Constituent Power and the Commonwealth Constitution: A Preliminary Investigation

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Abstract

The concept of constituent power — with its connotations of revolutionary political change — does not appear to be a natural fit with the Australian constitutional tradition. Recent discussions of constituent power, however, define it in broad terms as the power to create or fundamentally alter a constitution. This wide definition suggests that any constitutional settlement, inclusive of the *Commonwealth Constitution*, would involve both initial and potentially ongoing exercises of constituent power. It is in this context that public law scholars have started to introduce the concept, or close equivalents, into Australian constitutional discourse. In this article, we argue that the initial impression of lack of fit should nonetheless be taken seriously. At least currently, the concept of constituent power can only be applied to Australia's constitutional circumstances with significant caution and several qualifications.

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I Introduction

Constituent power — the power to create or fundamentally amend a constitution — is an increasingly prevalent concept in contemporary public law theory.[1] At least until recently, however, the concept has been notable mostly for its absence in Australian public law discourse.[2] Australia's British legal heritage is the most obvious explanation. At least since the Restoration and the 1688 Revolution, the proposition that a constitution is the product of an extra-constitutional constituent people has been distinctly alien to a British public law tradition structured around the common law and the sovereignty of the Crown-in-Parliament.[3] In terms of its colonial history, Australia did not have a revolutionary founding moment of self-assertion akin to that in the United States, and indeed the *Commonwealth Constitution* of 1901 was legally enacted in 1900 as an Act of the United Kingdom Imperial Parliament.

The framers of the *Commonwealth Constitution* were nonetheless far from free of American influences.[4] In addition, while there are obstacles to the application of constituent power to Australia's constitutional circumstances, the claim that the *Constitution* is grounded in popular sovereignty has some historical warrant and is now doctrinally orthodox. As we explore below, the process leading to Federation included popular election (for the time) of delegates to the Conventions, and subsequent endorsement of the constitutional text by the peoples of the colonies.[5] At the textual level, the *Constitution* refers to the people of the various colonies in its Preamble, stipulates that members of the Senate and House of Representatives (ss 7 and 24) must be 'directly elected' by the people, and also requires the approval of electors as a decisive part of the constitutional amendment process (s 128). These provisions have, in turn, served as the textual basis for the High Court of Australia's conclusion, first developed in the implied freedom of communication cases of the early- to mid-1990s (following the *Australia Acts* in 1986), that the *Constitution* derives its ultimate authority from popular sovereignty. If constituent power is the constitutional manifestation of the idea of popular sovereignty, then it might seem but a short step to the conclusion that the concept applies to the *Constitution* after

1 Important recent contributions include: Andrew Arato, *The Adventures of the Constituent Power: Beyond Revolution* (Cambridge University Press, 2017); Joel Colón-Ríos, *Constituent Power and the Law* (Oxford University Press, 2020); Lucia Rubinelli, *Constituent Power: A History* (Cambridge University Press, 2020).

2 There are no references to constituent power, and only one reference to constituent peoples, in the index of Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018). Aroney's chapter refers to constituent states, peoples, and colonies: Nicholas Aroney, 'Design' in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 727.

3 See Martin Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in Martin Loughlin and Neil Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007) 27. For recent advocacy of the reintroduction of constituent power into United Kingdom public law doctrine, see Alan Greene, 'Parliamentary Sovereignty and the Locus of Constituent Power in the United Kingdom' (2020) 18(4) *International Journal of Constitutional Law* 1166.

4 Aroney (n 2) 730, 745–6, 750; Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2011) 16.

5 Saunders (n 4) 11–12.

all. It is against this background that Australian public law scholars have started to introduce constituent power, or close equivalents of the idea, into their analyses.[6]

This article offers the first systematic and detailed examination of the applicability of constituent power to the *Commonwealth Constitution*. The interest of our analysis extends beyond the few recent tentative appearances of constituent power into Australian public law scholarship. Constituent power has an increasingly central place in debates about the foundations of public law worldwide, from Europe, the Middle East, Africa and Latin America.[7] Advocates of constituent power point to its capacity to reawaken the democratic promise of constitutional settlements, which partly explains some of the renewed interest in the concept. If it should turn out there are reasons why there has been little uptake of the concept in Australia, then it is instructive to consider not only why this is the case, but also what this says both about the Australian constitutional tradition and constituent power itself.

Constituent power is undoubtedly a 'liminal' concept, in the sense that it traverses clear distinctions between politics and law, fact and norm, and extra-legality and legality.[8] As a consequence, one could examine the concept from several points of view. One might, for example, assess the relevance and public acceptance of the concept within Australian political discourse. A further possibility would be to consider constituent power from an explicitly normative perspective, framing it as an evaluative guideline for the assessment of existing practice, regardless of its limited presence in Australian political and legal debates. Our primary concern here, however, is the juridical application of constituent power to Australia's constitutional circumstances. This explains two aspects of our approach. First, after its theoretical contextualisation of the idea of constituent power, the article engages closely with High Court judgments, judicial opinion and Australian public law scholarship. Second, and precisely insofar as the High Court has not been inclined (or not had occasion) to discuss constituent power directly, the article frames its discussion of constituent power by reference to the closely-related — but conceptually broader — topic of popular sovereignty.

The structure of the article is as follows. Part II provides a brief critical overview of the history and theory of constituent power. This background is necessary for a proper appreciation of the status of constituent power in Australia, which is introduced in Part III. In Part IV, we then consider the concept of constituent power in relation to High Court jurisprudence on popular sovereignty, with close reference to the implied freedom of political communication and the franchise cases.

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6 Elisa Arcioni, 'The Core of the Australian *Constitution*al People: "The People" as "The Electors"' (2016) 39(1) *University of New South Wales Law Journal* 421; Benjamin B Saunders and Simon P Kennedy, 'Popular Sovereignty, "the People" and the *Australian Constitution*: A Historical Reassessment' (2019) 30(1) *Public Law Review* 36.

7 For constituent power across jurisdictions, see Richard Stacey, 'Constituent Power and Carl Schmitt's Theory of *Constitution* in Kenya's Constitution-Making Process' (2011) 9(3–4) *International Journal of Constitutional Law* 587; Joel Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge, 2012); Andrew Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford University Press, 2016).

8 Ernst-Wolfgang Böckenförde, 'The Constituent Power of the People: A Liminal Concept of Constitutional Law [1986]' in Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory: Selected Writings*, ed Mirjam Künkler and Tine Stein, tr. Thomas Dunlap (Oxford University Press, 2017) 169.

The conclusion of our argument is that — notwithstanding some recent attempts to give the notion greater prominence — constituent power currently remains an uneasy fit with the Australian constitutional tradition. Further, while it cannot be ruled out that this tradition will evolve, or that the High Court might at some stage adopt the language of constituent power, this would represent a significant shift.

II Constituent Power in Historical and Theoretical Perspective

Both the meaning and the normative implications of the concept of constituent power are contested. While some theorists have postulated an exercise of constituent power as a necessary condition for democratic constitutional legitimacy, others have argued for its reconceptualisation, and still others for its rejection altogether.[9] In order to understand these debates, and their relevance to Australia's constitutional tradition, it is helpful to outline some key landmarks in the emergence and development of the concept of constituent power.

Despite anticipations in conciliarism, English civil war debates, early modern Huguenot writings on the right of resistance, and elsewhere, the idea of constituent power was first developed explicitly during the American and French Revolutions.[10] Constituent power hence arose in conjunction with the modern achievement of constitutionalism, whereby a constitution is understood as the higher positive law — emanating from the people or the Nation — that establishes a comprehensive and universal regulation of legitimate political rule.[11] Histories of constituent power generally grant centre stage to Sieyès and Schmitt. Both theorists — writing against the background of the imminent French Revolution and the crisis of the *Weimar Constitution* respectively — underline the legally-unlimited nature of constituent power as a disruptive force that sits outside positive law.

Sieyès characterised constituent power (*pouvoir constituant*) as the fundamental power of the Nation to establish a constitution.[12] Recent scholarship has sought to correct one-sided interpretations of Sieyès as a proponent of constituent power as an arbitrary force of national will unbound by legal constraints. Sieyès, on this corrective reading, deployed constituent power ultimately in order to tame assertions of unlimited sovereignty and advocate for the limited and representative government of the constituted powers.[13] Rather than identifying

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9 For examples of these positions on constituent power, see (respectively) Colón-Ríos (n 7); Arato (n 1); David Dyzenhaus, 'The Politics of the Question of Constituent Power' in Martin Loughlin and Neil Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007) 129.

10 Lee traces the idea to Monarchomach arguments from the late 16th century: Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford University Press, 2016) 143. On the history of constituent power, see also Joel Colón-Ríos, 'Five Conceptions of Constituent Power' (2014) 130(Apr) *Law Quarterly Review* 306; Martin Loughlin, 'The Concept of Constituent Power' (2014) 13(2) *European Journal of Political Theory* 218; Rubinelli (n 1).

11 Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press, 2016) 43.

12 Emmanuel Joseph Sieyès, 'What is the Third Estate'? [trans of: *Qu'est-ce que le Tiers-État*] in *Sieyès: Political Writings*, ed Michael Sonenscher (Hackett, 2003) 136.

13 See Lucia Rubinelli, 'Taming Sovereignty: Constituent Power in Nineteen-Century Political Thought' (2018) 44(1) *History of European Ideas* 60; Lucia Rubinelli, 'How to Think Beyond

constituent power with sovereignty, this reading suggests, Sieyès endeavoured to restrict the exercise of *pouvoir constituant* to representatives commissioned to make a constitution on behalf of the Nation. In his famous 1789 pamphlet written in the early stages of the French Revolution, 'What is the Third Estate?', Sieyès nonetheless argued that the Nation has the right to give itself whatever constitution it pleases. For Sieyès, a Nation is formed solely by natural law. From a juridical perspective, it 'exists prior to everything' and 'is the origin of everything'.[14] In this sense, a pre-constitutional Nation is unbound from all legal constraints and 'can never have too many possible ways of expressing its will'.[15] From the perspective of the will of the Nation, that is to say, every civil form is good.[16] As merely constituted powers, by contrast, the legislature and the executive are a derivative product of 'mere' positive law.

Sieyès' extravagant revolutionary rhetoric informed Schmitt's influential Weimar period account of constituent power (*verfassungsgebende Gewalt*). Schmitt defines constituent power as 'the political will (*politische Wille*), whose power or authority (*Macht oder Autorität*) is capable of making the concrete, comprehensive decision (*Gesamtentscheidung*) over the type and form of its political existence'.[17] Like Sieyès, Schmitt foregrounds the capacity of a unified people or Nation to make a free political decision unbound from any determinate constitutional forms and normative or abstract conception of justice.[18] Importantly, Schmitt does not restrict exercises of constituent power either to liberal-democratic constitutional regimes as outcomes or to the people as bearers. For Schmitt, indeed, constituent power remains popular (and democratic in his sense as based on the identity of ruler and ruled) when it establishes a Caesarist or a populist authoritarian regime. In such kinds of regime, a charismatic individual or elite might better represent the will of the people than an elected legislature.[19]

An exclusive focus on the theories of Sieyès and Schmitt could nevertheless paint a distorted picture of constituent power. For while it is always possible for constituent power to be exercised in an arbitrary manner, it is now more often associated with democratic theories of constitutional legitimacy. As Rubinelli has argued, the apparently uncontroversial thesis that the modern state rests on the principle of popular sovereignty has no uniform meaning, or is at least subject to several competing interpretations. Constituent power, according to Rubinelli, provides a 'language' for articulating the principle of popular power.[20] This framing of the distinction between popular sovereignty and constituent power is instructive, and we assume a similar explanatory model in what follows. Rubinelli's analysis suggests that popular sovereignty should be understood in terms of the broad

Sovereignty: On Sieyès and Constituent Power' (2019) 18(1) *European Journal of Political Theory* 47.

14 Sieyès (n 12) 136.

15 Ibid 138.

16 Ibid.

17 Carl Schmitt, *Constitutional Theory*, ed and tr Jeffrey Seitzer (Duke University Press, 2008) 125.

18 Ibid 136.

19 Hence Schmitt's notorious claim that the 'natural form of the direct expression of a people's will is the assembled multitude's declaration of their consent or their disapproval, the *acclamation*': ibid 131 (emphasis in original).

20 Rubinelli (n 1) 1, 17.

proposition that all legitimate public power ultimately derives from the agency of the people. Constituent power, by contrast, is a specific application of the idea of popular sovereignty to the creation or fundamental amendment of a constitution. This approach ties constituent power directly to its status as a contested tenet of modern constitutionalism, distinguishable from the more general idea that public power ultimately has a popular or democratic origin.

Our approach is hence consistent with important recent work arguing that constituent power — despite its continued association with extra-legal revolutionary political change — is readily amenable to juridical analysis.[21] As Colón-Ríos has argued, constituent power may be channelled through law in its exercise and often serves to limit the power of ordinary law-making institutions through the distinction between constituent and constituted powers.[22] It is nonetheless also important, we argue, to distinguish between the descriptive and normative dimensions of constituent power.[23] An acknowledgment that constituent power is amenable to a 'juridical'[24] analysis does not, of course, mean that it is invariably exercised in conformity with the standards of modern liberal constitutionalism. The same point applies to Colón-Ríos' attempt to distance constituent power from voluntaristic theories of sovereignty and his restriction of constituent power to exercises of constitution-making that respect the express terms of the people's commission, the rule of law, and the separation of powers.[25]

If one grants that popular sovereignty is the normative foundation of modern liberal democracies, then the obvious question is why some constitutional traditions have adopted the language of constituent power, while others have preferred alternative conceptualisations. On a broader definition, any constitutional settlement can be said to involve an exercise of constituent power. Constituent power is not only, as suggested above, amenable to juridical analysis, it is also generally exercised through elected representative bodies — such as conventions or assemblies, which are themselves established within a legal framework. These points certainly suggest the need to look beyond the more extravagant rhetoric of Sieyès and Schmitt. Yet, and notwithstanding the suitability of constituent power to a constitutionalist analysis, the association of constituent power with more robust or radical democratic theories of popular sovereignty that derive constitutional

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21 Prominent examples of a radical-democratic approach to constituent power are Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (University of Minnesota Press, 1999) and Andreas Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power' (2005) 12(2) *Constellations* 223.

22 Colón-Ríos (n 1).

23 See George Duke and Elisa Arcioni, 'Between Constituent Power and Constituent Authority' (2022) 42(1) *Oxford Journal of Legal Studies* 345.

24 Colón-Ríos (n 1) 8–12.

25 In this sense, Rubinelli and Colón-Ríos employ different historical-analytic approaches. Rubinelli restricts her analysis to constitutional theories that explicitly employ the phrase *pouvoir constituant*, *verfassungsgebende Gewalt*, or equivalents, starting with Sieyès' 1789 pamphlet *Qu'est-ce que le Tiers-État* (n 12). Cólon-Ríos, by contrast, assumes that constituent power can be identified in 'any [modern] juridical order', leading to a broader notion of constitution-making that traverses the distinction between original and derivative exercises to encompass the power to change fundamental legal norms: Cólon-Ríos (n 1) 1. The latter approach is prevalent in recent comparative constitutional work that engages with constituent power, but is questionable in relation to some constitutional traditions, for the reasons discussed in this article.

legitimacy from the unified extra-constitutional will of the people or Nation retains some plausibility.

Vinx has distinguished usefully in this context between stronger and weaker theories of popular sovereignty and their divergent treatment of the more specific concept of constituent power. For stronger theories of constitutional legitimacy grounded in popular sovereignty, '[t]he people as constituent power is taken to exist prior to and apart from all law, including constitutional law, and is taken to have the right to give itself whatever constitution it pleases.'[26] What is definitive for stronger theories of popular sovereignty is not so much the 'spontaneous' political action valorised by radical-democratic theories, as the idea that we can conceive of the people — and their agency — as 'external' or 'prior' to both coordination under political and legal procedures and constitutional incorporation.[27] Weaker theories of popular sovereignty, by contrast, tend to forgo talk of constituent power altogether and understand popular sovereignty as 'immanent in a framework of constitutional rules that make political leadership elective and gives equal rights of democratic participation to all citizens'.[28] The existence of a people, such theories suggest, is a function of its political and legal organisation, with the popular will always already mediated by representative institutions. Accordingly, for weaker theories of popular sovereignty the people is itself 'constituted' in the sense that it emerges through constitutional and political arrangements, such as the establishment of law-making, administrative and judicial bodies, and the enactment of rules for citizenship and voting.

Vinx's categorisation is broadly consistent with Loughlin's identification of three main approaches to constituent power. The first 'decisionistic' approach, associated with Schmitt, asserts that the people exist as a pre- or extra-constitutional unity and that its will is the ultimate source of constitutional authority.[29] The second 'relational' approach, advocated by Loughlin, argues that constituent power is 'dynamic' and postulates a dialectical interplay between the self-determining nation and its constitutional form.[30] For Loughlin, following Lindahl, an exercise of constituent power should be understood reflexively, so that 'those who claim to exercise constituent power act as an already constituted power' (that is, 'a constituent assembly or convention authorized to draft a constitution is an already

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26 Lars Vinx, 'The Incoherence of Strong Popular Sovereignty' (2013) 11(1) *International Journal of Constitutional Law* 101, 102.

27 For similar claims regarding the status of an extra-constitutional people, see Philip Pettit, 'Popular Sovereignty and Constitutional Democracy' (2022) 72(3) *University of Toronto Law Journal* 251 <https://muse.jhu.edu/article/823098>.

28 Vinx (n 26) 102. Vinx attributes this weaker view of popular sovereignty to John Rawls, *Political Liberalism* (Columbia University Press, 1993) and Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, tr William Rehg (MIT Press, 1996): Vinx (n 26) 102 n 1. For arguments suggesting that a focus upon 'founding' moments and the temporal precedence of a unified people can lead the constitutional theorist astray, see Philip Pettit, *On The People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press, 2012) 292.

29 Martin Loughlin, *The Foundations of Public Law* (Oxford University Press, 2010) 227–31.

30 Ibid 229.

constituted governmental institution').[31] In this sense, constituent power does not simply involve the exercise of power by the people, 'it simultaneously constitutes a people'.[32] Loughlin's resolution of the 'paradox' of constituent power hence denies the need for an 'extra-constitutional' people, while retaining an emphasis upon constitution-making agency. The third 'normativist' approach either denies the explanatory usefulness of constituent power altogether, or restricts it to a founding constitutional moment.[33] This third view thus has affinities with weaker theories of popular sovereignty, which tend either to ignore constituent power or subsume it within an existing framework of representative democracy.

For all the sophistication of the 'reflexive' or 'relational' view, public law theories that ascribe a central explanatory significance to constituent power also tend to articulate stronger theories of popular sovereignty, which regard the people as the bearer of an extra-constitutional agency to create or fundamentally amend a constitution.[34] This tendency is best understood by reference to what is plausibly the central motivation for ascribing a central role to constituent power. A large part of the appeal of constituent power is that it can appear to address perceived democratic deficits of liberal constitutionalism.[35] Many prevailing theories of democratic legitimacy associate 'rule by the people' with either the proceduralist constraint of representative parliamentarian decision-making, or the substantive constraint of a guarantee for fundamental political rights. From a democratic perspective, these theories are at least vulnerable to the objection that they focus excessively on the 'ordinary' level of 'daily governance', and often neglect to ask whether a constitution is the result of a democratic process and can subsequently be altered through democratic means.[36] For some democratic theorists, then, constituent power offers a way of enlivening the popular potential of constitutional settlements, reawakening the power of the people that lies dormant under strongly entrenched written constitutions, and the defaults of both negotiated decision-making by elected representatives and delegated administrative law-making.[37] Yet it is important to note that there are alternative ways of seeking to address democratic deficits in

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31 Ibid 227. See also Hans Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in Martin Loughlin and Neil Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007) 9.

32 Loughlin (n 29) 227. While Loughlin rejects the idea of a pre-constitutional people as a fixed unity, however, his view remains close to Schmitt in its derivation of constitutional law from 'real' politics and its contingencies.

33 Ibid 227–331.

34 This statement appears to remain true for both Colón-Ríos and Roznai, for example, even though their respective theories are certainly neither as 'decisionistic' as that of Schmitt, nor as radical-democratic and 'populist' as that of Negri. For representative statements, see Colón-Ríos (n 1) 284, 299–300; Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of the Amendment Powers* (Oxford University Press, 2017) 105–6.

35 In his earlier work, Colón-Ríos defines constituent power more expansively as 'the power of those living under a constitutional regime to reformulate its content democratically, free from any restrictions found in positive law': Colón-Ríos (n 7) 110. On this view, 'constituent power cannot be correctly attributed to an individual or elite': at 111.

36 Colón-Ríos (n 7) 35–7.

37 See Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge University Press, 2015). The concern discussed here is particularly pressing if one accepts a 'democratic dualism' of extraordinary founding constitutional moments and ordinary politics: see Bruce Ackerman, *We The People Volume 1: Foundations* (Harvard University Press, 1991).

contemporary constitutionalism that do not rely so heavily, or even at all, on the concept of constituent power. Two obvious examples are theories of democratic deliberation, which seek to increase communication between the public sphere and representative procedures and institutions, and contemporary republican theories, which advocate, by reference to the principle of non-domination, increased democratic control of governments by their citizens.[38]

In sum, and despite recent attempts at broad definitions and partial domestications, constituent power remains strongly associated at the normative level with a commitment to the idea of an extra-constitutional agency of the people, and often advocacy for 'some sort of challenge to the constitutional status quo'.[39] Even if one adopts a wide definition of constituent power, moreover, it matters what language a legal tradition employs to describe popular sovereignty. From this perspective, it is telling that the High Court of Australia has generally avoided the concept of constituent power and articulated a weaker view of popular sovereignty, one grounded firmly in specific constitutional provisions interpreted as expressing commitment to elective democracy and representative and responsible government. The Australian approach, we argue in what follows, is hence best associated with a weaker (and normativist in Loughlin's sense) theory of popular sovereignty. While this, of course, does not rule out the future adoption of constituent power by the High Court, it is important to appreciate the extent to which this would represent a significant departure for the Australian constitutional tradition.

III Constituent Power in Australia

For the historical and doctrinal reasons elaborated below, explicit references to constituent power are absent from the *Official Record of the Debates of the Australasian Federal Convention* ('*Convention Debates*') prior to Federation, not to mention the *Commonwealth Constitution* itself, and are rare in subsequent commentaries on the *Constitution* and High Court of Australia jurisprudence.[40] It has recently been argued, however, both that the framers of the *Constitution* implicitly held to a 'constitutive' conception of popular sovereignty in the *Convention Debates*, and that the *Constitution* itself contains provisions interpretable in terms of constituent power.[41] When these claims are placed alongside High Court jurisprudence on the implied freedom of political communication, which expressly asserts that the *Constitution* derives its authority from popular sovereignty, this motivates a closer investigation of the applicability of constituent power to Australian constitutional circumstances. Could it be that constituent power has been present in Australian constitutionalism all along, but that this was merely obscured by prevailing terminology?

If constituent power is understood as the capacity of a unified extra-constitutional people to determine its constitutional destiny through an act of political will, then there are clear obstacles for its application to Australian

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38 See Habermas (n 28); Pettit (n 27).
39 Colón-Ríos (n 10) 334.
40 For important exceptions, see nn 50–1 below.
41 Saunders and Kennedy (n 6) 48–51; Arcioni (n 6) 424.

circumstances. The *Commonwealth Constitution* was established as a federal compact by the plural peoples of the colonies and then legally enacted by the British Imperial Parliament. This British provenance should not be understated. Since the 17th century, the British tradition has downplayed the role of the constituent people in its constitutional arrangements, so that it is arguable it 'now serves no juristic function' because it has been 'entirely absorbed into the doctrine of the absolute authority of the Crown-in-Parliament to speak for the British nation'.[42] AV Dicey's assertion that the distinction between the power of a constituent assembly and of a legislative assembly belongs to 'the political phraseology of foreign countries' is a well-known expression of this point.[43]

The transference to Australia of the British commitment to common law constitutionalism is evident in most judicial statements on the source of the authority of the *Constitution* prior to the 1986 Australia Acts. These statements take as their starting point both the status of the *Constitution* as an Act of the British Imperial Parliament and Australia's common law heritage and are perhaps best exemplified by Owen Dixon's critique of the application to Australia of the American doctrine that all legitimate government properly serves as a delegated agent of the people as its principal. In words that evoke the British ambivalence about strong constituent theories of popular sovereignty noted above, Dixon argued in the mid-1930s that

> [the *Commonwealth Constitution*] is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions. In the interpretation of our *Constitution* this distinction has many important consequences. We treat our organs of government simply as institutions established by law, and we interpret their powers simply as authorities belonging to them by law.[44]

Dixon proceeded to assert that the American doctrine that it is impermissible for the ultimate power of the people to be delegated 'finds no place' in Australia's system,[45] and insisted elsewhere that the common law is 'the ultimate constitutional foundation' in Australia'.[46]

Even if one accepts the orthodoxy of Dixon's view prior to the Australia Acts, this does not dispense with the applicability of constituent power more generally. In the first instance, the doctrine that Dixon sought to deny with respect to Australian circumstances, is a robust view of popular sovereignty in which the people is understood as the inherent source of constituent authority. Notwithstanding the accuracy of Loughlin's treatment, there is a parallel tradition within British jurisprudence in which 'constituent power' was used 'to refer to the unlimited constitution-making power of Parliament with respect to the colonies, and, in some cases, to the constitution-making power of the colonial legislatures'.[47] In this respect,

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42 Loughlin (n 3) 27.
43 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 37.
44 Owen Dixon, 'The Law and the *Constitution*' (1935) 51(4) *Law Quarterly Review* 590, 597.
45 Ibid.
46 Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' in Judge Woinarski (ed), *Jesting Pilate and Other Papers and Legal Addresses* (Lawbook, 1965) 203, 205.
47 Colón-Ríos (n 10) 316.

it can be argued that the Westminster Parliament — as an assembly with both constituent and legislative jurisdiction — 'had a constituent power similar to the one ascribed to the people during the French and American Revolutions';[48] that is, one that could not be abdicated. Indeed, in *Attorney-General (NSW) v Trethowan*[49] and *Clayton v Heffron*,[50] the High Court suggested that the *Constitution Act 1902* (NSW) was the ultimate source of the New South Wales legislature's power to enact law and to amend its *Constitution*, while reiterating the requirement for Crown assent.[51]

The federal character of the Australian compact is, at least at first glance, another potential obstacle to applying the idea of the constituent power of the people to the *Commonwealth Constitution*. One concern here is that the exercise of constituent power in federations remains under-theorised due to the tendency to privilege the model of unitary states.[52] This concern would appear, however, to be mitigated if one assumes a wide notion of constituent power. If the *Constitution* is a product of constituent power, then it also a product of plural constituent acts in the colonies, which undermines any straightforwardly robust conception of the people as a unitary pre-constitutional agent. Correspondingly, if constituent power applies to all modern constitutional settlements (on the broadest definition), then federal states like Australia are polities that are constituted through the plural constitutive acts of their constituent polities.[53]

It remains the case, as discussed above in Part II, that most contemporary advocates of constituent power set out from the assumption of a stronger theory of popular sovereignty grounded in the agency of the people. Given the paucity of explicit references to constituent power in the Australian constitutional tradition, this suggests that the best way to investigate its applicability, or lack thereof, is to consider much more closely that tradition's approach to the meaning of the doctrine of popular sovereignty. This is particularly the case insofar as it is perhaps unrealistic for the High Court to have raised constituent power as a fundamental public law concept, given the relative stability of Australian political and legal history, which means that there have been limited opportunities to consider the idea. The most fruitful approach is, hence, to examine whether the now orthodox doctrine that 'constitutional norms, whatever may be their historical origins, are now to be traced

48 Ibid 317.

49 *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394, 445.

50 *Clayton v Heffron* (1960) 105 CLR 214, 245. Interestingly, in *Clayton v Heffron* Menzies J adopted the terminology of constituent power, attributing it to the Legislature of New South Wales: at 272.

51 Another rare exception to the neglect of constituent power in the Australian tradition is found in William Harrison Moore's treatise on the *Commonwealth Constitution* written shortly after Federation. Significantly, however, Moore applies the concept to place a limitation on the Australian Parliament, denying that it has 'the full constituent power,' not to uphold the agency of the people: William Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 130. We are grateful to Benjamin J Saunders for this reference. Relatedly, see Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 175; Colón-Ríos (n 10) 318.

52 Nicholas Aroney, 'Constituent Power and the Constituent States: Towards a Theory of the Amendment of Federal Constitutions' (2017) 17 *Jus Politicum: Revue de Droit Politique* 5, 6–7. See also Aroney (n 2).

53 Aroney (n 52) 7.

to Australian sources',[54] can be interpreted as at least implicitly supporting a potential commitment to constituent power.

The proposition that popular sovereignty is a normative foundation for the *Commonwealth Constitution* is well-supported textually and historically. From a textual perspective, the main provisions are the Preamble, and ss 7, 24 and 128. The Preamble refers to the agreement of the people of the colonies 'to unite in one indissoluble Federal Commonwealth'. Sections 7 and 24 both refer to the need for representatives to 'be directly chosen by the people': in the former case 'the people' refers to the different peoples of the states who are responsible for electing representatives to the Senate, in the latter case 'the people' denotes the enfranchised citizens responsible for electing members to the House of Representatives. Section 128 stipulates that the *Constitution* may be amended by the decision of a majority of electors in a majority of states and a majority of all electors voting (albeit this process is to be initiated by Parliament). While the federal character of the constitutional compact entails that 'the people' refers variously in the above provisions to: (i) the pre-constitutional colonial peoples; (ii) the peoples of the different states; and (iii) the people as citizens of the Commonwealth, this does not seem an insurmountable obstacle to the claim that the *Constitution* is grounded in popular sovereignty. For, as examples of federal states (including the United States, Germany and India) with a constitutional commitment to popular sovereignty suggest, the coexistence of several 'peoples' within a federal framework that establishes a national people is consistent with the view that political and legal authority is ultimately derived from a popular source.

From a historical perspective, there are sufficient resources to build the case that popular sovereignty has played an important role in Australian constitutionalism since the process leading to Federation. After the breakdown of initial negotiations for a federal compact and the 1891 National Australasian Convention, later efforts towards Federation 'had a more populist cast'.[55] This was reflected in the establishment of local Federation Leagues and the enactment of legislation in several of the colonies, which provided for direct election of representatives to the Federal Australasian Convention of 1897 and 1898.[56] Between June 1899 and July 1900, the final draft of the *Commonwealth Constitution* was approved in each colony by a popular vote. If one turns from the process to the recorded views of the framers, discussed more below, then the *Convention Debates* suggest that most of the

[54] *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

[55] Saunders (n 4) 11. See also John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) (Legal Books, 1976) 148–62; John Andrew La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 199–202; Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 172–6.

[56] The process, it should be noted, was far from uniform. The Western Australian Parliament chose its representatives and Queensland representatives did not attend the 1897–8 Convention: See Saunders (n 4) 11–12.

architects of the *Constitution* were committed to popular self-government through electoral representation.[57]

It may be granted, then, that the Australian constitutional tradition has a longstanding commitment to popular sovereignty of some kind. The more contentious issue is the robustness of this commitment. In their recent historical reassessment of the role of the people in the establishment and maintenance of the *Commonwealth Constitution*, Saunders and Kennedy argue that the Australian constitutional tradition includes both 'constitutive' and 'political' elements of popular sovereignty. For Saunders and Kennedy, the 'constitutive' element refers to the intention of the framers to 'create a constitutional structure that emanated from the people'.[58] The 'political' element describes the establishment of 'institutions of government through which the people would rule'.[59] While Saunders and Kennedy may appear, however, to be offering a defence of the applicability of constituent power to Australian circumstances, this would be a misreading. Indeed, despite some ambiguity, the 'constitutive' model of Saunders and Kennedy appears best understood as consistent with a weak model of popular sovereignty tied to representative government.

In the first instance, Saunders and Kennedy distinguish between: (i) a theory of popular sovereignty with a 'constitutive' element; and (ii) 'constituent power'.[60] Constituent power is defined as the view that there is 'a unified entity, which by an act of will constitutes the existence of the government'.[61] Saunders and Kennedy rightly suggest that this view is not present in the Australian tradition. The precise role played by the people in the 'constitutive' element of popular sovereignty is less clear. According to Saunders and Kennedy, the framers thought that 'the authority of "the people" lay behind the formation of the *Constitution* as well as the ongoing functioning of the institutions of government'.[62] This formulation — with its reference to 'the people' 'behind' the *Constitution* in scare quotes — leaves open whether: (i) an extra-constitutional unified people precedes the establishment of the *Constitution* (consistent with a narrower definition of constituent power); or (ii) the unity of 'the people' follows constitutional incorporation. The same equivocation seems present in the claim that the framers made a constitutional structure that 'emanates' from the people.

In any case, it is the framers who are centre stage in Saunders and Kennedy's account of Australia's process of constitutional formation, not a pre-constitutional people 'behind' the *Constitution*. It is the framers who sought to give 'effect to the people's wishes' by establishing a system in which the legislature and the executive

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57 Saunders and Kennedy (n 6) 51, citing (among other sources) *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1891, 735 (Playford) ('*Convention Debates (1891)*'); *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1897, 537 (Cockburn); *Official Report of the National Australasian Convention Debates*, Melbourne, 1898, 2198–9 (Wise); William McMillan, *Speech on the Referendum as a Mode of Settling Disputes Between the Two Houses of Parliament* (Angus and Robertson, 1896) 9–10.

58 Saunders and Kennedy (n 6) 36.

59 Ibid.

60 Ibid 50.

61 Ibid 38–9, citing Loughlin (n 29) 221.

62 Ibid 38.

would serve as 'representatives of the people'.[63] It is also the framers who adopted a process that is said to be remarkably democratic 'for the time'.[64] Saunders and Kennedy note in this context that the question of the degree to which Federation can truly be described as a 'popular process' has been controversial.[65] They also note the exclusion of most women, 'workers' and Indigenous peoples from the federation referendum process.[66] Quoting Cockburn's assessment, they nonetheless conclude that the framers believed that '[n]ever before has the instrument of government of a nation been so entirely the handiwork of the people themselves'.[67] One may concede that the power exercised originally by the framers was broadly 'constitutive' and that it reflected the wishes of the majority of the people. This is different, however, from the claim that the framers exercised constituent power on behalf of the will of a unified people. What the framers constituted on behalf of the people was, in fact, a federal structure of representative and responsible government. Within this structure, the sovereignty of the people is always exercised by representatives — consistent with weaker models of popular sovereignty — and, hence, legally incorporated within the extant federal constitutional system.

If one concentrates less upon the history of Federation, and considers popular sovereignty in light of subsequent national independence, then the path may still seem open to develop a theory of Australian constituent power grounded in contemporary assumptions. Rather than focus on the background of Federation, and the purported intentions of the framers, such an approach might seek to uncover an implicit constituent power through analysis of references to the people and electoral representation in the text of the *Commonwealth Constitution*, and in the jurisprudence of the High Court of Australia on the popular sovereignty implications of these provisions.

This approach is exemplified by Arcioni's exploration of the relationship between constituent power and the Australian constitutional people.[68] According to Arcioni, the text of the *Constitution* implicitly recognises at least two forms of original and ongoing constituent power. In the first instance, Arcioni argues, the

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63 Ibid 49.

64 Saunders (n 4) 11–12. As Saunders and Kennedy note, '[k]ey elements of this process were direct popular election of the delegates by the people of the colonies to the 1897–98 Federal Convention, and submission of the *Constitution* at referendums for the acceptance or rejection of the electors of each colony.': (n 6) 49. Saunders and Kennedy also refer, citing the *Convention Debates (1891)* (n 57) and the 1897 *Official Report of the National Australasian Convention Debates*, to the emphasis placed by many delegates (an emphasis that it is true to say only increased over time) that the *Constitution* should be 'accepted' or endorsed in referendums by the people: (n 6) 49.

65 Saunders and Kennedy (n 6) 50, citing Brian De Garis, 'How Popular Was the Popular Federation Movement?' (*Papers on Parliament* No 21, Parliament of Australia, 1993) 105; Robert Rudolph Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958) 101.

66 Saunders and Kennedy (n 6) 50. Levels of voter participation in the federation referendums differed across the colonies within the range of 39.5% to 72.6% of registered electors (which translates to between 7.9% and 36.3% of the total population): Saunders and Kennedy (n 6) 50, citing Glenn Rhodes, *Votes for Australia: How Colonials Voted at the 1899–1900 Federation Referendums* (Centre for Australian Public Sector Management, 2002) 13–14. The nationwide vote for Federation was 2.5:1 in favour: Saunders and Kennedy (n 6) 50. Women from the colonies of South Australia and Western Australia were included in the franchise in 1895 and 1899.

67 Saunders and Kennedy (n 6) 51, quoting John A Cockburn, *Australian Federation* (Horace Marshall, 1901) 73.

68 Arcioni (n 6) 423.

Preamble ascribes an original constituent power to the people that was exercised through their involvement in the Federation process.[69] Second, Arcioni identifies an ongoing constituent power in both s 128 and in ss 7 and 24. Section 128, in stipulating the process for constitutional amendment, seems best understood as prescribing the procedure for the exercise of a 'derived' or secondary constituent power. Sections 7 and 24 set out the process for the direct election by the people of representatives 'within' the governmental framework that is established under the *Constitution*. For Arcioni, these provisions should nonetheless be interpreted as reflecting a tacit understanding of the people as the ultimate source of the power underlying the structure of representative government.[70]

Arcioni also identifies a third form of constituent power by reference to High Court rulings on the franchise in *Roach v Electoral Commissioner*[71] and *Rowe v Electoral Commissioner*.[72] In these cases (discussed in much greater detail below), the Court assumes responsibility for protecting the integrity of Parliament's delimitation of the franchise by reference to the system of representative democratic government established under the *Constitution*. The *Constitution*, of course, does not itself stipulate the conditions for citizenship, but leaves this decision to democratically elected parliamentary representatives. On this basis, Arcioni suggests, the Australian people wield 'a power of collective self-definition'[73] because the electorate (as the juridical subset of the people) can decisively influence the breadth of the franchise through their role in electing the representatives who are responsible for determining the criteria for membership of the political community.[74]

Arcioni's interpretation assumes a broad understanding of constituent power, but is less revisionary than initial impressions suggest. Constituent power is defined as a 'commitment to popular involvement in the constitution-making process, which leads to "the people" being regarded as a source of authority for the constitution so made'.[75] There is little suggestion here of constituent power as an 'irruptive' political force disrupting the constitutional status quo — let alone of a unitary pre-constitutional will of the people — and in fact the definition traverses the distinction between stronger and weaker theories of popular sovereignty. The phrase 'popular involvement,' while not excluding a wide range of activities by the people, evokes in an Australian context (at least subsequent to the original constitutive moment of Federation) the mundane process of electing representatives to Parliament and intermittent participation in referenda. The effect of such a wide definition of constituent power is actually to dilute its more radical connotations. Arcioni's second and third forms of constituent power, indeed, are ultimately consistent with a weaker view of popular sovereignty, where the people as electorate choose representatives under an established constitutional system.

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69 Ibid 424.
70 Ibid 426.
71 *Roach v Electoral Commissioner* (2007) 233 CLR 162 ('*Roach*').
72 *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 39 ('*Rowe*').
73 Arcioni (n 6) 422.
74 Ibid 424.
75 Ibid.

In sum, Saunders and Kennedy, and Arcioni, operate with very broad conceptions of the constitutive or constituent power of the people, which can potentially be read down so that they accord with a weaker understanding of popular sovereignty. Neither account presupposes the idea of a unified pre-constitutional nation or people. Both accounts assume not only that constitution-making will be channelled through an assembly or convention elected by the people, but that ongoing popular participation is mediated by the representative institutions of Parliament. Saunders and Kennedy are also at pains to point out that there is no inconsistency between the framers' commitment to representative and responsible government — whereby the people rule indirectly — and the acceptance of popular sovereignty as the source of constitutional authority.[76] This undermines the suggestion that the more robust view of popular sovereignty usually associated with constituent power is applicable to Australian circumstances. Arcioni's claim that the Australian constitutional people is represented in an ongoing way by a subset of 'electors' also speaks to the integration of the power of the people within representative government. While consonant with the Australian constitutional tradition, then, these views of popular sovereignty are less robust than is typically found in advocacy of constituent power as a central explanatory concept and would ultimately seem to be reconcilable with a weaker, or even 'normativist,' understanding of the role of the people in Australia's constitutional settlement. In order to elaborate on these points, it is now time to consider more closely High Court of Australia jurisprudence on popular sovereignty in both the implied freedom of political communication and the franchise cases.

IV High Court of Australia Jurisprudence and Constituent Power

A *The High Court and Popular Sovereignty*

The High Court of Australia, in contrast to constitutional courts across jurisdictions as diverse as Germany, Kenya and Latin American nations, has rarely mentioned constituent power. This should not, however, be regarded as dispositive. As discussed above, since the Australia Acts, the High Court has expressly grounded the authority of the *Commonwealth Constitution* in popular or 'political' sovereignty.[77] If constituent power is applicable in an Australian context, as some recent scholars suggest, then perhaps this is because it can be read as an implication of the Court's treatment of popular sovereignty. The analysis of Part III above hence motivates the thought that the correct question to ask, in relation to High Court jurisprudence, is whether the court's interpretation of the Preamble and ss 7, 24, and 128, tacitly acknowledges the constituent power of the people, or rather reflects a weaker view, which subsumes the authority of the people within elected representative government.

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[76] Saunders and Kennedy (n 6) 51.

[77] The High Court's shift in terminology from 'popular' to 'political' sovereignty is discussed further in Part IV(B).

The High Court's jurisprudence on popular sovereignty was articulated most extensively in the implied freedom of political communication cases of the early- to mid-1990s. In the words of Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth*, the Court now insisted that the Australia Acts 'marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people'.[78] A selective quotation of High Court obiter dicta on popular sovereignty in the early to mid 1990's could indeed support a robust interpretation of the proposition that 'the *Constitution* now enjoys its character as a higher law because of the will and authority of the people'.[79] In *Nationwide News Pty Ltd v Wills*,[80] for example, Deane and Toohey JJ asserted that 'the powers of government belong to, and are derived from … the people'.[81] Four years later, in *McGinty v Western Australia*, McHugh J reiterated that 'the political and legal sovereignty of Australia now resides in the people of Australia'.[82] These statements unequivocally identify the people as the bearer of ultimate constitutional authority.[83] Yet a closer look at the relevant case law also suggests that Dixon's view of constitutional foundations, discussed in Part III, was not completely superseded after the Australia Acts. It is plausible, in fact, that the residual influence of Dixon's once uncontroversial and orthodox view can still be detected in the reluctance of the Court to entertain a stronger theory of popular sovereignty based on a pre-constitutional people.[84]

In this Part, we demonstrate that, scrutinised closely, both the implied freedom of political communication and the franchise cases support a weaker model of popular sovereignty. The doctrine of popular sovereignty developed by the High Court relies principally on ss 7 and 24 of the *Constitution* and, thus, reflects a repeated and overarching commitment to the principle of representative and responsible government, whereby 'the people' is understood in a juridical frame as the elector of representatives. While the incremental shift of the locus of power from

78 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 ('*ACTV*').

79 GJ Lindell, 'Why is Australia's *Constitution* Binding? The Reasons in 1900 and Now and the Effect of Independence' (1986) 16(1) *Federal Law Review* 29, 37. The High Court's statements in the implied freedom cases precipitated extravagant statements of a 'fundamental paradigm shift' and 'glorious revolution': see the citations in George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26(1) *Federal Law Review* 1, 1 nn 2–3.

80 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Nationwide News*').

81 Ibid 72.

82 *McGinty v Western Australia* (1996) 186 CLR 140, 230–7 ('*McGinty*'). For detailed analysis of the implications of McHugh J's reasoning in *McGinty*, see Simon Evans, 'Why is the *Constitution* Binding? Authority, Obligation and the Role of the People' (2004) 25(1) *Adelaide Law Review* 103, 107; George Duke, 'Popular Sovereignty and the Nationhood Power' (2017) 45(3) *Federal Law Review* 415, 422, 426.

83 For similar statements on popular sovereignty, see also *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104, 180 (Deane J) ('*Theophanous*'); *McGinty* (n 82) 201 (Toohey J).

84 Even in the earlier implied freedom judgments, it is important to note, there are more hesitant and moderate statements on popular sovereignty. In *Nationwide News*, Deane and Toohey JJ state that the *Constitution* only 'reserves to the people of the Commonwealth the ultimate power of governmental control' through direct election of members of parliament and the referendum processes established in s 128: *Nationwide News* (n 80) 71. In *Theophanous*, Deane J articulated a weaker view of popular sovereignty in his statement that it is the 'maintenance (by acquiescence) of its provisions by the people' that gives the *Constitution* its legitimacy: *Theophanous* (n 83) 171. In *ACTV*, Dawson J is at pains to point out that 'the legal foundation of the *Australian Constitution* is an exercise of sovereign power by the Imperial Parliament': *ACTV* (n 78) 181.

the authorisation of the Imperial Parliament to the Australian people may be regarded as now uncontentious, popular sovereignty has never been understood in a manner which suggests a robust commitment to the agency of an extra-constitutional people.[85] The High Court's treatment of the principle of popular sovereignty rather tends, on balance, towards a weaker or 'normativist' interpretation of the people's constitutional status and role.

B *The Implied Freedom of Political Communication*

It has been argued that there were two distinct rationales for the implied freedom in High Court of Australia jurisprudence prior to the decisive ruling in *Lange v Australian Broadcasting Corporation*.[86] On the narrower view, the freedom derives from necessary inferences regarding ss 7, 24 and 128 (and related provisions) of the *Commonwealth Constitution*.[87] On the broader view, the implied freedom is a product of a 'free standing, extra-constitutional principle of representative democracy' derived from the *Constitution*'s liberal democratic pedigree.[88] Since *Lange*, the narrower view has prevailed.[89] And the Court's language on the relationship between popular sovereignty and the implied freedom has only become more restrained in subsequent cases (discussed below) such as *McCloy v New South Wales*,[90] *Unions NSW v New South Wales*[91], *Tajjour v New South Wales*[92] and *Clubb v Edwards*.[93]

Even in the earlier 1990s cases, it is difficult to detect any argument that the implied freedom protects communication about political and governmental matters which relies on an extra-constitutional idea of the people as the bearer of popular sovereignty. An instructive example is Mason CJ's statement in *ACTV* that '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'.[94] Mason CJ clearly attributed sovereignty to the Australian people. Yet 'on behalf of' is a decisive phrase in this passage, insofar as it entails that the will of the people must always be represented. The people's sovereign authority is here exercised *within* the existing constitutional system of representative democracy, consistent with a weak or moderate view of popular sovereignty.

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85 We briefly discuss the potential significance of *Love v Commonwealth* (2020) 270 CLR 152 ('*Love*') in Part IIIC.

86 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*').

87 See Dan Meagher, 'What is 'Political' Communication? The Rationale of the Implied Freedom of Political Communication' (2004) 28(2) *Melbourne University Law Review* 438, 445; Carlo Dellora, 'Free Speech Consequentialism: An Australian Account' (2020) 46(2) *Monash University Law Review* 183, 191.

88 Meagher (n 87) 445.

89 Ibid 445; Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 374.

90 *McCloy v New South Wales* (2015) 257 CLR 178 ('*McCloy*').

91 *Unions NSW v New South Wales* (2013) 252 CLR 530 ('*Unions NSW*').

92 *Tajjour v New South Wales* (2014) 254 CLR 508 ('*Tajjour*').

93 *Clubb v Edwards* (2019) 267 CLR 171 ('*Clubb*').

94 *ACTV* (n 78) 138.

In any case, even if a more robust interpretation was a possibility in the early 1990's, *Lange* served both to make explicit the narrow scope of the implied freedom, and to preclude a stronger construal of popular sovereignty.[95] A full bench of the Court stated unequivocally in *Lange* that the scope of the implied freedom is delimited by the requirement in ss 7 and 24 that representatives be 'directly elected' by the people. The implied freedom, that is to say, 'can be understood only by reference to the system of representative and responsible government to which ss 7 and 24 and other sections of the *Constitution* give effect'.[96] What emerges from *Lange* is the Court's corresponding location of popular sovereignty within the framework of representative and responsible government. In developing this interpretation, the Court draws on both the *Convention Debates* and the text of the *Constitution*. The full bench notes, for example, that following the second 1897 Australasian Convention, the Convention adopted a motion by Edmund Barton resolving that the purpose of the *Constitution* was 'to enlarge the powers of self-government of the people'.[97] This idea of self-government is understood as mediated by the representative institutions established by the *Constitution*. As Issacs J had stated in 1926, 'the *Constitution* is for the advancement of representative government'.[98] And, at the time of Federation, 'representative government was understood to mean a system of government where the people in free elections elected their representatives to the legislative chamber which occupies the most powerful position in the political system'.[99] Here, the people are understood as electors within a constitutional system, and indeed in this formulation, it is the representative legislative chamber (rather than the represented people), that is placed at the true centre of power. The Court does note, to be sure, that for the implied freedom 'to effectively serve the purpose of ss 7 and 24 … it cannot be confined to the election period'.[100] It immediately refers, however, to the periods between elections set up under the constitutional system, not to an extra-constitutional popular will.[101]

The full bench in *Lange*, in considering the relevant constitutional provisions regarding the composition and function of Parliament, also suggests that the effect of ss 1, 7, 8, 13, 24 25, 28 and 30 is to 'ensure that the Parliament of the Commonwealth will be representative of the people of the Commonwealth'.[102] The people are once again here subsumed within a constitutional system of representative government as electors of representatives to Parliament. Importantly, this constitutional system is not simply representative in its design, but also responsible. Sections 6, 49, 62, 64 and 83 of the *Constitution* 'establish a formal relationship between the Executive Government and the Parliament and provide for a system of responsible ministerial government'.[103] Reference is also made by the full bench to the amendment procedure in s 128, but this reads as something of an afterthought in

95 *Lange* (n 86).
96 Ibid 557.
97 Ibid, quoting *Official Report of National Australasian Convention Debates*, Adelaide, 1897, 17.
98 *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 178, quoted in *Lange* (n 86) 557.
99 *Lange* (n 86) 559.
100 Ibid 561.
101 Ibid.
102 Ibid 558.
103 Ibid.

comparison with ss 7 and 24.[104] The discussion of s 128, while acknowledging the role of electors as the people in constitutional amendment, provides scant resources for a more expansive interpretation of constitutional change tied to the people's ultimate constituent power. The process of constitutional change in s 128 is interpreted in a self-enclosing manner as under the *Constitution*, that is, by reference to the 'procedure for submitting a proposed amendment to the *Constitution* to the informed decision of the people which the *Constitution* prescribes'.[105]

The full bench's statements on popular sovereignty in *Lange* are perfectly intelligible in light of its treatment of the implied freedom, which it sought to ground firmly in the 'text and structure of the *Constitution*'.[106] The implied freedom is justified because

> the *Constitution* requires 'the people' to be able to communicate with each other with respect to matters that could affect their choice in federal elections or constitutional referenda or that could throw light on the performance of Ministers of State and the conduct of the executive branch of government …[107]

Freedom of communication on matters of government and politics enables the people to exercise a free and informed choice as electors; it is

> an indispensable incident of that system of representative government which the *Constitution* creates by directing that members of the House of Representatives and the Senate shall be 'directly chosen by the people' of the Commonwealth and the States, respectively.[108]

The implied freedom does 'preclude the curtailment of the protected freedom by the exercise of legislative or executive power',[109] but it does not confer personal rights on individuals. In its approach to the implied freedom, the High Court remains close to the British common law heritage, inclusive of parliamentary supremacy, and seeks consistency between the requirements of the common law and the *Constitution*.[110] This supports our earlier suggestion that residual elements of Dixon's analysis of constitutional authority have been retained in the Court's treatment of the theme of popular sovereignty. At a minimum, there is no basis, or need, for the Court to appeal to extra-constitutional constituent power to support the operation of the implied freedom.

When one turns to High Court implied freedom jurisprudence after *Lange*, what is most striking is a paucity of references to popular sovereignty. With the partial exception of the plurality judgment in *Clubb*, moreover, the few references that do exist reflect the weaker conception of popular sovereignty as representative government articulated in *Lange*. In our survey of the post-*Lange* implied freedom

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104 Ibid 559.
105 Ibid 562.
106 Ibid 567.
107 Ibid 571.
108 Ibid 559.
109 Ibid 560. In this context, the Court cites approvingly Brennan J's statement that 'the implication is negative in nature', insofar as it invalidates laws and creates an immunity from legislative control: *Cunliffe v Commonwealth* (1994) 182 CLR 272, 327 (Brennan J).
110 *Lange* (n 86) 566. Hence, it makes little sense in an Australian context to interpret the implied freedom in terms of the United States doctrine of freedom of expression under the First Amendment (*United States Constitution* amend I): see *Lange* (n 86) 563.

jurisprudence, our focus is on those few passages that might be thought to at least imply a more robust interpretation of popular sovereignty.

The plurality in *Unions NSW* referred more directly to the 'sovereign power' of the people than other post-*Lange* implied freedom judgments, albeit in the context of a discussion of *ACTV*.[111] *ACTV*, the plurality noted, established that 'the concept of representative government in a democracy signifies government by the people through their representatives; in constitutional terms, a sovereign power residing in the people, exercised by the representatives'.[112] While this passage clearly attributed sovereignty to the people, it immediately qualified this by reference to its exercise by elected representatives. There is no room here to contemplate the stronger doctrine that the people *themselves* exercise their popular sovereignty through acts of constituent self-determination. As in *Lange*, representative and responsible government remains the terminus of the plurality's reasoning. This is also true for Keane J's (at first glance, more expansive) definition of 'the political sovereignty of the people of the Commonwealth' in terms of the requirement that they 'make the political choices necessary for the government of the federation and the alteration of the *Constitution* itself'.[113] With respect to the implied freedom as a constitutionally protected interest, Keane J noted merely the need for the people to make political choices that are in conformity with ss 7, 24 and 128.[114] The role of the Court, Keane J's argument suggested, is primarily to ensure that laws or regulations are 'compatible with the maintenance of the federation's system of representative and responsible government'.[115]

Keane J's judgment in *Tajjour* could likewise on first impression be taken to express a more robust view of popular sovereignty. Perhaps most suggestive is the statement, made with reference to McHugh J's judgment in *York v The Queen*,[116] that liberty at common law extends beyond negative liberty to a positive 'liberty to participate in political sovereignty'.[117] In isolation, this proposition, with its republican undertones, might serve as a premise in an argument for a more robust interpretation of popular sovereignty as the collective self-determination of citizens. Keane J, however, parsed this positive liberty in terms of participation by citizens in the electoral processes of representative democracy.[118] In explicating how 'sovereign power is exercised within the Commonwealth by its citizens',[119] Keane J hence refers to 'the people of the Commonwealth as electors',[120] rather than a robust pre-constitutional notion of the people. The other judgments in *Tajjour*, in contrast

111 *Unions NSW* (n 91) 548 [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

112 Ibid. With respect to the implied freedom, the plurality state that a law will be 'invalid where it so burdens the freedom that it may be taken to affect the system of government for which the *Constitution* provides and which depends for its existence upon the freedom.': *Unions NSW* (n 91) 548–9 [19]. This statement is intriguing, insofar as it suggests that the system of government is in some sense dependent upon the freedom (potentially raising the significance of the freedom), but even if this construal is correct, it tells us little regarding popular sovereignty.

113 Ibid 571 [104] (Keane J). Cf. 578 [135], 580–1 [144]–[146], 582–4 [155]–[159], 586 [166].

114 Ibid 572 [112], 573 [115] (Keane J).

115 Ibid 583–4 [158] (Keane J).

116 *York v The Queen* (2005) 225 CLR 466, 473.

117 *Tajjour* (n 92) 604 [236] (Keane J). See also at 600 [223].

118 Ibid 593 [196]–[197] (Keane J).

119 Ibid 601 [225] (Keane J).

120 Ibid. See also at 601 [226].

even with this relatively moderate construal, almost seem to go out of their way to avoid mentioning popular sovereignty. Gageler J, for example, with reference back to *Lange*, talked of the enlargement of the powers of the self-government of the people, rather than of the sovereignty of the people, and emphasised the connection of the implied freedom to 'information which might ultimately bear on electoral choice'.[121] The implied freedom was characterised by Hayne J — once again in a manner that echoed the narrower conception of *Lange* — as derived from the *Constitution* itself as 'an indispensable incident of that system of representative and responsible government which the *Constitution* creates and requires'.[122]

This relatively conservative approach to popular sovereignty was maintained in *McCloy*. In a perhaps revealing shift of terminology, the High Court referred more often to 'political' than to 'popular' sovereignty.[123] Nettle J defined political sovereignty as 'the freedom of electors, through communication between themselves and with their political representatives, to implement legislative and political changes'.[124] While the reference to 'political changes' is a little vague, the statement as a whole once again suggests a weaker notion of popular sovereignty, grounded in an existing constitutional structure of electoral representation, and assuming the subsumption of the people's authority within democratic procedure. In his closing statements, Nettle J similarly referred to an 'equality of political power which is at the heart of the Australian constitutional conception of political sovereignty'.[125] The plurality characterised the equality 'of opportunity to participate in the exercise of political sovereignty' as 'an aspect of the representative democracy guaranteed by our *Constitution*',[126] whereas Gordon J simply cited Mason CJ's identification of government by the people with representative government.[127]

Finally, and despite some innovations in its interpretation of the implied freedom, there is no evidence of any fundamental departure in the High Court's treatment of popular sovereignty in *Clubb*. Gageler J avoided reference to political sovereignty in his judgment, staying close to the shore by referring to the 'maintenance of the constitutionally prescribed system of representative and responsible government'.[128] Likewise, Nettle, Gordon and Edelman JJ grounded the implied freedom firmly in the constitutional requirements of ss 7, 24, 64 and 128 — understood as prescribing representative and responsible government — without

121 Ibid 577 [141] (Gageler J).
122 Ibid 558 [59] (Hayne J) . See also at 567 [98].
123 *McCloy* (n 90) 207 [45]. Here the plurality (French CJ, Kiefel, Bell and Keane JJ) follows the language of Keane J in *Unions NSW* (n 91) and *Tajjour* (n 92) and use 'political' and 'popular' sovereignty interchangeably. If anything, however, the phrase 'political sovereignty' seems better aligned with a weaker model of self-government that is tied to an electoral democracy and representative government under a system of constitutional law. The phrase 'popular sovereignty,' with its proximity to 'populism,' might be thought to imply a more robust interpretation of the role of the people.
124 *McCloy* (n 90) 257 [216] (Nettle J).
125 Ibid 274 [271] (Nettle J).
126 Ibid 207 [45] (French CJ, Kiefel, Bell and Keane JJ).
127 Ibid 284 [318] (Gordon J) citing *ACTV* (n 78) 137.
128 *Clubb* (n 93) 229 [177] (Gageler J). See also at 239 [207].

direct recourse to popular sovereignty.[129] In their plurality judgment, Kiefel CJ, Bell and Keane JJ introduced a surprisingly robust notion of human dignity in their treatment of the relationship between the implied freedom and 'the people of the Commonwealth as the sovereign political authority'.[130] The conclusion of their Honours' argument, however, is that

> the protection of the dignity of the people of the Commonwealth, whose political sovereignty is the basis of the implied freedom, is a purpose readily seen to be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[131]

In making this claim, the plurality cite *Lange*, *Unions NSW* and *McCloy* where the implied freedom is understood to protect 'the exercise by the people of the Commonwealth of a free and informed choice as electors'.[132] The purpose of the implied freedom to protect 'the functioning of the constitutionally prescribed system of representative and responsible government'[133] does not motivate a robust popular sovereignty, but rather assumes an identification of active citizenship with the juridical role of an elector.

In closing this analysis of popular sovereignty in the implied freedom cases, it is instructive to note that the obverse of the High Court's tendency to focus on the role of the people as electors in the implied freedom cases is its understated approach to s 128. Sections 7 and 24 are ubiquitous in explanations of the rationale for the freedom, while s 128 only makes rare appearances.[134] In one sense, of course, s 128 would potentially allow for a stronger interpretation of popular sovereignty — even to the extent of allowing for a derived form of constituent power — grounded in the pivotal role of the people in major or minor constitutional amendments. This role is qualified, however, by the fact that the s 128 process can only be initiated by Parliament triggering the necessary preconditions for a referendum.[135] From this perspective, to the extent that s 128 is considered at all by the High Court in discussions of the implied freedom, the role of the people as the political sovereign is again integrated within the existing framework of the *Commonwealth Constitution* and the exercise of popular sovereignty is mediated by the representative institution of parliament. There is little sense in Australia's constitutional arrangements of an

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129 Ibid 255–6 [247], 261 [258], 280–1 [307] (Nettle J); 303 [381] (Gordon J); 311 [408], 336–7 [477], 343–4 [495–8] (Edelman J). Gordon J (at 308–9 [401]) emphasises the accountability of those who exercise legislative power to the people.

130 Ibid 191 [29] (Kiefel CJ, Bell and Keane JJ).

131 Ibid 196 [51] (Kiefel CJ, Bell and Keane JJ).

132 Ibid 191 [29] (Kiefel CJ, Bell and Keane JJ). See also at 198–9 [60].

133 Ibid 198 [60] (Kiefel CJ, Bell and Keane JJ).

134 In *Lange* and *McCloy*, for example, discussion of the significance of s 128 is limited and does not always follow references to ss 7 and 24: see *Lange* (n 86) 559–61; *McCloy* (n 90) 222–3 [101] (Gageler J).

135 The high threshold requirements of s 128 — particularly its double-majority condition — have, of course, made successful Australian referenda historically elusive. For discussion, see Dylan Lino, 'Book Review — *Power People: The History and Future of the Referendum in Australia*' (2010) 7(21) *Indigenous Law Bulletin* 26.

underlying constituent power of the people that intermittently awakes from its slumber in extraordinary political moments.[136]

High Court jurisprudence on the implied freedom since *Lange*, hence, consistently articulates a weaker conception of popular sovereignty tied to representative government and the role of the people as electors under the framework of the *Constitution*. The conception of popular sovereignty operative in the implied freedom cases neatly exemplifies, in fact, Vinx's weaker formulation in terms of a self-government that is 'immanent in a framework of constitutional rules that makes political leadership elective and gives equal rights of democratic participation to all citizens'.[137] Only a very creative approach to constitutional interpretation would be able to derive from the implied freedom cases a commitment to a robust popular sovereignty grounded in the constituent power of a unified extra-constitutional people.

C *The Franchise Cases*

The other line of cases in which the High Court has considered the theme of popular sovereignty is *Roach*, *Rowe* and, more recently, *Murphy v Electoral Commissioner*.[138] These judgments, in which the Court assessed the validity of laws purporting to limit the franchise, undoubtedly raise broader questions of Australia's democratic 'values'.[139] The judgments have also served, however, as a central foundation for the argument that the concept of constituent power is applicable to Australia's constitutional system.[140] In this section, we argue that while such an identification may be theoretically cogent, it is a non-trivial departure from recent High Court jurisprudence. The Court's treatment of popular sovereignty in the franchise cases is, in fact, for the most part consistent with the weaker representative model of popular sovereignty evident in the implied freedom cases.

Roach opens with Gleeson CJ's reflections on the historical foundations of the *Constitution*. As a member of the 4:2 majority (deciding that a 2006 amendment to s 93(8AA) of the *Commonwealth Electoral Act* 1918 (Cth) was invalid), Gleeson CJ emphasised that the *Constitution*

> was not the product of a legal and political culture, or of historical circumstances, that created expectations of extensive limitations upon legislative power ... [nor was it] the outcome of a revolution, or a struggle against oppression. It was designed to give effect to an agreement for a federal union, under the Crown, of the peoples of formerly self-governing British colonies. Although it was drafted mainly in Australia, and in large measure ...

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136 During the writing of this article, the High Court decided a further implied freedom case: *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490. The judgment does not refer to either political or popular sovereignty.

137 Vinx (n 26) 102.

138 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 ('*Murphy*').

139 See Patrick Emerton, 'Ideas' in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018)143, 163–4. Emerton (at 164) argues that the franchise cases 'provide the best prospect' for the assertion of a clear constitutional value — democratic inclusiveness — in an Australian context.

140 Arcioni (n 6).

> approved by a referendum process in the Australian colonies, and by the colonial Parliaments, it took legal effect as an Act of the Imperial Parliament. Most of the framers regarded themselves as British. They admired and respected British institutions, including parliamentary sovereignty.[141]

One expression of this admiration, is 'the extent to which the *Constitution* left it to Parliament to prescribe the form of our system of representative democracy'.[142] It is in this context that one must understand that 'the words of ss 7 and 24 … have come to be a constitutional protection of the right to vote'.[143] For Gleeson CJ, then, and consistent with the prevailing approach in the implied freedom cases, the constitutional protection of the right to vote is embedded in the text of a *Constitution* that ascribes an authoritative role to Parliament. The conclusion that, in this instance, the impugned law was invalid did not rest upon an extra-constitutional notion of the people, but a textually grounded interpretation of representative government.

The plurality judgment of Gummow, Kirby and Crennan JJ in *Roach* ended up in a similar place, despite wide-ranging obiter dicta on the history and comparative breadth of the Australian democratic franchise.[144] The plurality's finding of invalidity rests on the claim that '[v]oting in elections for the Parliament lies at the heart of the system of government for which the *Constitution* provides'[145] (in ss 7 and 24) and that s 93(8AA) was not 'reasonably appropriate and adapted (or "proportionate") to the maintenance of representative government'.[146] The two dissenting judgments (Hayne and Heydon JJ) offer even less for a conception of the Australian democratic people outside the constitutional text. Despite the relative orthodoxy of the approach taken by the majority justices, Hayne J in particular insisted that

> the *Constitution* does not establish a form of representative democracy in which the limits to the legislative power of the Parliament with respect to the franchise are to be found in a democratic theory which exists and has its content independent of the constitutional text.[147]

Taken as a whole, the High Court in *Roach* remained firmly grounded in history and the text in a manner that precludes appeal to an extra-constitutional conception of the democratic people.[148] As with the implied freedom, the Court's interpretation of the democratic franchise articulated a weaker popular sovereignty tied to representative and responsible government.

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141 *Roach* (n 71) 172 [1] (Gleeson CJ).
142 Ibid 173 [4] (Gleeson CJ).
143 Ibid 174 [7] (Gleeson CJ).
144 Ibid 194 [69] (Gummow, Kirby and Crennan JJ). While noting that 'the adoption of the constitutional devices of radical democracy … moved much faster' in the Australian colonies than they did in the United Kingdom, the plurality also discuss historical limitations on the franchise, before and after Federation, including the disenfranchisement of prisoners: at 194 [69], quoting WG McMinn, *A Constitutional History of Australia* (Oxford University Press, 1979) 62.
145 *Roach* (n 71) 198 [81] (Gummow, Kirby and Crennan JJ).
146 Ibid 202 [95] (Gummow, Kirby and Crennan JJ).
147 Ibid 214 [142] (Hayne J).
148 This is true even if the High Court was exercising a form of judicial 'leadership' in these cases by seeking to enforce the constitutional arrangements for which the *Constitution* provides: see Emerton (n 139) 161.

Rowe does offer more material for a stronger reading of popular sovereignty. Of particular note are the judgments of French CJ and Crennan J (both in the 4:3 majority in finding multiple provisions of the *Commonwealth Electoral Act* 1918 (Cth) invalid). While both judgments relied on ss 7 and 24 as the 'constitutional bedrock' that determines that members of Parliament be directly chosen by the people,[149] they also raised questions of the identity of the Australian people and the foundations of democracy that could support the theoretical development of a more robust interpretation of the meaning of popular sovereignty.[150]

French CJ, in discussing the electoral franchise in *Rowe*, stated that

> [w]hile 'common understanding' of the constitutional concept of 'the people' has changed as the franchise has evolved [a law denying] the right to vote to any class of person entitled to be an elector … denies it to that class of 'the people'.[151]

Crucially, French CJ acknowledged that this means that the '"the people" is not a term the content of which is shaped by laws creating procedures for enrolment and for the conduct of elections'.[152] This is perhaps the closest any High Court justice has come to a concept of the people that could clearly support a theory of constituent power. For it could be taken to suggest that the Australian people exists as a political unity outside of the juridical structure of representative government — as set out in ss 7, 24 and related provisions — established by the *Constitution*. French CJ also referred in this context to the 'normative framework of a representative democracy based on direct choice by the people',[153] which relatedly implied that a normative theory of democracy can legitimately inform judicial interpretation of the textual meaning of the *Constitution*.

Crennan J's discussion of the history of Australian democracy in *Rowe* also alluded, although to a lesser extent, to normative considerations outside the constitutional text. In discussing franchise breadth debates in the colonies, for example, Crennan J averred that 'the conception of democracy appealed to during campaigns … for the right to vote transcended questions of qualifications for the franchise'[154] insofar as it was seen as 'an active and continuing process in which all legally eligible citizens had an equal share in the political life of the community'.[155] Crennan J also supported her conclusion that the multiple electoral provisions were invalid by linking a standard analysis of ss 7 and 24 with an argument to the effect that changing conceptions of democracy now require a 'fully inclusive franchise'.[156]

While these judicial statements are suggestive, their significance should not be overstated with respect to the High Court's underlying conception of popular sovereignty. It is noteworthy in this respect that the Court's subsequent treatment of

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149 *Rowe* (n 72) 12 [1] (French CJ), 107 [327]–328] (Crennan J), both quoting *Roach* (n 71) 198 [82] (Gummow, Kirby and Crennan JJ).
150 *Rowe* (n 72) 12 [1] (French CJ), 107 [330] (Crennan J).
151 Ibid 20 [25] (French CJ).
152 Ibid.
153 Ibid 21 [25] (French CJ). Cf *Ruddock v Vadarlis* (2001) 110 FCR 491, 542–3 [191]–[192].
154 Ibid 111 [344] (Crennan J).
155 Ibid 111–12 [344] (Crennan J).
156 Ibid 117 [367] (Crennan J).

peoplehood and democracy in *Murphy* is considerably more circumspect. In their joint judgment, French CJ and Bell J refer quite blandly to the people's role in choosing representatives as an 'aspect of the system of representative government'.[157] Kiefel J acknowledges that '*Roach* and *Rowe* effected something of a turning in the law' regarding the meaning of 'direct and popular choice',[158] but only within the bounds of the Court's interpretation of ss 7 and 24. Gageler J evocatively stated that part of the rationale for the decisions in *Roach* and *Rowe* was to reject the tendency of disenfranchisement that led to the freezing out of 'discrete minority interests'.[159] Yet Gageler J also cited the authority of McHugh J in *Langer v Commonwealth*[160] to the effect that while the content of the term 'the people' has changed over time, the purpose of ss 7 and 24 is ultimately to ensure representative government.[161] What is distinctive of a democratic system, Gageler J continued, is that the people to be governed have an opportunity to decide who is to possess the authority to govern them.[162] Keane J, in a statement that could easily recall Hayne J's dissent in *Roach*, asserted that it is impermissible to deduce from 'one's "own prepossessions"'[163] a (normative) theory of representative democracy and then use this as the benchmark for the validity of parliamentary legislation.[164] It is, Keane J noted, for the Parliament to establish the electoral system and determine the way in which the people will exercise its power to choose representatives under ss 7 and 24.[165] The *Constitution* looks principally to Parliament, as Nettle J also affirmed unambiguously in his judgment, to ensure that the 'sovereign citizenry are able to make a free, informed, peaceful, efficient and prompt choice of their legislators'.[166]

What general conclusions should one draw, then, from the High Court's approach to popular sovereignty and the Australian people in the franchise cases? The judgments of French CJ and Crennan J, as acknowledged above, do offer judicial resources for the potential development of a stronger conception of popular sovereignty grounded in an extra-constitutional constituent power of the Australian people. Yet what material there is for such an interpretation is dispersed and ambiguous, reflecting the fact (as Nettle J noted in *Murphy*) that *Rowe* was a highly complex decision, decided by a bare majority of 4:3, with the majority differing in their reasoning.[167] In addition, the Court's approach in *Murphy* suggests, if anything, a step back from such a robust conception of Australian democratic peoplehood. *Rowe*, as Nettle J noted in *Murphy*, cannot be taken as 'authority for the proposition that "chosen by the people" in ss 7 and 24 of the *Constitution* mandates making elections as expressive of the popular choice as practical considerations properly

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157 *Murphy* (n 138) 50 [33] (French CJ and Bell J).
158 Ibid 58 [53] (Kiefel J).
159 Ibid 73 [107] (Gageler J).
160 *Langer v Commonwealth* (1996) 186 CLR 302 ('*Langer*').
161 *Murphy* (n 138) 69 [89] (Gageler J) citing *Langer* (n 160) 342.
162 *Murphy* (n 138) 70 [94] (Gageler J), quoting Australia, *Final Report of the Constitutional Commission* (1988).
163 *Murphy* (n 138) 86 [177] (Keane J), quoting *Attorney-General (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 44.
164 *Murphy* (n 138) 86 [177] (Keane J), quoting *McGinty* (n 82) 169 (Brennan CJ).
165 *Murphy* (n 138) 87 [179] (Keane J).
166 Ibid 88 [183] (Keane J).
167 Ibid 102–3 [235] (Nettle J).

permit'.[168] What, in fact, emerges from a holistic analysis of the franchise cases is that the rationale of the Court for its judgments consistently coalesced — as with the implied freedom — around ss 7 and 24. The Court's responsibility to intervene with respect to potentially invalid encroachments on voting rights is viewed as a necessary incident of constitutional provisions (themselves reflective of self-government), not as a form of constitutional guardianship of the will of the extra-constitutional Australian people.[169]

On the balance, then, it is difficult to make out the argument that the franchise cases support a stronger conception of popular sovereignty grounded in a unified extra-constitutional people. One of the main reasons for this is, in fact, correctly identified by Arcioni,[170] as part of the argument that the Australian people exercise a form of constituent power by determining criteria for citizenship in their role as electors. The people, within the Australian constitutional tradition, are regarded principally (and certainly since Federation) as electors within the framework of a constitutional structure of representative and responsible government (as set out particularly in ss 7, 24 and 128). It is the Parliament that determines both citizenship criteria and the breadth of the franchise within the Australian constitutional system, albeit as representatives of the people. Even more decisively, this process in no way requires an act of original constituent power either by Parliament or the people as electorate. For the *Constitution* leaves the determination of these questions to the Parliament, as elected by the people, and the properties of a citizen or elector can, in fact, be altered without any change to the fundamental constitutional structure. So far from it being the case that the franchise judgments contain an incipient doctrine of constituent power, they help to explain why the concept has limited applicability to Australia's system of constitutional government.

V Conclusion

The paucity of references to constituent power in the Australian constitutional tradition is not simply a matter of terminological preference. Much depends, it should be recognised, on how constituent power is defined. If constituent power is understood, consistent with the tradition stemming from Sieyès and Schmitt, as the capacity of a unified pre-constitutional people to determine its constitutional destiny, then it does not apply to Australian circumstances. Yet it might seem that the Australian constitutional system of government could accommodate a broader definition of constituent power as simply the power to create or fundamentally amend the material content of a Constitution. The reason this conclusion would still be partially misleading, however, is that it does matter what concepts a constitutional tradition employs to describe its own legal doctrines. Constituent power, despite

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168 Ibid 105 [240] (Nettle J).

169 With respect to the High Court's treatment of the Australian people, it is true that the judgments of the majority in *Love* (n 85) open up new interpretative possibilities. See, in particular, the statements on Indigenous people as members of the political community and citizenship by Gordon and Edelman JJ: *Love* (n 85) 260–3 [289]–[299] (Gordon J), 288 [394] (Edelman J). The implications of *Love* with respect to popular sovereignty and the Australian people are still rather unclear, however, and outside of the scope of our discussion.

170 Arcioni (n 6) 441.

attempted domestications, retains strong connotations of a robust theory of popular sovereignty that is alien to both Australian history and the jurisprudence of the High Court of Australia.

From a constitutional perspective, the Australian approach to democratic self-government has consistently suggested a weaker (and sometimes even 'normativist' in Loughlin's sense) conception of popular sovereignty. Such a conception of popular sovereignty must still, of course, acknowledge the historical circumstances of constitution-making which determine a constitutional settlement. Yet there is no room in such a conception for an abiding extra-constitutional unified people that sits outside the structure of representative government and is empowered to exercise its will independently of electoral processes determined by the parameters set in the *Commonwealth Constitution* (or indeed by Parliament on the basis of the *Constitution*).

If one wishes to apply a wider concept of constituent power to the circumstances of Federation, then interesting questions arise as to the relation between the constitutive role of the Imperial Parliament (as the original legal source of the *Constitution*'s authority), and the constitutive role of the peoples of the colonies and states.[171] These questions are certainly worthy of further investigation. At a minimum, however, the attribution of an abiding constituent power to the Australian people subsequent to Federation would constitute a major shift for a constitutional tradition that has tended to integrate talk of the people within the structure of representative and responsible government and the election of members of Parliament. Our analysis does not demonstrate the incoherence of granting constituent power a greater role in Australian constitutional jurisprudence, but it does indicate some obstacles to overcome.

[171] See Aroney (n 2) 727–58.