party's Ricky Muir was elected despite receiving only 0.51 per cent of the primary vote; and in Western Australia, Wayne Dropulich of the Sports Party was elected with 0.2 per cent.<sup>11</sup> Significantly, the quota for election was 14.3 per cent.

Following the Joint Standing Committee on Electoral Matters' *Interim Report* into the election,<sup>12</sup> the *Commonwealth Electoral Act 1918* (Cth) ('*Electoral Act*') was amended to eliminate ticket voting and allow for optional preferential voting above and below the line.<sup>13</sup> In short order, South Australian Senator Bob Day commenced proceedings in the High Court, seeking declarations that the 2016 amendments infringed the *Commonwealth Constitution* ('*Constitution*') and were

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<sup>5</sup> *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) s 80.

<sup>6</sup> For instance, voters in New South Wales at the 2013 federal election were required to rank-order 110 Senate candidates.

<sup>7</sup> Over 95 per cent of voters voted above the line in the five federal elections between 2001 and 2013.

<sup>8</sup> William Cross and Anika Gauja, 'Designing candidate selection methods: Exploring diversity in Australia political parties' (2014) 49(1) *Australian Journal of Political Science* 22.

<sup>9</sup> Many of these were front parties established solely for the purpose of preference harvesting: Joint Standing Committee on Electoral Matters, Parliament of Australia, *Interim report on the inquiry into the conduct of the 2013 Federal Election: Senate voting practices* (2014) 23–24.

<sup>10</sup> *Ibid* 18–25.

<sup>11</sup> The Western Australian Senate election was subsequently voided in *Australian Electoral Commission v Johnston* [2014] HCA 5 (18 February 2014) and reran on 5 April 2014.

<sup>12</sup> Joint Standing Committee on Electoral Matters, above n 9.

<sup>13</sup> *Commonwealth Electoral Amendment Act 2016* (Cth). This Act also made provision for the printing of party logos onto ballot papers, and prohibited a person from simultaneously being the registered officer of multiple political parties.

therefore invalid. This article considers the arguments Senator Day made and, perhaps more importantly, did not make.

In *Day v Australian Electoral Officer (SA)*,<sup>14</sup> Senator Day's application was unanimously dismissed in a pithy 58 paragraphs. The outcome was unsurprising; his arguments were obfuscatory where they were not bordering on the incomprehensible. Many of his submissions<sup>15</sup> impugned features of the unamended system — such as above and below the line voting and the Droop quota<sup>16</sup> — the constitutionality of which had been upheld on multiple occasions.<sup>17</sup> Those submissions also omitted an argument making best use of *Roach v Electoral Commissioner*<sup>18</sup> and *Rowe v Electoral Commissioner*,<sup>19</sup> two cases in which the Court broadened the scope for review of the Commonwealth Parliament's electoral lawmaking. Consequently, an important unanswered question — whether the rate of exhaustion associated with optional preferential voting constitutes a constitutionally impermissible disenfranchisement — lies at the heart of *Day*, which this article will pose and then answer.

Three propositions will be articulated over the course of this article. The first is that the High Court has shown a diminishing deference to the Commonwealth Parliament's electoral lawmaking. Part one examines the Court's approach to the scrutiny of such laws, highlighting the turn in *Roach* and *Rowe* away from the preceding century of 'doctrinal deference'. The scene is thus set for part two, which delves into the plaintiff's arguments and the judgment in *Day*. The second proposition is that the plaintiff should have put to the Court a much more pivotal argument, that the higher incidence of vote exhaustion associated with optional preferential voting constitutes an unconstitutional disenfranchisement, contravening the expanded notion of representative government enunciated by the majorities in *Roach* and *Rowe*. Part three addresses this argument, in the course of which the recent decision in *Murphy v Electoral Commissioner*<sup>20</sup> becomes relevant. The third proposition, and ultimate conclusion, is that the argument would likely

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<sup>14</sup> [2016] HCA 20 (13 May 2016) ('*Day*'). Proceedings were also brought by electors in each of the other states and territories against their respective Australian Electoral Officers and the Commonwealth, to ensure the judgment would bind them all. Each Australian Electoral Officer filed a submitting appearance; the case was argued by the Commonwealth.

<sup>15</sup> Day, 'Written Submissions of Plaintiff', Submission in *Day v Australian Electoral Officer (SA)*, S77/2016, 5 April 2016, 2–11.

<sup>16</sup> This is the formula by which the quota for election is determined under *Electoral Act* s 237(8), being the number of valid votes divided by one more than the number of seats, plus one.

<sup>17</sup> *McKenzie v Commonwealth* (1984) 57 ALR 747 ('*McKenzie*'); *Abbotto v Australian Electoral Commission* (1997) 144 ALR 352 ('*Abbotto*'); *McClure v Australian Electoral Commission* (1999) 163 ALR 734 ('*McClure*'); *Ditchburn v Australian Electoral Officer (Qld)* (1999) 165 ALR 147 ('*Ditchburn*').  
<sup>18</sup> (2007) 233 CLR 162 ('*Roach*').

<sup>19</sup> (2010) 243 CLR 1 ('*Rowe*').

<sup>20</sup> [2016] HCA 36 (5 September 2016) ('*Murphy*').

not succeed if put to the Court today, optional preferential voting being a measure justified by substantial reasons.

## II DECLINING DEFERENCE IN VOTING LAW SCRUTINY

For much of its history, the High Court generally declined to impose restrictions upon the Commonwealth Parliament's electoral lawmaking. This flowed from the conception of voting rules as fundamentally and inextricably of a 'political nature',<sup>21</sup> decisions about which ought to be 'entrusted to ... elected legislatures rather than to [the] Court'.<sup>22</sup> Consequently, constitutional guarantees were read down and potential constitutional limitations on electoral lawmaking were given minimum content, interpreted in a fashion benign to legislative will. *R v Pearson; Ex parte Sipka*,<sup>23</sup> concerning s 41 of the *Constitution*, exemplifies the erosion of apparent constitutional guarantees, and *Attorney-General (Cth) ex rel McKinlay v Commonwealth*<sup>24</sup> illustrates the Court's reluctance to read into the *Constitution* limitations such as the principle of 'one vote, one value'.

More recently, the Court has demonstrated a greater willingness to intervene. As *Roach* and *Rowe* evidence, it has done this not by imposing standalone limitations on Commonwealth legislative power, but by embracing a more fulsome conception of the constitutionally prescribed notion of representative government. Promulgation of proportionality analysis in these cases has also fundamentally changed the Court's approach to these questions, representing a diminishing observance of parliamentary sovereignty and an increasing readiness to scrutinise laws curtailing access to the vote. While this is not at all a novel observation,<sup>25</sup> the ensuing discussion is nonetheless important as a means of establishing the law at the time *Day* was argued and emphasising themes bearing upon the balance of this article.

### A The Nature Of Judicial Deference

Judicial deference is a necessary concomitant of parliamentary sovereignty, described by Dicey as the 'legal fact' that Parliament has 'the right to make or unmake any law whatever; and, further, that no person or body ... [has] a right to

<sup>21</sup> *McGinty v Western Australia* (1996) 186 CLR 140, 183 (Dawson J).

<sup>22</sup> *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 57 (Stephen J).

<sup>23</sup> (1983) 152 CLR 254 ('*Ex parte Sipka*').

<sup>24</sup> (1975) 135 CLR 1 ('*McKinlay*').

<sup>25</sup> See, eg, Sarah Murray, 'Forcing Parliamentary Rollback: High Court Intervention in Australian Electoral Legislative Reform' (2012) 11(3) *Election Law Journal* 316, Sarah Murray, 'Courts, judicial review and the electoral process in Australia: an Antipodean perspective' in Po Jen Yap (ed.), *Judicial Review of Elections in Asia* (Routledge, 2016) 195, 199–202.

override or set aside [its] legislation'.<sup>26</sup> This theory of legislative omnicompetence demands 'deference as submission',<sup>27</sup> with the validity of legislation considered unjusticiable. Clearly, the Australian judiciary does not exercise deference of this sort. Courts are entrusted with the review of laws under the auspices of the *Constitution*, which imposes procedural and substantive constraints on the legislature. As Justice Kenneth Hayne wrote:

the whole system of Government in Australia is constructed upon the recognition that the ultimate responsibility for the final definition, maintenance and enforcement of the boundaries within which governmental power may be exercised rests upon the judicature.<sup>28</sup>

Alternatively, to borrow the phraseology of Keith Mason, 'parliaments may be supreme, but they are not sovereign'.<sup>29</sup>

However, the concept of deference is not entirely irrelevant to the relationship between the legislature and judiciary in Australia. Deference extends beyond obeisance, to 'deference as respect'.<sup>30</sup> This requires courts to recognise Parliament's legislative power and give weight to its reasons for acting. Of course, the degree of weight given to those reasons is variable, as is the corresponding degree of deference. Properly understood, judicial deference exists along a spectrum, with the abdication of judicial responsibility at one extreme and the usurpation of legislative power at the other. The contemporary debate is fought in the sensible centre, between those supporting a general doctrine of deference<sup>31</sup> and those who argue weight should be determined on a case-by-case basis, this being referred to as 'epistemic deference'.<sup>32</sup> The resolution of that debate is, happily, beyond scope. It is sufficient for present purposes to borrow the language of that scholarship, and the understanding that judicial deference is variable.

<sup>26</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10<sup>th</sup> ed, 1959) 39–40.

<sup>27</sup> David Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in Michael Taggart (ed.), *The Province of Administrative Law* (Hart Publishing, 1997) 279, 303.

<sup>28</sup> Justice Kenneth Hayne, 'Deference — an Australian perspective' [2011] *Public Law* 75, 76.

<sup>29</sup> Keith Mason, 'The Rule of Law' in Paul Finn (ed.), *Essays on Law and Government: Principles and Values* (Law Book, 1995) 114, 123.

<sup>30</sup> Dyzenhaus, above n 7, 286.

<sup>31</sup> This is the notion that courts have a duty of minimal deference and should acquiesce to legislative action unless a fundamental notion (eg reasonableness) is breached. See, eg, Aileen Kavanagh, 'Defending deference in public law and constitutional theory' (2010) 126 *Law Quarterly Review* 222, Murray Hunt, 'Sovereignty's blight: why contemporary public law needs the concept of "due deference"' in Nicholas Bamford and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing, 2003) 337, Alison Young, 'In Defence of Due Deference' (2009) 72(4) *Modern Law Review* 554.

<sup>32</sup> T R S Allan, 'Judicial deference and judicial review: legal doctrine and legal theory' (2011) 127 *Law Quarterly Review* 96; T R S Allan, 'Deference, defiance and doctrine: defining the limits of judicial review' (2010) 60(1) *University of Toronto Law Journal* 41.

## B A Century Of Deference

Over the 20<sup>th</sup> century, the Court adopted an ‘abstentionist’<sup>33</sup> approach in cases concerning the validity of voting laws. The reported decisions, though relatively few in number, overwhelmingly evidence this. One can look to cases like *Judd v McKeon*,<sup>34</sup> where the Court refused to read into s 9 of the *Constitution* that the ‘choice’ to which the provision refers must be voluntary, upholding the constitutionality of compulsory voting,<sup>35</sup> or *McKenzie*, in which Gibbs CJ concluded that the *Constitution* neither expressly nor impliedly prohibited ticket voting. Another is *Langer v Commonwealth*,<sup>36</sup> in which it was held that the Commonwealth Parliament was empowered to enact full preferential voting. Two cases will be examined below in more fulsome detail. The first is *Ex parte Sipka*, where the Court deviated egregiously from the text of s 41 of the *Constitution* to diminish the right that that provision appears to guarantee. The second is *McKinlay*, where the Court refused to imply into s 24 of the *Constitution* ‘one vote, one value’ as a limitation on Commonwealth legislative power.

### 1 *Ex parte Sipka: the emasculation of s 41*

The *Constitution* contains no express right to vote. The closest analogue is s 41, entitled ‘rights of electors of States’, which provides:

No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

On its face, s 41 seems to provide a ‘permanent’<sup>37</sup> constitutional guarantee of continuing effect, rendering nugatory any attempt by the Commonwealth Parliament to prescribe a franchise narrower than that under a less restrictive state

<sup>33</sup> Graeme Orr, *The Law of Politics* (Federation Press, 2010) 5.

<sup>34</sup> (1926) 38 CLR 380 (*Judd*). As an aside, the Court by majority (Knox CJ, Isaacs, Gavan Duffy, Rich and Starke JJ, Higgins J dissenting) determined in this case that conscientious objection did not constitute a ‘valid and sufficient’ reason for failing to vote. On this point, see also *Faderson v Bridger* (1971) 126 CLR 271 (*Faderson*), in which the Court determined that having no preference for any of the candidates was not a ‘valid and sufficient’ reason, either.

<sup>35</sup> Currently, the duty to vote is found in *Electoral Act* s 245.

<sup>36</sup> (1996) 186 CLR 302.

<sup>37</sup> *R v Jones* (1972) 128 CLR 221, 231–3 (Barwick CJ), 246 (Menzies J). In this case, ‘adult person’ was interpreted to mean a person of 21 years or older. On that basis, s 41 could not come to the aid of the three plaintiffs who were not ‘adult persons’ within the meaning of the provision, who sought to be included on the federal roll after South Australia lowered its voting age to 18.

law. Effectively, under such an interpretation, state laws set a floor, below which Commonwealth legislation cannot descend. The floor is shifting: a state legislature could unilaterally confer upon a previously excluded subset a right to vote at state elections and, by virtue of s 41, they would be entitled to vote at the federal level, too. Read in this way, s 41 significantly fetters the Commonwealth Parliament's power to enact legislation restricting the franchise.

However, the majority in *Ex parte Sipka*<sup>38</sup> adopted a considerably narrower construction. The applicants, who had failed to enrol prior to the closure of rolls for the 1983 federal election, sought to avail themselves of s 41. They argued that as they had subsequently had their names placed on the New South Wales electoral roll,<sup>39</sup> they could not be barred from voting at federal elections. The majority disagreed. Their Honours' construction of s 41 sought to preserve the Commonwealth's power to legislate for a uniform franchise,<sup>40</sup> which their Honours considered as being constitutionally prescribed once enlivened by Commonwealth legislation. A reading of s 41 that would have allowed a state parliament to subsequently introduce disuniformity in favour of its electors would, accordingly, be impermissible.<sup>41</sup> Instead, guided by Quick and Garran's interpretation,<sup>42</sup> the majority reduced s 41 to a mere transitional provision, which ensured only that rights acquired up until the point the Commonwealth legislated for a uniform franchise were reflected in that federal franchise.<sup>43</sup> It did so in 1902.<sup>44</sup> All those whose rights were guaranteed by s 41 would have died by 1983, and s 41 has consequently become a spent provision.<sup>45</sup>

In dissent, Murphy J's labelled this narrow view a 'pedantic interpretation' that 'make[s] a mockery' of the constitutional guarantee for which s 41 plainly provides.<sup>46</sup> His Honour regarded the majority's reliance on Quick and Garran's interpretation as misguided given the selectiveness of their account of the relevant Convention debates,<sup>47</sup> in respect of which it has been suggested that '[t]he Convention debates are ... illuminating only to the extent that they show there was

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<sup>38</sup> Consisting of Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ, Murphy J dissenting.

<sup>39</sup> Pursuant to s 23 of the *Parliamentary Electorates and Elections Act 1912* (NSW), a person who is enrolled to vote acquires an entitlement to vote.

<sup>40</sup> Sections 8 and 30 of the Constitution contemplate the passage by the Commonwealth Parliament of a uniform franchise.

<sup>41</sup> *Ex parte Sipka* (1983) 152 CLR 254, 260–1 (Gibbs CJ, Mason and Wilson JJ).

<sup>42</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 483–7.

<sup>43</sup> For instance, the Commonwealth Parliament could not have excluded women from the franchise, as female suffrage had been granted in South Australia in 1895 and in Western Australia in 1899: *ibid* 261 (Gibbs CJ, Mason and Wilson JJ).

<sup>44</sup> *Commonwealth Franchise Act 1902* (Cth).

<sup>45</sup> *Ex parte Sipka* (1983) 152 CLR 254, 280 (Brennan, Deane and Dawson JJ).

<sup>46</sup> *Ibid* 268–71 (Murphy J).

<sup>47</sup> *Ibid* 272 (Murphy J).

no clear rationale behind s 41'.<sup>48</sup> Anne Twomey argues the narrow construction is 'clearly unwarranted from the text of the provision', describing the deference to the Commonwealth Parliament as 'uncalled for'.<sup>49</sup> Notwithstanding the significant departure from a literalist interpretation and the questionable historical analysis upon which that departure was justified, the deferential narrow reading of s 41 appears entrenched as a matter of precedent, having been affirmed in *Snowdon v Dondas (No 2)*<sup>50</sup> and cited with approval in *Roach*.<sup>51</sup>

## 2 *McKinlay: the denial of 'one vote, one value'*

The 'one vote, one value' cases also illustrate the Court's deferential proclivities. The *Constitution* provides that 'each elector shall vote only once',<sup>52</sup> thus prohibiting plural voting.<sup>53</sup> Arguably, this principle of 'one person, one vote' would be rendered otiose without 'one vote, one value' — that is, unless each voter's vote is of equal weight to that of every other voter. This was certainly the view of the United States Supreme Court, which held by majority in *Wesberry v Sanders*<sup>54</sup> that art I § 2 of the *United States Constitution* contained an implication that 'as nearly as is practicable, one [person's] vote in a congressional election is to be worth as much as another's'.<sup>55</sup>

Inspired by the appellant's success in *Wesberry*, the plaintiffs in *McKinlay* challenged the validity of certain *Electoral Act* provisions concerning the drawing of electoral boundaries for the House of Representatives.<sup>56</sup> As it then stood, s 19 of the *Electoral Act*<sup>57</sup> permitted the number of electors in each electorate to vary by up to 10 per cent from the mean. In fact, given the time lag between redistributions, the malapportionment was significantly greater in many, with the largest electorate being almost twice as populous as the smallest.<sup>58</sup> As each returns only one member to the lower house, the vote of those in more populous electorates is of lesser relative value than the vote of those in less populous electorates. The plaintiffs

<sup>48</sup> Anne Twomey, 'The Federal Constitutional Right to Vote in Australia' (2000) 28 *Federal Law Review* 125, 130.

<sup>49</sup> *Ibid* 133.

<sup>50</sup> (1996) 188 CLR 48, 71–2 (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ).

<sup>51</sup> (2007) 233 CLR 162, 195 (Gummow, Kirby and Crennan JJ).

<sup>52</sup> *Constitution* ss 8, 30.

<sup>53</sup> Prior to Federation, plural voting on the basis of property ownership was permitted in Queensland, Western Australia and Tasmania.

<sup>54</sup> 376 US 1 (1964) ('*Wesberry*').

<sup>55</sup> *Ibid* 7–8 (Black J, Warren CJ, Douglas, Brennan, White and Goldberg JJ concurring).

<sup>56</sup> *Electoral Act* ss 18, 18A, 19, 23, 23A, 24.

<sup>57</sup> The provision is now found in *Electoral Act* s 66(3).

<sup>58</sup> The division of Wimmera, for example, had slightly fewer than 50 000 electors, while the division of Diamond Valley had almost 90 000. On this basis, Barwick CJ, Gibbs, Stephen and Mason JJ declared *Representation Act 1905* (Cth) s 12(a) invalid, despite upholding s 19 of the *Electoral Act*.

contended that s 24 of the *Constitution* implicitly required each electorate to contain, as far as practicable, the same number of electors to ensure relatively equal vote-weighting. Accordingly, the Commonwealth Parliament could not legislate to permit such wide variances.

The majority held that the purported implication was unfounded and had no basis in the text of s 24.<sup>59</sup> Reliance on *Wesberry* was rejected for compellingly simple reasons: *Wesberry* was based on a particular (and contested)<sup>60</sup> view of American history. Those historical circumstances are irrelevant to the Australian experience and could not inform an interpretation of the Australian *Constitution*.<sup>61</sup> In obiter, McTiernan, Jacobs and Mason JJ suggested that, despite the lack of a constitutional basis for ‘one vote, one value’, gross malapportionment could offend the ‘directly chosen by the people’ stipulation.<sup>62</sup> Given the extent of malapportionment patent on the facts before the Court,<sup>63</sup> the bar to judicial intervention is high and the utility of s 24 as a protection of voting power is dubious.

*McKinlay* is pertinent not only as a ‘classic example of [the Court] deferring to parliamentary sovereignty’,<sup>64</sup> but also for the enunciation by several justices of the Court’s general approach to the scrutiny of electoral laws. Barwick CJ, for instance, contrasted the American and Australian constitutional traditions. In comparison to the *United States Constitution*, the adoption of which was precipitated by a declaration of independence and a revolutionary war fought against British institutions and ideals, his Honour noted the relative pacificity of the Australian experience, resulting in a *Constitution*

built upon confidence in a [British-style] system of parliamentary Government with ministerial responsibility ... [t]hus, discretions in parliament are more readily accepted in the construction of the Australian Constitution.<sup>65</sup>

Similarly, Stephen J observed that as the *Constitution*

entrusted to elected legislatures rather than to this Court ... wide powers of shaping ... the details of [Australia’s] electoral system, it is not for this Court to intervene so

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<sup>59</sup> *McKinlay* (1975) 135 CLR 1, 17 (Barwick CJ), 39–40 (McTiernan and Jacobs JJ), 45 (Gibbs J), 57–8 (Stephen J), 61 (Mason J); cf 70–1 (Murphy J).

<sup>60</sup> *Wesberry*, 376 US 1, 30–2 (Harlan J) (1964).

<sup>61</sup> *McKinlay* (1975) 135 CLR 1, 23 (Barwick CJ), 47 (Gibbs J), 63 (Mason J).

<sup>62</sup> *Ibid* 36–7 (McTiernan and Jacobs JJ), 61 (Mason J).

<sup>63</sup> Compare the electorates of Wimmera and Diamond Valley in footnote 63.

<sup>64</sup> Graeme Orr, *The Law of Politics* (Federation Press, 2010) 27.

<sup>65</sup> *McKinlay* (1975) 135 CLR 1, 24 (Barwick CJ).

long as what is enacted is consistent with the existence of representative democracy  
...<sup>66</sup>

In keeping with these non-interventionist credos, the ‘directly chosen by the people’ stipulation was given a relatively spare interpretation, guaranteeing only that elections are direct and popular.<sup>67</sup> Under the majority’s approach, the implication of any additional limitations on the Commonwealth Parliament’s electoral lawmaking would have amounted to the imposition of judicial preference in an area falling squarely within the Commonwealth Parliament’s purview, and in which the Parliament has a wide degree of constitutional latitude. Overall, these comments quite clearly evince doctrinal deference, where the starting position, from which the Court was loath to depart, was one of judicial subordination.

### C *Increasing interventionism*

Reflecting in 2003 on the High Court’s role in the federal electoral system, Gerard Carney noted the Court’s general deferential approach, observing that ‘[i]t will require an activist court to depart from this traditional deference in matters where electoral rights are threatened’.<sup>68</sup> These comments foreshadowed *Roach* and *Rowe*, cases in which an interventionist shift in the Court’s approach emerged. This shift had two important, interrelated elements. First, the constitutionally prescribed notion of ‘representative government’ was widened, thus widening the bases for judicial intervention in electoral lawmaking. Secondly, proportionality analysis was adopted as an interpretative technique. By its nature, proportionality invites courts to consider and assign weight to the reasons underlying a particular enactment (showing the legislature epistemic, rather than doctrinal, deference) and, as James Allan opined in his blistering critique of the majorities’ approaches in *Roach* and *Rowe*, ‘clearly compounds the scope for debatable judicial value judgements’.<sup>69</sup>

Before examining those cases, it is useful to reflect briefly upon the implied freedom cases, the reasoning in which formed the foundation of the majority judgments in *Roach* and *Rowe*. In *Nationwide News Pty Ltd v Wills*<sup>70</sup> and *Australian*

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<sup>66</sup> Ibid 57–8 (Stephen J).

<sup>67</sup> Ibid 21 (Barwick CJ).

<sup>68</sup> Gerard Carney, ‘The High Court and the Constitutionalism of Electoral Law’ in Graeme Orr, Bryan Mercurio and George Williams (eds), *Realising Democracy: Electoral Law in Australia* (Federation Press, 2003) 170, 184.

<sup>69</sup> James Allen, ‘Judicial Activism: *Roach*, *Rowe* and (No) ‘Riginalism’ (2012) 36 *Melbourne University Law Review* 743, 749.

<sup>70</sup> (1992) 177 CLR 1.

*Capital Television Pty Ltd v Commonwealth*,<sup>71</sup> the Court derived from the *Constitution* an implied freedom of political communication, which it refined in *Lange v Australian Broadcasting Corporation*.<sup>72</sup> The phrase ‘directly chosen by the people’ in ss 7 and 24, the reasoning went, established a system of representative democracy, an inherent part of which is the periodic conduct of free elections.<sup>73</sup> This necessitates the free exchange of views on matters of state between electors, and between electors and their representatives, to allow them to cast their vote in an informed way.<sup>74</sup>

The implied freedom does not operate as an absolute restriction on Commonwealth legislative power.<sup>75</sup> Significantly, the Court applied a two-stage proportionality test: first, it must be shown that the impugned law burdens freedom of communication about government or political matters; and secondly, it must be shown that the law was not ‘reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government’.<sup>76</sup> A majority of the Court recast this test in *McCloy v New South Wales*.<sup>77</sup> The first question remains the same. However, the second question was restructured: a plaintiff must demonstrate that the purpose of the law or the means adopted are not compatible with the maintenance of the constitutionally prescribed system of representative government, or that the law is not reasonably appropriate and adapted to that legitimate end in the sense of being unsuitable, unnecessary or not adequate in its balance.<sup>78</sup> The significance of this development to the present enquiry will become apparent in the final part, with the potential adoption in *Murphy* of structured proportionality in cases where the impugned law burdens the franchise.

### 1 *Roach: proportionality testing and the evolutionary nature of representative government*

*Roach* concerned the 2006 exclusion of all serving prisoners from the franchise.<sup>79</sup> Previously, only those serving a term of three years imprisonment or

<sup>71</sup> (1992) 177 CLR 106.

<sup>72</sup> (1997) 189 CLR 520 (*‘Lange’*).

<sup>73</sup> *Ibid* 557 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

<sup>74</sup> *Ibid* 559–60 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

<sup>75</sup> *Ibid* 561 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

<sup>76</sup> *Ibid* 561–2, 567–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

<sup>77</sup> (2015) 325 ALR 15 (*‘McCloy’*).

<sup>78</sup> *Ibid* 18–19 (French CJ, Kiefel Bell and Keane JJ).

<sup>79</sup> *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) sch 1 item 15.

longer were excluded. By majority,<sup>80</sup> the blanket exclusion was invalidated. Borrowing from Brennan CJ's judgment in *McGinty v Western Australia*,<sup>81</sup> the majority held that any enactment disenfranchising a particular group of citizens must be based on a 'substantial reason' to comply with the constitutional stipulation of choice by the people.<sup>82</sup> However, their Honours differed as to what requirement for a 'substantial reason' entailed. As in *Lange*, Gummow, Kirby and Crennan JJ held that the law must be 'reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government',<sup>83</sup> concluding that the disqualification's indiscriminate nature meant it went beyond what was constitutionally permissible.<sup>84</sup> Gleeson CJ instead asked whether the provisions 'broke the rational connection necessary to reconcile the disenfranchisement with the constitutional imperative of choice by the people'.<sup>85</sup> His Honour answered this affirmatively, thus agreeing with the plurality.

All of the majority justices, conversely, upheld the previous exclusion as constitutionally proportionate.<sup>86</sup> The crucial distinction is that, unlike the blanket ban, it discriminated on the basis of culpability — only those serving a sentence of three years or longer were disqualified. The disqualification was justified in that the higher level of offending reflected in the sentence rendered the prisoner 'unfit ... to participate in the electoral process'<sup>87</sup> — or, as the Chief Justice stated:

represents such a form of civic irresponsibility that it is appropriate for Parliament to mark such behaviour as anti-social and to direct that physical separation from the community will be accompanied by symbolic separation in the form of loss of a fundamental political right.<sup>88</sup>

Short-term prisoners were therefore entitled to vote in the 2007 federal election. The differing treatment of these two measures demonstrates epistemic, as opposed to doctrinal, deference towards the Commonwealth Parliament, with the Court considering and assigning weight to the reasons underpinning each.

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<sup>80</sup> Consisting of Gleeson CJ, Gummow, Kirby and Crennan JJ, Hayne and Heydon JJ dissenting.

<sup>81</sup> (1996) 186 CLR 140 (*McGinty*), 170 (Brennan CJ).

<sup>82</sup> *Roach* (2007) 233 CLR 162, 174 (Gleeson CJ), 198 (Gummow, Kirby and Crennan JJ).

<sup>83</sup> *Ibid* 199 (Gummow, Kirby and Crennan JJ).

<sup>84</sup> *Ibid* 201–2 (Gummow, Kirby and Crennan JJ).

<sup>85</sup> *Ibid* 182 (Gleeson CJ).

<sup>86</sup> *Ibid* 179–80 (Gleeson CJ), 204 (Gummow, Kirby and Crennan JJ).

<sup>87</sup> *Ibid* 200–1 (Gummow, Kirby and Crennan JJ).

<sup>88</sup> *Ibid* 176–7 (Gleeson CJ).

Contrary to the strict originalism pervading 20<sup>th</sup> century judicial thought on the ‘directly chosen by the people’ stipulation,<sup>89</sup> the majority in *Roach* adopted an ‘evolutionary’ approach. For instance, Gummow, Kirby and Crennan JJ remarked that ‘the Constitution makes allowance for the evolutionary nature of representative government as a dynamic rather than purely static institution’.<sup>90</sup> Professor Twomey provides a useful distinction between an evolutionary approach and the ‘living tree’ approach with which the majority judgments in *Roach* and *Rowe* have also been associated:<sup>91</sup> under the living tree approach, the ambit of voting rights can broaden or narrow as changing contemporary standards demand, while under the evolutionary approach, ‘[e]ach liberalising step sets the new benchmark from which there can be no retreat, at least without a substantial reason’.<sup>92</sup> This unidirectional approach is most evident in the Chief Justice’s reasoning. His Honour affirmed obiter dicta in *McKinlay*,<sup>93</sup> *McGinty*<sup>94</sup> and *Langer*,<sup>95</sup> where several justices argued that as a result of the broadening of the franchise since Federation to include all adult citizens, universal adult suffrage was now entrenched as a constitutional imperative. A federal election conducted on the basis of any narrower franchise ‘could not now be described as a choice by the people’.<sup>96</sup>

Given the preceding century of doctrinal deference, the significance of *Roach* cannot be understated. As Graeme Orr and George Williams observed:

For the first time, a majority of the Australian High Court ... held that the requirement in sections 7 and 24 of the Australian Constitution that the Houses of Federal Parliament be “directly chosen by the people” imposes meaningful limitations on Parliament’s ability to delimit the franchise.<sup>97</sup>

## 2 *Rowe: increasing interventionism confirmed*

*Rowe* concerned the constitutional validity of provisions curtailing the statutory grace period in which a person could enrol or transfer their enrolment

<sup>89</sup> Hayne and Heydon JJ’s dissenting judgments harkened back to this originalism, with Hayne J asserting that ‘[h]istory provides the only certain guide’: *ibid* 206. See also *ibid* 224 (Heydon J).

<sup>90</sup> *Ibid* 186–7 (Gummow, Kirby and Crennan JJ).

<sup>91</sup> See, eg, Ruth Greenwood, ‘A Progressive Court and a Balancing Test: *Rowe v Electoral Commissioner* [2010] HCA 46’ (2010) 14 *University of Western Sydney Law Review* 119, 119.

<sup>92</sup> Anne Twomey, ‘*Rowe v Electoral Commissioner* — Evolution or Creationism?’ (2012) 31(2) *University of Queensland Law Journal* 181, 184.

<sup>93</sup> (1975) 135 CLR 1, 36 (McTiernan and Jacobs JJ).

<sup>94</sup> (1996) 186 CLR 140, 201 (Toohey J), 221–2 (Gaudron J).

<sup>95</sup> (1996) 186 CLR 302, 342 (McHugh J).

<sup>96</sup> *Roach* (2007) 233 CLR 162, 174 (Gleeson CJ).

<sup>97</sup> 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, 123.

following the issuance of the writs. The unenrolled were given until 8pm on the issuing day to enrol, and those wishing to transfer their enrolment had until 8pm on the third day thereafter.<sup>98</sup> Previously, a seven-day period applied to both enrolments and transfers. This seven days' grace was statutorised in 1983,<sup>99</sup> prior to which the long-standing, consistent executive practice of announcing the election some days before the formal issuance of writs gave voters an effective grace period of variant length.<sup>100</sup>

By majority,<sup>101</sup> the Court held the relevant amendments were an invalid, disproportionate exercise of Commonwealth legislative power, restoring the seven-day grace period that remains in place today.<sup>102</sup> The majority accepted the truncation of the grace period, while not expressly disqualifying electors, would nonetheless in their practical operation disenfranchise an estimated 100 000 people who were otherwise eligible to vote.<sup>103</sup> In so holding, the majority rejected the Commonwealth's contention that the disenfranchisement was justified because the earlier closure of the rolls was necessary to guard against fraud. That the Commonwealth was unable to demonstrate the risk of fraud as anything other than a mere potentiality led to the conclusion that it was not a substantial reason to disenfranchise such a large proportion of the electorate.<sup>104</sup> Similarly, the majority dismissed the argument that the measure, in giving the Commission additional time to process late enrolment applications, was reasonably appropriate and adapted to the enhancement and improvement of the electoral system. Evidence showed the Commission was more than capable of executing its statutory functions.<sup>105</sup> In all, the majority concluded there was no sufficient reason justifying the detrimental impact upon the franchise.

While the conclusion should not be overstated, given the majority's acceptance of the 'considerable discretion' the Commonwealth Parliament has in electoral lawmaking,<sup>106</sup> the majority's decision in *Rowe* clearly bedded down the two interventionist elements that emerged in *Roach*: proportionality testing was applied;<sup>107</sup> and the constitutionally prescribed notion of 'representative

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<sup>98</sup> *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) sch 1 items 20, 24, 28, 41, 42, 43, 44, 45, 52.

<sup>99</sup> *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) ss 29, 45.

<sup>100</sup> See, eg, *Rowe* (2010) 243 CLR 1, 12 (French CJ).

<sup>101</sup> Consisting of French CJ, Gummow, Crennan and Bell JJ, Hayne, Heydon and Kiefel JJ dissenting.

<sup>102</sup> *Electoral Act* s 155.

<sup>103</sup> *Rowe* (2010) 243 CLR 1, 20 (French CJ), 56–7 (Gummow and Bell JJ), 119 (Crennan J); cf 75 (Hayne J), where his Honour distinguished between the legal opportunity to participate and factual participation, the latter of which his Honour held was outside the purview of constitutional law.

<sup>104</sup> *Ibid* 38–9 (French CJ), 61 (Gummow and Bell JJ), 119–21 (Crennan J).

<sup>105</sup> *Ibid* 38–9 (French CJ), 119–21 (Crennan J).

<sup>106</sup> *Ibid* 22 (French CJ), 49–50 (Gummow and Bell JJ), 106 (Crennan J).

<sup>107</sup> *Ibid* 12, 19–20 (French CJ), 59 (Gummow and Bell JJ), 118–19 (Crennan J).

government' was given a richer, more fulsome interpretation, with the endorsement of the evolutionary view.<sup>108</sup>

Kiefel J, dissenting in *Rowe*, also applied proportionality analysis.<sup>109</sup> However, her Honour's conclusion differed from the majority's, observing that '[i]t should not be assumed that the application of identifiable tests of proportionality will lead to widening, impermissibly, the scope of review of legislation'.<sup>110</sup> Naturally, whether proportionality has this effect depends on the notion of representative government seen as being constitutionally prescribed: that is the touchstone against which impugned laws are tested. However, given the coinciding broadening of that notion by the majority, it is inarguably the case that, after a century in which the High Court displayed a scrupulous deference to the Commonwealth Parliament's electoral lawmaking, at no point in history has the Court's appetite to scrutinise voting laws, and its willingness to invalidate them in aid of voting rights, been greater.

This is the context in which *Day* was argued.

### III OPTIONAL PREFERENTIAL VOTING AND THE BURDEN ON THE FRANCHISE

Having determined the state of the law at the time *Day* was argued, the next step is to develop the 'missing argument' — that the higher incidence of vote exhaustion under optional preferential voting is a constitutionally impermissible disenfranchisement. This part begins by bringing to the forefront the defects in Senator Day's case. The missing argument will then be set out. The mechanism by which votes exhaust; the likely incidence of exhaustion; and its impact on voter participation will each be analysed. It will be argued that the notion of representative government has evolved to the point that full preferential voting is now constitutionally entrenched, whether because of its status as a 'durable legislative development' or because ss 7 and 24 require maximisation of participation. Optional preferential voting is therefore constitutionally impermissible unless justified with a substantial reason.

The intent is to uncritically state that argument at its highest, constructing a case based on the law and facts available when *Day* was argued. Though perhaps artificial, the endeavour demonstrates that there was an alternative argument the plaintiff should have advanced, which was free of the deficiencies in those he

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<sup>108</sup> Ibid 18–19 (French CJ), 48 (Gummow and Bell JJ), 106–7 (Crennan J).

<sup>109</sup> Ibid 145–7 (Kiefel J).

<sup>110</sup> Ibid 140 (Kiefel J).

actually put to the Court. Subsequent developments — the outcomes of the 2016 federal election and the decision in *Murphy* — will be considered in the next part.

It would be remiss not to note Professor Twomey’s recent contribution to the *Sydney Law Review*, in which she outlined a similar argument.<sup>111</sup> In addition to being expressed in more elaborate detail, the analysis in this part departs from Professor Twomey’s in relation to the significance of the voluntary nature of the purported disenfranchisement.

## A *The arguments in Day*

### 1 *Argument A: multiple methods of voting*

First, the plaintiff alleged a breach of s 9 of the *Constitution*, which provides that ‘Parliament ... may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States’. Emphasis was placed on the word ‘method’, expressed in the singular. Conversely, the plaintiff asserted that ‘[f]or the first time since Federation, the Parliament in Form E has prescribed for use by electors ... a ballot paper which requires voters to exercise ... a choice between two prescribed methods of voting’.<sup>112</sup> The plaintiff characterised these as separate, substantively distinct methods, describing above the line voting as the ‘party list’ method and below the line voting as the ‘candidate list’ method.<sup>113</sup> In aid of this submission, the plaintiff referred to the *Electoral Act* definition of ‘dividing line’ — meaning the ‘line on a ballot paper that separates the voting *method* described in subsection 239(1) from the voting *method* described in subsection 239(2)’<sup>114</sup> — as amounting to a legislative concession of the correctness of the argument. However, French CJ described this in oral argument as ‘trying to use a statutory tail to wag a constitutional dog’.<sup>115</sup>

The Court rejected this argument, describing it as imposing a ‘pointlessly formal constraint on parliamentary power’ and holding that “[m]ethod” is a

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<sup>111</sup> Anne Twomey, ‘*Day v Australian Electoral Officer (SA): Senate Voting Reforms under Challenge*’ (2016) 38 *Sydney Law Review* 231, 239–41. As the editors note, Professor Twomey’s contribution was received prior to the decision in *Day* and was not rewritten following the handing down of the Court’s judgment. For that reason, her note is speculative and does not consider the Court’s reasons.

<sup>112</sup> *Day*, ‘Written Submissions of Plaintiff’, Submission in *Day v Australian Electoral Officer (SA)*, S77/2016, 5 April 2016, 1–2. This assertion is incorrect. Voters have been choosing between voting above the line or below the line since the 1984 federal election.

<sup>113</sup> *Ibid* 3.

<sup>114</sup> *Electoral Act* s 4(1) (emphasis added).

<sup>115</sup> Transcript of Proceedings, *Day v Australian Electoral Officer (SA)* [2016] HCATrans 97 (2 May 2016) 245–6 (French CJ).

constitutional term to be construed broadly allowing for more than one way of indicating choice within a single uniform system'.<sup>116</sup>

## 2 *Argument B: indirect choosing of Senators*

Secondly, the plaintiff argued that in allowing voters to select from parties above the line, the 2016 amendments contravened the stipulation in s 7 of the *Constitution* that Senators must be 'directly chosen'. While acknowledging that above the line votes are counted as votes for candidates,<sup>117</sup> the plaintiff emphasised the word 'direct', contending that the choosing of Senators must be conducted 'without the intervention of an intermediary or third party or other obstacle'.<sup>118</sup> In the plaintiff's view, a (direct) vote for a party above the line was an indirect vote for candidates, which is constitutionally proscribed. Disposing of this 'untenable' argument, the Court cited the construction of 'directness' in *McKinlay* as implying only that the choice cannot be conducted via an electoral college or similar body.<sup>119</sup>

## 3 *Argument C: disproportionality and the Droop quota*

Thirdly, the plaintiff argued the 2016 amendments breached an implied constitutional requirement of 'directly proportional representation' — that the notion of representative government requires a party's vote-share to bear some relation to its seat-share. The plaintiff sought to derive this principle from the stipulation in s 24 of the *Constitution* that the number of members of the House of Representatives for each state must be proportional to its population, extending this principle to the Senate because of the nexus between the two houses required by that provision. Also relied upon was the requirement in s 128 that, where a referendum proposes to diminish a state's proportionate representation, voters in the affected state must approve the proposal by majority.<sup>120</sup> However, this is an equivocation: the proportionality s 24 requires is between a state's population and its parliamentary representation. The relationship between a party's vote-share and its parliamentary representation is another thing entirely. The Court concluded that no such relationship was constitutionally prescribed and did not concern itself

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<sup>116</sup> *Day* [2016] HCA 20 (13 May 2016), [44].

<sup>117</sup> Pursuant to *Electoral Act* s 272(2), above the line votes are taken to have been marked as if the voter had voted for candidates below the line in the order listed on the ballot paper.

<sup>118</sup> Day, 'Written Submissions of Plaintiff', Submission in *Day v Australian Electoral Officer (SA)*, S77/2016, 5 April 2016, 7.

<sup>119</sup> *Day* [2016] HCA 20 (13 May 2016), [48]–[50].

<sup>120</sup> Day, 'Written Submissions of Plaintiff', Submission in *Day v Australian Electoral Officer (SA)*, S77/2016, 5 April 2016, 8.

further with the argument.<sup>121</sup> For the sake of completeness, several comments may be made.

The plaintiff's complaint related to the counting of the vote and, in particular, the formula by which quotas for election are determined, being the Droop method.<sup>122</sup> The plaintiff contended that, in dividing the number of valid votes by one more than the number of seats available, the Droop method leaves an 'unrepresented rump' of approximately 14.3 per cent at a normal half-Senate election.<sup>123</sup> An alternative, the Hare method, does not exhibit this 'defect', with the number of votes being instead divided by the number of seats available. Further, in requiring fewer votes for election, the Droop quota leaves a larger surplus to be transferred to successful candidates' compatriots. This 'springboard effect', Senator Day argued, unfairly disadvantaged independents and minor party candidates.<sup>124</sup>

The 'unrepresented rump' argument is obfuscatory. The 'rump' consists of those preferring the losing candidate for the last seat. It could equally be said that each lower house contest, which ends after one candidate receives a majority, leaves an unrepresented rump of almost 50 per cent. As a matter of political science, the 'springboard effect' argument is sound.<sup>125</sup> However, it is another thing entirely to suggest the existence of an implied constitutional requirement of proportional representation, met by the Hare quota but in respect of which the Droop quota falls short. The plaintiff made no case as to where the line between constitutional and unconstitutional disproportionality is to be drawn, and did not develop an argument to the effect that the *Constitution* requires maximisation of proportionality.

#### 4 *Argument D: misleading instructions*

Fourthly, the plaintiff argued the instructions on the Senate ballot paper<sup>126</sup> were misleading and burdened the implied freedom of political communication in two ways. First, in instructing voters to vote *either* above *or* below the line, the ballot paper impliedly precluded other ways of voting, such as the 'just vote one' option.

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<sup>121</sup> *Day* [2016] HCA 20 (13 May 2016), [54].

<sup>122</sup> *Electoral Act* s 273(8): the number of valid votes in each state and territory is divided by the number of seats available plus one, to which one is added.

<sup>123</sup> *Day*, 'Written Submissions of Plaintiff', Submission in *Day v Australian Electoral Officer (SA)*, S77/2016, 5 April 2016, 9–10. The 'unrepresented rump' would be 7.7 per cent at a double dissolution election and 33.3 per cent at elections for territory Senators.

<sup>124</sup> *Ibid* 10–11.

<sup>125</sup> It is accepted that the Droop quota is less advantageous to small parties and results in less proportionate outcomes: see, eg, Arend Lijphart, 'Degrees of Proportionality of Proportional Representation Formulas' in Bernard Grofman and Arend Lijphart (eds.) *Electoral Laws and their Political Consequences* (Agathon Press, 1986) 169, 175–6.

<sup>126</sup> The prescribed form of the ballot paper is Form E in *Electoral Act* sch 1: *Electoral Act* s 209(1).

Secondly, in instructing voters to number at least six boxes above or twelve boxes below the line, the ballot paper failed to inform voters that their vote could exhaust if they expressed an insufficient number of preferences.<sup>127</sup> The Court held that neither of the alleged burdens were made out: the ballot paper accurately reflected the *Electoral Act* requirements,<sup>128</sup> and the plaintiff, in arguing the savings provisions<sup>129</sup> provided for alternative ways to vote, mischaracterised those provisions.<sup>130</sup>

## 5 *Argument E: the ‘catch all’*

Finally, the plaintiff argued the 2016 amendments impaired the principle of representative government and the implied freedom.<sup>131</sup> The plaintiff did not pursue this point in oral argument.<sup>132</sup> Accordingly, the Court’s treatment of this argument was cursory, describing it as a ‘catch all’ proposition that merely repeated the plaintiff’s other arguments.<sup>133</sup> At this juncture, other than to indicate that in the plaintiff’s submissions here can be found the germ of the unanswered question that this paper will now turn to articulate, nothing can be added to the Court’s reasoning.

### B *The unanswered question: vote exhaustion and the burden on the franchise*

#### 1 *The distinction between optional and full preferential voting*

The first three arguments could equally have been levelled against ticket voting,<sup>134</sup> first upheld in *McKenzie*. Senator Day did not invite the Court to overturn *McKenzie*, which was decided by a single justice.<sup>135</sup> In fact, the Court in *Day* cited

<sup>127</sup> Day, ‘Written Submissions of Plaintiff’, Submission in *Day v Australian Electoral Officer (SA)*, S77/2016, 5 April 2016, 11–14.

<sup>128</sup> *Electoral Act* s 279.

<sup>129</sup> *Ibid* ss 268(1)(b) and 269(1)(b) provide, respectively, that a ballot paper with six squares completed below the line or one square completed above the line is not invalid.

<sup>130</sup> *Day* [2016] HCA 20 (13 May 2016), [56].

<sup>131</sup> Day, ‘Written Submissions of Plaintiff’, Submission in *Day v Australian Electoral Officer (SA)*, S77/2016, 5 April 2016, 14–15.

<sup>132</sup> The Commonwealth’s observation that the argument had been abandoned was not met with any resistance: Transcript of Proceedings, *Day v Australian Electoral Officer (SA)* [2016] HCATrans 98 (3 May 2016) 2800 (N J Williams SC).

<sup>133</sup> *Day* [2016] HCA 20 (13 May 2016), [57].

<sup>134</sup> *Ibid* [37].

<sup>135</sup> In fact, in each case where the constitutionality of ticket voting was impugned, the matter was decided by a single justice: in *Abbotto*, Dawson J sat alone as the Court of Disputed Returns, and in *McClure* and *Ditchburn*, the Court was constituted solely by Hayne J.

*McKenzie* with approval,<sup>136</sup> determining for the first time the constitutionality of ticket voting with the conclusive force of a unanimous full bench decision. Perhaps the plaintiff's approach was intended to avoid the irresistible concession that would follow — that, as the Solicitor-General put it, 'Senator Day is, in fact, not Senator Day: he is Mr Day. He has been sitting invalidly in the Senate for the last three years'.<sup>137</sup>

Whatever the reason, the plaintiff sought instead to distinguish *McKenzie* on the basis that the voting system then under scrutiny involved full preferential voting and allowed voters to vote above the line for 'groups' as opposed to 'parties'.<sup>138</sup> The latter of these is a distinction without a difference: the 2016 amendments did not modify s 168 of the *Electoral Act*, which provides that candidates can opt to be grouped together on the ballot paper, whether or not they are members of a political party registered under the *Electoral Act*.<sup>139</sup> In general, the distinction is unconvincing. In all respects material to the first three arguments, ticket voting and optional preferential voting are indistinguishable: both allow voters to vote above or below the line; both allow voters to vote for candidates through groups or parties; and both employ the Droop quota. The plaintiff's case demonstrates that no argument against the constitutionality of the 2016 amendments could have prevailed so long as it could also have been levelled against ticket voting.

The distinguishing feature of optional preferential voting is the higher incidence of vote exhaustion. Since 1948, the Senate system has been a variant of the single transferable vote,<sup>140</sup> a preferential voting system.<sup>141</sup> Rather than allowing voters to make a single choice between candidates, voters have the opportunity to choose multiple candidates and identify the order in which they would prefer to see them elected. Subsequent preferences come into play at two junctures of the count. First, upon the election of a candidate, any votes surplus to quota are distributed according to voters' subsequent preferences at a fractional transfer value.<sup>142</sup>

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<sup>136</sup> *Day* [2016] HCA 20 (13 May 2016), [23].

<sup>137</sup> Transcript of Proceedings, *Day v Australian Electoral Officer (SA)* [2016] HCATrans 73 (24 March 2016) 188–9 (J T Gleeson SC).

<sup>138</sup> *Day*, 'Written Submissions of Plaintiff', Submission in *Day v Australian Electoral Officer (SA)*, S77/2016, 5 April 2016, 8.

<sup>139</sup> *Electoral Act* pt XI.

<sup>140</sup> *Commonwealth Electoral Act 1948* (Cth) s 3. In fact, Edmund Barton's minority government had proposed the use of the single transferable vote in the first uniform voting Act, the Electoral Bill 1902 (Cth), but failed to attract sufficient support: see, eg, David Farrell and Ian McAllister, '1902 and the Origins of Preferential Electoral Systems in Australia' (2005) 51(2) *Australian Journal of Politics and History* 155.

<sup>141</sup> See, eg, Douglas Rae, *The Political Consequences of Electoral Laws* (New Haven, 1971) 18.

<sup>142</sup> *Electoral Act* s 273(9). The method currently employed to obtain the transfer value is the 'inclusive Gregory method', by which the number of surplus votes is divided by the total number of ballot papers held by the candidate. All of the elected candidate's ballots are transferred at the fractional transfer value, to voters' next preferred candidate.

Secondly, upon the exclusion of a candidate, those candidate's votes are distributed according to voters' subsequent preferences, at the value at which they were obtained.<sup>143</sup> If a ballot paper is to be transferred, but the voter has not indicated a subsequent preference for any candidate remaining in the count, their ballot paper is set aside as exhausted.<sup>144</sup>

The 2016 amendments limited the extent of the choice required by the *Electoral Act*, removing the injunction that voters must rank-order every candidate on the ballot paper. Instead, voters must now indicate six preference above or 12 preferences below the line.<sup>145</sup> Though the proportion is inestimable, it is a reasonable proposition that the vast majority would simply comply with the minimum statutory requirement, reflected in the instructions on the ballot paper and the educative advertising campaign conducted by the Electoral Commission.<sup>146</sup> Also, the prevalence of above the line voting under the previous system suggests voters will apply the principle of least effort in casting their votes, as does the experience of optional preferential voting in elections to the New South Wales Legislative Council. Following the 1999 'tablecloth election',<sup>147</sup> at which a number of minor party candidates were elected with preferences 'harvested' through complex inter-party arrangements, the New South Wales Parliament implemented optional preferential voting for its upper house elections.<sup>148</sup> Voters are required to indicate at least one preference above the line,<sup>149</sup> or at least 15 preferences below the line.<sup>150</sup> At the 2015 state election, approximately 83 per cent took the path of least resistance, indicating only one above the line preference.<sup>151</sup> Therefore, while Senator Day could not have produced exact figures, it could have been argued with confidence that most voters would not have indicated the full gamut of preferences.

One would expect that many ballots would exhaust, some of which would have had no purpose in the count except for determining when the voter's preferred candidate or candidates were excluded. Again, it would have been difficult for the plaintiff to prospectively determine the incidence of exhaustion; necessarily, argument must be by analogy to previous experience and deference to expertise.

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<sup>143</sup> *Ibid* s 273(13AA).

<sup>144</sup> *Ibid* s 273(26).

<sup>145</sup> *Ibid* s 239(1)–(2).

<sup>146</sup> See, eg, Stephanie Anderson, 'Senate voting changes explained in Australia Electoral Commission advertisements', *ABC News* (online), 25 April 2016 <<http://www.abc.net.au/news/2016-04-26/aec-advertising-campaign-on-way-senators-are-elected/7356308>>.

<sup>147</sup> So called because the number of candidates (264) stretched the size of the ballot paper to the legislatively stipulated maximum of 70 by 100 centimetres.

<sup>148</sup> *Parliamentary Electorates and Elections Amendment Act 1999* (NSW) s 3.

<sup>149</sup> *Parliamentary Electorates and Elections Act 1912* (NSW) s 103(4).

<sup>150</sup> *Ibid* s 103(3).

<sup>151</sup> Antony Green, '2015 New South Wales Election: Analysis of Results' (Background Paper No 1, Parliamentary Research Service, Parliament of New South Wales, 2015) 45.

Final round exhaustion rates at each of the four elections to New South Wales Legislative Council under optional preferential voting are set out in Table 1.

	Exhausted votes	Formal votes	Exhaustion
2003	359 328	3 721 457	9.66%
2007	350 384	3 811 245	9.19%
2011	312 602	4 076 024	7.67%
2015	305 744	4 316 498	7.08%

**Table 1:** Final round exhaustion rates, 2003–15 New South Wales Legislative Council elections<sup>152</sup>

By the final round of counting at the 2015 election, at which four out of 21 members of the Legislative Council were elected, 305 744 votes exhausted — about seven per cent of the formal votes.<sup>153</sup> Previous elections saw similar exhaustion rates.

While these figures may have given some indication of the exhaustion rate to be expected at the 2016 federal election, the comparison is imperfect — for one, the Senate ballot paper encourages voters to express a greater number of preferences. In general, how voters would vote and for whom they would vote are both unknowns that would influence the exhaustion rate. One political scientist, Nick Economou, hazarded an estimate that between 14 and 20 per cent of ballots could potentially exhaust.<sup>154</sup> It is unclear how Dr Economou arrived at his conclusion. Nonetheless, actors such as the 3 Million Voices campaign<sup>155</sup> and the Australian Labor Party<sup>156</sup> associated themselves with the figure. Certainly, the rate of exhaustion would be much higher than at elections under ticket voting, where votes only exhausted by the operation of savings provisions for otherwise invalid below the line votes.

<sup>152</sup> NSW Electoral Commission, *Past Results — State elections* (4 April 2016) <[http://www.office.elections.nsw.gov.au/past\\_results/state\\_elections](http://www.office.elections.nsw.gov.au/past_results/state_elections)>.

<sup>153</sup> NSW Electoral Commission, *Legislative Council Progressive Total Report, Count 391* (17 April 2015) <[http://pastvtr.elections.nsw.gov.au/SGE2015/lc/state/dop/dop\\_cnt\\_391/index.htm](http://pastvtr.elections.nsw.gov.au/SGE2015/lc/state/dop/dop_cnt_391/index.htm)>.

<sup>154</sup> Stephanie Anderson, 'Proposed Senate voting changes could lead to increase in 'exhausted' votes: experts', *ABC News* (online), 15 March 2016 <<http://www.abc.net.au/news/2016-03-15/senate-voting-changes-will-increase-exhausted-votes-experts/7245828>>.

<sup>155</sup> 3,000,000 Voices (2016) <<http://www.3mv.net.au>>.

<sup>156</sup> See, eg, Commonwealth, *Parliamentary Debates*, Senate, 17 March 2016, 2388 (Penny Wong, Leader of the Opposition in the Senate).

## 2 *Vote exhaustion and voter disenfranchisement*

Why might the higher exhaustion rate be constitutionally problematic? Essentially, voters whose votes exhaust do not participate as fully in the election. The concern is particularly acute for those whose votes exhaust at full value, through the elimination of their preferred candidates. Arguably, in practical effect those voters are not participating in the electoral process at all. To a lesser extent, those whose votes exhaust at a fractional value, after the election of at least one of their preferred candidate or candidates, are also deprived of the opportunity to participate as fully in the electoral process as would have been the case before the 2016 amendments.

In *Langer*, in which the Court unanimously upheld the constitutionality of a provision criminalising the encouragement of informal voting,<sup>157</sup> several justices extolled the conceptual centrality of voters expressing full preferences in a preferential voting system. For example, Toohey and Gaudron JJ observed that

[o]ne matter that furthers the democratic process is full, equal and effective participation in the electoral process ... 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 earlier exhausted.<sup>158</sup>

The reasons a voter may have for participating to a lesser extent are irrelevant. As Brennan CJ opined, '[i]t is not to the point that, if a ballot paper were [only partially] filled in ... the vote would better express the voter's political opinion'.<sup>159</sup> McHugh J went as far as to say that '[t]he system is as effectively undermined by filling in a ballot-paper in a way that does not indicate the voter's complete order of preferences as it is by a vote that is wholly informal'.<sup>160</sup> Of course, these dicta cannot be determinative of the case against optional preferential voting. The system of which their Honours spoke required full preferential voting; *Langer* could simply be distinguished on that basis.<sup>161</sup> It is necessary to demonstrate that this parliamentary prescription has taken on the mantle of a constitutional fiat. The majority judgments in *Rowe* bridge this gap.

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<sup>157</sup> The provision — *Electoral Act* s 329A — was enacted in the *Electoral and Referendum Amendment Act 1992* (Cth) s 27 and repealed in the *Electoral and Referendum Amendment Act 1998* (Cth) sch 1 item 161.

<sup>158</sup> *Langer* (1996) 186 CLR 302, 334 (Toohey and Gaudron JJ).

<sup>159</sup> *Ibid* 317 (Brennan CJ).

<sup>160</sup> *Ibid* 339 (McHugh J).

<sup>161</sup> This point was made by counsel for the Commonwealth: Transcript of Proceedings, *Day v Australian Electoral Officer (SA)* [2016] HCATrans 98 (3 May 2016) 2766-71 (N J Williams SC).

(a) *The constitutionalisation of durable legislative developments*

According to French CJ's view that the 'directly chosen by the people' stipulation is evolutionary, 'durable legislative developments' become constitutionalised and cannot be diminished absent a substantial reason.<sup>162</sup> If durability is the touchstone, full preferential voting surely satisfies the criterion, having been in place since the introduction of the single transferable vote in 1948. It is of greater durability than the seven-day grace period upheld in *Rowe*, enacted in 1983,<sup>163</sup> and of significantly greater durability than the disenfranchisement of prisoners serving terms of three or more years upheld in *Roach*, enacted in 2004.<sup>164</sup> Full preferential voting, in requiring that voters indicate the order in which they would prefer to see each candidate elected, ensures all voters cast votes equally fulsome in detail, such that votes do not prematurely exhaust. The 2016 amendments, in facilitating optional preferential voting, diminish this durable legislative development and would be constitutionally impermissible unless justified with a substantial reason.

(b) *Maximisation of voter participation*

An alternative basis upon which Senator Day could have argued the *Constitution* requires full preferential voting is the idea expressed in Gummow and Bell JJ's joint judgment in *Rowe*, that ss 7 and 24 require maximisation of voter participation. Their Honours indicated that

the legislative selection of the ballot system of voting and provisions for the efficacy of that system is not 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.<sup>165</sup>

To reiterate Toohey and Gaudron JJ's comments in *Langer*,<sup>166</sup> voter participation is self-evidently maximised when significant proportions of the votes do not exhaust during the course of the count. As a means of maximising voter participation, optional preferential voting is less effective than full preferential

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<sup>162</sup> *Rowe* (2010) 243 CLR 1, 18 (French CJ).

<sup>163</sup> *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) s 45.

<sup>164</sup> *Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Act 2004* (Cth).

<sup>165</sup> *Rowe* (2010) 243 CLR 1, 52 (Gummow and Bell JJ).

<sup>166</sup> (1996) 186 CLR 302, 334 (Toohey and Gaudron JJ).

voting and is constitutionally impermissible unless justified with a substantial reason.

(c) *Political equality?*

Finally, the notion of political equality might mean the exhaustion rate under optional preferential voting is constitutionally problematic. In *McCloy*, each justice<sup>167</sup> cited Harrison Moore's observation that '[t]he great underlying principle [of the Constitution] is, that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power'.<sup>168</sup> A voter whose ballot remains in the count participates in the election of more Senators than a voter whose ballot exhausted at an earlier point. Arguably, whether or not the first voter's preferred candidates are successful, their continued participation in the count gives them a greater share in political power.

However, the extent to which the *Constitution* requires political equality is unclear. In *McCloy*, Professor Moore's comment was evoked at the balancing stage,<sup>169</sup> with the joint majority concluding that the impugned provisions were compatible with political equality in ensuring those with a higher capacity to make political donations could not unduly influence government.<sup>170</sup> *McCloy* is not authority for the proposition that, for example, the constitutionally prescribed notion of representative government requires political equality. Whether and how this notion will be developed remains to be seen.

3 *The self-inflicted nature of the disenfranchisement*

It should not escape comment that the disenfranchisement alleged is not a formal disenfranchisement as in *Roach*. Voters can still cast a full and effective vote that will not exhaust. However, as the majority in *Rowe* recognised, regard must be had to the practical operation of the impugned law.<sup>171</sup> Here, the introduction of optional preferential voting allows and encourages the diminution of the extent to which voters participate in the election of Senators and has an

<sup>167</sup> *McCloy* (2015) 325 ALR 15, 24 (French CJ, Kiefel, Bell and Keane JJ), 43 (Gageler J), 67 (Nettle J), 87–8 (Gordon J).

<sup>168</sup> Harrison Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2<sup>nd</sup> ed, 1910) 616.

<sup>169</sup> The Court accepted that the impugned provisions of the *Election Funding, Expenditure and Disclosure Act 1981* (NSW) that capped political donations, limited 'indirect campaign contributions' and prohibited the making of such donations by 'prohibited donors' burdened the implied freedom: *McCloy* (2015) 325 ALR 15, 20 (French CJ, Kiefel, Bell and Keane JJ).

<sup>170</sup> *Ibid* 25–9, 29–30 (French CJ, Kiefel, Bell and Keane JJ).

<sup>171</sup> *Rowe* (2010) 243 CLR 1, 12 (French CJ), 56–7 (Gummow and Bell JJ), 119 (Crennan J).

adverse practical effect upon the exercise of the entitlement to vote, even though the legal opportunity to participate fully is not hindered. It is immaterial that vote exhaustion occurs because the voter chooses to indicate only a limited number of preferences.

It is here the argument departs from that articulated by Professor Twomey. Professor Twomey distinguishes disenfranchisement caused by vote exhaustion from the disenfranchisement in *Roach* and *Rowe*, writing that the 2016 amendments

[do] not require that votes exhaust. In *Roach* and *Rowe*, the impugned laws prevented voters who wished to vote from voting. The opposite is the case in relation to the 2016 Act. Voters continue to have the right and power to give full preferences when they vote.<sup>172</sup>

However, the legal opportunity to participate fully is not determinative of the issue at hand. In *Rowe*, the majority rejected as constitutionally insignificant the argument that those who failed to enrol or transfer in time were, as Heydon J put it, ‘authors of their own misfortunes’.<sup>173</sup> While recognising the factual accuracy of the argument, the majority focused on the law’s practical effect. Their Honours concluded that, notwithstanding that the plaintiffs were burdened not by the law but by their own inaction, the truncated grace period constituted ‘a significant detriment in terms of the constitutional mandate’.<sup>174</sup> The practical effect of optional preferential voting is that votes will likely exhaust, limiting voter participation.

Another useful analogy is compulsory voting.<sup>175</sup> If the Commonwealth Parliament introduced non-compulsory voting, voters would have the choice to not vote. The experience with voluntary voting elsewhere indicates that large swathes of the voting population would voluntarily cease to participate in the electoral process.<sup>176</sup> Though the constitutionality of non-compulsory voting did not arise in *Rowe*, Gummow and Bell JJ remarked that compulsory voting ‘furthers the constitutional system of representative government by popular choice’.<sup>177</sup> Given their Honour’s conception of ss 7 and 24 as requiring maximisation of participation, their Honours would seem to be of the view that compulsory voting is constitutionally entrenched. Voluntary voting would be impermissible if not justified with a substantial reason, notwithstanding that the legal opportunity to vote would be in no way diminished. Therefore, that voters have the legal opportunity

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<sup>172</sup> Twomey, above n 1, 241.

<sup>173</sup> *Rowe* (2010) 243 CLR 1, 95 (Heydon J).

<sup>174</sup> *Ibid* 38–9 (French CJ).

<sup>175</sup> *Electoral Act* s 245, upheld in *Judd and Faderson*.

<sup>176</sup> For instance, turnout at United States presidential elections is generally around 55 to 60 per cent, and Western Australian local government elections see around 30 per cent of electors voting.

<sup>177</sup> *Rowe* (2010) 243 CLR 1, 50–1 (Gummow and Bell JJ).

to guard against the exhaustion of their vote under optional preferential voting by casting a full vote is no answer to the argument that many will not do so.

#### 4 *The nexus with the constitutional question*

Finally, one criticism levelled against the majority's reasons in *Rowe* is, as Professor Twomey argues, that 'the process of reasoning ... 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'.<sup>178</sup> In relation to *Rowe*, the complaint is essentially that the question of when the rolls close is too far removed from the question of when a Senator is said to be 'chosen by the people'. Conversely, the impact of vote exhaustion on the extent to which Senators are chosen by the people is more readily apparent: to refer once more to the results in the 2015 New South Wales state election by way of example, the last four Members of the Legislative Council elected were chosen by a narrower electorate — one that excluded the seven per cent whose votes had exhausted prior to the final round of counting.

In this part, it has been argued that Senator Day should have contended that the rate of vote exhaustion associated with optional preferential voting is contrary to ss 7 and 24 of the *Constitution* and the notion of representative government. Full preferential voting is either a constitutionally entrenched legislative development, or required as a measure maximising voter participation. Therefore, optional preferential voting is constitutionally impermissible unless justified by a substantial reason. The next part will examine those reasons, and will consider the impact of the Court's recent decision in *Murphy* on the efficacy of the argument.

### IV THE PROPORTIONALITY OF OPTIONAL PREFERENTIAL VOTING

This final part addresses the unanswered question in *Day*, as to the constitutionality of optional preferential voting given the higher rates of vote exhaustion with which it is associated. While the scope of the previous part was limited to the facts and law then available to Senator Day, this part asks how the argument would fare today. Two developments impact upon the inquiry. Briefly, exhaustion rates at the 2016 federal election will be analysed, throwing into stark relief the difference between the prediction that up to three million voices would be lost and what actually occurred. The decision in *Murphy* will then be examined in

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<sup>178</sup> Anne Twomey, 'Rowe v Electoral Commissioner — Evolutionism or Creationism?' (2012) 31(2) *University of Queensland Law Journal* 181, 193.

relation to whether the *Constitution* requires maximisation of participation, and the applicable form of proportionality testing. Though the Court was unclear on this latter point, structured proportionality testing will then be used to evaluate the constitutionality of optional preferential voting as a method promoting transparency in reasoning. Ultimately, it will be concluded that optional preferential voting, notwithstanding the burden it imposes on the franchise, is justified by substantial reasons — the empowerment of voters and the transparency and simplicity of the electoral system — and is suitable, necessary and adequate in its balance.

#### A *Developments since Day*

##### 1 *Vote exhaustion at the 2016 federal election*

Following the rejection of three government Bills by the Senate,<sup>179</sup> Prime Minister Malcolm Turnbull advised the Governor-General that both Houses of Parliament should be dissolved pursuant to s 57 of the *Constitution*. Consequently, the 2016 federal election — the seventh double dissolution election since Federation and the first since 1987 — was held on 2 July, with each state returning 12 Senators and each of the territories returning two.<sup>180</sup> Across the country, 7.52 per cent of votes had exhausted by the final round — on par with the proportions seen at New South Wales state elections, and well below the range of figures suggested by Dr Economou. Exhaustion rates at the final rounds of counting are set out in Table 2.

	Exhausted votes	Formal votes	Exhaustion
NSW	414 656	4 492 197	9.23%
VIC	300 283	3 500 237	8.58%
QLD	208 964	2 723 166	7.67%
WA	85 766	1 366 182	6.28%
SA	21 556	1 061 165	2.03%
TAS	9 531	339 159	2.81%
ACT	109	254 767	0.04%
NT	0	102 027	0%
<b>Total</b>	<b>1 040 865</b>	<b>13 838 900</b>	<b>7.52%</b>

<sup>179</sup> Building and Construction Industry (Improving Productivity) Bill 2013 (Cth); Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 (Cth); Fair Work (Registered Organisations) Amendment Bill 2014 (Cth).

<sup>180</sup> Under the *Senate (Representation of Territories) Act 1973* (Cth), each territory is represented by two Senators, serving until the next general election.

**Table 2:** Final round exhaustion rates, 2016 federal election<sup>181</sup>

As would be expected, the exhaustion rate largely correlates with the number of candidates and parties in each state and territory:<sup>182</sup> as the number of candidates and parties rises, the proportion of voters who choose candidates or parties other than those ultimately elected will increase. Two factors militate against the extent of exhaustion. First, some of the figures are inflated by votes that exhausted in counts occurring after the identity of the final winner had become beyond doubt.<sup>183</sup> After this point, the election is effectively concluded. Discounting exhaustion at those counts, the rate of exhaustion falls to 5.08 per cent. Table 3 gives the exhaustion rates after the round of counting at which the final winners were determined.<sup>184</sup>

	Exhausted votes	Formal votes	Exhaustion
NSW	326 849	4 492 197	7.28%
VIC	180 896	3 500 237	5.17%
QLD	115 685	2 723 166	4.25%
WA	49 043	1 366 182	3.59%
SA	21 556	1 061 165	2.03%
TAS	9 531	339 159	2.81%
ACT	109	254 767	0.04%
NT	0	102 027	0%
<b>Total</b>	<b>703 669</b>	<b>13 838 900</b>	<b>5.08%</b>

**Table 3:** Effective exhaustion rates, 2016 federal election<sup>185</sup>

<sup>181</sup> Australian Electoral Commission, 2016 Federal Election — State and territory results (9 August 2016) *Tally Room* <<http://results.aec.gov.au/20499/Website/SenateStateResultsMenu-20499.htm>>.

<sup>182</sup> NSW: 40 groups, 151 candidates; VIC: 37 groups, 115 candidates; QLD: 37 groups, 122 candidates; WA: 27 groups, 79 candidates; SA: 23 groups, 64 candidates; TAS: 21 groups, 58 candidates; ACT: 10 groups, 22 candidates; NT: 7 groups, 19 candidates.

<sup>183</sup> In Western Australia, for instance, the distribution of Louise Pratt's surplus votes between the three remaining candidates made clear that Rod Culleton and Rachel Siewert would be elected. The subsequent exclusion of Kado Muir was unneeded, inflating the exhaustion rate by 2.7 per cent. The may be contrasted against the Tasmanian contest, where the final round of the count was necessary to determine the identity of the state's 12<sup>th</sup> Senator: the distribution of Catryna Bilyk's surplus votes could either have elected Nick McKim or Kate McCulloch. Ultimately, Senator McKim prevailed.

<sup>184</sup> Psephologist Kevin Bonham refers to this as the 'effective exhaustion rate': Kevin Bonham, 'Senate Reform Performance Review Part 1' (6 August 2016) <<http://kevinbonham.blogspot.com.au/2016/08/senate-reform-performance-review-part-1.html>>.

<sup>185</sup> Australian Electoral Commission, 2016 Federal Election — State and territory results (9 August 2016) *Tally Room* <<http://results.aec.gov.au/20499/Website/SenateStateResultsMenu-20499.htm>>.

Secondly, it is important to note that the figures given in Tables 2 and 3 reflect the number of votes that exhausted, not the number of individual voters' ballots. Significantly more ballots exhausted, at a fractional value after having elected a Senator or Senators. The number of exhausted ballots and exhausted votes at the final determinative round of counting in each state and territory, and the average value at which ballots exhausted, is represented in Table 4.

	Exhausted votes	Exhausted ballots	Average value at exhaustion
NSW	326 849	1 171 459	0.279
VIC	180 896	536 861	0.337
QLD	115 685	360 625	0.321
WA	49 043	169 874	0.289
SA	21 556	142 605	0.151
TAS	9 531	108 617	0.088
ACT	109	109	1.000
NT	0	0	1.000

**Table 4:** Effective vote and ballot exhaustion and average value at exhaustion, 2016 federal election<sup>186</sup>

The figures in Table 4 suggest that a significant proportion of the exhausted rates were made up of ballots exhausting at miniscule values, with an average value at exhaustion of as low as 0.088 in Tasmania. Few ballots would have exhausted without the voter having participated in the election of at least one Senator.<sup>187</sup> The upshot of the above is that, while the rate of exhaustion at the 2016 was not insignificant, it should equally not be overstated.

## 2 *The decision in Murphy*

In *Murphy*, the plaintiff impugned *Electoral Act* provisions<sup>188</sup> giving a person seven days after the issuance of the writs to enrol or transfer their enrolment, after

<sup>186</sup> Grahame Bowland, *Australian Senate 2016* (2016) Angrygoats <<https://angrygoats.net/senate2016/>>.

<sup>187</sup> However, the exact number cannot be easily quantified on data publicly released by the Australian Electoral Commission.

<sup>188</sup> *Electoral Act* ss 94A(4), 95(4), 96(4), 102(4), 103A(5), 103B(5), 118(5).

which the rolls would close. This was the grace period left standing after a truncated period was invalidated in *Rowe*. The plaintiff argued the seven-day period fell foul of ss 7 and 24 of the *Constitution*, the inherent notion of representative government in which requires maximisation of participation. In light of technological advances and the proven viability of less burdensome provisions elsewhere,<sup>189</sup> the plaintiff contended that the Commonwealth Parliament had failed to fulfil the constitutional mandate by imposing any cut-off date for enrolments and transfers.<sup>190</sup> The special case put to the Court was answered *ex tempore* after two days of hearings; unanimously, the provisions were upheld.<sup>191</sup> It would be another four months until reasons were delivered, in six separate judgments. Those judgments are of direct relevance to the constitutionality of optional preferential voting in two respects: the rejection of an implication that the *Constitution* requires maximisation of participation, and the divergence as to the applicable method of proportionality testing.

(a) *Maximisation of participation*

The plaintiff relied heavily on Gummow and Bell JJ's dictum in *Rowe* that the constitutionally prescribed notion of representative government requires maximisation of participation. Their Honours' passing comment, that 'developments in technology and availability of resources [may] support the closure of the Rolls at a date closer to election date',<sup>192</sup> became the plaintiff's clarion call.<sup>193</sup>

Bell J, writing with French CJ, seemingly resiled from her Honour's position in *Rowe*, rejecting the premise that the Commonwealth Parliament's failure to allow for polling day enrolment burdened the franchise.<sup>194</sup> More explicitly, Kiefel and Nettle JJ both observed simply that neither *Roach* nor *Rowe* were authority for the proposition that the *Constitution* requires maximisation of participation.<sup>195</sup> Similarly, Keane J read down Gummow and Bell JJ's dictum.<sup>196</sup> To these points, Gordon J added the observation that the plaintiff's submission '[found] no support

<sup>189</sup> Under the *Parliamentary Electorates and Elections Act 1912* (NSW) and the *Electoral Act 2002* (Vic), a person can enrol at any time up to and including on polling day.

<sup>190</sup> Murphy, 'Plaintiff's Annotated Submissions', Submission in *Murphy v Electoral Commissioner*, M247/2015, 11 April 2016, 1–2.

<sup>191</sup> Transcript of Proceedings, *Murphy v Electoral Commissioner* [2016] HCATrans 111 (12 May 2016) 4444–85 (French CJ).

<sup>192</sup> *Rowe* (2010) 243 CLR 1, 52 (Gummow and Bell JJ).

<sup>193</sup> Murphy, 'Plaintiff's Annotated Submissions', Submission in *Murphy v Electoral Commissioner*, M247/2015, 11 April 2016, 1.

<sup>194</sup> *Murphy* [2016] HCA 36 (5 September 2016), [42] (French CJ and Bell J).

<sup>195</sup> *Ibid* [58] (Kiefel J), [240] (Nettle J).

<sup>196</sup> *Ibid* [186] (Keane J). His Honour observed that 'their Honours were not endorsing the view that ss 7 and 24 contemplate a "sans-culottes" frenzy of the spontaneous manifestation of the popular will'.

or foundation in the text or structure of the *Constitution*, or elsewhere'.<sup>197</sup> Gageler J was critical of what his Honour viewed as the plaintiff's attempt to 'have ... the Court compel the Parliament to maximise the franchise by redesigning the legislative scheme to adopt what the plaintiffs put forward currently to be best electoral practice'.<sup>198</sup>

The Court gave short shrift to the associated notion, described by Keane J as 'creeping unconstitutionality',<sup>199</sup> that an enactment can be invalidated as the feasibility of alternative measures becomes apparent. According to French CJ and Bell J, this would 'allow a court to pull the constitutional rug from under a valid legislative scheme upon the court's judgment of the feasibility of alternative arrangements'.<sup>200</sup>

It is now abundantly clear that the notion of representative government does not require maximisation of voter participation. The fact that alternative and less burdensome arrangements are, or become, technically possible does not lead to the conclusion that those arrangements are constitutionally prescribed.

(b) *The form of proportionality testing*

Another issue confronted by the Court was as to the form of proportionality testing applicable in determining whether enactments burdening the franchise are justified by a substantial reason. In place of the 'reasonably appropriate and adapted' test applied in *Roach* and *Rowe*, the plaintiff contended that the joint majority's reformulation in *McCloy* should be adopted.<sup>201</sup> The test, a structured form of proportionality analysis, asks whether a law burdening a particular guarantee, immunity or freedom is nonetheless valid, as being a measure suitable, necessary and adequate in its balance.<sup>202</sup>

With one crucial exception, the Court in *Murphy* split along the same lines as it did in *McCloy*. French CJ and Bell J held that the approach in *McCloy* can be used to adjudge the validity of laws 'burdening or infringing a constitutional guarantee, immunity or freedom' including the 'constitutional mandate of choice by the people'.<sup>203</sup> Ultimately, however, their Honours determined that the question

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<sup>197</sup> Ibid [316] (Gordon J). Her Honour adopted Hayne J's remarks on this point in his Honour's dissent in *Rowe: Rowe* (2010) 243 CLR 1, 76 (Hayne J).

<sup>198</sup> *Murphy* [2016] HCA 36 (5 September 2016), [109] (Gageler J).

<sup>199</sup> Ibid [191] (Keane J).

<sup>200</sup> Ibid [42] (French CJ and Bell J).

<sup>201</sup> *Murphy*, 'Plaintiff's Annotated Submissions', Submission in *Murphy v Electoral Commissioner*, M247/2015, 11 April 2016, 8–9.

<sup>202</sup> *McCloy* (2015) 325 ALR 15, 18–19 (French CJ, Kiefel, Bell and Keane JJ).

<sup>203</sup> *Murphy* [2016] HCA 36 (5 September 2016), [38] (French CJ and Bell J).

of proportionality did not arise, as the plaintiff failed to establish a burden on the franchise.<sup>204</sup> Kiefel J, conversely, was prepared to accept that the plaintiff had met this threshold.<sup>205</sup> Her Honour endorsed a structured proportionality test, as under the alternative ‘reasonably appropriate and adapted’ test, ‘[value] judgments and the method of reasoning are not required to be exposed’.<sup>206</sup> Kiefel J concluded that the impugned provisions were proportionate, being suitable in that they bore a rational connection to the purpose of facilitating the efficient conduct of elections; necessary in that there was no equally practicable and less burdensome alternative; and adequate in their balance, when considering the certainty and efficiency that the provisions promote, against the voluntary nature of the disenfranchisement.<sup>207</sup>

Three other justices declined to transplant the *McCloy* test. Gageler J reiterated the reservations about structured proportionality that his Honour expressed in *McCloy*,<sup>208</sup> describing it as ‘at best an ill-fitted analytical tool [that] has become the master, and has taken on a life of its own’.<sup>209</sup> Along similar lines, Gordon J confined the operation of the *McCloy* test to its constitutional context — the implied freedom. In her Honour’s view, the necessity stage, involving an examination into alternative measures that would achieve the same purpose as the impugned law, renders structured proportionality testing inappropriate in the electoral lawmaking context, where Parliament has a great deal of constitutional latitude.<sup>210</sup> Nettle J applied the reasonably appropriate and adapted test without proffering any reason against structured proportionality.<sup>211</sup> Indeed, his Honour’s judgment in *McCloy* bespeaks a certain indifference towards this methodological question; in his Honour’s view, ‘[i]t is enough to observe that each approach involves questions of judgment’.<sup>212</sup> Gageler, Nettle and Gordon JJ each arrived at the conclusion that the closure of the rolls, if it burdened the franchise, was justified by a substantial reason, being reasonably appropriate and adapted to the orderly and efficient conduct of elections.<sup>213</sup>

Finally, Keane J eschewed proportionality analysis entirely, notwithstanding that his Honour had joined in the majority judgment in *McCloy*. His Honour distinguished the implied freedom context, involving an enquiry into the scope of a constitutional implication, from the electoral lawmaking context, which concerns

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<sup>204</sup> Ibid [39]–[42] (French CJ and Bell J).

<sup>205</sup> Ibid [60] (Kiefel J).

<sup>206</sup> Ibid [64] (Kiefel J).

<sup>207</sup> Ibid [66]–[74] (Kiefel J).

<sup>208</sup> *McCloy* (2015) 325 ALR 15, 49–52 (Gageler J).

<sup>209</sup> *Murphy* [2016] HCA 36 (5 September 2016), [101] (Gageler J).

<sup>210</sup> Ibid [297]–[303] (Gordon J).

<sup>211</sup> Ibid [244] (Nettle J).

<sup>212</sup> Ibid [255] (Nettle J).

<sup>213</sup> Ibid [103]–[104] (Gageler J), [245]–[250] (Nettle J), [324]–[332] (Gordon J).

the scope of express constitutional provisions. In the latter case, his Honour determined that no form of proportionality testing is warranted:

The considerations which gave rise to the formulation of the *Lange* test are not engaged here ... [t]he only question is whether the impugned laws can be seen to be compatible with the requirements of ss 7 and 24 of the *Constitution*, bearing in mind Parliament's powers under ss 8, 9, 27, 29, 30 and 51(xxxvi).<sup>214</sup>

Seemingly, Keane J's view is that proportionality is (or ought to be) separate from the question of compliance with ss 7 and 24 of the *Constitution*. His Honour sought to recast the majority judgments in *Rowe* in this image, describing French CJ and Crennan J's use of proportionality analysis as being a means of 'explaining' or 'testing' their Honours' conclusions as to validity, rather than being determinative of the question.<sup>215</sup> Similarly, Gummow and Bell JJ's application of proportionality testing was described as a 'checking exercise'.<sup>216</sup> With respect, these remarks are questionable, not least because French CJ and Bell J in *Murphy* quite clearly regard proportionality testing as an integral part of the reasoning process: it is not an extraneous superfluity, but a criterion of validity.<sup>217</sup>

What conclusions can be drawn on this question? While there is a clear majority in favour of proportionality analysis, the Court has diverged in relation to the applicable methodology, with the Court (Keane J excepted) evenly divided between those supporting structured proportionality analysis in the electoral lawmaking context and those who regard the continued application of the 'reasonably appropriate and adapted' test as sufficient. Clarity on this issue from the Court would be welcomed.

### B *Testing the proportionality of optional preferential voting*

The final substantive exercise is to test whether the 2016 amendments are justified by a substantial reason in light of the developments noted above. A variant of the *McCloy* test will be used. Although it may not have received the endorsement of a majority in *Murphy*, the transparency in reasoning that structured proportionality testing offers is self-evident, rendering it a suitable analytical tool for present purposes. Value judgements are made explicit and are situated within in a framework of objective analysis. Further, the imposition of structure ensures the

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<sup>214</sup> Ibid [205] (Keane J).

<sup>215</sup> Ibid [206]–[207], [209]–[210] (Keane J).

<sup>216</sup> Ibid [208] (Keane J).

<sup>217</sup> Ibid [26]–[36] (French CJ and Bell J).

balancing exercise is not approached ‘as a matter of impression’, with the outcome ‘pronounced as a conclusion, absent reasoning’.<sup>218</sup> The outcome, in this case, is that optional preferential voting is constitutionally permissible as a measure suitable, necessary and adequate in its balance, notwithstanding the burden it places on the franchise.

## 1 *Burden*

The first stage of the inquiry asks whether the impugned law effectively burdens the franchise in its terms, operation or effect.<sup>219</sup> As argued in the previous part, the higher exhaustion rate under optional preferential voting burdens the franchise in that voters do not participate as fully in the electoral process as under full preferential voting — full preferential voting being required because it is entrenched as a ‘durable legislative development’, or because the *Constitution* requires maximisation of participation. While the decision in *Murphy* now suggests that maximisation of participation is not constitutionally prescribed, the correctness of French CJ’s dictum that durable legislative developments become constitutionalised was not called into question. In fact, Gageler J seemed to lend his support to it, writing that ‘judicial discernment of the content of the requirements of ss 7 and 24 ... [must] have regard to stable and enduring developments that have occurred within our system of representative government’.<sup>220</sup> On that basis, it can still be said that optional preferential voting burdens the franchise.

## 2 *Compatibility testing*

‘Compatibility testing’ asks whether the impugned law’s purpose and the means adopted to achieve it are legitimate, in the sense of being compatible with the maintenance of the constitutionally prescribed system of representative government.<sup>221</sup> According to the majority in *McCloy*, this is a low bar: the means and ends will be compatible with representative government if they do not ‘adversely impinge upon [its] functioning’.<sup>222</sup>

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<sup>218</sup> *McCloy* (2015) 325 ALR 15, 35 (French CJ, Kiefel, Bell and Keane JJ). See generally *McCloy* (2015) 325 ALR 15, 35 (French CJ, Kiefel, Bell and Keane JJ), *Murphy* [2016] HCA 36 (5 September 2016), [62] (Kiefel J). See generally Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 460–7.

<sup>219</sup> *Ibid* 18 (French CJ, Kiefel, Bell and Keane JJ).

<sup>220</sup> *Murphy* [2016] HCA 36 (5 September 2016), [92] (Gageler J).

<sup>221</sup> *McCloy* (2015) 325 ALR 15, 18 (French CJ, Kiefel, Bell and Keane JJ).

<sup>222</sup> *Ibid* 18–19, 32–3 (French CJ, Kiefel, Bell and Keane JJ).

The legislative purpose underpinning the introduction of optional preferential voting can be found enunciated in the explanatory memorandum to the Commonwealth Electoral Amendment Bill 2016 (Cth),<sup>223</sup> which relevantly provides:

To provide confidence to voters that their vote goes to the intended candidate, the Bill will introduce partial optional preferential ... [t]he Bill will also empower voters, returning control of their preferences to them, by abolishing individual and group voting tickets. Together, these amendments will improve transparency and simplify the Senate voting system, thereby improving the franchise, and supporting the democratic process.<sup>224</sup>

Giving voters greater control over their preferences and improving the transparency and simplicity of the electoral system are clearly objects that do not detract from, and are thus compatible with, representative government.

### 3 *Proportionality testing*

#### (a) *Suitability*

The first step in proportionality testing is suitability. To be ‘suitable’, the law must bear a rational connection to — or ‘contribute to the realisation of’<sup>225</sup> — its purpose.<sup>226</sup>

Optional preferential voting gives voters greater control over inter-party preferences: unless the voter so intends, preferences cannot flow between parties. Voters are neither required to express preferences for each candidate, and nor are they taken to have done so by their adoption of a group voting ticket — this being predicated on the flawed assumption<sup>227</sup> that voters would familiarise themselves with their chosen party’s preferred flow of preferences. Optional preferential voting also facilitates greater voter control over the allocation of intra-party preferences. By simplifying the act of voting below the line, voters are better placed to disturb parties’ predetermined order of candidates. The election of Lisa Singh in Tasmania provides a striking example. Senator Singh won a fifth seat for the Australian Labor Party notwithstanding her demotion to the sixth position on the party’s ballot. Her victory occurred despite her not receiving any of the Labor Party’s above the line

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<sup>223</sup> Explanatory Memorandum, Commonwealth Electoral Amendment Bill 2016 (Cth).

<sup>224</sup> *Ibid* 2.

<sup>225</sup> *McCloy* (2015) 325 ALR 15, 36 (French CJ, Kiefel, Bell and Keane JJ).

<sup>226</sup> *Ibid* 19 (French CJ, Kiefel, Bell and Keane JJ).

<sup>227</sup> Joint Standing Committee on Electoral Matters, above introduction n 9, 2.

votes, and made her the first candidate to win a Senate seat out of order since 1953.<sup>228</sup>

Furthermore, optional preferential voting bears a rational connection to the transparency of the electoral system, displacing a system under which most votes flowed according to opaque inter-party preference arrangements. In the reformed system, a vote can no longer be appropriated by any candidate for whom the voter did not expressly intend to vote. Finally, optional preferential voting bears a rational connection to the simplicity of the electoral system. Arguably, in requiring the expression of a greater number of preferences above the line, the 2016 amendments complicate the act of voting. At the same time, however, voting below the line is substantially simplified by the removal of the need to express a preference for each candidate. That the vast majority of votes no longer flow according to group voting tickets adds a degree of complexity to the counting process,<sup>229</sup> but the simplicity towards which the 2016 amendments were adapted appears to be directed to simplifying the electoral process for voters<sup>230</sup> (rather than facilitating the efficient conduct of an election, as was the case in *Murphy*).<sup>231</sup>

The nexus between optional preferential voting and the legitimate ends sought to be achieved is obvious and manifold. The suitability criterion is met.

(b) *Necessity*

An enactment will be ‘necessary’ if there are no obvious and compelling alternative means of achieving the same purpose that are both reasonably practicable and less burdensome on the franchise.<sup>232</sup> An obvious alternative is to revert to the system used between 1949 and 1983, requiring full preferential voting without the shortcut of ticket voting.<sup>233</sup> Full preferential voting curtails the extent of exhaustion, ensuring that ballots remain active throughout the count. However, this alternative would not necessarily be less burdensome on the franchise. The prime motivation for the enactment of ticket voting was the view that the rate of informal voting had become unacceptably high at 9.87 per cent at the 1983

<sup>228</sup> Kevin Bonham, ‘Senate Reform Performance Review Part 2’ (8 August 2016) <<http://kevinbonham.blogspot.com.au/2016/08/senate-reform-performance-review-part-2.html>>.

<sup>229</sup> Under optional preferential voting, each ballot paper must be data-entered, whereas under the previous system, only below the line votes required data entry. The Australian Electoral Commission used a semi-automated process to conduct the 2016 Senate count, with ballots first scanned and then verified by Commission staff: Australian Electoral Commission, ‘Central Senate Scrutiny frequently asked questions’ (2016) <<http://www.aec.gov.au/elections/candidates/files/counting/css-faqs.pdf>>.

<sup>230</sup> Explanatory Memorandum, Commonwealth Electoral Amendment Bill 2016 (Cth) 2.

<sup>231</sup> *Murphy* [2016] HCA 36 (5 September 2016), [66]–[74] (Kiefel J), [103]–[104] (Gageler J), [245]–[250] (Nettle J), [324]–[332] (Gordon J).

<sup>232</sup> *McCloy* (2015) 325 ALR 15, 19 (French CJ, Kiefel, Bell and Keane JJ).

<sup>233</sup> As argued above, the retention of ticket voting would be contrary to the empowerment of voters.

election.<sup>234</sup> Since 1983, the number of candidates vying for Senate seats has only risen,<sup>235</sup> suggesting that the reintroduction of full preferential voting would result in even higher rates of informality. Rather than being less burdensome, this alternative might even be adverse to the franchise.

Another alternative — an intermediate measure between full preferential voting and optional preferential voting as implemented in the 2016 amendments — is to increase the number of preferences required. As the number of preferences expressed rises, ballots remain in the count for longer and exhaustion rates decline. Simultaneously, however, informality would rise as voting becomes more unwieldy. There is no obvious answer how this balance should be struck. In that sense, the alternative is not a compelling one. The ‘obvious and compelling’ qualification emphasises that the question of necessity is a tool of analysis, not an invitation for courts to tinker at the margins of enactments. As the majority in *McCloy* warned, ‘[c]ourts must not exceed their constitutional competence by substituting their own legislative judgments for those of parliaments.’<sup>236</sup> There being no obvious and compelling alternative, the 2016 amendments satisfy the necessity criterion.

(c) *Adequacy in its balance*

Finally, to be adequate in its balance, there must be congruence between the importance of the impugned law’s purpose and the extent of the disenfranchisement. This is invariably a value judgement, rather than one based on principle.<sup>237</sup> Accordingly, reasonable minds may differ.

At risk of overstating the case, laws resulting in the empowerment of voters over their vote and the transparency and simplicity of that system would improve *any* democratic system. The ends underlying the adoption of optional preferential voting are incontrovertibly and self-evidently desirable.

These ends are to be balanced against the extent of the disenfranchisement — which, while not as drastic as had been predicted, was nonetheless not insignificant. Approximately one million votes exhausted at full or fractional value. A number of

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<sup>234</sup> Over 75 per cent of the informal votes were unintentional errors attributable to the arduousness of rank-ordering each candidate: Joint Select Committee on Electoral Reform, Parliament of Australia, *First Report* (1983) 62–4.

<sup>235</sup> Between the 1983 and 2016 federal elections, the total number of candidates increased by 2.5 times (from 250 to 631). In New South Wales, the most contested state, the number of candidates increased from 62 to 151. The increase in each other jurisdiction was as follows: ACT: 8 to 22; NT: 6 to 19; QLD: 42 to 122; SA: 35 to 64; TAS: 17 to 58; VIC: 50 to 116; and WA: 30 to 79.

<sup>236</sup> *McCloy* (2015) 325 ALR 15, 31 (French CJ, Kiefel, Bell and Keane JJ), adopting *Tajjour v NSW* (2014) 254 CLR 508, 550 (French CJ).

<sup>237</sup> See, eg, *McCloy* (2015) 325 ALR 15, 38 (French CJ, Kiefel, Bell and Keane JJ).

countervailing observations may be made. First, according to Kiefel J in *Murphy*, it is permissible at this stage of the inquiry to account for the self-inflicted nature of the disenfranchisement.<sup>238</sup> Therefore, that votes exhaust because voters consciously decide to express only a limited number of preferences is relevant as a factor militating against the extent of the disenfranchisement. Secondly, vote exhaustion arguably serves the purpose of the enactment. Allowing voters to, in effect, opt out of the electoral process when their preferred candidates are elected or eliminated is entirely consistent with the purpose of voter empowerment. Full preferential voting may ensure that voters participate fully in the choosing of Senators throughout the entirety of the count, but if a voter genuinely has no preference between the remaining candidates, to ascribe to them such a preference is an artifice.

Therefore, optional preferential voting is suitable, necessary and adequate in its balance. Justified as it is by substantial reasons, the measure would, if again challenged, likely be upheld notwithstanding the burden it imposes on the franchise.

## V CONCLUSION

In this article, it has been argued that the plaintiff in *Day* failed to prosecute the best case possible against the Commonwealth Parliament's provision for optional preferential voting — but that argument, if put to the Court today, would not have succeeded. The argument proceeded in three stages.

First, the development of the relevant jurisprudence was canvassed. After a century in which the Court afforded the Commonwealth Parliament an almost absolute degree of latitude to make electoral laws, the majorities' decisions in *Roach* and *Rowe* evinced a greater appetite for intervention. The inherent notion of representative government in ss 7 and 24 of the *Constitution* was given fuller content, with an evolutionary view being adopted. Durable legislative measures became entrenched and maximisation of participation became, it appeared, constitutionally prescribed. Further, proportionality testing emerged as a means by which the Court could call into question the Commonwealth Parliament's lawmaking.

That body of law was then applied to the facts, highlighting the glaring omission from Senator Day's case. The likely incidence and effect of vote exhaustion under optional preferential voting were analysed. It was argued that this, notwithstanding its essentially self-inflicted nature, constituted an effective burden

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<sup>238</sup> *Murphy* [2016] HCA 36 (5 September 2016), [74] (Kiefel J).

upon the franchise, constitutionally impermissible unless justified by a substantial reason.

That argument was appraised in the third part, having regard to the actual outcomes of the 2016 federal election and the decision in *Murphy*. In *Murphy*, the Court split as to whether the reformulated test in *McCloy* was applicable in cases of voter disenfranchisement. Nonetheless, for the transparency in reasoning it promotes, the structured test was employed to test the validity of the measure. Ultimately, it was concluded that optional preferential voting is proportionate to the empowerment of voters and the simplicity and transparency of the electoral system, being necessary, suitable and adequate in its balance.

Given the Court has already adjudged the constitutionality of optional preferential voting, and done so emphatically, one might question the import of this conclusion. However, history demonstrates that these matters are frequently relitigated. For example, ticket voting was upheld in *McKenzie*, which did not prevent those laws being again impugned in *Abbotto*, *McClure* and *Ditchburn*; and in *McKinlay*, the plaintiff sought unsuccessfully to rely on a constitutional implication of ‘one vote, one value’, as did the plaintiffs in *McGinty* some two decades later. The constitutionality of optional preferential voting may one day come back before the Court, and the Court may be called upon to address the argument that ought in the first place to have been advanced by Senator Day. This article proffers a view of the outcome that might be expected in such circumstances.