Elections as Rituals

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Introduction – ritual and aesthetics

The area that we will traverse today falls within the law of politics. As a fairly new field, the law of politics hoovers up not just electoral law, but the rules governing parliaments, parties and money in politics. It mixes constitutional law, administrative issues and political science concerns, in equal parts. For the best part of two decades, I have been exploring the law of politics. It has been fun helping found a new sub-discipline.

Ten years ago I paused from the labour of wading through statutes and case law, and wrote an essay in ANU's *Federal Law Review*. It was called 'The Ritual and Aesthetic in Electoral Law'.[1] The essay was an attempt at a sociological understanding of elections *as events*, events we experience. Ten years later I turned the little tunes in that paper into a book titled R*itual and Rhythm in Electoral Law*.[2] Its title prompted one wag to ask whether I was Catholic. (I am not. As we will see, the 'ritual' is secular and the 'rhythm' has nothing to do with the Billings' method and everything to do with the way elections set up the seasons of politics).

Today's talk will distil some of the flavour of that book. Beyond thinking about elections, my overall theme is the importance of thinking about public institutions and practices in terms of how we experience them, and what meanings might be embedded in their forms and patterns.

On the way to this forum I was reflecting on the charms of Canberra. Non-Canberrans are meant either to embrace, with awe, Canberra's great public buildings and national symbols. Or we are meant to malign its sprawling suburbs and lack of dynamism. But what strikes me most is that Canberra is a gracious and spacious city. It is quintessentially Australian in its natural environment. Yet in one key aesthetic aspect Canberra seems more European than English-speaking. It is the only city in Australia that doesn't bombard you with billboards and advertising. Commerce is here, but it not the dominant motif. Canberra has an aesthetic that both reflects and reinforces the culture, and the public service and governmental values, of the place. In our lives, appearances matter.

Law and culture

Thinking about ritual occurs at the cusp of political culture and law. The institutions and rules of democracy at once open up *and* also constrain the space in which great public events like elections

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[1] Graeme Orr, 'The Ritual and Aesthetic in Electoral Law' (2004) 32 *Federal Law Review* 425; see also 'Ritual in the Law of Electoral Politics' in Glenn Patmore and Kim Rubinstein (eds), *Law and Democracy – Contemporary Questions* (ANU Press, 2015) 115.

[2] Graeme Orr, *Ritual and Rhythm in Electoral Systems: A Comparative Legal Account* (Ashgate/Routledge, 2015).

occur. Culture or law? Chicken or egg? At one level it hardly matters: they obviously feed-back upon each other, symbiotically.

Take Japan (figure 1). It has a parliamentary and party based system, like Australia. So it has a collective rather than individualized politics. But unlike Australia, in Japan campaign expenditure is limited by law. And Japanese public funding of election campaigns not only pays for posters on billboards – billboards that are regulated by local government. It even funds one or more campaign vehicles (cars or boats) per candidate', whilst strictly limiting more costly forms of campaigning.[3] Part of the rationale is to equality of resources between candidates. But the law also perpetuates traditional street level campaigning, complete with the white gloves.

In such street level campaigns we see the classic inversion of election time – when the rulers come down to us, to beg for votes. Yet Japanese law also bans house-to-house solicitation of votes.[4] Such a ban once would have been rationalized as minimizing opportunities to bribe individual voters: but in a wealthy contemporary democracy it suggests a cultural more. Face-to-face, domestic solicitation takes nerve and may be considered impolite.

In contrast, the United States notoriously has a more 'look at me' culture. The US *Constitution* requires a directly elected executive or Presidency. Not the parliamentary model where leaders are chosen by their MPs as peers. The first amendment of the US *Constitution* mandates free speech. This in turn forbids any limits on political expenditure, so private political money is king. And US statute law requires primary elections, where every elector can help pre-select candidates for the general election. The whole structure, from *Constitution* to party primary laws, is designed to weaken parties and empower charismatic, well-heeled individual candidacies. 'Go Run, Go Vote, Go Lead, Go Girl', as in the Barbie-for-President 2004 doll I found in Los Angeles (figure 2).

The examples can be multiplied. We can contrast our neighbours, across the ditch in Aotearoa. New Zealand has a modest campaign culture, more like the British than Australia's. There is an accent on text based campaigns through billboards and pamphleteering. There is also a healthy dose of humour and even disrespect, as the practice of comic defacing of electoral billboards reveals. NZ law plays a big role in this, by setting short parliamentary campaign periods and then regulating them – quite unlike the US. NZ law in fact limits (as the UK bans altogether) paid television ads at election time, in favour of a rationed system of free airtime for parties. NZ also tones things down by banning electioneering *completely* on polling day.[5]

Why we have elections – the purposes and values behind electoral democracy

Government officials and lawyers prefer to think in terms of analytical classifications or normative goals rather than messy things like culture. Figure 3 offers a diagram which I discuss with my students in the law of politics. It shows the various answers to the question 'why do we have

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[3] *Public Offices Election Act 1950* (Japan) article 141. I am indebted to Akiko Ejima for this citation.

[4] ACE, *Election System in Japan* (ACE Electoral Knowledge Project, 2007) 42–3.

[5] Andrew Geddis, *Electoral Law in New Zealand* (1st ed, 2007) ch 9 (broadcasting rules) and *Electoral Act 1993* (NZ) section 197. In comparison Australia allows open-slather election advertising and broadcasting, except for a 'blackout' on broadcast advertising in the last three days of the campaign. Like the NZ ban on any campaigning on polling day, this was designed to create a quiet period of repose.

elections?' The diagram groups together the different concepts through which we can understand electoral democracy, and the goals that might drive regulation.

The top two quarters of the diagram are by far the dominant strains in official and academic thinking. Officially, we either think about elections either as instruments of government, or as triumphs of liberal democracy. Yet when you talk to the media, or follow conversations at parties, the bottom half of the diagram rears its head. The elections as charade view is a cynical, outsiders' counterpoint to the idea of elections as integrity mechanisms. My theme today however occupies the neglected other quadrant. It is the idea of electoral democracy as a 'secular ritual'.

We can define ritual as any *patterned human activity embodying social value or meaning*. The patterned, recurrent and hence rhythmical nature of rituals does not mean that just any old habit is a public ritual. I scratch my flaky scalp when I'm bored or agitated: it's just a habit with no meaning. Rituals can also be private: someone who takes her coffee at the same place and time every day might seem to be in a routine or even a rut; but if the café is where she met her late partner, we'd recognise that she is living out something meaningful embodied in a personal ritual. It's my contention that when we think about electoral democracy and constitutional law and institutions more widely, we need to think about public or shared rituals. In saying we need to, I do not mean to we should worship ritual uncritically. Rituals can be rich and positive. But they also can be 'ritualistic,' in the negative sense, like a North Korean harvest festival.

So my book was born of dissatisfaction with the language and concepts we use to describe and evaluate the framework through which we run elections. That language and those concepts draw on ideas of elections as instrumental competitions for power, whose *integrity* must be managed. Or they draw on theories of elections as great exercises destined to achieve *liberal values* like political freedom and equality and, if we're optimistic, popular deliberation. In the instrumental or integrity model, the analysis is drily numerical. In the vision of elections as cornerstones of liberalism, the analysis is lofty.

Don't get me wrong. Each of these perspectives is vital to encapsulate the ideal of free and fair elections. However we – especially academics, bureaucrats, politicians and judges who study or shape the electoral process – rarely address elections from the *experiential* dimension. There are exceptions. Some historians have focused on early elections as communal events.[6] Sociologists also sometimes consider the colour and meanings of wider political practices, like public demonstrations. In recent years, two insightful professors of politics, Ron Hirschbein and Stephen Coleman, have explored the rites and experiences of voting in the US and the UK.[7]

The study of electoral systems however has largely lacked this dimension. It has been fixated on the outcome of electoral democracy and not on the journey. It concerns itself with 'purposive goals'

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[6] An excellent example, from the US perspective, is Mark W Brewin, *Celebrating Democracy: the Mass-Mediated Ritual of Election Day* (Peter Lang, 2008). From the UK perspective see Frank O'Gorman's work, especially his *Voters, Parties and Patrons: the Unreformed Electorate of Hanoverian England, 1734-1832* (Clarendon Press, 1989). Jon Lawrence has recently woven past and present campaign styles and norms together in his incisive and entertaining *Electing our Masters: The Hustings from Hogarth to Blair* (Oxford University Press, 2009).

[7] Ron Hirschbein, *Voting Rites: The Devolution of American Politics* (Praeger, 1999) from a philosophical perspective, and Stephen Coleman, *How Voters Feel* (Cambridge University Press, 2013) from both an empirical and theoretical sociology-of-politics perspective.

rather than the 'latent function' of elections, to quote from Professor Jean Baker.[8] We purport to know a lot about elections, through abstractions, book learning and through quantitative studies of voter behaviour and electoral statistics. We do so without sufficient concern for knowing about the electoral experience, let alone how systems and rules shape that experience.

Cocooned in these instrumental and liberal analyses, we forget that elections are *nothing* if not grand social events. Events whose configuration shapes our experience of electoral democracy. Elections are giant rituals. They are recurring political masquerades and festivals. Each election itself is then made up of lots of what I call 'everyday rituals': campaign activities, balloting, declarations of results, investitures. They are events whose rhythms, patterns and activities are either set or contoured by law and administrative institutions.

Western analysts have tended to ignore or even deride ritual understandings of politics. A US professor noted once that 'anthropological studies have too often been dismissed as bearing only on the political organization of "primitives", living in small-scale societies'.[9] So we find it easy to at other cultures, or to look back on our past, as quaint foreign countries. Like in the painting 'The Chairing of the Member' (figure 4). In it British artist William Hogarth caricatured a typically feisty Oxfordshire election in 18th century England.[10] Polling, before the late Victorian era, was a multi-day festival: colourful, full of reciprocity, bribes and booze, with voting by voice rather than secret ballot.

Then leap forward to today. To the image in figure 5, taken in a northern New South Wales town early on an election morning in the 2000s. That's a family, including casual Australian Electoral Commission (AEC) workers, heading down the road to set up the one-day-every-3 or 4 year ritual of secret balloting. They carry with them the recyclable cardboard booths which act as shelters to cater for the pencil on paper ballot which is mandated by law in Australia.[11] And unlike the US or UK, which vote on Tuesdays and Thursdays, it's a Saturday, not a busy work day but traditionally a family day.

The pre-reform election is bursting with public ritual. But various democratic reforms – especially secret balloting, clamping down on corruption in the form of direct treating of voters – have led to the ritual becoming quieter, embedded as part of the ritual of the 'everyday'.

On its face there is a linguistic contradiction here. The coming together of a secular society as a polity is hardly 'everyday', not in the sense of something that happens every day. An election is a national moment; a constitutive one and a theatrical one. Our triennial elections establish the rhythm of the political seasons. But at the level of legal rules and administrative practice, elections

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[8] Jean H Baker, *Affairs of Party: The Political Culture of Northern Democrats in the Mid-Nineteenth Century* (Cornell University Press, 1983) 262.

[9] David Kertzer, *Ritual, Politics and Power* (Yale University Press, 1988).

[10] See further Christina Scull, *The Soane Hogarths* (Trefoil Publications/Sir John Soane's Museum, 1991) and David Bindman et al eds, *Hogarth's Election Entertainment: Artists at the Hustings* (Apollo Magazine/Sir John Soane's Museum, 2001).

[11] '[E]ach voting compartment shall be furnished with a pencil for the use of voters': *Commonwealth Electoral Act 1918* (Australia) section 206. Pencils are more failsafe than pens or computers. That few Australians object to their use reflects a high level of trust. Unfortunately, when he thought he was narrowly losing the 2013 election in Fairfax on the Sunshine Coast, Clive Palmer MHR raised vague claims about ballots being erasable. When at the completion of recounts he narrowly won the seat, Mr Palmer did not pursue the allegations.

are also a quotidian or everyday experience. No more so in the trip to the local school or community hall, as we are summonsed – indeed compelled to turnout by law in Australia – back to the site of our coming of age and rounding out as citizens.

Voting – a private affair

Let us now focus on polling day, that traditional culmination of the electoral ritual. Polling is at once a private, a communal and also a public action. To cast a ballot is the most public of citizen actions, yet it is done in private. In figure 6, we have an image of Tiwi Islanders voting behind those cardboard screens. If you believe the ballot is a sign of hope, if not in its transformative potential, then watching people disappear behind a voting screen or compartment evokes the metaphor of a 'closet of prayer', which appears in Les Murray's poem 'My Ancestress and the Secret Ballot, 1848–1851'.[12]

The everydayness of the ritual of modern voting was foreseen as long ago as the late 1850s. Here's a quote from an observer in Victoria, just after secret balloting was first instituted in Australia: 'The [secret] ballot does away with all the base dissembling and hollow protestations of canvassing … of kissing squalid children, flattering slatternly housewives, cajoling partial fathers. It abrogates the demoralising influences of the flagon and the purse … *everything proceeds with the same tranquil placidity as if the community was undergoing a trying operation under the influence of chloroform, waking up to consciousness on the declaration of the poll*… the proudest of civil rights may be exercised with all the peace and security of a religious ceremony.'[13]

As they pander to 'working families', modern politicians might chuckle at the vain hope that campaigning would be ever be free of solicitation. Campaigning, as we have noted, *inevitably* involves a ritualised inversion of the normal order of ruler and ruled, where every candidate from the prime minister down asks for our votes.

But what was noticeable, even in the 1850s, was a utilitarian desire to chloroform the hubbub of elections. This was to be done with the legal technology of the secret ballot and orderly polling stations. Admittedly at the time there was some push-back: South Australian Governor Ferguson lamented the lassitude he saw in the quietness of the secret ballot.[14] But the technocrats had their way.

Voting – a communal affair

The secular ritual of polling day is itself now under threat, by what is known as 'convenience voting'.[15] I have traced that term to at least 1948 in the US, where a reformer who wanted all voting to be by postal ballot, argued for 'laws to make possible the economy of carrying the one ounce

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[12] Les A Murray, *Suburban Redneck Poems* (Farrar, Strauss and Giroux, 1996). For a history of the secret ballot in Australia (also invoking that poem) see Michael McKenna, 'The Story of the "Australian Ballot"' in Marian Sawer ed, *Elections: Full, Free and Fair* (Federation Press, 2001) 45.

[13] William Kelly, *Life in Victoria or Victoria in 1953, and Victoria in 1858* (Lowden, 1977) 318. Emphasis in the original.

[14] Cited in McKenna, above n 12, 60.

[15] For more, see Graeme Orr, Convenience Voting: the End of Election Day?' (2014) 39 *Alternative Law Journal* 151

ballot to the polls instead of the 200 pound elector to the polls'.[16] (Obesity, it seems, was a problem even then.)

Postal voting has had a renaissance, driven partly by cost-saving considerations. All-mail elections have been been trialled in local government in Australia and in the UK. They are also mandated by law at all levels of elections in a few US jurisdictions, currently Oregon, Washington and Colorado. In Queensland, postal voting on demand was recently legislated as a right.[17] As a technology this is ironic, given that the red post-box is going the way of the dodo. Nevertheless postal voting, once the preserve of the immobile or infirm, now accounts for over 10 per cent of turnout in Australia.

Even on integrity grounds, this is curious. Postal voting was originally a legally guarded *privilege*, because it cannot guarantee a secret ballot. As recent UK electoral rorting cases show, postal voting has obvious integrity weaknesses. Parties in Australia have even manipulated the law to make themselves conduits for postal voting.[18]

Even more significantly, pre-poll or early voting in person, is also on the rise. In contrast to postal voting it doesn't save money. Admittedly, in parts of the US early voting is critical. Americans vote on Tuesday, a working day. In less resourced communities and in states that mandate photographic voter ID, minorities have to push hard for the right to queue at *pre-polling* stations. However, in Australia pre-polling attracts mostly staunch middle class electors. Typically these are people who think 'I always vote for party X so let's "get it out of the way"'. This is a consideration of pure convenience. In the 2015 Victorian state election, over 30 per cent voted early, whether in person or by post and a majority voted this way in one recent by-election.[19] Electoral commissions, encouraging this trend, are thus gearing up for elections where almost half may vote early. All this threatens the once every year or so experience and symbolism of polling both communally and on the same day.

In the brave new electoral world, internet voting, we are told, is inevitable. It's being rolled out and trialled in NSW, although at this stage just for visually impaired and service people. Yet will we stop to consider the shift in performative meaning of logging in, at any time, to vote on our iPhones? And how that differs from visiting a communal polling station on election day? It is a change on par with say the way the ritual of brewing and sharing tea was replaced by the convenience of the tea bag, or in a more blokey metaphor, the way T20 cricket, in short bursts at night, is threatening the more leisurely formats of the past.

There are deliberative and participation angles to this shift from 'election day' to 'election month'. Not knowing who has voted early, parties are wondering how to stage campaigns. But my concern here is to tease out the ritual and rhythmical elements in the shift.

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[16] George F Miller, *Absentee Voting and Suffrage Laws* (Daylion, 1948) 18.

[17] See now *Electoral Act 1992* (Qld) s 114.

[18] See further Norm Kelly, *Directions in Australian Electoral Law: Professionalism and Partisanship in Australian Electoral Management* (ANU E-Press, 2012) ch 9.

[19] Nathaniel Reader, 'The Growth of Early Voting in Australia', paper to the Challenges of Convenience Voting Workshop, University of Sydney, 4 November 2015.

A *London Times* columnist recently wrote that 'the act of voting in Britain has all the glamour of queuing for a wee at a school jumble sale'.[20] This wasn't a whinge: she meant that the pedestrian nature of voting at a local school had an 'authenticity', a symbolic value in which 'we the people' see 'we the people' gathering to put pencil marks on paper and exercise recall power over our political masters. It's quite a leap from the tangible communal paper ballot to the ephemerality of e-voting anytime from anywhere.

Voting – a public affair

Finally there is the rhythm of election night. Election night is a time when elections and drinking are reunited. (My book includes chapters on both alcohol and betting at election time). Political parties may be wary of offering alcohol – the old crime of treating – at meetings these days. Indeed Australian law has, since 1902, forbidden voting on the licensed parts of premises even though, in some small towns, the pub has always been the one and only public venue.[21] But well-lubricated election night *parties* remain the climax of the ritual for many.

Australia once had a National Tally Room, as depicted in figure 7. It evolved from the practice of newspapers setting up giant tally boards on election night. A national tally room was born out of a desire to have a public focus for election results. The national tally room became an institution: overseen by the electoral commission, open to all citizens and a tangible symbol of democracy. It was a scene of triumph and despair: Australians of a certain age still recall prime minister-elect Bob Hawke being mobbed in 1983 as Malcolm Fraser wept as he lost office.

But the national tally room died at the hands of cost-cutting, the advent computerised feeds, and a drift by media and politicians to more controlled environments. Just as parties shy away from public rallies, so they prefer now the secure interior of a hotel ballroom, whilst the media sucks in the electronic data and brands it with its own graphics. No more the gaze of the physically tally board, that symbol of the river of numbers, encompassing each individual vote, forming a flood that can sweep away our rulers.

Now I do not wish to be a Luddite. The public space of election night has been, at least since the mid 20th century, a mediated one for most people. Electronic voting in time will transform the public rhythm of election night, with its parties, live-crosses, and schadenfreude. Because with e-voting, the results can all be known instantly, then dumped en masse into a super computer, rather than unfolding with suspense. (Relatedly, many countries ban opinion polls in the last week or two before polling day – ostensibly for integrity reasons, but also for deliberative repose.[22] Limiting opinion polls also invests the event of election night with greater suspense).

Compare British election nights. The British vote until till 10pm GMT, whereas Australian polls close four hours earlier. The British have a curious ritual of counting every ballot on election night. British people vote on a single ballot, with a cross, so the count is simpler than here where

[20] Carol Midgley, 'The British Ballot Box is a Glamour Free Zone – Long May it Last', *The Times* (London), 6 May 2010, 33.
[21] See now *Commonwealth Electoral Act 1918* (Australia) section 205.
[22] See Graeme Orr and Ron Levy, 'Regulating Opinion Polling: A Deliberative Democratic Perspective' (2016) 39(1) *UNSW Law Journal* (forthcoming).

preferential voting is used. Moreover, unlike in Australia, British postal votes have to be in by close of polling. City councils, who manage each count, in response, even race to be the first to declare each result. Talk about ritual triumphing over purity! When, in 2010, to save money on overtime (and perhaps ensure more accurate counts) British returning officers sought to delay counting until the morning after polling, there was a backlash in the form of a 'Save General Election Night' campaign. It succeeded in generating a law mandating that counting start no later than four hours after polls close.[23]

Under UK law the local mayor, as nominal returning officer, declares the poll for each House of Commons constituency. These declarations happen across over 600 communal tally rooms. The customary rule is that all candidates attend and are invited, like Edmund Burke of old,[24] to give a final address to their electors. As figure 8 shows, even a re-elected PM can thus be brought down to level. After the Iraq war, Tony Blair faced not only a Monster Raving Loony Party candidate wearing a 'Bliar' hat, but an independent candidate whose serviceman son had died in Iraq.[25]

Conclusion – ritual and civic quietism

In contemporary times, fear or resentment of electoral passivity is often not far from the surface. Especially amongst political progressives. A US professor wrote, in Th*e New Yorker*, that she longed for more electoral 'hue and cry. … Sometimes, inside that tiny booth, behind the red-white-and-blue curtains, it's just a little too quiet.'[26] A fellow American, Professor Hirschbein similarly has written that he is worried that 'for many, Election Day is bereft of its former liturgical fullness … the carnival spirit is gone.'[27] I wonder what they would have thought about the LNP proposal in Qld in 2014, to ban all electioneering on polling day, a measure I opposed as a final leeching of the colour and activity of the day as much as a risk to the freedom of non-party activists to protest, or opposition parties to use how to vote cards encourage preference swaps.

At the heart of this concern lies a regret about contemporary electoral quietism. Its's the feeling that whilst we don't want the excessive money or razzamattaz of the US, elections in other developed countries today are *too* placid or insufficiently passionate. This regret can be a friendly critique of electoral democracy: elections are worthwhile, but they should be *more* engaging. It is thus a rallying cry for 'elections plus', a call for a more integrated participatory democracy throughout the electoral cycle.

Once one established practice or rule supersedes another, the old practice becomes seen as 'archaic and senseless' and the new one, in time, comes to feel natural. This is true of politics, where streamlined forms of electoral administration and top-down, professionalised and centralised campaigns now seem natural or inevitable. In turn, older forms of electoral practice appear highly ritualised: we gape at the past like a foreign country, like early anthropologists at the workings of some unfamiliar tribe.

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23 *Constitutional Reform and Governance Act 2010* (UK) section 48. I am indebted to Dr Heather Green for this reference.

24 Compare Burke's famous 'Speech to the Electors of Bristol' (3 November 1774) where he set out the concept of an MP as a trusted agent, elected to exercise discretion, in distinction to an MP being a delegate following the bidding of their electors.

25 The image now graces the front cover of Lawrence's book, above n 6.

26 Jill Lepore, 'Rock, Paper, Scissors: How We Used to Vote', *The New Yorker*, 13 October 2008.

27 Ron Hirschbein, *Voting Rites: the Devolution of American Politics* (Praeger, 1999).

It is unrealistic to expect the typical election in a settled democracy to bear the same passion as when the ballot was younger. Ultimately, the lament is not for a lost oasis, as it is about a perceived lack of political engagement and interest. There is no magic wand to revivify politics – it is not something laws or electoral commissions can ordain. The law can create the space, but it is up to parties and citizens to fill that space.

Whilst the lament about electoral quietism carries a whiff of nostalgia, it is far from new. As I said earlier, when secret ballot laws were introduced, there were those who despaired that elections had assumed a new 'quietness and indifference', just as others welcomed a 'tranquil placidity' around election day. Contemporary concerns about 'civic privatism', to borrow a phrase from Professors Ackerman and Fishkin,[28] thus turn out to be nothing new.

But just as there was no 'sausage sizzle' in the electoral days of rolling out the barrel, my ultimate point is that the electoral processes and rituals of today are certainly different from but not necessarily lesser than those of the past. However, if we do not attend to describing and understanding the ritual dimension of public law and practices, we cannot begin to appreciate their importance. Let alone openly undertake the normative task of deciding which elements we want to savour, update or farewell.

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[28] Bruce Ackerman and James S Fishkin, 'Deliberation Day' (2002) 10 *Journal of Political Philosophy* 129 at 129–30.