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Does compulsory voting violate a right not to vote?

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It is sometimes claimed that compulsory voting violates a particular right *not* to vote. For some, this assumed right is as fundamental as the right *to* vote. The existence of such a right, however, has attracted little sustained scholarly attention. This article explores from a political theory perspective whether the alleged 'right not to vote' is deserving the same legal and moral protection as the right to vote. I argue on two broad grounds that it is not. First, not all rights are capable of being legally waived and voting is one of them. Second, voting is a right but it is also a duty; it is a duty-right. Therefore, even though many people do fail to vote, doing so does not seem to constitute the exercise of any particular right, nor should it be legally recognised as such.

Keywords: voting; rights; duties; compulsory voting; representative democracy

Introductory comments

In 2013, an Australian citizen, Anders Holmdahl, attracted media attention when he applied for special leave to appeal to the High Court of Australia to hear his argument that compulsory voting is constitutionally invalid. According to Holmdahl there self-evidently exists 'a right not to vote' (*Holmdahl v Australian Electoral Commission & Anor*).[1] Holmdahl is not the first or only person to claim the existence of a specific right not to vote. There are those, including some political and legal theorists, who consider the right not to vote to be as fundamental as the right *to* vote.

This article canvasses the issues involved in the term 'right not to vote' and maps out the difficulties in thinking through that term. It considers whether compelling people to vote is a violation of a particular right not to vote. I argue that it does not, and my tentative conclusion is that the notion of a 'duty-right' is a useful way of addressing the question.[2]

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[1] *Holmdahl v Australian Electoral Commission & Anor* [2013] HCATrans. 72, 2013.

[2] Lardy (2004) has argued that there is no right not to vote but on different grounds to the ones presented here, namely, that voting offers 'non-domination' in the Pettitian sense.

The discussion proceeds as follows: I begin by exploring the nature of rights and of voting rights in particular, after which I present the claims of those who argue for the existence of a right not to vote. I then consider how courts – in both Australia and elsewhere – have dealt with right-not-to-vote cases. The article then explores the available legal exit options under Australia's compulsory voting laws, after which I consider the question of whether there is even a voting right to invert or waive under the Australian Constitution. I then reflect on whether the assumed right not to vote is deserving of legal recognition. By way of denying that it is, I argue that not all rights imply their inverse and that some rights, like the right to vote, are too important to be legally waived. Further, some rights serve social as well as individual purposes. So there are times when the collective interest overrides any individual's determination to waive a particular right. Finally, I resolve the issue of whether voting is a right or a duty by arguing that it is both: it is a 'duty-right'. As a duty-right, it is doubly immune to waiving, alienation and inversion. I use the terms 'waive', 'alienate' and 'invert' in roughly the same sense throughout this article to denote the formal or legal ability to divest oneself, either permanently or intermittently, of a particular right. Its sense of permanence distinguishes the term 'alienate', but all three involve a deliberate intention to relinquish some right or interest. Before commencing the argument proper, a brief discussion of the nature of rights – and voting rights in particular – is worthwhile.

Rights and the right to vote

What are rights? More importantly, what do they *do*? A right is a high priority, morally enforceable claim, or entitlement to act in a certain way and to have others act in a certain way towards us. A right both permits actions and imposes obligations. Rights exist not only to protect the legal, political and social interests of people, but also their dignity as human beings. We tend to think of rights as different from other moral claims because they 'aspire towards institutional embodiment and enforceability' (Ivison 2008: 7) and are usually created by legislative enactment and judicial decisions (Nickel 2006).

A distinction is usually made between rights that are derived from *a priori* principles (natural, innate rights) and rights that are acquired or created by legislation (positive or statutory rights). The right to vote is best categorised as a positive or statutory right because its exercise depends on the existence of certain positive institutions, in this case, the institutions of representative democracy. Further, eligibility for its exercise depends on the possession of a particular legal status (usually citizenship) that only formal institutions of the state can grant. Accordingly – following Hohfeld's standard scheme – the right to vote can be categorised as 'a power-right'. A 'power-right' is a legal 'ability' whose jural opposite is legal 'disability' (Hohfeld 1964: 36, 51). For example, I do not have a power-right to drive until the state issues me with a license that legally entitles me to do so; until it does, I am legally disabled from driving. Being a driver is a legal, not a natural right just as being a voter is a legal entitlement restricted to those who are qualified. As Beckman notes, possessing the right to vote 'is not just to be free to vote (under no duty not to vote) but to have the power to perform a specific legally recognised action' (2009: 130–31).

The right to vote is more than just a power-right, however; it is also a 'claim-right.' A claim-right entitles me to make a claim on others so that they owe me a duty. In the case of voting, others have a duty not to interfere with the exercise of my right to vote and may even be under duty to assist me in exercising it (Jones 1994: 14–15). Note that

the jural opposite of a claim-right is a 'no-right', not a 'privilege' (Hohfeld 1964: 36). I point this out because those who assert the existence of a right not to vote assume that voting is simply a privilege-right. A privilege-right affords its bearer a right *not* to be under a duty to act in certain ways (Hohfeld 1964: 36; Jones 1994: 12–13) and to be free from the claims of others. Voting is not, however, that kind of right: it is a combination of a power-right and a claim-right. The reasons for this become clearer as the article progresses.

The right to vote occupies a privileged place in the liberal-democratic lexicon of rights because of what it *does*. Democracy is based on – even defined by – the political participation of citizens. The possession of suffrage rights is the key indicator of citizenship and is virtually synonymous with the concept of citizenship. From it flows all the other rights and freedoms inhabitants of democratic orders enjoy. Universal suffrage and the principle of 'one vote, one value' are the key mechanisms by which legitimacy is conferred on democratic states. Therefore, the right to vote for democratic representation, without discrimination, is rightly seen as a fundamental civil freedom in all systems that purport to be both democratic and legitimate. Because the right to vote performs a number of vital political functions within representative democracies, courts tend to be particularly sensitive to any perceived infringements on its exercise.

The right-not-to-vote position(s)

Most regard voting as a right so important, precious and hard-won that it should never be surrendered. For some, however, the right not to vote should be valued just as highly as the right *to* vote. According to Ciccone the '[t]he logical inverse of the right to vote, is a right not to vote', and because it is 'just as important as the right to vote', it should be afforded equal respect and attract the same levels of 'strict [legal] scrutiny' when threatened (2001–02: 347–48). Blomberg has insisted that, because 'abstention involves a form of political expression', the right to abstain is deserving of (US) constitutional protection (1995: 1016–17; 1036; see also Lerman 2009: 26, and Thomas Hoffman and Timothy Ulrich, the plaintiffs in *Hoffman v Maryland*).[3] Feeley has asserted that '[c]learly' if voting is a right 'then one must have the opportunity to choose whether to exercise it' (1974: 242), while Lever suggests that 'the right not to vote' is not 'a trivial one' (2010: 66–72). Closer to home, Rydon has defended 'the right to abstain' as being as 'important as the right to vote' (1989: 97; see also Hirst 2002: 3; Minchin 1996). Gray has adverted to the existence of 'constitutional grounds' for challenging compulsory voting as a violation of a particular 'right not to vote' (2012: 608). Among other things, Gray conceives compulsory voting as a violation of the implied freedom of political communication as found in *Lange v Australian Broadcasting Corporation*.[4] For Holmdahl, because voting is a right, it must be capable of being waived; therefore, there exists under the Constitution a right not to vote (*Holmdahl v Australian Electoral Commission & Anor*).[5]

[3] *Hoffman v Maryland,* 928 F2d 646 (fourth Cir. 1991).
[4] *Lange v Australian Broadcasting Corporation* (1997), 189 CLR 520, 557.
[5] Holmdahl also claimed that what is required by 'voting' is not 'properly defined' and that he could not, therefore, be compelled to vote. However, the magistrate pointed that 'the meaning of the words "to vote" in regard to Federal Elections is well established by case law' (*Holmdahl v Australian Electoral Commission* 2012 SASC 76). I do not explore this line of argument here.

Abstaining in Australia: the acceptability of available choices

We might think that electors already effectively enjoy a right not to vote in Australia because if they are averse to voting they can simply lodge an informal or blank ballot. Electors also have recourse to other legal exit options. The *Commonwealth Electoral Act 1918*, Section 245(1) specifies that non-voters are exempt from prosecution if they are 'absent from Australia on polling day', reside more than 8 km from a polling place, or are 'itinerant', living abroad or based in the Antarctic at the time of the election (the secrecy of the ballot cannot be assured for those living in the Antarctic, hence the exemption). There is also the caveat found in subsection 14 that any elector who 'believes it to be part of his or her religious duty to abstain from voting' has 'a valid and sufficient reason' for failing to vote. Other acceptable excuses relate to illness and misadventure (AEC 1999).

Thus, Australian electoral law seems to recognise that the *requirement* to vote can be relaxed, due to such events as illness, misadventure, being too far from a polling place or religious reasons. This is not the same, however, as admitting that the *right* to vote is legally 'invertible'. The exemptions noted above do not constitute a legal waiving of rights. Rather, they are cases where the exercise of the right is not practically possible or easy, and therefore citizens are being released from a *duty* because voting either places too heavy a burden on them or they are confronted with other competing and more compelling duties. As a consequence, the availability of such exit options does not satisfy compulsory voting objectors who demand much more: namely, that the alleged 'right not to vote' be formally recognised – and even constitutionally protected – in which case the compulsory voting laws would have to be overturned.

Is there room for finding a right not to vote in the Australian Constitution? Before this can be determined, we need to ask first whether there is, in fact, a right *to* vote in the Constitution. After all, Holmdahl and others like him need something to invert. A right *to* vote must exist in order for there to be a right *not to* vote (at least, i.e., their reasoning, though not mine, for reasons that will soon become evident).

Most agree that there is little explicit protection of the right to vote in the Constitution, but there is an established *implied* constitutional protection of a universal franchise in Sections 7 and 24, because both require that the Commonwealth Houses of Parliament be 'directly chosen by the people' (*Lange v Australian Broadcasting Corporation*).[6] The judgements in neither *Roach* nor *Rowe*, however, concluded that the implied right to vote is an absolute right. Rather, it is limited and can be taken away if there are proportionate and substantial reasons for doing so (Hill and Koch 2011).

There is no explicitly protected right to vote, but let us assume for the sake of argument that there is an implied right to vote. Could we say that this right gives rise to a right not to vote? What have the courts said so far?

Legal tests so far: Australia and elsewhere

There have been few cases of voters alleging a right not to vote, but in all that I have been able to detect, courts have denied – either directly or indirectly – its existence. Such a right has been tested most often in Australian courts (albeit indirectly), and the

[6] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557.

most important case is *Judd v McKeon* (1926).[7] This judgement, which effectively – but not explicitly – denied that there is a right not to vote,[8] has been endorsed in all subsequent cases.[9]

In 1971, the European Commission of Human Rights heard a case in which the litigant claimed that compulsory voting violated an express right not to vote (see *X v Austria*).[10] Citing Article 9 of the *European Convention on Human Rights* ('freedom of thought, conscience and religion'), an Austrian citizen (X) argued that in any free election 'freedom of conscience and freedom to manifest one's beliefs in public' ought not to 'be limited by coercive measures and threats of punishment'. He noted that the ballot paper only listed two candidates, neither of whom he considered 'a suitable Federal President'. Having to choose, he suggested, was 'even worse than being denied the right to vote' (cited in European Commission and European Court of Human Rights 1972: 468, 470, 472). The court dismissed the case as 'manifestly ill-founded' within the meaning of the convention. It argued that, provided there was no compulsion to mark the ballot formally and that the voter was free to 'hand in either a blank or spoiled ballot', compulsory voting does not violate Article 9 of the *European Convention on Human Rights* (European Commission and European Court of Human Rights 1972: 472, 474).

In the USA the right not to vote has been indirectly challenged a number of times via constitutional challenges to voter-purge statutes.[11] All have been unsuccessful, including one that explicitly argued that voter-purge statutes violate the right *not* to vote and thereby express political dissatisfaction (*Hoffman v Maryland*).[12] Therefore, no court – Australian or otherwise – has recognised an explicit 'right not to

[7] *Judd v McKeon* (1926) 38 CLR 380. This case has been extremely important in challenges to compulsory voting laws. Briefly, Mr Judd, a socialist, challenged the validity of Section 245 of the *Commonwealth Electoral Act 1918* that makes failure to vote an offence. He said he would rather not vote because all the candidates on the ballot were implicated in the perpetuation of capitalism, therefore he and other members of the Socialist Labour Party were 'prohibited from voting' for any of them. The court rejected this argument and the Central Police Court in Sydney fined Judd 10 shillings. His appeal to the High Court was rejected on the grounds that his reasons for not voting were those of a political party, not his own. Even if his reasons had been individual ones, however, the court held that it was not an acceptable excuse because it was 'no more than the expression of an objection to the social order of the community' in which he lived (AEC 1999).

[8] I say 'effectively' because Judd's counsel drew on the claim that there is a right to vote which may or may not be exercised. The court did not explicitly deny that there is a 'right not to vote' but determined that Judd did not have 'valid and sufficient reason' for his failure to vote. (Thanks to an anonymous referee for helpful criticisms and suggestions on this issue). For voting libertarians, however, the effect is the same, insofar as Judd affirmed the legality of compelling people to vote which, in turn has the effect of denying that there is a right not to vote. It is a practical rather than legal consequence of the case.

[9] See, for example, *Krosch v Springell*; ex parte Krosch (1974), QdR 107; *O'Brien v Warden* (1981) 37 ACTR 13 (AEC 1999).

[10] *X against Austria*, Appn. No. 4982/71.

[11] A note on purge statutes is warranted here. In their efforts to prevent fraud and maintain accurate voter registration rolls, many US states use voter purge statutes that remove voters from the registry who have failed to vote in a certain number of elections. It has been argued that this practice 'infringes upon a voter's right not to vote and further discourages those already disenchanted with the political process … The threat of being purged for failure to vote forces an individual either to go to the polls and vote for a candidate not of his or her choice or to reregister … While voter purge statutes do not undermine a voter's right to actually go and pull the lever, voter purge statutes still violate the inherent right not to vote' (Blomberg 1995: 1036).

[12] *Hoffman v Maryland*, 928 F2d 646 (fourth Cir. 1991).

vote'. *Should* such a right be recognised? That it has gone unrecognised does not mean that it is undeserving of protection.

Should a right not to vote be recognised?

As mentioned, many voting libertarians assume that the existence of any right automatically implies the right to waive or invert it. This assumption appears intuitively plausible and uncontroversial: millions of citizens worldwide routinely fail to vote without being penalised. Many people fail to vote, but it is unclear whether doing so is the same as exercising a particular right. There is something odd about the reasoning of voting libertarians here, because simply inverting the positive right with a bit of lexical adjustment does not automatically yield an unassailable negative right. For example, it would be awkward to argue that, because I have a right to be free from physical assault, I also have a right *not* to be free from physical assault. Are all or any rights 'invertible' or alienable?

The assumption that all rights can be waived is problematic and this has been shown repeatedly in landmark cases. In Australia, for example, the High Court considered whether the 'right' to trial by jury can be waived should the accused wish to do so.[13] The majority judgement of the court was that the right to trial by jury, as protected by Section 80, could not be waived 'because jury trials were held to be a fundamental institution within criminal justice' that existed 'for the benefit of the community as a whole as well as for the benefit of the individual' (Gray 2012: 602–03). Similarly, in the USA it has been found that there is no right to waive the rights to workplace safety, to a minimum wage, to equal employment opportunities and the right of a criminal defendant to be tried only when competent.

Some cases have also confirmed that an individual's ability to waive constitutional rights in exchange for government benefits is limited. For example, the court in *Perry v Sinderman* (1972) found that 'government employees may not waive their right to free speech as a condition of employment', while *Sherbert v Verner* (1963) held that 'a state cannot condition the availability of unemployment benefits on a beneficiary's waiving her right to the free exercise of religion' (HLR 2007). Some rights (such as the right to bear arms) can be waived, but this does not mean that *all* rights can be. Neither does it prove the 'general existence of inverse rights'. The US Supreme Court observed this in *Singer v United States* (1965), in which it upheld a federal rule that requires government consent in order for criminal defendants to waive their rights to a jury trial. According to the court, '[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right'.[14]

Apart from conceiving rights as 'invertible' and waivable, right-not-to-vote advocates also seem to take for granted that rights are individuated and divisible, existing only to serve personal ends. The right to vote, however, is also a *social* right intended to serve the social condition of democracy. As a right, it is only possible due to the

[13] See *Brown v The Queen* (1986) 160 CLR 171.

[14] *Singer v United States* 380 US 24 (1965). The court cited several examples of this principle 'in the context of a criminal defendant's Sixth Amendment rights: the right to a public trial, the right to be tried in the state and district where the crime was committed, and the right to confront the government's witnesses' (HLR 2007: 599). However 'some states hold that a defendant's request for a waiver must not be denied' while 'all states permit defendants to waive trial by jury although under various rules', usually that the offence may not attract the death penalty (Fellman 1976: 182–83).

existence of organised political communities, and individual possession of this right depends on their membership of a particular community (Jones 1994: 89). Significantly, in *Holmdahl v Australian Electoral Commission*, the court emphasised that if there is a right to vote, it is not a personal right.[15] According to Justice Gray: '[t]he Commonwealth Constitution does not vest a personal right in the defendant or any elector to vote in a federal election. The rights conferred by § 7 and 24 are given to the "people of the State" or the "people of the Commonwealth"'.[16] In echoing Chief Justice French's words in *Rowe v Electoral Commissioner 2010*,[17] Gray drew attention to the fact that rights do not exist to protect individual liberty alone: individual rights often serve public as well as private interests. For example, the right to a trial by jury protects individuals from the state, but it also performs an important collective function by ensuring the 'accuracy and legitimacy' of criminal trials (Kreimer 1984: 1387). Similarly, the right not to be murdered for another's amusement even where the victim has explicitly consented, exists not only to protect individuals, but to preserve the decent, secure society: a collective interest.[18]

In cases where a particular right defines the structure of government, or even the structure of a decent society, any individual's desire to waive becomes immaterial. Rights instruments that proscribe slavery (e.g., the *European Convention on Human Rights*, Article 4, the *International Covenant on Civil and Political Rights* or the *US Bill of Rights*, 13th Amendment) do so not only to protect individual liberty, but also to eradicate a practice that profoundly undermines the ideals of a free society (Kreimer 1984: 1387–88). Should citizens wish to assent to a life of slavery, the state would not recognise their attempt to waive the right to equal protection because that state (and all the people it represents) has an interest in maintaining a society free from slavery. Our freedoms are limited: they do not extend to the derogation or annihilation of the freedoms themselves because this defeats the purpose of having them in the first place. As Mill (1991: 114) famously wrote: 'The principle of freedom cannot require that [a person] should be free not to be free. It is not freedom, to be allowed to alienate [one's] freedom.'

Rights usually have conditions that often prevent their holders from acting in a certain way. The right to be free from the murderous intentions of others also requires that people refrain from consenting to be the victims of sadistic murder. The right to be free from slavery requires that we refrain from willingly selling ourselves into

[15] *Holmdahl v Australian Electoral Commission* 2012 SASC 76.

[16] See also *Langer v The Commonwealth* (1996) 186 CLR 302, 340.

[17] Gray was referring to the words of Chief Justice French in *Rowe* when he said that the requirement under Sections 7 and 24 of the Australian Constitution that the people directly be choose Parliament was a 'constitutional bedrock' that conferred 'rights on the people of the Commonwealth *as a whole*' (*Rowe v Electoral Commissioner* (2010 243 CLR 1, [1] (French CJ); emphasis added).

[18] The example of sadistic murder is apposite here because, as a society, we would want to distinguish between the consent to euthanasia of a dying person in unbearable pain and the consent of a person to be murdered for another's pleasure. The point is well illustrated in the 2002 case of Armin Meiwes, a German citizen who was arrested after he was found to have murdered and eaten another man a year earlier. Meiwes' defence rested on the fact that he had advertised on internet chat rooms for his victim and explicitly outlined his intentions. Meiwes had found a suitable victim who was willing to register his consent on videotape (and actively participate in the crime), but the court nevertheless found Meiwes guilty of murder. Note that the courts originally found Meiwes guilty only of manslaughter due to the consent of his victim but later reconsidered on the grounds that the consent of the victim was irrelevant (Fray 2004).

servitude. These rights are so fundamental that they carry with them a strict condition of inalienability, even where an individual is strongly inclined to waive that right and where their consent seems to be freely given. This holds true even when the alienation of a particular right appears to offer its holder some advantage.

Let us take the example of the right to an eight-hour (as opposed to a 10-hour) workday. It is rational for a worker to prefer the eight-hour day, but it is also rational for individual workers to work 10 hours in particular cases to gain a market advantage over other workers. In the long run, however, this is a bad idea for both the individual worker and all other workers because those who free-ride on the abstinence of others will end up working 10 hours for a day's pay if they are not prevented from doing so. The right to an eight-hour day not only protects workers from long work hours; it also requires them to refrain from certain actions that give rise to an unwelcome and perhaps unforeseen collective-action problem. The *option* of an eight-hour working day is not enough: all workers need the *inalienable* right to an eight-hour day. The right not to work 10 hours exists for the benefit of the right-holder, but it is invoked to prevent the right-holder from acting in a certain way that might serve their personal interests in the short term but which harms the interests of all workers in the long term, including those of the individual worker (Hardin 1986: 58–59).

Therefore, it is consistent for a libertarian to argue that inalienable rights are not only rights but also a *denial* of rights because they impose a duty on the right-holder to refrain from certain actions. Inalienable rights do not exist as individual rights because they only make sense at the group level: the benefits conferred on individuals by the right derive indirectly from its effects on the larger class of which they are members (Hardin 1986: 58–59). The right to vote is not only an individual right; it also exists for a collective purpose and benefit: to constitute and perpetuate representative democracy. There may be certain electors who perceive some benefit in alienating their right to vote, but the collective has a more compelling interest in preventing this from happening. The right to vote is fundamental: it is not only central to the perpetuation of representative democracy; it is partly *constitutive* of it and therefore too precious to be alienable, to be turned on and off like a tap as individuals please. Many voters in voluntary systems are perfectly entitled to continue to abstain or vote as they please, but this is not the same as having a formal entitlement to waive their right to vote: it does not represent an explicit recognition of a particular right not to vote. The right not to vote cannot be admitted because it cannot be universalised; doing so would endanger – and possibly destroy – the system for which it exists: representative democracy.

So far, I have argued on the basis that voting is a right but not a legally waivable one. What if voting is not only a right but also a duty?

A 'right' versus a 'duty' to vote

Voting libertarians, who tend to see it as a right only, usually deny that voting might also be a duty (Brennan 2009; Lomasky and Brennan 2000; Saunders 2010). Some also believe that, even if voting were a duty, it could not operate simultaneously as both a right and a duty. Indeed, according to Holmdahl, this is impossible. As his lawyer, Kevin Borick, said: a 'duty and right, in this situation, cannot coexist'. Holmdahl also argued that Australian law is contradictory on the question of the status of voting rights. The *Commonwealth Electoral Act 1918* defines voting as a duty, but the

Constitution defines it as a right. Because, on his view, there cannot be both a right and a duty to vote, and because the Constitution is more legally authoritative than the *Electoral Act* and is supposed to override any statutory law that conflicts with it, there no longer exists a duty to vote. Accordingly, Section 245(1) of the *Commonwealth Electoral Act 1918* is unconstitutional or at least 'invalid'. When Justice Gageler asked Borick why he perceived 'an inconsistency between the existence of a right and the existence of a duty to exercise that right' Borick replied that 'a right involves a choice and you can waive that right' whereas duties cannot be 'waive[d]'. The court did not show any interest in testing this argument and denied Holmdahl leave to appeal with the simple pronouncement that his case had 'no prospect of success'.[19]

This case raises questions about the status of voting under Australian law. On the one hand, we have seen that the High Court has found an implied right to vote in the Constitution. On the other hand, however, Section 245(1) of *The Commonwealth Electoral Act 1918* stipulates that voting is 'the *duty* of every elector … at each election'. Is voting a right or a duty? Must we choose between them, as Holmdahl insists?

The answer to this question is 'no': there is nothing in democratic or legal theory that obviously precludes conceiving voting as *both* a right and a duty. Voting seems to be a 'duty-right'. A 'duty-right' exists where one has both a duty to do something (because others have a claim-right that I perform it and because I have a duty to pursue certain values – see below), and a claim that protects this duty. If I have a duty to vote, I also have a claim to not be interfered with in the performance of this duty. We rarely hear about duty-rights, but they are common and people perform them all the time: judges have duty-rights to impose sentences, teachers have a duty-right to grade the work of their pupils, and police officers have both a right and a duty to arrest criminals. A duty-right exists even when we would prefer not to have it, as in the case of the duty-right to pay our debts (Rainbolt 2006: 34–36). Courts have explicitly recognised the concept of a duty-right. For example, in *Albertson v Kirkingburg*,[20] the court found that the owners of Albertson's (a grocery store chain) had a duty-right to dismiss one of their delivery van drivers (Kirkingburg) once they discovered that his vision did not meet federally specified vision standards. They were legally and morally empowered to do so, and they had a duty to others to do so.

Voting can be plausibly characterised as a duty as well as a right because: (a) as argued above, voting is one of those rights that carry with them duties to refrain from acting in certain ways (in this case, to refrain from waiving the right) and (b) because the justification for voting is only partly rights-based: there are powerful consequentialist arguments for the importance of voting rights. For example, on the 'decision-centred' argument, voting rights are justified because democracy – based on the expressed will of the people – is thought to be the best procedure for making decisions. Voting is central to legitimising governments (Katz 1997), and functions as a practice that promotes and protects 'the common interests of the members of a political community' (Weale 1999: 41–42). Voting rights have been defended in relation to utility maximisation (Downs 1957: 45–46), while voting is commonly conceived as the mechanism by which individuals are enabled to exercise their interests in self-protection, self-government and self-development.

[19] *Holmdahl v Australian Electoral Commission & Anor* [2013] HCATrans 72, 2013, emphasis added.
[20] *Albertsons, Inc. v Kirkingburg* 527 US 555 (22 June 1999).

We find a key consequentialist justification for voting in the fact that suffrage is the sovereign right that protects all other rights. The US Supreme Court has repeatedly asserted that the right to vote is fundamental because it is the 'preservative of all rights' and 'the citizen's link to his laws and government' (Ciccone 2001–02). The European Court of Human Rights has also determined that the right to vote is a fundamental human right with universal suffrage the basic principle.[21] Were people to fail persistently and ubiquitously to express the right to vote, there would be no check against the potential tyranny of those in power, especially those seeking to trespass on realms of individual autonomy. This is why courts generally treat voting as a 'preferred' or special right (Douglas 2008).

Therefore, insofar as I have a duty to promote certain values or desirable ends – such as the protection of rights and the perpetuation of a system that promotes self-government and the common interest – there are powerful consequentialist grounds for a duty to vote. This is distinct from, but in addition to, my duty to meet the claim-rights of others. On this latter count, we have a duty to vote because others have a claim-right on us to vote (i.e., they have a right to have us perform the duty). The reason others have a legitimate claim-right here is that democracy involves work, and we must all do some of this work if the system is truly 'of the people, for the people, by the people'. Many democrats hold that a successful democracy depends on widespread interest and participation in politics; voting is clearly central here. If we intentionally and persistently refrain from taking such an interest we are refusing our political responsibility while continuing to enjoy the benefits of democratic life, of living in a democracy instead of, say, a dictatorship or an oligarchy. By failing to vote, we are free-riding as well as passively eroding the democratic condition. As Mill (1991: 210) observed: 'representative institutions are of little value and may be a mere instrument of tyranny or intrigue, when the generality of electors are not sufficiently interested in their own government to give their vote'.

Participating in the mutually advantageous co-operative enterprise of democracy requires a willingness to give up some freedom, a willingness that, in the name of fairness, should be reciprocal (Hart 1967: 61) and therefore universal. I have a reciprocal obligation to all other citizens to vote so that, together, we can constitute and perpetuate the system of representative democracy and collectively enjoy the benefits of living in a properly functioning democracy.

Apart from my obligation to all other members of a given *demos*, there is a second group of people that has a claim on me to vote: namely, other members of my social group or class. For example, the poor owe it to each other to vote so that the wealthy do not monopolise the attention of governments (which does indeed happen when low numbers of poor people turn out to vote (Hill 2013). Similarly, women should vote in order to protect their interests as a social group. Being the only woman who bothered to vote would leave me vulnerable to the domination of men: I need the cooperation of other women to prevent this from happening. We owe it to other members of our social group to cooperate and vote so that we can shape, in

[21] See *Hirst v United Kingdom (No. 2)* [GC], no. 74025/01, ECHR 2005-IX (Grand Chamber, second instance), [43] 59 (2006). Obviously voting rights can be defeased because felons can be disenfranchised, but this is not the same as waiving or alienating a right. Further, there are many who argue that suffrage is too fundamental a right to be defeasible, by which I mean, capable of being subject to termination or annulment.

our favour, the terms on which we face other classes and thereby derive the liberty and equality-enhancing benefits of voting.[22]

To summarise, voting is best characterised as both a duty and a right. It is a 'duty-right' because there is a universal obligation to share equally the work of promoting the values and social condition of democracy: I have a reciprocal obligation to all other citizens to vote so that I do my fair share in the collective task of conserving and perpetuating democracy. Nevertheless, we also have an obligation to other members of our social group so that together we can meet other classes on more even terms.

Thus, on the one hand, voting must be seen as a *duty* because of (a) its special place in serving democratic *desiderata* and in perpetuating democracy as a form of government, and (b) because others have a claim-right that I should vote. On the other hand, voting must also be a legally recognised *right* to prevent its erosion and ensure that the claims of the disentitled have purchase.

If voting is a duty as well as a right, it is reasonable to refuse to legally recognise a right not to vote or even to require voting by law. There are some duties that we would not consider it proper to legally compel (such as the moral duty to tell the truth), but voting is not just any duty: it is a *special* duty because the existence and proper functioning of representative democracy (and ultimately our collective welfare) depend on its universal performance.

Conclusion

I have argued that the entitlement to vote is not a personal, divisible, alienable privilege but something that comes with strings attached: namely, a duty not to waive or alienate that right. Not all rights can be waived as the possessor pleases. Because other interests are at stake, the right to vote cannot be waived or alienated, and the collective interest in perpetuating a democratic form of government negates any individual's determination to waive such a right. The alleged right not to vote cannot be formally recognised because it cannot be universalised. Doing so would undermine the form of government for which it exists: democracy, a collective benefit. This means that, even if voting were *only* a right (and not a duty-right, as I have argued), it still could not be waived.

In any case, voting is not only a right but a *duty* as well. Insisting on a right not to vote constitutes a refusal to participate in the maintenance of what appears to be the best form of government for the preservation of rights and the project of self-protection and self-government: namely, representative democracy. Further, people have a duty to other members of their particular social group to vote.

Compulsory voting does not seem to violate any assumed right not to vote. This does not mean that those in voluntary systems who continue to abstain from voting should be penalised in any way; nor does it mean that all voluntary voting systems should become compulsory in order to be deemed legitimate. It only means that there should be no formal legal or moral recognition of a 'right not to vote'. Many citizens in voluntary-voting settings will continue to abstain from voting as it suits them, but their abstention will not – and should not – constitute the exercise of any particular right.

[22] As Hardin (1986) has argued in relation to the example of an eight-hour working day.

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