GETTING TO YES: EXPLAINING STATE REFERENDUM SUCCESS AND WHAT (IF ANYTHING) THE COMMONWEALTH CAN LEARN FROM IT

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This article provides the first detailed account of the results of state constitutional referendums and asks why the success rate of state referendums (75%) is so much higher than that of Commonwealth referendums (18%). It finds that state referendums have typically involved uncontentious proposals for institutional reform. Bipartisanship, timing, and the willingness of voters to follow party cues in low-key campaign environments have aided success. The disparity in state/Commonwealth success rates is due partly to state practice, including care in issue selection and consensus-building. However, state polls also occur in an institutional context that is more conducive to referendum success. Federalism, rigidity and a high public profile mean that Commonwealth referendum proposals are more likely to affect multiple interests, attract scrutiny, generate strong opposition and prompt fears about irreversible change. The state experience therefore expands our understanding of referendum outcomes but does not provide a blueprint for federal referendum success.

I INTRODUCTION

It is widely known that winning a Commonwealth referendum is very difficult – 'one of the labours of Hercules', according to Robert Menzies.[1] Federal governments have submitted 45 proposals for constitutional change to the people, of which just 8 (or 18%) have been carried. But a very different, and lesser-known, picture emerges if we turn our eyes to the states. Of the 12 proposals for constitutional amendment put by state governments, 9 (or 75%) have been approved by voters. In other words, the success rate[2] for state constitutional referendums is more than

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1   L F Crisp, *Australian National Government* (Longman Australia, 5th ed, 1983) 40.
2   This article uses the terms 'success' and 'failure' in a neutral way, as rough synonyms for 'approval' and 'defeat'. Their use is not intended to communicate the author's views on the substantive merits of a referendum proposal.

four times higher.[3] The recent history is even more striking. Australians last agreed to change the *Commonwealth Constitution* in 1977. Since then, state electors have participated in nine constitutional referendums and voted 'Yes' in eight of them.

The state referendum record challenges the idea that Australians are natural naysayers on constitutional reform. It also invites an obvious question: why is it that Australians have been comfortable voting 'Yes' to the amendment of their state constitutions, yet so reluctant to change their national constitution? This is a question that has received only passing attention from scholars, typically in contributions that run for no longer than a few sentences. It has been suggested that federalism,[4] issue selection,[5] and public education[6] are among the reasons that explain the disparity in success rates. These are plausible explanations. But what is lacking is a more comprehensive analysis that is grounded in a detailed account of the various state referendums. This article aims to provide such an analysis. As we approach the 50th anniversary of the last successful Commonwealth referendum and reflect on the defeat of the 2023 Voice vote, there is no better time to pay attention to the state referendum experience and ask what we can learn from it.

Any study that seeks to compare Commonwealth and state referendums encounters limitations. One relates to sample size. The states have run just 12 constitutional referendums, about a quarter of the number put by the Commonwealth. But this sample of a dozen polls, while relatively modest, is large enough to capture referendums held across time, in different states, on a range of topics, with varying outcomes. It is therefore sufficiently large to generate meaningful observations and insights, and to serve as a basis of comparison. A second limitation concerns the diversity of the sample. Only three states – New South Wales ('NSW'), Queensland ('QLD') and South Australia ('SA') – have

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3   This article focuses on constitutional referendums. It does not discuss plebiscites – that is, advisory referendums on policy issues. For discussion of state plebiscites, see Paul Kildea, 'The Law and History of State and Territory Referendums' (2022) 44(1) *Sydney Law Review* 31.

4   Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 320–1 (suggests that higher success rate in NSW 'may be a reflection on the fact that Commonwealth referenda are often perceived as attempts to increase power at the Commonwealth level (to the disadvantage of the states), whereas state referenda do not tend to involve such issues'); Graeme Orr and Samara Cassar, 'When Referendums Go Wrong: Queensland's 2016 Fixed Four-Year Term Proposal' (2016) 31(2) *Australasian Parliamentary Review* 161, 164 (noting that '[t]he federalist factors of double-majorities, oppositional campaigns funded by other levels of government, and Commonwealth versus State powers do not arise' at the state level).

5   Twomey, *The Constitution of New South Wales* (n 4) 320–1 (suggests the higher success rate in NSW 'may be because State governments have been more careful in relation to the type of referenda put to the voters'); George Williams, 'For Referendums to Work, Voice Failure Must Drive Reform', *The Australian* (online, 23 October 2023) <https://www.theaustralian.com.au/commentary/for-referendums-to-work-voice-failure-must-drive-reform/news-story/f003170158ed7a5f2ca4c0e5698ca39a> (says the state record shows there is 'ample evidence that Australians are willing to vote yes in referendums to the right proposals put in the right way').

6   Anne Twomey writes that 'providing voters with informative and accurate material rather than inflammatory and misleading material is likely to have helped at the state level': Anne Twomey, 'The Government Will Not Send Out Yes and No Case Pamphlets Ahead of the Voice to Parliament Referendum. Does This Matter?', *The Conversation* (online, 2 December 2022) <https://theconversation.com/the-government-will-not-send-out-yes-and-no-case-pamphlets-ahead-of-the-voice-to-parliament-referendum-does-this-matter-195806> ('The Government Will Not Send Out Yes and No Case Pamphlets').

held popular votes on constitutional change, and the first of those states, with its eight referendums, dominates the sample. We cannot know if or how the state referendum record would be different had governments in Victoria, Western Australia ('WA') and Tasmania held their own referendums. The state referendum experience, it must be acknowledged, is the experience of three states only and one state most prominently. Any findings must be understood with that in mind. A third limitation is that each of the six states is different and to speak of a 'state' referendum experience necessarily involves some flattening of distinct peoples and entities. At the same time, there are important and relevant similarities across the jurisdictions, including as regards their constitutional systems, which are marked by their 'considerable homogeneity'.[7] That fact justifies a focus on state referendums in the same way that it validates general studies of state constitutions and systems of government.[8]

This article proceeds as follows. Part II provides an overview of the state constitutional context. It examines the form, substance and visibility of state constitutions, and discusses the laws that govern the holding of state constitutional referendums. Part III gives a brief account of each of the 12 state referendums included in this study, covering such matters as why they were held, their topics and outcomes, and offers general observations on the state referendum record. Part IV explores the factors that have contributed to the outcomes of state referendums. The analysis is informed by existing literature on referendum results and addresses six factors: the nature of referendum proposals, the presence of consensus and opposition, the timing of the poll, voter knowledge, the strength of 'Yes' and 'No' campaigns, and the party in government. Part V turns to a comparison of state and federal referendums. It suggests that the disparity in success rates is due to a mix of practice, underlying structural factors and differences in electorate composition, and considers the relevance of each. This article concludes in Part VI by reflecting on what, if anything, the Commonwealth can learn from the state referendum experience.

II THE STATE CONSTITUTIONAL CONTEXT

A State Constitutions: Form, Substance and Visibility

Today's state constitutions have their origins in colonial constitutions enacted by colonial parliaments under British authority. The first colonial constitutions emerged in NSW, Victoria, Tasmania and SA in the 1850s, followed by Queensland (1867) and WA (1889). Since Federation, all states except WA have re-enacted their constitutions.[9] State constitutions are 'local Acts' in the sense that they owe

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7   Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 1 <https://doi.org/10.1017/CBO9780511607288>.

8   See, eg, ibid; R D Lumb, *The Constitutions of the Australian States* (University of Queensland Press, 5th ed, 1991).

9   *Constitution Act 1902* (NSW) ('*NSW Act*'); *Constitution of Queensland 2001* (Qld) ('*Qld Act 2001*'); *Constitution Act 1867* (Qld) ('*Qld Act 1867*'); *Constitution Act 1934* (SA) ('*SA Act*'); *Constitution Act 1934* (Tas) ('*Tas Act*'); *Constitution Act 1975* (Vic) ('*Vic Act*'); *Constitution Act 1889* (WA) ('*WA Act*').

their existence to an enactment of their respective state parliaments rather than –
as is the case for the *Commonwealth Constitution* – an enactment of the British
Parliament.[10] Further, putting aside those provisions that are entrenched by manner
and form (discussed below), state constitutions are ordinary statutes that are 'subject
to express and implied amendment and repeal like any other State enactment'.[11]
In this sense they are mostly flexible documents, in that most provisions can be
amended by a parliamentary majority.

The various state Constitution Acts, like their 19th century predecessors, do not
seek to provide a complete framework of government and leave many matters to
case law and convention.[12] They have been described as 'sketchy on some subjects
and prolix on others'[13] and, compared to the *Commonwealth Constitution*, 'less
structured and more diffuse, mixing matters of relatively minor detail with the
establishment of the principal organs of the State'.[14] Most detail is typically devoted
to the legislative branch, including provisions as to the existence of a lower and an
upper house (except in unicameral Queensland), the vesting of legislative power,
and terms of office. In general, the state constitutions say little about the executive
branch or the operation of responsible government.[15] Some matters of constitutional
significance are dealt with in other legislation; for instance, in some states the
tenure of judges is addressed in a Supreme Court Act rather than the constitution.[16]

The state constitutions have a low public profile. This is consistent with
subnational constitutions worldwide, which tend to have 'low salience and
visibility'.[17] Australia's state constitutions do not tend to be viewed as markers
of regional identity,[18] and they barely register in the minds of many voters.
Gerard Carney writes of a 'general public ignorance of the existence of State
Constitutions, let alone what they might provide'.[19] He connects this lack of
community recognition to the local status of state constitutions.[20] The fact that those
constitutions are ordinary statutes, and have not been ratified by the people of each
state, has probably contributed as well.[21] Nicholas Aroney summarises the position
when he writes that Australia's state constitutions 'do not have a particularly strong

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10   Carney (n 7) 105; Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart
      Publishing, 2011) 43 <https://doi.org/10.5040/9781509955657> ('*The Constitution of Australia*').
11   Carney (n 7) 105.
12   John Waugh, 'Australia's State Constitutions, Reform and the Republic' (1996) 3(1) *Agenda: A Journal of
      Policy Analysis and Reform* 59, 60 <https://doi.org/10.22459/AG.03.01.1996.07>.
13   Ibid.
14   Saunders, *The Constitution of Australia* (n 10) 43.
15   Waugh (n 12) 60; Carney (n 7) 257.
16   Lumb (n 8) 131–2. See, eg, *Supreme Court of Queensland Act 1991* (Qld) s 21.
17   Patricia Popelier, Nicholas Aroney and Giacomo Delledonne, 'Conclusion: Nine Hypotheses to
      Explain Variation in Subnational Constitutional Autonomy' in Patricia Popelier, Giacomo Delledonne
      and Nicholas Aroney (eds), *Routledge Handbook of Subnational Constitutions and Constitutionalism*
      (Routledge, 2021) 310, 318 <https://doi.org/10.4324/9781003052111-20>.
18   Ibid 319.
19   Carney (n 7) 30.
20   Ibid 105.
21   Nicholas Aroney, 'Popular Ratification of the State Constitutions' in Paul Kildea, Andrew Lynch and
      George Williams (eds), *Tomorrow's Federation: Reforming Australian Government* (Federation Press,
      2012) 210, 210–11.

symbolic value in mainstream political or popular consciousness' and that 'their significance in general public debate and deliberation is generally very minimal'.[22]

The state constitutions, then, are mostly flexible documents that establish local governing arrangements and have a low public profile. They are, in these ways, very different from their national counterpart. The *Commonwealth Constitution* is a rigid document in that a referendum is required to amend each of its provisions.[23] It provides the legal framework for the federation[24] in addition to setting down governance arrangements for the national sphere of government. The *Commonwealth Constitution* also has a higher public profile. It is referred to informally as the nation's 'birth certificate',[25] it carries symbolic weight in national political culture,[26] it is said to give expression to shared national values and it is generally thought to say something about 'who we are' as a people.[27] Various factors probably contribute to the *Commonwealth Constitution*'s higher standing, including its national character, the fact that it was enacted by the Imperial Parliament following referendums in each colony, and its status as a higher law.[28] The differences between the state constitutions and the *Commonwealth Constitution* will be returned to in Part V when I explore how underlying, structural factors help to explain the disparity in referendum success rates.

B State Constitutional Referendums: The Legal Framework

State laws govern the holding of referendums on matters of constitutional amendment. At a basic level, all such referendums must be initiated by the government and/or parliament. The law makes no provision for citizen-initiated referendums.

There are three legal avenues for the initiation of a constitutional referendum. The first arises where a government wishes to alter or repeal a provision that is

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22   Nicholas Aroney, 'Subnational Constitutionalism in Australia: State Autonomy in a Uninational Federation' in Patricia Popelier, Giacomo Delledonne and Nicholas Aroney (eds), *Routledge Handbook of Subnational Constitutions and Constitutionalism* (Routledge, 2021) 36, 45, 50 <https://doi.org/10.4324/9781003052111-3>.

23   *Commonwealth Constitution* s 128.

24   For instance, it provides for a division of legislative power between the federal and state tiers of government and establishes that Commonwealth law prevails in the case of inconsistency. It also sets down arrangements for financial relations between the federal and state governments: *Commonwealth Constitution* ss 51–2, 109. For discussion see Saunders, *The Constitution of Australia* (n 10) 39, 45–6.

25   For example, Prime Minister Anthony Albanese, when speaking on his government's proposal to establish a Voice in the *Commonwealth Constitution*, said, '[t]he fact that our national story stretches back 65,000 years is something our nation's birth certificate should recognise and celebrate': Commonwealth, *Parliamentary Debates*, House of Representatives, 25 May 2023, 3694 (Anthony Albanese, Prime Minister).

26   Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and Aspirations in the Australian Constitution' (2016) 14(1) *International Journal of Constitutional Law* 60, 60–1 <https://doi.org/10.1093/icon/mow003>; Dylan Lino, 'The *Australian Constitution* as Symbol' (2020) 48(4) *Federal Law Review* 543, 544 <https://doi.org/10.1177/0067205X20955076>.

27   Alexander Reilly and Anna Olijnyk, 'The Australian Constitution and National Identity' in Alexander Reilly and Anna Olijnyk (eds), *The Australian Constitution and National Identity* (Australian National University Press, 2023) 1, 2 <https://doi.org/10.22459/ACNI.2023.01>.

28   Saunders, *The Constitution of Australia* (n 10) 44–5.

entrenched behind a manner and form provision that requires a referendum.[29] In such cases the government can only proceed with its plans to amend the constitution if it wins both parliamentary and public approval. Such votes are binding. Ten of the 12 proposals included in this study were put via this first pathway.

The idea of using the referendum as an entrenchment device originated in NSW in the late 1920s when the conservative government of Thomas Bavin sought to protect the Legislative Council from abolition.[30] The Labor Party of the time was committed to abolishing the State's Upper House and, under the leadership of Jack Lang, had come close to doing so while in government in 1926. In the lead up to the 1930 election, on Bavin's instigation, the Parliament inserted a new section 7A into the State Constitution that prohibited the abolition of the Council unless certain steps were taken, including the holding of a referendum in which a majority of voters approved it.[31] Lang subsequently won government and, being of the view that whatever parliament can do it can undo, he introduced legislation to repeal section 7A and abolish the Council.[32] But a Council member brought legal action and the State Supreme Court, the High Court, and the Privy Council all found against Lang.[33] The immediate significance of those decisions was to put a stop to the Labor government's attempt to abolish the Upper House without a referendum. More broadly, though, they affirmed the existence of a procedure by which state parliaments could use the referendum as an entrenchment device.[34] In the decades since, all states except Tasmania have followed NSW's lead and entrenched certain constitutional provisions behind a referendum requirement: first Queensland (1934), then SA (1970), WA (1978) and Victoria (2003).[35] Commonly entrenched features include the structure and composition of the legislature and the length of parliamentary terms. Other features are entrenched in only one or two states: eg, the office of Governor (Queensland and WA); the offices of Auditor-General, Ombudsman and Electoral Commissioner (Victoria); and compulsory voting (NSW).[36]

The second avenue for initiating a constitutional referendum arises where there is persistent disagreement between two houses of parliament on a Bill that seeks

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29   *NSW Act* (n 9) ss 7A–7B; *Vic Act* (n 9) s 18(1B); *Qld Act 1867* (n 9) s 53; *Constitution Act Amendment Act 1934* (Qld) s 3 ('*Qld Amendment Act*'); *Qld Act* (n 9) s 19I; *SA Act* (n 9) ss 10A, 88; *WA Act* (n 9) s 73.

30   Ian Loveland, 'Assessing the Legitimacy of Referendums as a Vehicle for Constitutional Amendment: Reform and Abolition of the Legislative Councils in Queensland and New South Wales' (2023) 34(2) *King's Law Journal* 388, 399–403 <https://doi.org/10.1080/09615768.2023.2246289>.

31   *Constitution (Legislative Council) Amendment Act 1929* (NSW).

32   Loveland (n 30) 402–3.

33   *Trethowan v Peden* (1930) 31 SR (NSW) 183; *A-G (NSW) v Trethowan* (1931) 44 CLR 394; *A-G (NSW) v Trethowan* (1932) 47 CLR 97.

34   The High Court and Privy Council said that the use of the referendum as an entrenchment mechanism was within the power of the state parliaments by virtue of section 5 of the *Colonial Laws Validity Act 1865* (Imp), which gave those parliaments the power 'to make laws respecting the constitution, powers, and procedure of such legislature'. Today, this power is located in section 6 of the *Australia Act 1986* (Cth).

35   *Qld Amendment Act* (n 29); *Constitution Act Amendment Act 1969* (SA); *Acts Amendment (Constitution) Act 1978* (WA); *Constitution (Parliamentary Reform) Act 2003* (Vic). There is no referendum requirement in the *Tasmanian Constitution*.

36   Kildea, 'The Law and History of State and Territory Referendums' (n 3) 42–3.

to advance constitutional change, and a referendum is held as a means of resolving that inter-cameral deadlock. Two proposals for constitutional change have been put via this pathway.

This type of procedure was first introduced in Queensland in 1908 with the enactment of the *Parliamentary Bills Referendum Act 1908* (Qld). The Act was spearheaded by Liberal Premier William Kidston, who had grown frustrated with the Legislative Council's obstruction of his legislative program, including significant labour market and welfare reforms, and viewed the referendum as a device that could be used to overcome Upper House resistance to Bills that had won approval in the Legislative Assembly.[37] If Bavin had deployed the referendum as a conservative device – that is, as a break on change, and specifically as a hindrance to one of Labor's key legislative objectives – Kidston invoked it as a progressive tool to counter the legislative power of the political right.[38] In the end, Kidston never used the procedure, but it was later invoked by Labor Premier Thomas Ryan in 1915–16 as he sought to legislate to abolish the Upper House altogether.[39] Council member William Taylor brought a high-profile legal challenge, arguing that the state lacked legal competence to abolish its Legislative Council and that, in any event, abolition could not be achieved through a legislative process that substituted a popular majority for a Council majority.[40] But the High Court rejected these arguments and a referendum on abolition went ahead in May 1917.[41] This deadlock-resolving procedure was ultimately rendered obsolete in Queensland when the Queensland Upper House, having been stacked by abolition supporters, voted itself out of existence in 1922.[42] About a decade later, in 1933, NSW amended its constitution to provide for a mechanism similar to the one that had been legislated in Queensland.[43] In 1961, the State held its only referendum to be triggered by that mechanism, also on the question of Legislative Council abolition. Today, NSW remains the only state whose constitution provides for an inter-cameral deadlock to be resolved by way of a referendum.

The third pathway involves a government holding a non-binding popular vote for the purpose of ascertaining public opinion on a proposed constitutional change. The ability to conduct such polls arises from the power that each state legislature holds to make laws with respect to its jurisdiction.[44] This has occurred only once:

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37   Loveland (n 30) 393.

38   Ibid 407.

39   Constitution Act Amendment Bill 1915 (Qld).

40   Loveland (n 30) 396.

41   In *Taylor v A-G (Qld)* (1917) 23 CLR 457, the High Court upheld the validity of the *Parliamentary Bills Referendum Act 1908* (Qld), finding that section 5 of the *Colonial Laws Validity Act 1865* (Imp) authorised the Queensland Parliament to create an alternative legal procedure that circumvented the Legislative Council. It also ruled that that procedure could be used for a Bill that provided for the abolition of the Legislative Council.

42   *Parliamentary Bills Referendum Act 1908* (Qld), which was not formally repealed until 1968: *Acts Repeal Act 1968* (Qld) s 2. See Loveland (n 30) 399.

43   *NSW Act* (n 9) s 5B. The referendum is initiated by Legislative Assembly resolution. The procedure is not available to resolve deadlocks over money bills. For discussion see Twomey, *The Constitution of New South Wales* (n 4) 254–66.

44   See, eg, *NSW Act* (n 9) s 5.

in 1903, the NSW government held a poll on the size of the Legislative Assembly in which it asked voters to choose between 125 (status quo), 100 and 90 members. More than 70% of voters chose the last option and Parliament implemented the change shortly thereafter.[45] I have excluded this poll from my analysis as it cannot be said that a particular proposal was carried or defeated, as is the case with the other (binary) referendums under examination.

III   AN OVERVIEW OF STATE CONSTITUTIONAL REFERENDUMS

Before examining the reasons behind state referendum outcomes, it is useful to give a brief overview of the 12 referendums, including their topics and outcomes. Table 1, below, provides a basic summary. While a variety of proposals have been put to voters, most have related in some way to the state legislatures, whether that be with respect to their structure, powers, membership, operation, or method of election. This is unsurprising when we consider that state constitutions devote considerable detail to the legislative branch and that several state legislatures have entrenched some of that detail behind a referendum requirement. As already noted, only three states have held constitutional referendums, with NSW holding the most (8), followed by Queensland (3) and SA (1).

Table 1: State Constitutional Referendums

Year	State	Topic	Result	Yes %	Government
1917	QLD	Legislative Council Abolition	Defeated	39.3	Labor
1933	NSW	Legislative Council Reform	Carried	51.5	UAP/UCP
1961	NSW	Legislative Council Abolition	Defeated	42.4	Labor
1978	NSW	Legislative Council Reform	Carried	84.8	Labor
1981	NSW	Disclosure of Pecuniary Interests	Carried	86.0	Labor
1981	NSW	Legislative Assembly Terms	Carried	69.0	Labor
1991	SA	Electoral Boundaries	Carried	76.7	Labor
1991	QLD	Legislative Assembly Terms	Defeated	48.8	Labor
1991	NSW	Legislative Council Reform	Carried	57.7	Liberal/National
1995	NSW	Legislative Assembly Terms	Carried	75.5	Liberal/National
1995	NSW	Judicial Independence	Carried	65.9	Liberal/National
2016	QLD	Legislative Assembly Terms	Carried	53.0	Labor

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45   *Electorates Redistribution Act 1904* (NSW) s 2.

A Queensland

Queensland's 1917 vote on Legislative Council abolition, alluded to above, was the first of the 12 state-level constitutional referendums included in this study. Voters were asked to approve a proposal to abolish the State's Legislative Council and require a referendum for its restoration. The proposal was defeated easily, with more than 60% of voters choosing to retain the Upper House.

Queensland has since held two more referendums, both on the topic of parliamentary terms. In 1990, Labor Premier Wayne Goss moved to amend the State Constitution to extend Legislative Assembly terms from three years to a maximum of four years.[46] By that time, all other states had adopted four-year terms. The main opposition party, the National Party, ran against the proposal, arguing instead for a four-year term with a three-year minimum. The Goss proposal was defeated at the 1991 referendum. It won 48.8% of the vote, suffering the narrowest defeat of any state referendum. A quarter-century later, in 2016, the issue was revisited when Labor Premier Annastacia Palaszczuk, this time with the support of the Liberal National Party, put forward a proposal for fixed, four-year terms.[47] On polling day, Queenslanders narrowly endorsed the proposal with 53.0% voting in favour.

B New South Wales

In NSW, the referendum has been a vehicle for significant reform of the two Houses of Parliament, including two successful proposals for major reconstitutions of the Legislative Council and one failed attempt at its abolition. The State's first constitutional referendum was held in 1933, when conservative Premier Bertram Stevens proposed a suite of amendments to reform the Upper House. The Stevens package had several elements:

- The introduction of indirect election for members of the Legislative Council, to replace appointment by the Governor;
- The establishment of 12-year terms for Council members, replacing life tenure, and transitional arrangements whereby one quarter of members would retire every three years;
- A substantial reduction in the size of the Council – it was to be capped at 60 members;
- Clarification of the Council's powers with respect to money bills; and
- The introduction of a referendum procedure to resolve deadlocks between the Houses.[48]

A key objective of these reforms was to stop governments from 'swamping' the Council with loyal appointees as had occurred in the previous decade. But the

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46 Queensland, *Parliamentary Debates*, Legislative Assembly, 28 November 1990, 5473 (Wayne Goss). The relevant legislation was: Constitution (Duration of Legislative Assembly) Amendment Bill 1990 (Qld); *Constitution (Duration of Legislative Assembly) Referendum Act 1990* (Qld).

47 The genesis of the referendum was a private member's bill, moved by shadow Attorney-General Ian Walker on 17 September 2015: Constitution (Fixed Term Parliament) Amendment Bill 2015 (Qld); *Constitution (Fixed Term Parliament) Referendum Act 2015* (Qld).

48 Constitution Amendment (Legislative Council) Bill 1932 (NSW); Constitution Further Amendment (Referendum) Bill 1932 (NSW).

Labor Party, which opposed the changes, argued that the government's private goal was to entrench itself in the upper chamber by making it exceedingly difficult for Labor to win a Legislative Council majority.[49] In one of the closest results in state referendum history, the Stevens reforms were carried with a 'Yes' vote of 51.5%.

The 1961 vote on Legislative Council abolition was the State's next constitutional referendum. This referendum is notable for its torturous path to initiation. Labor Premier Robert Heffron introduced a Bill for the Council's abolition in November 1959.[50] By April 1960, the Bill had been passed twice by the Assembly and sent back twice by the Council. Under the deadlock procedure approved at the 1933 referendum, this enabled the government to put the Bill to a referendum. The Opposition sought an injunction to prevent a referendum going ahead. The Supreme Court, following months of legal proceedings, refused the injunction.[51] When the abolition proposal was finally put to voters in April 1961 it was easily defeated, with 57.6% of voters opting to keep the Upper House.

In 1978, Labor Premier Neville Wran set aside any lingering desire within the party for abolition and instead put up a proposal to substantially reform the Council. At the time there was cross-party support for the direct election of Upper House members but mutual suspicion about how different models might promote or impede party self-interest. The Opposition, for instance, was concerned that the voting system adopted would favour Labor, and was also worried that Wran would win a majority in a reformed Upper House and then use his parliamentary numbers to bring forward a redistribution of Lower House electorates.[52] These differences were worked out at a rare Free Conference and the agreed proposal was put to the people with bipartisan backing – with the Liberal Party in support and the Country Party staying neutral.[53] The package of measures included the following:

- The direct election of Legislative Council members;
- A reduction in Council membership from 60 to 45 members;
- A change to term lengths that would see them defined as equivalent to three terms of the Assembly (an effective reduction to nine-year terms);
- The gradual replacement of indirectly elected members with directly elected members; and
- The establishment of a system of optional preferential proportional representation in a state-wide electorate.[54]

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49   Bede Nairn, *The 'Big Fella': Jack Lang and the Australian Labor Party 1891–1949* (Melbourne University Press, 1986) 270; John McCarthy, 'After Lang, 1932–35' in Heather Radi and Peter Spearritt (eds), *Jack Lang* (Hale & Iremonger & Labour History, 1977) 179, 188. After the passage of the 1933 referendum, another 16 years elapsed before Labor was next able to secure a Legislative Council majority.

50   Constitution Amendment (Legislative Council Abolition) Bill 1959 (NSW).

51   *Clayton v A-G (NSW)* [1960] NSWR 592, 626 (Evatt CJ and Sugaman J). On 15 December 1960, the High Court refused the plaintiff special leave to appeal: *Clayton v Heffron* (1960) 105 CLR 214, 252 (Dixon CJ, McTiernan, Taylor and Windeyer JJ).

52   David Clune, *Connecting with the People: The 1978 Reconstitution of the Legislative Council* (New South Wales Legislative Council, 2017) 22–3.

53   Ibid 13–30.

54   Constitution and Parliamentary Electorates and Elections (Amendment) Bill 1978 (NSW); Constitution (Referendum) Bill 1978 (NSW).

On polling day, the proposal won the support of 84.8% of voters, the second highest 'Yes' vote recorded at a state referendum.

Three years later, in 1981, Wran sought further constitutional change. On the same day as the state election, he put forward proposals to extend the maximum term for the Legislative Assembly from three years to four years, and to require members of Parliament ('MPs') to disclose certain pecuniary interests.[55] The measures enjoyed bipartisan support, and both were approved by large majorities: 69.0% and 86.0%, respectively. The majority for the pecuniary interests proposal constitutes the highest 'Yes' vote recorded at a state referendum.

One of the consequences of the move to four-year Assembly terms was an extension of maximum Legislative Council terms from 9 years to 12 years. In 1991, Liberal Premier Nick Greiner sought to address this by reducing Council terms of office from the equivalent of three Assembly terms to two (that is, a maximum of eight years). Greiner's proposal also reduced the size of the Council to 42 members, provided for half of the Council to be chosen at each election (thus reducing the quota of votes a candidate would need to win an election), and adopted the same rules for filling casual vacancies as then applied in the Senate.[56] The Labor Party opposed the changes, arguing for a larger reduction in the size of the Council. It also alleged that the government had an ulterior motive, namely, to change the composition of the Council to make it easier to pass its industrial relations legislation.[57] On polling day, 57.7% of voters approved the proposed reforms. The referendum was held alongside a state parliamentary election that was called 10 months early and, in a surprise result, Greiner was forced into minority government.

The outcome of the 1991 election set in train events that led to the State's next two referendums. Greiner, to ensure confidence and supply in the Lower House, signed a memorandum of understanding, known as the Charter of Reform, with three independent MPs.[58] In it, the government committed itself to a range of initiatives at the behest of those MPs, including fixed terms for the Legislative Assembly and constitutional recognition of judicial independence. The Coalition government, led from June 1992 by John Fahey, passed legislation that arranged for those reforms to be put to referendums at the next state election in 1995.[59] The government and the Labor Opposition recommended a 'Yes' vote on both questions but neither campaigned on them.[60] On polling day the Labor Party defeated the

55 Constitution (Disclosures by Members) Amendment Bill 1981 (NSW); Constitution (Legislative Assembly) Amendment Bill 1981 (NSW); Constitution (Referendum) Bill 1981 (NSW).

56 Constitution (Legislative Council) Amendment Bill 1991 (NSW); Constitution (Referendum) Bill 1991 (NSW).

57 Matthew Moore, 'Trio Face the Axe in Upper House', *The Sydney Morning Herald* (Sydney, 22 February 1991) 4.

58 David Clune and Gareth Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856–2003* (Federation Press, 2006) 541–3.

59 *Constitution (Fixed Term Parliaments) Special Provisions Act 1991* (NSW); *Constitution (Fixed Term Parliaments) Amendment Act 1993* (NSW); *Constitution (Entrenchment) Amendment Act 1992* (NSW); *Constitution (Amendment) Act 1992* (NSW).

60 Paolo Totaro, 'Both Sides Agree on Referendum Proposals', *The Sydney Morning Herald* (Sydney, 25 March 1995) 32.

Fahey government but both referendum measures were approved in decisive fashion: fixed terms were approved by 75.5% of voters, while the entrenchment of judicial independence was endorsed by 65.9% of voters.

C South Australia

South Australia's sole constitutional referendum was in 1991 on the drawing of electoral boundaries. There were two main issues. One was the frequency of redistributions. In 1985 the Parliament had extended House of Assembly terms to four years and only realised later that this would make boundary reviews less frequent and allow the number of voters in each electorate to get out of balance.[61] The second issue concerned the relationship of votes to seats and the demonstrated potential for a party to win a majority of votes and yet win only a minority of seats and thus be unable to form government.[62] The Labor government led by Premier John Bannon proposed to hold a referendum on the first issue, but the Liberal Party Opposition refused to support the enabling legislation unless it also addressed the second.[63] Labor lacked the numbers in the House to pass its preferred enabling laws as it was in minority; it relied on the votes of two independent members, one of whom supported the Liberal position. In the end, the government, acknowledging this political reality and the desirability of bipartisanship, put to a referendum a set of constitutional amendments that were recommended by a cross-party select committee of the Parliament and which addressed both issues.[64] The proposal enabled an immediate redistribution of electorate boundaries, required a review of boundaries after every general election, and mandated that the State's boundaries commission consider a 'fairness' criterion when determining new boundaries.[65] On polling day, these bipartisan amendments were approved by 76.7% of voters.

D Observations on the State Referendum Record

The fact that the six states, combined, have held only 12 constitutional referendums in over a century reflects the mostly flexible nature of state constitutions. State governments can achieve significant constitutional reforms by working with their parliaments and rarely must resort to the more arduous means of holding a popular vote. For example, Victoria legislated far-reaching constitutional changes in 2003, having opted not to hold a referendum in the absence of a legal requirement.[66]

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61   Jenni Newton-Farrelly, 'The 1991 Referendum on Electoral Boundaries' in David Brooks, Zoe Gill and John Weste (eds), *South Australian Referenda, 1896–1991* (South Australian Parliamentary Research Library, Research Paper No 7, 2008) 58, 59.

62   The relationship between votes and seats had arisen most recently at the 1989 election when the Liberal Party (and one National candidate) had won only 23 of 47 Assembly seats despite winning a clear majority (52.1%) of the two-party preferred vote. See ibid 60.

63   South Australia, *Parliamentary Debates*, House of Assembly, 21 March 1990, 680–2 (Donald Hopgood); South Australia, *Parliamentary Debates*, House of Assembly, 10 April 1990, 1372–3 (Dale Baker).

64   South Australia, *Parliamentary Debates*, House of Assembly, 13 November 1990, 1761 (Donald Hopgood).

65   Referendum (Electoral Redistribution) Bill 1991 (SA); Constitution (Electoral Redistribution) Amendment Bill 1990 (SA).

66   Kildea, 'The Law and History of State and Territory Referendums' (n 3) 43.

Some decades earlier, Neville Wran, who held three referendums (more than any other Premier), legislated major reforms including the introduction of 'one vote, one value', optional preferential voting, and the public funding of elections.[67] It is also the case that some states can advance by legislation what other states can only achieve through a referendum. For example, the extension of lower house terms from three years to four years required referendums in NSW (1981) and Queensland (1991, 2016), but was achieved by parliamentary majorities in all other states.

State constitutional referendums are a relatively recent phenomenon, with few having occurred before the 1970s. The most active period was 1978–95, when three states, led by NSW, revisited aspects of their constitutions. There has been a noticeable lull since then, with only one constitutional poll held in almost three decades. This is curious on one level, given that the use of manner and form to entrench constitutional provisions has gradually expanded. The impetus to hold constitutional referendums has probably weakened now that fixed, four-year terms are common across state legislatures,[68] and all state upper houses are popularly elected. Nonetheless, some argue that more effort could be put into modernising and reforming state constitutions,[69] and members of state parliaments continue to propose constitutional referendums from time to time.[70]

Turning to the outcomes of state constitutional referendums, the high success rate (75%) stands out. NSW has the most sustained record of success with seven of eight proposals winning favour with voters (87.5%), while SA's sole referendum was approved. In Queensland, just one of its three referendums was carried, although that still exceeds the Commonwealth success rate. In the modern, post-1977 era, eight of nine constitutional referendums have succeeded (88.9%), including six in a row in NSW. The average 'Yes' vote across all referendums is 62.6% (compared to 50.1% for federal referendums). Some amendments have recorded especially large majorities, with four measures winning more than 75% of the vote. The two attempts to abolish a legislative council have easily been the least popular; on each occasion, only about 40% of electors favoured the change.

IV   UNDERSTANDING THE OUTCOMES OF STATE CONSTITUTIONAL REFERENDUMS

This Part identifies and evaluates different factors that have contributed to the success and failure of state constitutional referendums. My analysis is informed by existing literature on referendum results, especially the large body of scholarship

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67   Antony Green, 'The "Wranslides" and Electoral Politics' in Troy Bramston (ed), *The Wran Era* (Federation Press, 2006) 31, 39.

68   Tasmania is the exception; its House of Assembly has variable four-year terms: see *Constitution Act 1972* (Tas) s 2.

69   Carney (n 7) 29–34; Waugh (n 12) 64–6.

70   See, eg, Constitution (Deadlocks) Amendment Bill 2015 (SA); Constitution (Permissible Tolerance) Amendment Bill 2020 (SA).

devoted to success and failure at Australia's federal referendums.[71] It examines, in turn, the nature of the referendum proposals, the presence of consensus and opposition, the timing of the poll, voter knowledge, the strength of 'Yes' and 'No' campaigns, and the party in government. Part IV concludes with an overall assessment of the factors that have contributed to success and failure at state referendums.

A Referendum Proposals

The referendum proposal itself is an obvious starting point when thinking about why referendums have won or lost. There are four strands to this: issue substance, scale of reform, complexity, and question wording.

1 Issue Substance

There are different views on how important the issue on the ballot paper is in determining referendum outcomes. Some studies of European referendums argue that the issue may be relatively unimportant compared to other factors such as party positions or the wording of the question.[72] In the Australian literature, though, it is observed that voters at federal referendums have demonstrated one issue-based voting tendency, namely, the rejection of proposals to centralise power. All 17 attempts to increase Commonwealth economic power have been rejected, while four other measures concerning non-economic powers have also been lost.[73] All up, only 3 of 24 proposals to increase central power have been approved.[74] Scott Bennett concludes that constitutional change 'can thus be difficult if it strays outside the federal parameters'.[75]

The state referendum record does not so easily yield an issue-based explanation for success and failure. However, a case can be made that voters have been sceptical of proposals perceived as weakening political accountability. Two failures concerned attempts to abolish a state legislative council, thus removing an institutional constraint on government. In each case, the 'No' campaign portrayed the upper house as an important 'safeguard' against government excesses.[76] The

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71   For good overviews, see George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (University of New South Wales Press, 2010) ch 6; Scott Bennett, 'The Politics of Constitutional Amendment' (Research Paper No 11, Parliamentary Library, Parliament of Australia, 23 June 2003) 14–31. For analysis of European referendum results, see Stefan Vospernik, 'Referendums and Consensus Democracy: Empirical Findings from 21 EU Countries' in Laurence Morel and Matt Qvortrup (eds), *The Routledge Handbook to Referendums and Direct Democracy* (Routledge, 2018) 123 <https://doi.org/10.4324/9780203713181-8>.

72   Lawrence LeDuc, *The Politics of Direct Democracy: Referendums in Global Perspective* (Broadview Press, 2003) 182 <https://doi.org/10.3138/9781442602823>; Sergiu Gherghina and Matt Qvortrup, 'Compulsory Voting, Economic Conditions and Turnout: Explaining the Outcome of Constitutional Referendums' (2024) 48(2) *West European Politics* 352 <https://doi.org/10.1080/01402382.2023.2293380>.

73   Bennett (n 71) 27.

74   Williams and Hume (n 71) 223. The three proposals were 1910 (State Debts), 1946 (Social Services) and 1967 (Aboriginals).

75   Bennett (n 71) 27.

76   W Muir, 'The People's Day', *The Brisbane Courier* (Brisbane, 5 May 1917) 5 ('The Legislative Council is the real safeguard of every Queenslander … A locomotive without a break is a dangerous thing'); R W Askin and C B Cutler, 'No: The Case Against Abolition of the Council', *The Sun-Herald* (Sydney, 23

other rejected measure was Queensland's 1991 proposal to extend maximum Legislative Assembly terms, which could reduce the frequency of elections while leaving governments in control of election timing.

On the flip side, proposals to enhance popular control over their representatives or to otherwise strengthen accountability have tended to do well. Voters have approved measures for shorter legislative council terms and more democratic approaches to elections.[77] They have also voted 'Yes' to curb the powers and influence of politicians[78] and to improve oversight of the financial affairs of parliamentarians.[79] The themes of popular control and accountability have sometimes been communicated to voters in populist terms. A 1991 Liberal Party advertisement, for instance, told voters that the NSW Upper House was 'a fine institution and fewer politicians will make it an even better one',[80] while in 2016, Queensland voters were told that fixed terms would 'prevent summer holidays being interrupted by an election'.[81]

This issue-based explanation for state referendum outcomes has limitations. Electors in NSW voted overwhelmingly in 1981 to extend Legislative Assembly terms to four years, leave election timing unfixed, and (consequently) lengthen Legislative Council terms from 9 years to 12 years. A key difference between that referendum and Queensland's failed 1991 vote on the same topic was the fact that the NSW measure had bipartisan support. Further, at some referendums, claims about a proposal's impact on accountability have been contested. Labor governments viewed legislative councils as unrepresentative and obstructionist and therefore saw them as barriers to responsive government.[82] Opponents of Queensland's successful 2016 proposal argued that the introduction of fixed, four-year terms in a state that lacked an upper house would ultimately weaken accountability.[83] It may be that this argument resonated with some voters as, despite the presence of bipartisanship, the measure won only a slim majority.

No single factor, including the issue on the ballot paper, can provide a complete explanation for state referendum outcomes. On the whole, though, the state experience suggests that proposals seen as weakening accountability have struggled, whereas measures depicted as enhancing popular control or accountability have tended to be received well by voters.

April 1961) 75 (the Legislative Council as voters' 'democratic safeguard against hasty, rash and extreme actions by the Assembly').

77   NSW 1933, NSW 1978, SA 1991, NSW 1991.

78   For example, the power of the legislature to interfere with judicial independence (NSW 1995) and the ability of the Premier to determine the timing of elections (NSW 1995, QLD 2016).

79   NSW 1981 (Disclosure of Pecuniary Interests).

80   Liberal Party of Australia, 'Legislative Council', *The Sun-Herald* (Sydney, 19 May 1991) 28–9.

81   Electoral Commission of Queensland, *2016 Fixed Four-Year Terms Referendum: Election Report* (Report, 19 March 2016) 23–4.

82   See, eg, R J Heffron, 'Why You Should Vote Yes and Abolish the Dictatorship of the Legislative Council', *The Sun-Herald* (Sydney, 23 April 1961) 75.

83   *2016 Fixed Four-Year Terms Referendum: Election Report* (n 81) 25.

2 *Scale of Reform*

Some scholars interpret the federal referendum record as evidence that Australians have been more open to approving modest constitutional alterations as opposed to more significant changes.[84] It is said that proposals for minimal or incremental change, including those that seek to ratify pre-existing arrangements, have often been met with success.[85]

There is no evidence that state referendum voters have favoured modest changes over significant reforms. State electors have voted for reform proposals of varying ambitions. At the more modest end, they have supported the reporting of politicians' pecuniary interests (NSW 1981) and reforms to the redistribution process (SA 1991). At the other end of the spectrum, they have voted for two major reconstitutions of the Legislative Council (NSW 1933, 1978).[86] It is noteworthy, though, that the most substantial institutional reform to be put to a referendum – the abolition of a state upper house – has twice been soundly rejected by voters.

3 *Complexity*

Proposal complexity has been cited as a barrier to federal referendum success. It is argued that Australian federal governments have sometimes put too many questions to voters on the one day or bundled too many changes into a single question. It is said that this has increased complexity and made it easier for 'No' campaigners to argue against the proposed reforms.[87]

There is no evidence that proposal complexity has been a barrier to state referendum success. In fact, all nine successful referendum proposals have featured some complexity. Twice voters have been asked to approve two proposals on the same day (NSW 1981, 1995). On the other occasions, electors cast votes on proposals that bundled multiple measures into a single question (NSW 1933, 1978, 1991; SA 1991; QLD 2016). In each instance, this complexity did not stand in the way of referendum success. It is also notable that the three referendums to end in failure put forward relatively straightforward reform propositions.

4 *Question Wording*

Some scholars have suggested that the wording of a referendum question can affect its outcome. It is argued that the use of emotive words such as 'approve' or

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84   Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government* (Cambridge University Press, 1995) 118–20 <https://doi.org/10.1017/CBO9781139084932> ('*A Federal Republic*'). Galligan acknowledges three significant Commonwealth constitutional amendments: 1928 (State Debts), 1946 (Social Services) and 1967 (Aboriginals).

85   Williams and Hume (n 71) 234–6, citing the examples of 1928, 1946, 1967 and 1977.

86   The 1978 reconstitution of the NSW Legislative Council has been described as 'the most important change to the composition of the Council in its to then 122-year history': Barbara Page, 'Developments in the Legislative Council of New South Wales since 1978' (1991) 5(2) *Legislative Studies* 23, 23.

87   Williams and Hume (n 71) 212–14.

'agree' on the ballot paper enhance the chances of an affirmative vote.[88] Also, where a question is not neutral, this might nudge voters towards a particular choice.[89]

At state referendums, as in federal referendums, it has been customary to include the long title of the constitutional alteration Bill on the ballot paper and to ask voters to 'approve' it. The only referendum to not use this method was Queensland's 1917 vote on Legislative Council abolition.[90] Further, some questions have used tendentious language with populist undertones. The multi-faceted 1978 proposal in NSW was boiled down to the question: 'Do you approve of the Bill entitled "A Bill for an Act to provide for the election of members of the Legislative Council *directly by the people*"?' (emphasis added). In 1995, voters in the same state were asked to approve '[a] Bill to require the Parliament of NSW to serve full four-year terms *and to prevent politicians calling early general elections* or changing these new constitutional rules without a further referendum?' (emphasis added).

It is hard to know what, if any impact, question wording has had on state referendum results. After all, two of the three losing referendums also used the word 'approve' on the ballot paper. But, if the scholarship referred to above is a sound guide, we might conclude that the use of non-neutral language on ballot papers has aided state referendum success to some degree.

B   Consensus and Opposition

Scholars in Australia and overseas have long recognised that referendums are difficult to win in the face of committed opposition.[91] This is especially the case where the main opposition party (or parties) campaigns against the measure. Conversely, a government is 'much more likely' to win a referendum where the main opposition party supports it.[92] The impact of partisanship has been given special emphasis in studies of Australian federal referendums, with many seeing it as the most decisive factor and the one that best explains the high proportion of referendum defeats.[93] The record lends support to this view: all partisan

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88   Gherghina and Qvortrup (n 72) 356.

89   François Rocher and André Lecours, 'The Correct Expression of Popular Will: Does the Wording of a Referendum Question Matter?' in Laurence Morel and Matt Qvortrup (eds), *The Routledge Handbook to Referendums and Direct Democracy* (Routledge, 2018) 227, 229 <https://doi.org/10.4324/9780203713181-13>.

90   The 1917 ballot paper read: 'I vote for/against "A Bill to amend the Constitution of Queensland by abolishing the Legislative Council"': Loveland (n 30) 397.

91   Williams and Hume (n 71) 244; Vospernik (n 71) 136; Gherghina and Qvortrup (n 72) 364–5.

92   Vospernik (n 71) 136.

93   Enid Campbell, 'Southey Memorial Lecture 1988: Changing the Constitution' (1989) 17(1) *Melbourne University Law Review* 1, 6; Don Aitkin, 'Australia' in David Butler and Austin Ranney (eds), *Referendums: A Comparative Study of Practice and Theory* (American Enterprise Institute for Public Policy Research, 1978) 123, 133; Galligan, *A Federal Republic* (n 84) 118–20. For a more sceptical perspective on the importance of bipartisanship to federal referendum success, see Murray Goot, 'Without "Bipartisanship" Have Referendums to Change the Australian Constitution Ever Succeeded? An Unnoticed Success, Several Near-Misses, and the Struggle to Explain Why Referendums Fail' (2024) *Australian Journal of Politics & History* (forthcoming) <https://doi.org/10.1111/ajph.13011>; Paul Kildea, 'Getting to "Yes": Why Our Approach to Winning Referendums Needs a Rethink', *AUSPUBLAW* (Blog Post, 12 December 2018) <https://www.auspublaw.org/blog/2018/12/getting-to-yes-why-our-approach-to-winning-referendums-needs-a-rethink>.

federal proposals have been rejected; of the 11 bipartisan measures, 8 have been approved by voters.[94] Some scholars have interpreted this record as showing that bipartisanship is necessary to referendum success.[95]

1   (Bi)partisanship and Referendum Outcomes

The state experience largely affirms the conventional wisdom on the relationship between consensus and referendum outcomes. Of the 12 referendum proposals put to voters, 7 have enjoyed bipartisan support, while 5 have proceeded without the backing of the main opposition party (see Table 2). All seven bipartisan measures have passed. Most passed easily: six won more than 65% of the vote, and the average 'Yes' vote across the bipartisan polls is 73.0%. By contrast, just two of the five contested proposals were approved by voters. The average 'Yes' vote recorded for partisan measures is much lower, at 48.0%.

Table 2: Referendum Results by 'Yes' Vote (Descending)

Year	State	Topic	Result	Bipartisan?	Held at state election?	Yes %
1981	NSW	Disclosure of Pecuniary Interests	Carried	Yes	Yes	86.0
1978	NSW	Legislative Council Reform	Carried	Yes	No	84.8
1991	SA	Electoral Boundaries	Carried	Yes	No	76.7
1995	NSW	Legislative Assembly Terms	Carried	Yes	Yes	75.5
1981	NSW	Legislative Assembly Terms	Carried	Yes	Yes	69.0
1995	NSW	Judicial Independence	Carried	Yes	Yes	65.9
1991	NSW	Legislative Council Reform	Carried	No	Yes	57.7
2016	QLD	Legislative Assembly Terms	Carried	Yes	No	53.0
1933	NSW	Legislative Council Reform	Carried	No	No	51.5
1991	QLD	Legislative Assembly Terms	Defeated	No	No	48.8
1961	NSW	Legislative Council Abolition	Defeated	No	No	42.4
1917	QLD	Legislative Council Abolition	Defeated	No	No	39.3

What explains the relationship between (bi)partisanship and referendum outcomes? It has been suggested that cross-party consensus removes the 'most effective potential leader' of a 'No' campaign (the Opposition) from the campaign space, sends clear partisan cues to voters, and signals to voters that the proposal

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94   This count includes the 1946 (Social Services) referendum, which most authors consider bipartisan. But see Goot (n 93) who highlights the fact that the main opposition party, the Liberal Party, did not take a position, even if its leader, Robert Menzies, was supportive of the government proposal.

95   Williams and Hume (n 71) 244.

is safe and appropriate.[96] The state experience affirms this line of thinking, while suggesting two additional explanations. First, cross-party consensus can serve to reduce the competitiveness of a referendum. At the state level, bipartisan measures have tended to face ineffective opposition. With the major parties calling for change, the case against has typically been left to minor parties, independent MPs, interest groups and academics, all of whom have struggled to have their voices heard.[97] Even where the government has funded the circulation of official 'Yes' and 'No' cases, the major parties' higher profiles and superior resources have given them a dominant position. This has sometimes been a source of frustration. After Queensland's 2016 vote on fixed, four-year terms, minor party representative Robbie Katter said that it had been difficult for the 'No' side to compete against the major parties to get its message across.[98]

Second, bipartisanship removes a major, potential source of conflict over an issue, which can reduce media coverage and dampen public interest.[99] This, in turn, can foster a low-information environment in which voters are more inclined to follow party cues which, at a bipartisan poll, favours a 'Yes' vote. The relationship between bipartisanship, information and voting choice is discussed further below in the section on 'Voters'.

On the flip side, the state experience also shows how partisan disagreement can weaken the prospects of a referendum proposal. In general, the five partisan proposals encountered much stronger opposition. They were typically countered by a major party that deployed its resources, organisation and profile to argue for a 'No' vote. Voters, as a result, had more access to arguments and opinions on both sides. In 1961, for instance, the NSW Liberal Party and Country Party ran a 'vigorous'[100] campaign against the abolition of the Upper House. They implored voters to 'play it safe' and reject Labor's attempt to win 'absolute power' – messages that were circulated via television and radio and through a telephone and leaflet drive.[101] It is not surprising that committed opposition of this kind would drive down support for a proposed constitutional amendment.

Party allegiance has also come into play when a proposal has lacked bipartisan support. Electoral returns for the two referendums on legislative council abolition show that not a single conservative (non-Labor) seat voted in favour of the Labor

96　　Ibid 216–17.

97　　Among the individuals and groups to have been involved in this way include the Constitutional Security Movement (NSW 1978), academic Malcolm Mackerras (NSW 1981) the Electoral Reform Society (SA 1991) and the Katter Australia Party (QLD 2016).

98　　Sarah Vogler, 'How "Yes" Was Finally Won', *The Courier Mail* (Brisbane, 21 March 2016) 6. See also Orr and Cassar (n 4) 162.

99　　This observation, for example, was made in relation to SA's 1991 referendum: Andrew White, 'Boundaries Poll in SA', *Australian Financial Review* (Sydney, 8 February 1991) 5.

100　Clune and Griffith (n 58) 411.

101　Askin and Cutler (n 76); 'No', *The Sydney Morning Herald* (Sydney, 28 April 1961) 9.

proposals.[102] Similarly, only conservative-held seats voted for Bertram Stevens's 1933 reforms to the State Upper House.[103]

2 Bipartisanship Not Essential to Success

One of the more surprising features of the state experience is that two referendum proposals have succeeded in the face of major party opposition. In 1933 and 1991, conservative governments in NSW won referendums on Upper House reform despite Labor Party opposition. The results are more remarkable when we consider that, on both occasions, there were suspicions that the government had ulterior motives for moving its constitutional amendments (see Part III). These polls are unique in Australian history – they are the only constitutional referendums to be carried in the face of major party opposition.

What might explain these outliers? The 1991 result can be put down to the fact that the government's proposal was not subject to the kind of organised, committed opposition that we usually expect to see at partisan referendums. The Labor Opposition ultimately ran a very muted 'No' campaign as it put its main energies into a parliamentary election held on the same day.[104] This is reflected in voting returns showing that the government's proposal not only passed in Coalition seats but also won a slim majority (50.5%) of votes in Labor electorates.[105]

The 1933 referendum is the more interesting of the two outliers. The government's wide-ranging reforms to the Legislative Council succeeded in the face of fierce Labor resistance. Premier Bertram Stevens and Opposition leader Jack Lang each played a central role in what has been described as '[a] torrid and bitter campaign'.[106] Both sides sought to play on the fears of voters, giving the impression that liberty and democracy were at stake. Lang argued that the reforms would lead to 'a permanent constitutional oligarchy',[107] while the government claimed that retention of the status quo could see a future government 'sweep away constitutional government and all safeguards for justice and for the protection of

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102   Author's analysis, drawing on seat-by-seat referendum results (reported in New South Wales, *New South Wales Gazette*, No 56, 19 May 1961, 1510) and the results of the 1959 state election and subsequent by-elections (accessed at Parliament of New South Wales, '1959 Election: Details of Polling and Elected Members', *NSW Elections* (Web Page, 5 July 2007) <https://www.parliament.nsw.gov.au/electionresults18562007/1959/DistrictList.htm>).

103   Author's analysis, drawing on seat-by-seat referendum results (reported in New South Wales, *New South Wales Gazette*, No 86, 6 June 1933, 1980) and the results of the 1932 state election and subsequent by-elections (accessed at Parliament of New South Wales, '1932 Election: Details of Polling and Elected Members', *NSW Elections* (Web Page, 5 July 2007) <https://www.parliament.nsw.gov.au/electionresults18562007/1932/DistrictList.htm>).

104   Anita Catalano, 'Voters Urged to Study Referendum', *The Sun-Herald* (19 May 1991) 13; 'Abolish the NSW Upper House?', *The Sydney Morning Herald* (Sydney, 23 May 1991) 16.

105   Author's analysis, drawing on seat-by-seat referendum results (reported in New South Wales, *New South Wales Gazette*, No 94, 20 June 1991, 4774–5) and the results of the concurrent 1991 state election (accessed at Parliament of New South Wales, '1991 Election: Details of Polling and Elected Members', *NSW Elections* (Web Page, 5 July 2007) <https://www.parliament.nsw.gov.au/electionresults18562007/1991/DistrictList.htm>).

106   Clune and Griffith (n 58) 329.

107   'Referendum: Mr Lang Opens Campaign', *The Sydney Morning Herald* (Sydney, 7 April 1933) 9.

life, liberty, and property'.[108] In a tight contest, the difference may have been the united and well-resourced campaign run by the government's coalition partners, the United Australia Party and the United Country Party, and the support it received from business groups and community organisations.[109] The government's resources enabled it, among other things, to circulate 100,000 copies of a 'Yes' pamphlet authored by Attorney-General Henry Manning, a privilege not enjoyed by their opponents.[110] These factors may have enabled the government to achieve the very rare feat of winning a referendum in the face of committed opposition.

The results of these referendums are not entirely at odds with the conventional wisdom about partisanship and outcomes. While both referendum proposals were carried, neither attracted an especially high 'Yes' vote, suggesting that a lack of cross-party consensus probably did depress support.

C Timing

Some argue that the timing of a referendum – that is, whether it is held as a standalone event or concurrently with an election – can affect its chances of success. It is reasoned that standalone referendums are more difficult to win as there is a more intense focus on the referendum issues and the main opposition party is often tempted to run a vigorous 'No' campaign in the hope of damaging the government.[111] Election day referendums are said to be more likely to succeed as they can float 'under the radar' as both the government and the Opposition focus their energies on the election contest.[112]

The state experience is consistent with this line of thinking. As Table 2 shows, four of the seven mid-term referendums have been carried, with an average 'Yes' vote of 56.7%. By contrast, the five election day referendums have all been carried, registering an average 'Yes' vote of 70.8%. Those five referendums happen to be the last five held by governments in NSW, and all featured relatively muted campaigns. In 1991 the State electoral commissioner expressed disappointment at the lack of attention paid to the referendum issue, remarking that '[r]eferendums tend to fade into the background during all the political election coverage'.[113] A decade earlier, in 1981, academic and commentator Malcolm Mackerras accused the Wran government of 'trickery', complaining that 'the referendums will be lost

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108 'Upper House Reform: What the Referendum Means', *The Sydney Morning Herald* (Sydney, 7 March 1933) 8.

109 Among these was the anti-communist Sane Democracy League, which ran several prominent press advertisements urging people to vote Yes: eg, 'A Fair Deal to Every Party', *The Sydney Morning Herald* (Sydney, 29 April 1933) 8.

110 Clune and Griffith (n 58) 329.

111 Peter Brent, 'Timing Is (Almost) Everything', *Inside Story* (Blog Post, 22 June 2021) <https://insidestory.org.au/voice-referendum>. See generally Williams and Hume (n 71) 92–3.

112 Anne Twomey, quoted in Casey Briggs, 'With the Voice Referendum Resoundingly Defeated, Will Australia Ever Again Change the Constitution?', *ABC News* (online, 29 October 2023) <https://www.abc.net.au/news/2023-10-29/voice-referendum-defeat-will-australia-ever-change-constitution/103018686>.

113 Catalano (n 104) 13.

in the elections' and that voters would 'easily be deceived into believing that they are non-controversial and sensible "reforms" agreed to by all the parties'.[114]

The state record also affirms the view, drawn from the federal experience, that putting a partisan proposal at a standalone referendum is especially risky.[115] The four lowest 'Yes' votes belong to partisan measures put to voters during the life of a parliament (see Table 2).

D   Voters

Another prominent theme in the Australian literature is the idea that public ignorance helps to explain the high rate of failure in federal referendums. It has been argued that voters generally know little about the *Commonwealth Constitution*, nor about specific referendum proposals, and that this leads them to be highly cautious about constitutional change.[116] The notion is that voters, faced with the complexity of constitutional questions and the difficulty of learning about them in the middle of a hard-fought campaign, opt to 'play it safe' and favour the status quo. In Don Aitkin's phrase, they 'shrug their shoulders and vote no'.[117] The impulse is said to be fostered by the 'boisterous and noisy'[118] nature of Australian referendums and exploited by 'No' campaigns that engage in hyperbole and try to spread fear and confusion.[119] It has also been encouraged by the 'Don't Know? Vote No' message that has been deployed at multiple referendums.[120]

Turning to state referendums, and noting their high success rate, we might entertain a hypothesis that state voters have been comparatively knowledgeable and that this has helped to foster referendum success by combating any natural aversion to change. It is impossible to prove or falsify this hypothesis in the absence of contemporaneous polling data, but there are reasons to be sceptical. It would be peculiar if Australians who struggle with basic civics knowledge at federal polls suddenly became better informed when voting on changes to their state constitutions. And a close analysis of successful state referendums does not support the idea of an informed electorate.

As noted, the last five referendums in NSW were held concurrently with parliamentary elections. This generally suppressed public discussion of the

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114   Malcolm Mackerras, 'The Hidden "Trick" in Wran's Four-Year Parliament Plan', *The Sydney Morning Herald* (Sydney, 7 September 1981) 7.

115   Richard Miles, 'Australia's Constitutional Referendum: A Shield, Not a Sword' (1998) 35(4) *Representation* 237, 244 <https://doi.org/10.1080/00344899808523045>.

116   Crisp (n 1) 51.

117   Aitkin (n 93) 131; Williams and Hume (n 71) 207. Some international studies have also observed a tendency for under-informed voters to favour the status quo: Michael Marsh, 'Voting Behaviour in Referendums' in Justin Fisher et al (eds), *The Routledge Handbook of Elections, Voting Behaviour and Public Opinion* (Routledge, 2017) 256, 261–2 <https://doi.org/10.4324/9781315712390-22>.

118   Galligan, *A Federal Republic* (n 84) 130.

119   Williams and Hume (n 71) 230.

120   Howard Manns, 'Voice Referendum: "If You Don't Know, Vote No" – an Old Slogan for Modern Politics', *Lens* (Blog Post, 24 October 2023) <https://lens.monash.edu/@politics-society/2023/10/24/1386245/voice-referendum-if-you-dont-know-vote-no-an-old-slogan-for-modern-politics>.

referendum issues.[121] In three of those instances, in 1981 and 1991, the decision to hold unusually short three-week campaigns created a further barrier to public education. The State's last two referendums, in 1995, had an especially low profile. Electoral officials reported 'widespread ignorance about the referenda among voters', noting that 'many [were] completely unaware of them'.[122] Political scientist Elaine Thompson commented afterwards on the 'lack of debate' on the two questions and observed that the two proposals 'drew support from an electorate that was significantly ignorant of the issues'.[123] A similar story can be told about SA's 1991 vote on electoral boundaries. In the final days of the campaign, the State electoral commissioner worried about low turnout and spent $60,000 on last-minute advertisements to help counter emerging misinformation about the proposals.[124] On the eve of the referendum, one columnist lamented 'an appalling lack of knowledge in the community of what the referendum means'.[125] Other successful referendums have been criticised for inadequate public education or a one-sided approach to voter information.[126] It is therefore difficult to sustain the idea that state referendum success is due to the presence of a well-informed electorate that is confident to break from the status quo.

Having said that, the circulation of quality education materials, superior to those provided to voters at federal referendums, may have helped at the margins.[127] Voters at the last six NSW referendums and at SA's 1991 poll had access to official information, either in newspapers or by direct mail, that was drafted by independent, non-partisan actors rather than elected politicians.[128] In NSW, public servants prepared an explanation of the proposal for constitutional amendment, and arguments for and against the change;[129] in SA, the electoral commissioner prepared an explanation of facts relating to the proposal and the referendum itself.[130]

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121 See, eg, Mackerras (n 114) 7; Catalano (n 104) 13.
122 Suzanne Houweling, 'Voters Slam Poll "Con": Referenda Take Many by Surprise', *The Sunday Telegraph* (Sydney, 26 March 1995) 6.
123 'Ignorance Wins', *The Australian* (Sydney, 28 March 1995) 4.
124 Nick Cater, 'Parties in Last-Minute Plea for "Yes" Vote', *The Advertiser* (Adelaide, 9 February 1991) 2; Jenny Brinkworth, 'Minister May Lose Seat in Changes', *The Advertiser* (Adelaide, 11 February 1991) 3.
125 Peter Haynes, 'Point of the Poll', *The Weekend News* (Adelaide, 8 February 1991) 17.
126 A Sydney newspaper editorial said of the 1978 referendum on Legislative Council reform that 'the half-hearted presentation of the "No case" in the official pamphlet' had not done 'justice' to the arguments against the proposal and that '[s]omething better could and should have been contrived, to give voters … a chance to make up their own minds': 'The "Ayes" Should Have it Today', *The Sydney Morning Herald* (Sydney, 17 June 1978) 10. Orr and Cassar (n 4) 162, 170 described Queensland's 2016 referendum as 'a low-information referendum with a short campaign' that saw '[n]o serious attempt at … voter education'.
127 Federally, the official 'Yes' and 'No' cases have always been authorised by parliamentarians on either side of the issue. Some 'neutral' materials were circulated prior to the 1999 and 2023 referendums. See Paul Kildea and Rodney Smith, 'The Challenge of Informed Voting at Constitutional Referendums' (2016) 39(1) *University of New South Wales Law Journal* 368, 378, 381.
128 At other state referendums, official information has taken the form of arguments for and against the referendum proposal prepared and/or authorised by the government (eg, NSW 1933), party leaders (NSW 1961) or Members of Parliament (QLD 2016).
129 See, eg, 'Referendum on Reform of the Legislative Council', *The Sydney Morning Herald* (Sydney, 7 June 1978) 2. For disucssion see Twomey, *The Constitution of New South Wales* (n 4) 320; Kildea, 'The Law and History of State and Territory Referendums' (n 3) 53–6.
130 'Facts You Should Know About the Referendum', *The Advertiser* (Adelaide, 5 February 1991) 16.

Anne Twomey has suggested that this approach to public education may have improved the chances of referendum success; she writes that 'providing voters with informative and accurate material rather than inflammatory and misleading material is likely to have helped at the state level'.[131]

This is a plausible argument, but any benefit has probably been small. We know from studies of federal referendums that, even where pamphlets are sent directly to households, about half never get opened.[132] And the circulation of this high-quality state information has often occurred against the wider backdrop of a low-key referendum campaign in which political parties have not been especially active and concerns have been expressed about public awareness of referendum issues. In these circumstances the provision of quality information is unlikely to be the making of a widely informed electorate.

The evidence therefore points us towards a surprising finding, namely, that state referendums have succeeded even though many voters have been under-informed. To repurpose Aitkin's phrase, state voters, faced with the challenge of making up their minds about a constitutional reform proposal in a low-information environment, have shrugged their shoulders and voted Yes. This goes against our expectations of 'status quo bias' that feature in the literature on federal referendums.[133]

What might explain this unexpected finding? The most likely explanation is that less-informed voters have opted to follow party cues. Where a referendum proposal is of low salience to voters and generates little public discussion, it can be difficult for people to make up their minds on the issues. Many will fall back on party positions instead.[134] When a referendum is both low-key and bipartisan, as seven of the eight successful state referendums since 1978 have been, this favours referendum success by sending under-informed voters a cross-party signal that a 'Yes' vote is the better choice.[135] Of course, some voters will be sceptical of any measure that has cross-party support and will vote against it. But the state referendum record suggests that those voters have been in the minority. The combination of bipartisanship and minimal public discussion has led many state voters to adopt a philosophy of 'Don't Know? Vote Yes'.

E Campaigns

Scholars acknowledge the potential importance of campaigns to referendum outcomes. In particular, the relative strength of the 'Yes' and 'No' campaigns can

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131   Twomey, 'The Government Will Not Send Out Yes and No Case Pamphlets' (n 6).

132   Williams and Hume (n 71) 75.

133   Aitkin (n 93) 131; Williams and Hume (n 71) 207.

134   This tendency has been remarked upon the context of European referendums: see Sara Binzer Hobolt, 'Campaign Information and Voting Behaviour in EU Referendums' in Claes H de Vreese (ed), *The Dynamics of Referendum Campaigns* (Palgrave Macmillan, 2007) 84 <https://doi.org/10.1057/9780230591189_5>; Sara Binzer Hobolt, 'When Europe Matters: The Impact of Political Information on Voting Behaviour in EU Referendums' (2005) 15(1) *Journal of Elections, Public Opinion and Parties* 85, 105 <https://doi.org/10.1080/13689880500064635>.

135   Indeed, this argument has been made with respect to the outcome of Queensland's 2016 referendum: Orr and Cassar (n 4) 163.

affect a referendum's prospects.[136] At Commonwealth referendums, the federal government has often run muted 'Yes' campaigns and, it is said, this has put them at a disadvantage against 'No' campaigns that have generally been successful at building energy and momentum.[137]

The state record reflects this to some extent. A strong 'Yes' campaign may have made the difference in NSW's hard-fought 1933 referendum on Legislative Council reform (discussed above). Further, superior 'No' campaigns may help to explain why the two attempts to abolish a state upper house ended in defeat. In 1917, the Queensland government encountered an organised and well-funded 'No' campaign run by the Constitution Defence Committee, and struggled to get its message across as Labor Party funds were re-directed to a federal election held on the same day.[138] In 1961, the NSW government ran a divided, 'lacklustre' and 'pedestrian' campaign compared to the united and 'vigorous' campaign of the Liberal Party and Country Party.[139]

At the many bipartisan referendums, however, the 'Yes' side has sometimes won without mounting an especially impressive campaign. At SA's 1991 referendum on electoral boundaries, neither party actively campaigned. Commentators accused the government and Opposition of 'apathy' and criticised them for failing to devote more resources to raising public awareness and understanding of the referendum issues.[140] It was a similar story for the twin referendums held in NSW in 1995. Neither major party campaigned on the two referendum questions, which had been spearheaded by independent MPs and were seen as a distraction from the election held on the same day.[141] The retreat of the major parties from the campaign space did not ultimately imperil these referendums; instead, all were carried by handsome margins.

F   Party in Government

The literature on federal referendums observes a link between the party in government and referendum outcomes. More specifically, it is noted that Labor governments carry an especially poor record in achieving constitutional change, with just 1 of 26 Labor proposals returning a 'Yes' vote.[142] There is only a small disparity at the state level on this measure. Non-Labor governments have enjoyed a higher rate of success: all four non-Labor proposals have carried, compared to

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136   Williams and Hume (n 71) 228.

137   Ibid 211–12.

138   'Upper House Abolition: Poll to be Taken Today', *The Brisbane Courier* (Brisbane, 5 May 1917) 4; D J Murphy, 'Abolition of the Legislative Council' in D J Murphy, R B Joyce and Colin A Hughes (eds), *Labor in Power: The Labor Party and Governments in Queensland 1915–57* (University of Queensland Press, 1980) 95, 101; Justin Harding, 'Ideology or Expediency? The Abolition of the Queensland Legislative Council 1915–1922' [2000] 79 *Labour History* 162, 166 <https://doi.org/10.2307/27516738> (asserts that the 'Yes' campaign 'barely caused a ripple on the pond of public consciousness').

139   Clune and Griffith (n 58) 411; Robert Carr, 'Robert James Heffron (1890–1978)', *Australian Dictionary of Biography* (Web Page, 2006) <https://adb.anu.edu.au/biography/heffron-robert-james-10476>.

140   Haynes (n 125) 17; 'Bid to Fuel Interest in Referendum', *The Advertiser* (Adelaide, 1 February 1991) 3.

141   Totaro (n 60) 32.

142   Bennett (n 71) 18. The Voice was Labor's 26th referendum proposal.

five of eight Labor proposals. But it is not apparent that this comparatively modest difference is 'party related' in the sense of it being attributable to differences in how the parties have approached constitutional change or the conduct of referendums.

G What Explains State Referendum Outcomes?

The preceding discussion provides an idea of the different factors that have influenced state referendum outcomes. Of course, the result of any individual referendum may be due to a set of multiple, overlapping factors rather than any single reason.[143] Here I attempt to consolidate key points from the above discussion to provide a generalised account of why state referendums have succeeded or failed.

Turning first to the three failed referendums, all faced committed opposition, were held as standalone events, and put forward proposals that opponents depicted as weakening accountability. Two of those three proposals also encountered focused and well-resourced 'No' campaigns. In this way, we can see how issue substance, partisanship, timing, and campaign factors combined to bring about the defeat of these proposals. As for the nine successful referendums, the fact that eight enjoyed bipartisan support or faced little opposition naturally puts a spotlight on consensus as a factor that, in line with expectations established in the literature, has helped to foster state referendum success. But my analysis shows that other factors have come into play too. The winning proposals commonly laid claim to enhancing popular control and/or accountability, and five were timed to coincide with a parliamentary election. Indeed, the confluence of muted opposition and timing emerges as significant: five of the seven highest 'Yes' votes were recorded by proposals that faced weak resistance and were held on an election day. More generally, most of the successful referendums stand out for being low-key affairs in which the proposed constitutional changes were the subject of minimal public debate. This may have prompted the less informed to follow party cues. The main outlier among the successful state referendums is the 1933 vote in NSW, which was carried despite strong opposition and a hard-fought, intense campaign.

The high degree of consensus and low incidence of conflict at many successful state referendums arguably has its roots in something else: namely, the relatively uncontentious character of the proposals on the ballot paper. They have been uncontentious in the sense that they have not, by their nature, triggered partisan divisions or ignited public passions. On issues such as extended legislative assembly terms, legislative council reform and redistribution timetables, there has often been a baseline consensus between the major parties on the need for reform even if there has been disagreement on the details. These are not issues that have enlivened underlying ideological disagreements between the parties, nor are they issues that have sparked divisions, or even strong interest, among the voting public, a fact that can be explained partly by the low profile of state constitutions.[144]

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143 Williams and Hume (n 71) 203.

144 The various referendum measures can be contrasted with the issues put to voters at state plebiscites, such as drinking hours and daylight saving, which by their nature are contentious and more prone to generate broad public interest and disagreement.

The decisions of state governments to hold referendums on such uncontentious issues has made cross-party consensus and public support more achievable. It has provided a strong foundation for success that has then been built upon, at different times, by decisions on other matters such as timing, campaigning and, perhaps, question wording and public education.

V   WHY DO STATE REFERENDUMS HAVE A HIGHER SUCCESS RATE THAN COMMONWEALTH REFERENDUMS?

Having analysed the state referendum experience we are now able to give a detailed response to this question. The disparity is due to a mix of practice, underlying structural factors and, perhaps, differences in electorate composition. In terms of practice, state actors, compared to their federal counterparts, have shown better judgment on issue selection and have proven more able to reach consensus. More structurally, though, it must be understood that state referendums occur in an institutional context that is more conducive to referendum success. In the background, the different composition of state and federal electorates may also have had an impact.

A   Practice

State governments have been more circumspect in their use of the referendum and have shown better judgment in deciding which issues should be referred to a popular vote. They have deployed the referendum device sparingly – employing it on just 12 occasions in over a century – and have usually reserved its use for constitutional changes capable of winning broad consensus. Commonwealth governments, by contrast, have been more prone to put referendum proposals despite predictable opposition either from the main opposition parties, the states or other quarters.[145] This is most apparent in the many failed proposals to expand Commonwealth powers put by Labor governments even though it was known that they would be opposed by non-Labor parties and the states. Careful issue selection therefore goes some way to explaining the relatively high rate of state referendum success.

State governments and oppositions have also been more adept at achieving consensus on constitutional reform. State opposition parties have offered bipartisan support to government proposals more than half of the time, on 7 of 12 occasions. We can contrast this with the federal experience, where cross-party backing has been provided for 11 of 45 measures, or roughly one-quarter of the time.[146] There is a marked difference, too, in the willingness of conservative parties to reach across the aisle. State non-Labor parties have offered bipartisanship more than half of the time (on five out of eight occasions). By contrast, federal conservative

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145   On poor judgment by Commonwealth governments, see, eg, Brian Galligan, 'Referendums' in Brian Galligan and Winsome Roberts (eds), *The Oxford Companion to Australian Politics* (Oxford University Press, 2007) 498 <https://doi.org/10.1093/acref/9780195555431.001.0001>.

146   Counting the eight successful measures plus three which failed despite having bipartisan support: Williams and Hume (n 71) 217.

parties have a long history of opposing Labor referendum proposals. They have offered support for Labor proposals just once in 26 opportunities, the exception being the successful Social Services amendment in 1946.[147] Overall, the ability of state actors to forge bipartisan consensus has put their referendum measures in a stronger position to win approval from voters.

The higher incidence of bipartisanship reflects the fact that the politics of constitutional reform play out very differently at the state level. There is more scope for agreement and less knee-jerk opposition. We see it in those instances where state governments and oppositions have made genuine efforts at compromise on reform measures that might otherwise have divided the parliament (eg, NSW 1978 and SA 1991; see Part III). We also see it in the fact that state parties have been less inclined to engage in opportunistic opposition. Among state referendums, the only standout example of opportunism is the Queensland National Party's 1991 campaign against four-year terms despite its general support for longer terms; some speculated that the Party took this position in order to weaken a popular premier.[148] Federally, that opportunism is more common, as evident in the sometimes fierce 'No' campaigns mounted at mid-term referendums to damage the standing of the government, the adoption of blanket 'No' positions on multiple measures, and the occasional practice of supporting a reform in government and then opposing it in opposition.[149]

More fundamentally, the federal parties, unlike their state counterparts, have very different philosophical starting points when it comes to constitutional reform. Federal conservative parties have traditionally been committed to protecting the *Commonwealth Constitution*, viewing it as a fundamental law that 'ought not lightly be altered'.[150] The federal Labor Party has generally been more comfortable, even enthusiastic, about the prospect of constitutional change. Moreover, federal conservative parties, in contrast to Labor, have long been ideologically opposed to the centralisation of power.[151] The state parties, by contrast, are more aligned philosophically. Neither major party feels compelled to protect or defend a state constitution and, putting aside the two attempts to abolish a legislative council, which triggered partisan differences on the value of upper houses, the amendments put at state polls have not tapped into ideological fault lines. In short, the philosophical orientations of the state major parties towards constitutional reform are more harmonious, and this has helped clear the path towards consensus and, as a by-product, referendum success.

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147   Constitution Alteration (Social Services) Bill 1946 (Cth).

148   'At its simplest, the National Party is opposing the referendum proposal for four-year terms because it believes it can inflict a defeat on the Goss Government by doing so, and remove some of the so-called "Goss gloss"': Peter Charlton, 'The Referendum Is All a Question of Politics', *The Courier Mail* (Brisbane, 20 March 1991) 8.

149   For example, the shifting positions of the Coalition on the introduction of simultaneous elections: Bennett (n 71) 20. On this theme see also Cheryl Saunders, 'The Australian Experience with Constitutional Review' (1994) 66(3) *Australian Quarterly* 49, 54 <https://doi.org/10.2307/20635781>; Williams and Hume (n 71) 227.

150   Bennett (n 71) 19.

151   Ibid 17–19.

A third aspect of state practice that may have helped foster referendum success is the wider use of public education materials that are drafted by non-partisan actors such as public servants. However, as argued above, it is unlikely that this has had a large impact on referendum results.

Finally, we might point to question wording as a factor that has helped state referendums have more success. But the questions put at federal referendums have also routinely used the word 'approve' and have sometimes been criticised for containing bias.[152] As such, question wording is not relevant to explaining the difference in success rates.

B Structure

The above discussion shows that state governments and oppositions, compared to their federal counterparts, have taken steps or made decisions that have enhanced the prospects of constitutional referendums. It must also be recognised, however, that underlying structural factors have helped make this possible, while more generally easing the path to referendum success. As outlined in Part II, the state and federal constitutions are different types of documents, and those differences go a long way to explaining the contrasting referendum experiences of the two levels of government.

1 Federalism

Federalism is one of the structural factors that helps to explain why state referendums have a higher success rate. Winning public approval to amend a federal constitution, as opposed to one that focuses solely on local governance, is more difficult because the chances of disagreement are far higher. Attempts to amend a federal constitution engage a more complicated set of interests, enliven more complex sets of identities and attachments, and provoke and mobilise more natural opposition. Proposed amendments to a federal governance framework are liable to be seen as against the interests of one or more states, offend voters' sense of attachment to their state, and prompt resistance from state governments and other actors who feel strongly about the balance between federal and state powers. We have seen this play out often in Commonwealth referendums. Certain measures, such as those aimed at increasing central power or changing the structure of the Senate, have prompted strong pushback from state governments and mobilised voters around state interests.[153] Such issues have also ignited partisan divisions due to philosophical ideas, discussed above, around federal vs state powers. By contrast, attempts to amend state constitutions have tended not to arouse interest beyond state borders and, as a result, they have been exposed to fewer sources of opposition.[154] Put another way, the non-federal nature of state constitutions

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152 Kildea and Smith (n 127) 383.

153 On state opposition campaigns, see Williams and Hume (n 71) 218–21.

154 Unusually, in 1933 both the Prime Minister and federal Opposition Leader made statements, respectively, for and against the NSW government's proposals to reform the State's Legislative Council. But in each case, those statements advanced party interests as opposed to asserting a national perspective: 'Prime

has fostered the submission of referendum proposals that are inherently less contentious than those presented at Commonwealth referendums, and this has given them better prospects of success.

The ways in which federalism can make referendum success more difficult are apparent when we compare the three state referendums on extending parliamentary terms (NSW 1981, QLD 1991, QLD 2016) with the sole Commonwealth referendum on that same topic (1988). At the state polls, the arguments against longer terms included the absence of a minimum term (which meant that the government would continue to control election timing) and the fact that fewer elections could not be guaranteed.[155] At the Commonwealth referendum, opponents made the same arguments but, in addition, they focused on the proposal's effect on the Senate and framed the debate as a matter of states' rights.[156] The official 'No' case argued that the proposal would disadvantage residents of smaller states and ran with the slogan 'No more power to Canberra'.[157] The alteration of Commonwealth parliamentary terms thus invoked complicated and fraught questions about how the changes would affect the design of the federal system and impact the positions of the states, making the task of winning majority support that much harder. The results reflect this: two of the three state referendums were carried; the Commonwealth referendum was defeated nationally and in all six states, registering the second lowest 'Yes' vote on record (32.9%).

Federalism makes winning Commonwealth referendums more difficult in an another, more concrete way. It is the rationale behind the supermajority decision rule in section 128 of the *Commonwealth Constitution*, which requires that the preferences of voters in each state be considered alongside the national vote tally. This rule means that a proposal for constitutional amendment can win a national majority of votes but nonetheless fail if it does not win majorities in four states.[158] That scenario has occurred on five occasions.[159] State proposals, by contrast, have required only a simple majority of votes. There is no equivalent of the supermajority rule – no requirement, for instance, that votes cast in certain regions be considered alongside the state-wide vote count. It is impossible to say how state referendums would have fared with a more demanding rule of this kind, but we might reasonably speculate that the few measures that won marginal victories (eg, NSW 1933, QLD 2016) would instead have been rejected.

Minister: Vigorous Appeal', *The Sydney Morning Herald* (Sydney, 12 May 1933) 12; 'Labour Party's Plans', *The Sydney Morning Herald* (Sydney, 23 March 1933) 8.

155   See, eg, 'Qld ALP Will "Fight" for 4-Year Term', *The Canberra Times* (Canberra, 14 March 1991) 14.

156   The 1988 amendment introduced maximum 4-year terms for both the House of Representatives and the Senate; it therefore extended House terms by a year while cutting Senate terms by two years: Constitution Alteration (Parliamentary Terms) Bill 1988 (Cth) ss 2, 5–6.

157   Australian Electoral Commission, *Yes or No?: Referendums. Saturday 3 September 1988. The Cases For and Against* (Australian Government Publishing Service, 1988) 10.

158   *Commonwealth Constitution* s 128.

159   The five proposals were: 1937 (Aviation), 1946 (Organised Marketing of Primary Products), 1946 (Industrial Employment), 1977 (Simultaneous Elections) and 1984 (Terms of Senators).

2 *Rigidity vs Flexibility*

A second structural factor that should be considered when comparing the state and federal referendum records is the relative flexibility of state constitutions. This feature enables state governments to be more judicious in their referendum usage (one of the points of practice discussed above) as they are more able to achieve constitutional reform through ordinary legislative means. Put another way, reformist state governments are more able to pursue constitutional change without having to run the risk of public rejection at a referendum.

State parliaments have, for example, enacted legislation to bring about longer terms, increase the size of the legislature, alter the electoral system (eg, by introducing 'one vote, one value', or switching to optional/compulsory preferential voting) and give constitutional recognition to First Peoples. Such reforms could have been difficult to achieve through a referendum process, at least in some states,[160] just as they have proven challenging federally. In short, any assertion of the 'sound judgment' of state governments must be tempered with an appreciation that those governments are sometimes saved from having to make hard choices about referendum usage thanks to the relative flexibility of their constitutions.

3 *Status and Visibility*

A third structural factor that helps to explain the disparity in state and federal success rates is the difference in status and visibility of the state constitutions as compared to the *Commonwealth Constitution*. The low profile of state constitutions, and the lack of community understanding and attachments, has probably contributed to the low-key nature of many state referendums. And, as argued above, this may have aided referendum success in those circumstances where the major parties supported change.

By contrast, the relatively high standing and visibility of the *Commonwealth Constitution* has probably made it more difficult to amend via referendum. It is a national document that, even if not especially well understood by voters, has a stronger presence in political culture. Its status as the nation's 'birth certificate' speaks to its symbolic importance. All of this elevates the stakes of constitutional reform. The fear of 'getting it wrong' is greater. Anxiety about change is a major theme at federal referendums in a way that it is not at state referendums. 'No' campaigners frequently try to exploit any natural caution among voters by emphasising the 'permanence' of change and the possibility of unanticipated consequences.[161] The national standing of the *Commonwealth Constitution* also generates more substantial media coverage, more scrutiny and, perhaps, increases the incentives for opposition parties to engage in opportunism. In summary, the

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160   The defeat of 4-year terms in Queensland (1991) speaks for itself. Winning a referendum in WA on 'one vote, one value' would also have been challenging, if Labor's difficulties in pursuing legislative changes are any indication: see Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2nd ed, 2019) 25–6.

161   For example, the claims by Voice opponents in 2023 that the new body would be 'permanent … We will be stuck with the negative consequences forever': 'The Case for Voting No' in *Your Official Yes/No Referendum Pamphlet* (Australian Government, 2023) 15.

decision to change the *Commonwealth Constitution* is seen as a more momentous affair and this has probably made it more difficult for federal governments to find referendum success.

C   Electorate Composition

Alongside practice and structural factors, it is possible that differences in electorate composition also help to explain the disparity in referendum success rates. A nationwide electorate participates at federal referendums whereas only a subset of that wider electorate votes at state referendums. It is possible that there is something about the profile of voters in the three states in which referendums have been held (NSW, Queensland and SA) that renders them more likely than Commonwealth electors to vote 'Yes' at constitutional referendums. Three relevant differences warrant consideration: general attitudes towards constitutional reform, the balance between urban and regional/rural populations, and the use of compulsory voting.

It is possible that some states are generally more open to constitutional reform than others. The best source of data on this question is the voting history of individual states at Commonwealth referendums. Across the 45 federal referendum proposals, NSW, Queensland and SA have registered 18, 21 and 16 'Yes' votes, respectively.[162] That record does not suggest that voters in those three states have a predisposition towards voting 'Yes'. However, if we confine our analysis to post-war referendums, NSW has voted 'Yes' most often (14 times in 26 opportunities) while other states have done so only rarely. Perhaps it could be said that this record shows a relatively high inclination among NSW electors to vote for constitutional change, and that this helps to explain why voters in that state have approved 6 out of 7 state referendum proposals in the post-war period. Against this, it might be wondered whether a state's voting record on proposals to amend the *Commonwealth Constitution* can tell us anything meaningful about the general orientation of voters towards constitutional reform. It is difficult to draw firm conclusions.

The degree of urbanisation in a jurisdiction could be relevant to attitudes to constitutional reform. The results of some federal referendums have shown a greater propensity among city dwellers to vote 'Yes' compared to residents of regional and rural seats.[163] There is also some evidence of this at state referendums; for instance, the 'Yes' vote at Neville Wran's 1978 referendum was higher in city electorates (88.0%) than in country electorates (76.4%).[164] NSW, along with Victoria, is more populous and urbanised than the rest of the federation – perhaps this helps to explain why referendums in that State have enjoyed such a high success rate? While this explanation is plausible, it is difficult to evaluate with any precision. It is always challenging to untangle the reasons that electors vote the way they do. At the 1978 referendum, for instance, it is impossible to say whether the lower

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162   Victoria, WA and Tasmania have voted 'Yes' 15, 23 and 10 times, respectively. This data is sourced from Bennett (n 71) 8 (updated to take account of the 2023 referendum).

163   For example, the 'Yes' vote at the 1999 republic referendum was higher in metropolitan electorates (50.7%) than in provincial (40.4%) and rural electorates (36.2%): ibid 30.

164   Clune (n 52) 49.

country vote was due to a general wariness about constitutional reform among rural voters or, alternatively, the substance of the reform proposal and the sceptical position adopted towards it by the Country Party. Urbanisation cannot be ruled out as a contributing factor, but it is hard to say how much weight it should be given.

Finally, we might wonder if the presence of compulsory, as opposed to voluntary, voting is relevant. Some authors argue that compulsion makes winning referendums harder as it compels the least interested and knowledgeable voters to the polls.[165] Perhaps compulsory voting has been employed more often at federal referendums? The reality is the opposite: where voters have been legally compelled to vote at all 12 state referendums, they were not required to do so at the first 13 Commonwealth referendums, or roughly 30% of the time.[166] The variance in compulsory voting rules therefore does not help us to understand the disparity between state and federal approval rates; if anything, it makes the state success rate more impressive.

VI   CONCLUSION

The state referendum record challenges the idea that Australians instinctively vote against constitutional reform. State electors have approved reform proposals three-quarters of the time, which is four times higher than the Commonwealth success rate. While scholars have speculated about the reasons for this disparity, this article provides the first comprehensive analysis grounded in a detailed account of the state referendum experience.

Successful state referendums have usually involved relatively uncontentious proposals to reform governance institutions. They have generally had bipartisan support or have faced muted opposition. In addition, successful proposals have commonly been depicted as strengthening popular control and/or accountability, have often been timed to coincide with a parliamentary election, and have been low-key affairs in which under-informed voters have probably followed party cues when marking their ballot papers. The failed referendums, by contrast, lacked bipartisan consensus, proposed changes that were depicted by opponents as weakening accountability, were held as standalone events during a parliamentary term and faced relatively strong 'No' campaigns.

The disparity between state and federal success rates is best understood as the result of three factors, namely, practice, structure and electorate composition. In terms of practice, state governments and oppositions have arguably performed better than their federal counterparts in deciding which issues should be put to a referendum and in building consensus. The higher incidence of bipartisanship

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165   Klaas Woldring, 'The Case for Voluntary Voting in Referendums' (1976) 11(2) *Politics* 209, 210 <https://doi.org/10.1080/00323267608401575>; Ian McAllister, 'Elections Without Cues: The 1999 Australian Republic Referendum' (2001) 36(2) *Australian Journal of Political Science* 247, 266 <https://doi.org/10.1080/10361140120078817>; Gherghina and Qvortrup (n 72) 356, 364.

166   Two of those proposals were carried. Compulsory voting was introduced for federal elections and referendums in 1924: *Commonwealth Electoral Act 1924* (Cth) s 2.

reflects differences in constitutional reform politics at the state and federal levels: the state major parties are more aligned in their philosophical approaches to constitutional change and are less inclined to engage in opportunistic opposition. The provision by state governments of higher quality, neutral educational materials may also have helped improve referendum prospects but only at the margins.

While these aspects of state practice are significant, there are underlying structural factors that make referendum success easier to achieve at the state level. State constitutions establish a framework for local governance only, can be altered by ordinary legislation much of the time, and are low-visibility documents that attract little in the way of community interest or attachment. By contrast, the *Commonwealth Constitution* establishes a framework for federal governance, can only be amended by referendum, imposes a supermajority amendment rule, and is more prominent in political culture. These structural differences mean that proposed amendments to the *Commonwealth Constitution*, by their nature, attract more attention and opposition, and prompt more anxiety about change. Finally, differences between individual state electorates and the national electorate, including those relating to general attitudes towards constitutional reform and the degree of urbanisation, cannot be discounted as factors that have contributed to the disparity in success rates.

Does the state referendum experience offer any lessons for the conduct of federal referendums? The state record highlights the importance of consensus to referendum outcomes, alongside other factors such as the nature of the proposal, the timing of the vote and the strength of campaigns. It suggests that any future federal government looking to win a referendum should identify a relatively uncontentious reform to institutional governance that is capable of winning bipartisan support and then put it to voters at a referendum that is held alongside a parliamentary election. And, reflecting on state practice, the Commonwealth could look to be more careful with issue selection, work harder at forging cross-party consensus and, perhaps, improve public education.

However, the lessons of state constitutional referendums cannot be transferred easily into the Commonwealth sphere. Even with improved practice, the *Commonwealth Constitution* would retain those underlying qualities that make it more difficult to amend through a popular vote. Proposals are more likely to impact multiple interests, generate strong opposition, attract intense public scrutiny and prompt fears about irreversible change. There is no escaping the fact that the state and Commonwealth constitutions are different types of documents. The nature of state constitutions fosters the submission of referendum proposals that are less contentious, and this generally gives them better prospects of success. Supporters of federal constitutional change can learn from the state experience but those looking for a ready-made blueprint for referendum success will be disappointed.

More generally, this article has identified distinctive features of the state constitutional experience that should be of interest to followers of state and federal referendums alike. First, two state referendums have won in the face of major party opposition, challenging the idea that bipartisanship is essential to referendum success. Second, public ignorance has not proven a barrier to referendum success

at the state level. The record does not suggest the presence of 'status quo bias' so much as an inclination among under-informed voters, in a low-key and bipartisan campaign environment, to follow party cues when casting their ballot. Finally, while the federal referendum literature focuses primarily on failure, this article has helped to fill out our understanding of the sorts of factors that can foster referendum success. Each of these issues warrants further scholarly investigation.