"THE PEOPLE" AS A SOURCE OF CONSTITUTIONAL PRINCIPLE

The Australian Constitution and the Contours of Representative Government

This article explores the genesis of "the people" as an Australian constitutional touchstone. While the mandate that the Commonwealth Parliament be "directly chosen by the people" has seen the High Court of Australia source an implied freedom of political communication and a constitutionally guaranteed franchise, its content remains opaque and many questions remain as to the role of the High Court in determining the contours of representative government within the Australia constitutional landscape.

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1 In Australia, the pre-federation catch-cry of "One people. One destiny"[1] was transformed by the Preamble of the Commonwealth of Australia Constitution Act 1900 into an agreement of "the people … to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland".

2 This article explores the genesis of "the people" as an Australian constitutional touchstone and its various manifestations and uncertainties including the Antipodean profile of "popular" or "political" sovereignty. The mandate that Parliament be "directly chosen by the people" has seen the High Court of Australia source an implied freedom of political communication and a constitutionally guaranteed franchise. However, its content remains opaque and many questions remain as to the role of the High Court in determining the contours of representative government within the Australia constitutional landscape.

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1 The Henry Parkes Foundation, "In His Own Words …" <https://parkesfoundation.org.au/resources/sir-henry-parkes-2/in-his-own-words/> (accessed 21 September 2017).

I. Australian federation

An Act to constitute the Commonwealth of Australia[2]

3 From 1 January 1901, the six Australian colonies, under the British-enacted Commonwealth Constitution,[3] formed a federation drawing on American and British constitutional influences. As a constitutional monarchy under the British crown, but with a local Governor-General as the Queen's representative, power was divided between one Commonwealth (or federal) government and the six "continuing"[4] states and later, territories. The Commonwealth Constitution established a Commonwealth parliament, with a House of Representatives and a house of review (the Senate) founded on the principles of representative and responsible government by which the executive arm was to be held to account. It also ensured that the judicial power of the Commonwealth was to be invested within courts and established the High Court of Australia.

4 While the Commonwealth of Australia Constitution Act 1900 was enacted by the UK Parliament, the Australian people did have a role in the move to federate. Progressively, although admittedly without a broad sweeping franchise,[5] there were referendums held in the colonies,[6] acquiescing to the draft constitutional document.[7] Today, "the people" are required to exercise their democratic rights with compulsory voting (via legislative and not constitutionalised avenues)[8] at federal elections and referendums.

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2 Commonwealth of Australia Constitution Act 1900.

3 Commonwealth of Australia Constitution Act 1900, covering cl 9.

4 Nicholas Aroney, Peter Gerangelos, Sarah Murray & James Stellios, *The Constitution of the Commonwealth of Australia – History, Principle and Interpretation* (Cambridge University Press, 2015) at pp 601–611.

5 See, *eg*, James A Thomson, "Review Essay: A Great Swindle: Australia's Constitution and the People: Origins and Amendment" (2000) 23(2) UNSW Law Journal 345 at 355, Helen Irving, "How Well Does the Compact Fit? A Critique of the New Constitutional *Grundnorm* in the Light of History and Theory" (2002) 11 *Griffith Law Review* 408 at 412–414; James Stellios, *Zines's The High Court and the Constitution* (The Federation Press, 2015) at p 599.

6 The draft Constitution was eventually approved in referendums held across the colonies (except for Western Australia) in 1899. While held after the enactment of the Commonwealth of Australia Constitution Act by the UK Parliament, Western Australia held a successful referendum in July 1900 and by covering cl 3 was therefore able to be included as an Original State: Nicholas Aroney, Peter Gerangelos, Sarah Murray & James Stellios, *The Constitution of the Commonwealth of Australia – History, Principle and Interpretation* (Cambridge University Press, 2015) at p 608.

7 This was except for s 74: see *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [1], *per* Gleeson CJ.

8 Commonwealth Electoral Act 1918 (Act 27 of 1918) s 245(1); Commonwealth Referendum (Machinery Provisions) Act 1984 (Act 44 of 1984) s 45(1); *Rowe v*

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II. Popular sovereignty

WHEREAS the people …[9]

5 Much debate in Australia has focused on popular sovereignty and whether it explains the legitimacy of the Commonwealth Constitution.[10] Much of this deliberation has centred on the accumulation of sovereignty by "the people" after federation on 1 January 1901, if it was not held prior as the form of the Preamble might suggest.[11] As John Quick and Robert Garran explained, although the Constitution "proceeds from the people, it is clothed with the form of law by an Act of the Imperial Parliament"[12] and is enclosed within covering cl 9 of a UK statute.

6 Later constitutional milestones such as the passing of the UK Statute of Westminster 1931 and the UK and Commonwealth Australia Acts 1986 saw a shrinking in the UK's legislative powers over the federation. Accordingly, it is sometimes said that, as the only avenue to reform the Commonwealth Constitution is via a constitutional referendum under s 128; this provision has become the derived source of Australia's popular sovereignty.[13] However, as George Winterton has

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Electoral Commissioner (2010) 243 CLR 1 at [132], *per* Gummow and Bell JJ, at [219], *per* Hayne J, at [414], *per* Kiefel J.

9 See the preamble to the Commonwealth of Australia Constitution Act 1900.

10 See James A Thomson, "The Australian Constitution: Statute, Fundamental Document or Compact?" (1985) 59(11) *Law Institute Journal* 1199, Geoffrey Lindell, "Why Is Australia's Constitution Binding? – The Reasons in 1900 and Now, and the Effect of Independence" (1986) 16 *Federal Law Review* 29, Michael Kirby, "Deakin: Popular Sovereignty and the True Foundation of the Australian Constitution" (1996) 3 *Deakin Law Review* 129, George Winterton, "Popular Sovereignty and Constitutional Continuity" (1998) 26 *Federal Law Review* 1, Harley G A Wright, "Sovereignty of the People – The New Constitutional *Grundnorm*?" (1998) 26 *Federal Law Review* 165, Anthony Dillon, "A Turtle by Any Other Name: The Legal Basis of the Australian Constitution" (2001) 29 *Federal Law Review* 241 and Simon Evans, "Why Is the Constitution Binding? Authority, Obligation and the Role of the People" (2004) 25 *Adelaide Law Review* 103.

11 Denis J Galligan, "The Sovereignty Deficit of Modern Constitutions" (2013) 33(4) *Oxford Journal of Legal Studies* 703 at 710.

12 John Quick & Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth – Part 1* (The Australian Book Company, 1901) at p 285.

13 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 138, *per* Mason CJ:

> Despite its initial character as a statute of the Imperial Parliament, the Constitution brought into existence a system of representative government for Australia in which the elected representatives exercise sovereign power on behalf of the Australian people. Hence, the prescribed procedure for amendment of the Constitution hinges upon a referendum at which the

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noted in this regard, such statements can begin to conflate meanings of "sovereignty".[14] For Winterton, it can be used to refer to "the source" of the Constitution's "authority" or the facility to change it, with the latter being the less indeterminate in the Australian context.[15]

7 What is clear is that any assertions of Australian "people power" need some qualification. Even if the explanatory power of the sovereignty of "the people" is more palatable, it is not necessarily a substitute legal explanation for the binding nature of the Constitution.[16] "The people" did not acquire sovereignty from the UK through transference as such.[17] Instead, the decreasing legislative powers of the UK Parliament with respect to Australia saw a gradual reduction in its constitutional and legislative status, while still retaining the British monarch as the Australian head of state. As Winterton recognised:[18]

> The continuing legal authority of our Constitution derives from its original enactment at Westminster and subsequent retention (with amendments) by those empowered to amend it, which includes the Australian electors. But the latter derived their legal authority from the former.

Further, in terms of the facility to change the Constitution, the power of the federal parliament in the constitutional reform process must not be overlooked. The electorate (or for that matter, the states) cannot

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proposed amendment is approved by a majority of electors and a majority of electors in a majority of the States.

14 George Winterton, "Popular Sovereignty and Constitutional Continuity" (1998) 26 *Federal Law Review* 1 at 4.

15 George Winterton, "Popular Sovereignty and Constitutional Continuity" (1998) 26 *Federal Law Review* 1 at 4–7.

16 Geoffrey Lindell, "Why Is Australia's Constitution Binding? – The Reasons in 1900 and Now, and the Effect of Independence" (1986) 16 *Federal Law Review* 29 at 37, cited in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 138, *per* Mason CJ; George Winterton, "Popular Sovereignty and Constitutional Continuity" (1998) 26 *Federal Law Review* 1 at 7, generally and citing *Breavington v Godleman* (1988) 169 CLR 41 at 123, *per* Deane J; see also Simon Evans, "Why Is the Constitution Binding? Authority, Obligation and the Role of the People" (2004) 25 *Adelaide Law Review* 103; Harley G A Wright, "Sovereignty of the People – The New Constitutional *Grundnorm*?" (1998) 26 *Federal Law Review* 165; Anthony Dillon, "A Turtle by Any Other Name: The Legal Basis of the Australian Constitution" (2001) 29 *Federal Law Review* 241.

17 James Stellios, *Zines's The High Court and the Constitution* (The Federation Press, 2015) at pp 597–598; Cheryl Saunders, *The Constitution of Australia – A Contextual Analysis* (Hart Publishing, 2011) at p 62; Anthony Dillon, "A Turtle by Any Other Name: The Legal Basis of the Australian Constitution" (2001) 29 *Federal Law Review* 241 at 247.

18 George Winterton, "Popular Sovereignty and Constitutional Continuity" (1998) 26 *Federal Law Review* 1 at 7.

unilaterally propose s 128 constitutional amendments.[19] Rather, by the provision's terms, such amendments must originate in a bill introduced into the Senate or House of Representatives. The provision also then requires that a constitutional amendment be, at least, passed by an absolute majority of both houses of the Commonwealth Parliament as well as a majority of electors in a majority of states and a majority of electors overall (and with some amendments, a majority of the electors of the affected state).

8 The question is what place this leaves for popular sovereignty and what it delineates? Does it have merely a figurative significance[20] or is there a greater role for it to play?[21] There is a rich body of literature in the US concerning, and questioning, the sovereignty of the people.[22] This is not surprising given the US Constitution's[23] pyrotechnic beginning: "[w]e the people of the United States".[24] The "people's" constitutional mystification is partly definitional and partly practical. It is definitional as to whether popular sovereignty is being attached to thicker (control by the people) or thinner (more agency-centred) conceptions and whether it is being used in a "legal" or "political" "sense".[25] It is practical in the sense that the populace are frequently

19 See Sarah Murray, "State Initiation of Section 128 Referenda" in *Tomorrow's Federation – Reforming Australian Government* (Paul Kildea, Andrew Lynch & George Williams eds) (The Federation Press, 2012) at pp 332–349.

20 James Stellios, *Zines's The High Court and the Constitution* (The Federation Press, 2015) at p 599; see also Sanford Levinson, "Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program" (2014) 123 Yale LJ 2644 at 2653, citing and discussing Edmund S Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (W W Norton & Company, 1988) at p 13: "[m]ake believe that the people *have* a voice or make believe that the representatives of the people *are* the people"; see also pp 38, 50 and 58; Harold J Laski, "The Theory of Popular Sovereignty" (1919) 17 Mich L Rev 201 at 204.

21 See, *eg*, Kirby J, who has hinted at its untapped potential: *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 431; Michael Kirby, "Deakin: Popular Sovereignty and the True Foundation of the Australian Constitution" (1996) 3 *Deakin Law Review* 129 at 139–142.

22 See, *eg*, Akhil Reid Amar, "Of Sovereignty and Federalism" (1987) 96 Yale LJ 1425, Bruce Ackerman, *We the People – Foundations* (Belknap Press, 1991), Akhil Reed Amar, "The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem" (1994) 65 U Colo L Rev 749, Edmund S Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (W W Norton & Company, 1988), Wilson R Huhn, "Constantly Approximating Popular Sovereignty: Seven Fundamental Principles of Constitutional Law" (2010) 19 Wm & Mary Bill Rts J 291 and "The Meaning(s) of "The People" in the Constitution" (2013) 126 Harv L Rev 1078.

23 The Constitution of the United States.

24 The Constitution of the United States, Preamble.

25 Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan & Co, 8th Ed, 1927) at pp 70 and 72; see also Denis J Galligan, "The Sovereignty Deficit of Modern Constitutions" (2013) 33(4) *Oxford Journal of Legal Studies* 703 at 705.

sidelined from the political quotidian[26] and must reckon with the inevitable pull of the sovereignty of parliament notwithstanding the constitutional and conventional limits upon it.

9 It might be that popular sovereignty exists by virtue of the constitutional and political mechanisms through which representatives are kept accountable and through the signalling of the people's preferences at the ballot box or referendums.[27] Much turns on what pattern and degree of "sovereignty" emerges in this setting.[28] There is also an evident shift in the jurisprudence towards the phraseology of "political sovereignty" to explicate the nature of the people's participation in and engagement with governance in Australia.[29] As Denis Galligan explained: "[t]he Australian Constitution … says nothing about sovereignty, yet in providing for elections and related matters, assumes the people to be in some sense supreme. This idea may conveniently be expressed as political sovereignty".[30]

A. Implied freedom of political communication: "The people" and "political sovereignty" – A source of constitutional principle?

10 One of the key ways that the political sovereignty of the people has been practically and constitutionally recognised has been through the development of the implied freedom of political communication in Australia as pivotal to the operation of representative government as set out in the constitutional text. *Australian Capital Television Pty Ltd v*

26 Bruce Ackerman, *We the People – Foundations* (Belknap Press, 1991) at p 6; Akhil Reed Amar, "The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem" (1994) 65 U Colo L Rev 749 at 749; For a fascinating comparative discussion long before his High Court appointment, see Stephen Gageler, "Foundations of Australian Federalism and the Role of Judicial Review" (1987) 17 *Federal Law Review* 162 at 194. As to whether the achievement of popular sovereignty cannot necessarily be equated with the success of democracy, see Robert Post, "Democracy, Popular Sovereignty and Judicial Review" (1998) 86 Cal L Rev 429 at 437; *cf* Daniel Hulsebosch, "Civics 2000: Process Constitutionalism at Yale" (1999) 97 Mich L Rev 1520 at 1548.

27 See further Stephen Gageler, "Foundations of Australian Federalism and the Role of Judicial Review" (1987) 17 *Federal Law Review* 162 at 173 for a discussion of the province of "the People" as that of the "ordinary political process"; see also C A Hereshoff Bartlett, "The Sovereignty of the People" (1921) 37 *Law Quarterly Review* 497 at 501.

28 Denis J Galligan, "The Sovereignty Deficit of Modern Constitutions" (2013) 33(4) *Oxford Journal of Legal Studies* 703.

29 *McCloy v New South Wales* (2015) 89 ALJR 857 at [45], *per* French CJ, Kiefel, Bell and Keane JJ.

30 Denis J Galligan, "The Sovereignty Deficit of Modern Constitutions" (2013) 33(4) *Oxford Journal of Legal Studies* 703 at 705.

Commonwealth[31] ("*ACTV*") and the contemporaneous *Nationwide News v Wills*[32] were watershed decisions in this regard.

11 In giving the Sir Maurice Byers Memorial Lecture, Stephen Gageler[33] recounted Sir Maurice Byers QC's famous submission in *ACTV* that:[34]

> The agreement of the Australian people called the Constitution into existence and gave it substantial validity. The Commonwealth of Australia Constitution Act … gave that agreement legal form. The Constitution derives its continuing validity from the will of the Australian people … The Constitution enshrines the principles of representative and responsible government: … Section 106 preserves the existence of State Constitutions in which representative and responsible government were at the time of federation, and remain, essential characteristics … The principle of responsible government permeates the Constitution, forming part of the fabric on which the written words of the Constitution are superimposed. That principle, involving as its essential feature executive responsibility to a popularly elected legislature, has as its principal design and effect that the actual government of the State is conducted by officers who enjoy the confidence of the people … Representative and responsible government is responsive to the voice of the people … The fundamental premise of the structure of the Constitution, and in particular of the electoral processes specifically provided for by ss 7, 24, 28 and 128 and preserved in the case of State Constitutions by s 106, is the continuous ability of the Australian people as a whole to make informed judgments on matters of political significance. This necessarily involves the capacity at all times for free and unhindered public discussion on all such matters, subject to traditional and proportional limitations … A law which seeks to control the content of a communication on a matter of political significance, in the absence of some compelling justification, is therefore invalid on two grounds: first, as an interference with the free operation of the institutions and processes created or preserved by the Constitution, in particular the electoral processes required or preserved by ss 7, 24, 28, 106 and 128; secondly, as a denial of a fundamental premise on which the representative and responsible government established and preserved by the Constitution is based, viz. the ability of the Australian people to control the institutions of government through electoral processes.

12 This submission was one of the key influences in the genesis of the implied freedom of political communication jurisprudence. As

31 (1992) 177 CLR 106.
32 (1992) 177 CLR 1.
33 This was prior to his elevation as a judge to the High Court of Australia.
34 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 109–111; Stephen Gageler, "Beyond the Text: A Vision of the Structure and Function of the Constitution" (2009) 32(2) *Australian Bar Review* 138 at 139.

explained by Gageler: "[a] government which relies for the constitutional legitimacy of an exercise of legislative power on political accountability to the people of Australia cannot, in Sir Maurice's language, be allowed to commit a 'fraud on the power'".[35]

13 In *ACTV*, Mason CJ teased this out in stating:[36]

> [R]epresentatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act …
>
> Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion …

14 Without this freedom of communication, political and governmental discussion would be too impaired to allow for representative government to exist.[37] Confirming that the communication is not solely confined to those with the power to be elected or vote, Mason CJ pointed out that the freedom applied to "the people" more broadly: "all persons, groups and other bodies in the community".[38]

15 In these early cases and the *Theophanous v Herald and Weekly Times Ltd*[39] and *McGinty v Western Australia*[40] ("*McGinty*") decisions that followed, conflicting approaches across the court became evident. This conflict was in relation to whether the implied freedom was sourced in the constitutional text based on "fundamental implications of the doctrines of government"[41] or drawn "from the terms of the instrument itself"[42] or somewhere between these extremes.[43] Five years

35 Stephen Gageler, "Beyond the Text: A Vision of the Structure and Function of the Constitution" (2009) 32(2) *Australian Bar Review* 138 at 155.
36 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 138.
37 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 139.
38 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 139.
39 (1994) 182 CLR 104 at 204, *per* McHugh J.
40 (1996) 186 CLR 140 at 168, *per* Brennan CJ, at 182–183, *per* Dawson J, at 231–234, *per* McHugh J.
41 *Nationwide News v Wills* (1992) 177 CLR 1 at 69, *per* Deane and Toohey JJ.
42 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 181, *per* Dawson J.
43 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 140, *per* Mason CJ, at 231, *per* McHugh J.

on in *Lange v Australian Broadcasting Corp*,[44] in a unanimous pronouncement, the High Court resolved this discord in favour of the more textually tethered approach originally espoused by Sir Byers QC. The court held:[45]

> Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be 'directly chosen by the people' of the Commonwealth and the States, respectively …
>
> …
>
> Under the Constitution, the relevant question is not, 'What is required by representative and responsible government?' It is, 'What do the terms and structure of the Constitution prohibit, authorise or require?'
>
> …
>
> To the extent that the requirement of freedom of communication is an implication drawn from ss 7, 24, 64, 128 and related sections of the Constitution, the implication can validly extend only so far as is necessary to give effect to these sections …

The court confirmed that the freedom is not a constitutional right personally bestowed on individuals but rather operates to limit legislative or executive power, at all governmental levels, which infringe the ability of individuals, or "the people", to communicate about political and governmental matters.[46]

16 More recent cases have confirmed and further developed the concept's jurisprudential credentials. The implied freedom of political communication test has been progressively refined into separate questions concerning whether a law effectively burdens the freedom of communication about political matters and whether "the purpose of the law and the means adopted to achieve that purpose" are "legitimate" and "compatible with the maintenance of the constitutionally prescribed system of representative government".[47] The latter steps directly raise "structured" proportionality questions of suitability, necessity and adequacy which inevitably import complications such as how other

44 (1997) 189 CLR 520; see further, Adrienne Stone, "Case Note: *Lange*, *Levy* and the Direction of the Freedom of Political Communication under the Australian Constitution" (1998) 21(1) UNSW Law Journal 117.

45 *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 at 559 and 567.

46 *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 at 560.

47 *McCloy v New South Wales* (2015) 89 ALJR 857 at [2], *per* French CJ, Kiefel, Bell and Keane JJ.

societal interests are to be balanced with the communication of political ideas.[48]

17 What has also emerged is the use of the language of "popular" or "political sovereignty" to explain the ontology of the implied freedom.[49] For instance, in *Unions NSW v New South Wales*,[50] Keane J referred to it being implied "to ensure the political sovereignty of the people of the Commonwealth, who are required to make the political choices necessary for the government of the federation and the alteration of the Constitution itself".[51] The joint judgment also used similar language in noting the "sovereign power residing in the people, exercised by the representatives".[52] French CJ, Kiefel, Bell and Keane JJ in *McCloy v New South Wales*[53] referred to the role played by both "political" and "popular sovereignty" under the Commonwealth Constitution and the importance of "equality of opportunity to participate".[54] In the same decision, Gageler J emphasised the paramountcy of "equality of political power",[55] defining political sovereignty as "the freedom of electors, through communication between themselves and with their political representatives, to implement legislative and political changes".[56] What has emerged is a tendency to see the implied freedom of political communication as a condition precedent for the political sovereignty constitutionally dictated by the requirement that parliamentarians be "directly chosen by the people".

III. The people and electors

> [Section 7:] The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate …

48 See, *eg*, the recent more "structured" approach to proportionality in *McCloy v New South Wales* (2015) 89 ALJR 857 at [2]; see also *Monis v The Queen* (2013) 249 CLR 92; *Unions New South Wales v New South Wales* (2013) 252 CLR 530; *Tajjour v New South Wales* (2014) 254 CLR 508.

49 See James Stellios, *Zines's The High Court and the Constitution* (The Federation Press, 2015) at p 601.

50 *Unions New South Wales v New South Wales* (2013) 252 CLR 530.

51 *Unions New South Wales v New South Wales* (2013) 252 CLR 530 at [104]; and also at [135], [146] and [158]. Keane J used similar phraseology in *Tajjour v New South Wales* (2014) 254 CLR 508 at [196]. Note also an early application of the term "political sovereignty" in Stephen Gageler, "Foundations of Australian Federalism and the Role of Judicial Review" (1987) 17 *Federal Law Review* 162 at 195.

52 *Unions New South Wales v New South Wales* (2013) 252 CLR 530 at [17], *per* French CJ, Hayne, Crennan, Kiefel and Bell JJ.

53 (2015) 89 ALJR 857.

54 *McCloy v New South Wales* (2015) 89 ALJR 857 at [45].

55 *McCloy v New South Wales* (2015) 89 ALJR 857 at [271].

56 *McCloy v New South Wales* (2015) 89 ALJR 857 at [216].

> …
>
> [Section 24:] The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.
>
> The number of members chosen in the several States shall be in proportion to the respective numbers of their people …[57]

18 For Akhil Amar, the "denominator problem"[58] is defining who constitutes "the people". Are "the people" in Australia none other than "the electors"? While simplicity might recommend it, and while "the people" do act via the franchise, traditionally it has not been seen as possible to equate "the people" with the electors who vote because of the members of the population who are excluded from the franchise. Accordingly, "the people" come to act via the franchise with those enfranchised acting in "the people's" name.[59] As McTiernan and Jacobs JJ explained in *Attorney-General (Cth), ex rel McKinlay v Commonwealth*[60] ("*McKinlay*"), "[t]o say that 'people' means 'electors' or 'enfranchised subjects' is erroneous because it takes account only of the enfranchised subjects regarded individually but no account of the body of subjects regarded collectively as a unity".[61] The constitutional text does tend to obfuscate. Section 41 refers to "electors" rather than "people".[62] Section 24 recognises this Janus-like aspect in recognising "the people" as both the electors and as part of the wider body politic,[63] as does covering cl 5,[64] (but not always so as to include the people in Australia's territories).[65] Such disparities also emerge in the constitutional reform provision of s 128, which limits inclusion of "the people" of the Territories to the overall majority count.[66]

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57 Constitution of the Commonwealth, ss 7 and 24.

58 Akhil Reed Amar, "The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem" (1994) 65 U Colo L Rev 749 at 750.

59 See Elisa Arcioni, "The Core of the Australian Constitutional People – 'The People' as the 'The Electors'" (2016) 39(1) UNSW Law Journal 421 at 424–425 and 427.

60 (1975) 135 CLR 1.

61 *Attorney-General (Cth), ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 35–36.

62 *Attorney-General (Cth), ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 44, *per* Gibbs J.

63 *Attorney-General (Cth), ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 36, *per* McTiernan and Jacobs JJ.

64 James Stellios, *Zines's The High Court and the Constitution* (The Federation Press, 2015) at p 597.

65 Elisa Arcioni & Adrienne Stone, "The Small Brown Bird: Values and Aspirations in the Australian Constitution" (2016) 14(1) *International Journal of Constitutional Law* 60 at 68.

66 Constitution Alteration (Referendums) 1977 (Act 84 of 1977); see also Elisa Arcioni & Adrienne Stone, "The Small Brown Bird: Values and Aspirations in the

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19 There is, however, an argument that voting reform has meant that the discrepancy between "the people" and the electors can be overplayed. French CJ in *Rowe v Electoral Commissioner*[67] ("*Rowe*"), for instance, highlighted that the impervious expansion of the franchise means that, inevitably, the gap between "the people" and the "electors" is much smaller than it once was and "leaves little relevant room for distinguishing between 'the people' and those entitled to become electors".[68]

A. The people, participation and the franchise

20 The "directly chosen by the people" imperative in ss 7 and 24 were an obvious source for those endeavouring to enrich the very limited constitutional rights in Australia bestowed by the Commonwealth Constitution. In requiring that "Senators" or the "House of Representatives" be "directly chosen by the people", the assumption was that this might restrict the Commonwealth Parliament's electoral powers under ss 8, 9, 16, 29, 30, 31 and 34 of the Commonwealth Constitution and the interrelated legislative power in s 51(xxxvi) to make laws where the Constitution contemplates that the Parliament might "otherwise [legislatively] provide". The High Court was, however, initially conservative in its interpretation of ss 7 and 24 and deferential to the Commonwealth Parliament's ability to determine the franchise and the electoral system employed.

21 In *R v Pearson, ex parte Sipka*,[69] the High Court had shied away from interpreting s 41:

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

as granting a direct constitutional right to vote to an "adult person", confirming the constitutional worth of the provision as "spent".[70] Challenges seeking to find a guarantee of one vote, one value implicit in

Australian Constitution" (2016) 14(1) *International Journal of Constitutional Law* 60 at 68.

67 *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

68 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [21].

69 *R v Pearson, ex parte Sipka* (1983) 152 CLR 254; *cf* Anne Twomey, "The Federal Constitutional Right to Vote in Australia" (2000) 28 *Federal Law Review* 125.

70 *R v Pearson, ex parte Sipka* (1983) 152 CLR 254 at 280, *per* Brennan, Deane and Dawson JJ.

the "directly chosen by the people" requirement were rejected[71] (extreme malapportionment aside)[72] as were arguments seeking to impose stringent limits on Australian parliamentary control of electoral method or design.[73] As Gleeson CJ explained in *Mulholland v Australian Electoral Commission*,[74] the constitutional mandate in ss 7 and 24 "imposes a basic condition of democratic process, but leaves substantial room for parliamentary choice, and for change from time to time".[75]

22 In cases like *McKinlay*[76] and *McGinty*,[77] some judges confirmed in *obiter dicta* that the franchise could not depart from "universal adult suffrage",[78] however, this position was not unanimous.[79] A decade on, and with "affinity"[80] to the developments with the implied freedom of political communication, the cases of *Roach v Electoral Commissioner*[81] ("*Roach*") and then *Rowe* saw the High Court use the "the directly chosen by the people" imperative to invalidate electoral laws. This occurred not as a consequence of a direct constitutional right to a vote held by "the people" but as an implied limit on Commonwealth electoral legislation drifting from the "directly chosen by the people" dictate.

23 In *Roach*,[82] a Commonwealth electoral amendment sought to deny the vote to all prisoners regardless of the length of their sentence. A majority of the High Court (4:2) struck down the amendment, in not

71 *Attorney-General (Cth), ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; *McGinty v Western Australia* (1996) 186 CLR 140.

72 *Attorney-General (Cth), ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 36–37, *per* McTiernan and Jacobs JJ, at 61, *per* Mason J, at 69, *per* Murphy J; *McGinty v Western Australia* (1996) 186 CLR 140 at 222–223, *per* Gaudron J.

73 *Attorney-General (Cth), ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 56, *per* Stephen J; *McGinty v Western Australia* (1996) 186 CLR 140 at 182, *per* Dawson J, at 220, *per* Gaudron J, at 236, *per* McHugh J; *Langer v Commonwealth* (1996) 186 CLR 302 at 317, *per* Brennan CJ, at 333, *per* Toohey and Gaudron JJ, at 341, *per* McHugh J, at 349, *per* Gummow J; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 189–191, *per* Gleeson CJ, at 206–207, *per* McHugh J, at 237, *per* Gummow and Hayne JJ, at 254–255, *per* Kirby J.

74 (2004) 220 CLR 181.

75 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 190–191.

76 *Attorney-General (Cth), ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 36, *per* McTiernan and Jacobs JJ, at 69, *per* Murphy J.

77 *McGinty v Western Australia* (1996) 186 CLR 140 at 166, *per* Brennan CJ, at 201, *per* Toohey J, at 222, *per* Gaudron J.

78 *Attorney-General (Cth), ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 36, *per* McTiernan and Jacobs JJ.

79 *Attorney-General (Cth), ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 19, *per* Barwick CJ, at 44, *per* Gibbs J, at 57, *per* Stephen J, at 62, *per* Mason J.

80 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [86], *per* Gummow, Kirby and Crennan JJ.

81 (2007) 233 CLR 162 at [86], *per* Gummow, Kirby and Crennan JJ.

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

distinguishing between serious and minor offending, as being not for a "substantial reason" that was "reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government".[83] Gummow, Kirby and Crennan JJ noted:[84]

> [I]n the federal system established and maintained by the *Constitution*, the exercise of the franchise is the means by which those living under that system of government participate in the selection of both legislative chambers, as one of the people of the relevant State and as one of the people of the Commonwealth. In this way, the existence and exercise of the franchise reflects notions of citizenship and membership of the Australian federal body politic.
>
> Such notions are not extinguished by the mere fact of imprisonment. Prisoners who are citizens and members of the Australian community remain so. Their interest in, and duty to, their society and its governance survives incarceration …

Their Honours identified the electoral process as "at the very heart of the system of government for which the Constitution provides".[85] Also in the majority, Gleeson CJ identified ss 7 and 24 as bringing about a "constitutional protection of the right to vote".[86]

24 For the dissenting judges of Hayne and Heydon JJ, the meaning of "directly chosen by the people" was not ambulatory over time, concluding that a contraction in the franchise was constitutionally permissible.[87] Heydon J expressed reticence towards any suggestion that the Commonwealth Parliament could not "wind the clock back" in retracting from a broad or near universal suffrage when "narrowing the franchise in any of these ways may be highly undesirable; it does not follow that it is unconstitutional".[88]

25 Three years after, in the "complex decision"[89] of *Rowe*,[90] the legislative window to enrol after the issue of electoral writs was significantly narrowed. New enrolments had to be lodged by 8.00pm on the day of election writs being issued and by 8.00pm three days later for

83 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [85], *per* Gummow, Kirby and Crennan JJ.
84 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [83]–[84].
85 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [81].
86 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [7]; see also *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539 at [44], *per* French CJ, Gummow, Hayne, Crennan and Bell JJ.
87 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [161], *per* Hayne J, at [179]–[180], *per* Heydon J.
88 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [180].
89 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [235], *per* Nettle J.
90 *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

those transferring electors between electorates. Once again, a majority of the court (this time, 4:3) relied on the "directly chosen by the people" mandate to invalidate the amendment so that the post-writ enrolment period reverted to the previous seven-day window, thereby allowing a further 100,000 electors to vote at the 2010 election. The complicating factor was that, unlike *Roach*, the electors were not directly disenfranchised. Instead, they were prevented from enrolling, which was a prerequisite to be able to cast a vote. The majority found that there was an effective disenfranchisement by the electoral roll cut-off periods, which were not for a substantial reason (assertions of preventing electoral fraud were not substantiated) and which were held not to be reasonably appropriate and adapted to serve an end consistent or compatible with the constitutionally required system of representative government.

26 In confirming the constitutional role played by "the people", French CJ saw the requirement of direct choice as a "constitutional bedrock"[91] which he identified as being influenced by the "durable legislative development of the franchise".[92] For French CJ, the "universal adult-citizen franchise" imposed cannot be lessened,[93] meaning that, with some exceptions (encompassing those of unsound mind or children, *etc*) the bright line between "the people" and "the electors" was fading.[94] Therefore, for French CJ to "den[y] the right to vote to any class of person entitled to be an elector … denies it to that class of 'the people'".[95]

27 Contrastingly, for the minority judges such as Hayne J, the "directly chosen by the people" requirement was more constitutionally "spare"[96] with room for parliamentary regulation and definition as circumstances require without reference to "common understanding"[97] or maximising civic participation.[98] For the minority, the fact that some people failed to enrol in line with their statutory duty to do so was beside the constitutional point.[99]

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91 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [1].
92 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [19]; see also Graeme Orr, "The Voting Rights Ratchet: *Rowe v Electoral Commissioner*" (2011) 22 *Public Law Review* 83.
93 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [18].
94 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [21].
95 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [25].
96 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [200].
97 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [266].
98 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [217] and [221]–[222]; see also Heydon J at [292]–[304] and Kiefel J at [405]–[421].
99 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [225], *per* Hayne J, at [274]–[275] and [284], *per* Heydon J, at [402] and [488], *per* Kiefel J.

28 Even more recently, in *Murphy v Electoral Commissioner*[100] ("*Murphy*"), the High Court effectively rejected any suggestion that "maximising participation" could be a constitutional sword used to challenge electoral practice. In *Rowe*, a differently composed bench invalidated a legislative reversal of electoral legislation seen to contravene the constitutional mandate. In distinguishing the holding in *Rowe*, the judges in *Murphy* denied the imposition on the Commonwealth Parliament of an obligation to legislate to enhance the mandate. In *Murphy*, it was unsuccessfully argued that technological advancements meant that electoral enrolment should be possible right up to polling day (or that the period during which the electoral roll could not be altered should be determined by counting back from election day). This submission was contrary to the well-established post-writ seven-day enrolment period and the court found, across six separate judgments, that the plaintiff was attempting to give the interpretations in *Roach* and *Rowe* an overreach.[101] While the court confirmed the limiting role played by ss 7 and 24[102] and the "political sovereignty" of the people,[103] the challenge in *Murphy* was found to be misplaced.

29 In *Murphy*, the impugned provisions were bread and butter-style electoral legislative provisions and were clearly a weak basis for grounding any significant expansion in Australian electoral entitlements. However, several interesting observations emerged. For Keane J, the place of ss 7 and 24 needed to be approached with care and not as a "'sans-culottes' frenzy of … political will".[104] His Honour explained:[105]

> While it is not to be supposed that the Parliament may impede the making of the choice by the people contemplated by ss 7 and 24 of the Constitution, to say this is not to postulate a theoretical ideal of representative democracy by which the measures enacted by Parliament are to be judged. It is not permissible to deduce from one's 'own prepossessions' of representative democracy a set of irreducible standards against which the validity of Parliament's work may be tested …

100 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027.
101 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [39] and [42], *per* French CJ and Bell J.
102 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [33], *per* French CJ and Bell J, at [87], *per* Gageler J, at [244], *per* Nettle J, at [262], *per* Gordon J.
103 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [176], *per* Keane J.
104 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [186].
105 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [177]; see also similar reticence of Nettle J at [243] and [254] and Gordon J at [262].

The constitutional gate was therefore shut to *Murphy*-like claims directed at the "integral and unremarkable elements of an electoral system".[106]

30 For Gageler J, the importance of the equitable distribution of "political power" was detailed[107] and the role for judicial review, exemplified by *Rowe* and *Roach*, in enforcing any exercise of electoral legislative power against minorities or minority interests.[108] Gordon J, like Keane J, thought that "subject to limitations deriving from the text and structure of the Constitution", the Commonwealth Parliament has considerable discretion to regulate electoral design.[109]

31 These comments, to varying degrees, do qualify the constitutional protection given to "the people" under the Commonwealth Constitution. For instance, Gordon J particularised that the constitutional mandate, while protecting a gouging of the franchise,[110] does not impute a numbers game and even the decision of "a large proportion of the enrolled population" to refrain from voting would not fall short of the requisite requirement.[111] The case hints at a cooling in the fervency of the "directly chosen by the people" requirement. It is likely that the current High Court bench will be more deferential to Parliament's ability to legislate in the electoral context. This is not to say, however, that the political sovereignty of the people lacks any constitutional safeguards. As Gageler J highlights in *Murphy*, judicial intervention may get the green light if equality of political participation is threatened by legislative erosion.[112]

B. The people and the states?

32 While this article has a decidedly federal constitutional focus, it would be remiss not to touch briefly on the relevance of the state constitutions to the constitutional concept of "the people". The Commonwealth Constitution contemplates in s 106 that the various state constitutions, across the six constituent states, would continue to have effect post-federation. For instance, for Western Australia, the Constitution Act 1889 in s 73(2)(c) imposes entrenched manner and form limitations on a Western Australian parliamentary bill that

106 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [204], *per* Keane J.
107 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [87].
108 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [93], [95] and [106]–[107].
109 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [263].
110 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [321].
111 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [315].
112 Interestingly, in *Alqudsi v The Queen* (2016) 90 ALJR 711 at [133], *per* Gageler J, jury service was seen as a key aspect of civic participation and as shaping the Commonwealth jury trial provision in s 80 of the Commonwealth Constitution.

"expressly or impliedly provides that the Legislative Council or the Legislative Assembly shall be composed of members other than members chosen directly by the people". It also allows voters to challenge non-compliance with such requirements.[113] As well as potentially imposing, post-*Roach*/*Rowe*, some limitations on parliamentary alterations to the franchise, the entrenched nature of s 73(2)(c) has also been identified as a basis for sourcing an implied freedom of political communication at the Western Australian constitutional level.[114]

IV. The people – Conceptual limits and possibilities

'But the Courts will take no notice of the will of the electors.'[115]

33 The constitutional concept of "the people" and "political sovereignty" in Australia comes to life through the implied freedom of political communication jurisprudence and the plethora of recent franchise cases. "The people" can discuss, protest and write about political matters and vote at elections and referendums, but the risk is that the Commonwealth Parliament will hollow out the ability to participate in these activities. The obvious response to this is that the High Court acts as the final check and can strike down legislation that contravenes the dictates of ss 7 and 24 of the Commonwealth Constitution. While this is certainly true, uncertainties remain. Is judicial review in this context "counter-majoritarian"?[116] Should it be left to "the people" to remove representatives who enact unfavourable legislation at the ballot box? The difficulty, of course, is that the "hollowing-out" might prevent "people" from being classed as "electors" in the first place and therefore able to bring about this removal. Majoritarian concerns might themselves point towards the need for judicial review.[117]

113 Constitution Act 1889 (WA) s 73(6).

114 *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 236, *per* Brennan J.

115 Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan & Co, 8th Ed, 1927) at pp 71–72.

116 Alexander M Bickel, *The Least Dangerous Branch – The Supreme Court at the Bar of Politics* (Bobbs-Merrill, 1962) at p 16; see also Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) at p 291, Adrienne Stone, "Judicial Review without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review" (2008) 28(1) *Oxford Journal of Legal Studies* 1 and Murray Wesson, "Crafting a Concept of Deference for the Implied Freedom of Political Communication" (2016) 27 *Public Law Review* 101.

117 Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) at pp 291 and 296–298.

34 Gageler was pondering such issues long before his appointment to the High Court.[118] In an early paper, he surmised that the electoral process and its primacy as a check on government takes the pressure off the courts constantly "mapping out rigid lines of demarcation"[119] while ensuring that the Judiciary can step in when "the limitations of the political process" surface.[120] Judicial deference must therefore be put to one side when the tyranny of the majority means that the interests of under-represented citizens are not being legislatively respected.[121] He expanded these observations some years later to reflect on the particular role played by ss 7 and 24 in protecting the franchise and the freedom of political communication. And, particularly, the need for heightened judicial alertness when the interests of parliamentarians and the populace do not necessarily align:[122] "[y]ou see judicial deference as appropriate where political accountability is inherently strong. You see judicial vigilance as appropriate where political accountability is either inherently weak or endangered".[123]

35 Ultimately, for Gageler, "the underlying purpose of the Constitution" becomes to "enlarge the powers of self-government of the people of Australia" through the mechanism of "politically accountable" "institutions".[124] Nearly 30 years later, in *Murphy*, Gageler J explained the outcomes in the decisions of *Roach* and *Rowe* on this basis.[125]

36 The difficulty is ensuring the High Court's gatekeeping role does not become too politicised in the process of ruling on when the "directly chosen by the people" proscription is contravened. This was particularly evident across the majority and minority in *Rowe* as to how much "representative" content could be read in by the court to the "directly chosen by the people" mandate. This is rendered all the more

118 Stephen Gageler, "Foundations of Australian Federalism and the Role of Judicial Review" (1987) 17 *Federal Law Review* 162 at 197.

119 Stephen Gageler, "Foundations of Australian Federalism and the Role of Judicial Review" (1987) 17 *Federal Law Review* 162 at 197.

120 Stephen Gageler, "Foundations of Australian Federalism and the Role of Judicial Review" (1987) 17 *Federal Law Review* 162 at 197.

121 Stephen Gageler, "Foundations of Australian Federalism and the Role of Judicial Review" (1987) 17 *Federal Law Review* 162 at 197.

122 Stephen Gageler, "Beyond the Text: A Vision of the Structure and Function of the Constitution" (2009) 32(2) *Australian Bar Review* 138 at 154–155. The parallels with the work of John Ely here are noteworthy: John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) at p 103; see also Luke P McLoughlin, "The Elysian Foundations of Election Law" (2009) 82 Temp L Rev 89.

123 Stephen Gageler, "Beyond the Text: A Vision of the Structure and Function of the Constitution" (2009) 32(2) *Australian Bar Review* 138 at 152.

124 Stephen Gageler, "Beyond the Text: A Vision of the Structure and Function of the Constitution" (2009) 32(2) *Australian Bar Review* 138 at 151.

125 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [107].

vexed when "the people" themselves do not necessarily agree about these things.[126] When is the constitutional line crossed so as to impair the constitutional system of government prescribed by the Constitution and how is subjectivity avoided in this determination and the application of proportionality or structured proportionality approaches?[127] For example, following *Roach*, Graeme Orr and George Williams noted the difficulty of delineating "any principled reason for drawing the line at a particular point to support or deny disenfranchisement".[128] However, constitutional rigidity is unlikely to be the redeemer in such a situation when political and constitutional circumstances do inevitably alter.

37 These issues are not readily resolvable for or by "the people", at least if bright constitutional lines are sought. However, structured proportionality, for all its faults, does provide a mechanism for transparently laying out the reasoning of the court. The next battleground is likely to concern the utility of "principled balancing" of the kind raised by Gageler J, influenced by the writing of Aharon Barak and earlier approaches of Mason CJ[129] and Gleeson CJ,[130] which shapes the inquiry at large so that it "cleaves to the reasons for the [constitutional] implication"[131] providing greater (but far from definitive) guidance as to when judicial deference must give way to the constitutional demands of political sovereignty. As Gageler J detailed:[132]

> [F]idelity to the reasons for the implication is in my view best achieved by ensuring that the standard of justification, and the concomitant level or intensity of judicial scrutiny, not only is articulated at the outset but is calibrated to the degree of risk to the system of representative and responsible government established by the Constitution …

126 Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) at p 294.

127 Jeremy Kirk, "Constitutional Guarantees, Characterization, and the Concept of Proportionality" (1997) 21 *Melbourne University Law Review* 1 at 17; *McCloy v New South Wales* (2015) 89 ALJR 857 at [141]–[154], *per* Gageler J; *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [101], *per* Gageler J, at [299], *per* Gordon J.

128 Graeme Orr & George Williams, "The People's Choice: The Prisoner Franchise and the Constitutional Protection of Voting Rights in Australia" (2009) 8(2) *Election Law Journal* 123 at 138.

129 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 143–144.

130 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200.

131 *McCloy v New South Wales* (2015) 89 ALJR 857 at [150].

132 *McCloy v New South Wales* (2015) 89 ALJR 857 at [150]; see also *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [101], *per* Gageler J.

V. Conclusion

38 For Australian constitutional law, "the people" has been described as a "vague but emotionally powerful abstraction"[133] which "defies being diced or squashed to fit within a judicially constructed box".[134] Without a doubt is the constitutional richness of the concept. Since 1901, the Australian High Court has drawn from the "directly chosen by the people" phrase to create a constitutional capstone for the Australian governmental and institutional framework. It guides not only the boundaries of the franchise and the constitutional legitimacy of legislative measures that tread on the airing of political ideas, but becomes the key constitutional foundation for reading and interpreting the Commonwealth Constitution. Without it, "the people" can surely only ever play a make-believe constitutional role, far removed from the shadows of popular or political sovereignty.

133 *Langer v Commonwealth* (1996) 186 CLR 302 at 342, *per* McHugh J.
134 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [89], *per* Gageler J.