

## THE CORE OF THE AUSTRALIAN CONSTITUTIONAL PEOPLE – ‘THE PEOPLE’ AS ‘THE ELECTORS’

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### I INTRODUCTION

Questions of membership of the Australian constitutional community are coming to the fore of legal, political and constitutional debates related to both proposed amendments to the *Australian Constitution* to ‘recognise’ Indigenous Australians and changes to Australian citizenship legislation which extend the bases of citizenship revocation.<sup>1</sup> In this article, I focus on constitutional membership by interrogating the relationship between ‘the people’ and ‘electors’, as seen in the text of the *Constitution*. That text creates a relationship between these categories, supporting a predominantly democratic or political conception of the Australian constitutional community. That conception not only places the Australian ‘people’ within a recognised category in the international literature regarding constitutional identity, but also has real legal effect by imposing limitations on the legislative power of the federal Parliament.

In Part II, I address the political roles of ‘the people’, acting through electors, which can be seen in the constitutional text – the historical involvement of ‘the people’ in the making of the *Constitution*, and the ongoing powers of ‘the people’ in the structures of representative government under the *Constitution*. ‘The people’ and ‘electors’ are not identical concepts but the case law of the High Court is consistent with Chief Justice French’s assertion that the two groups have converged.<sup>2</sup> One indicator of the broadening of the electors group to include more of ‘the people’ is the position of women in the current case law, compared to their position at Federation.

Some of the text relating to the federal franchise and representation in Parliament was influenced by considerations of gender. In Part III, I consider the emergence of women as part of ‘the people’. The Court’s explication of the text, whose form was influenced by a concern for the protection of (eligible) women’s

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1 For an overview of the ‘recognition’ movement, see generally Megan Davis and George Williams, *Everything You Need to Know About the Referendum to Recognise Indigenous Australians* (NewSouth, 2015). The most recent amendments regarding citizenship are contained in the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth). See details in the postscript to this article.

2 *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 19 [21].

membership of the political people, tells us little about the ongoing membership of women. Instead, the reasoning directs us to look at what the Parliament has done with respect to the federal franchise, and how the *Constitution* is understood in that context.

In Part IV, I turn to the High Court case law regarding the federal franchise. The Court conceives of the electors as a subset of ‘the people’ and the relationship between those groups has serious jurisprudential weight, in the sense that it limits legislative power. Specifically, the Parliament cannot reduce the now almost universal adult citizen franchise without sufficient justification. Therefore, the historically precarious voting rights of groups, including women, are now protected. The identification of who are the relevant ‘electors’ may have a normative element so the general principle of a broad franchise is tempered by consideration of legitimate exclusion of persons who demonstrate a rejection of community standards. The reasoning adopted by the Court in protecting the now broad franchise confirms that ‘the people’ are to be considered as a collective and that their will determines to a significant extent their own constitutional identity, which I call the third constitutive function of ‘the people’ – a power of collective self-definition.

In Part V, I conclude that the reasoning of the Court which leads to this third constitutive power of ‘the people’ affects the scope of the Parliament’s power regarding membership of the constitutional ‘people’.

## II ‘THE PEOPLE’ AS ‘THE ELECTORS’

Scholars and judges, in Australia and internationally, are becoming increasingly interested in the identity of ‘the people’ under constitutions.<sup>3</sup> In the international literature, there is often an assumption that the relevant ‘people’ are defined either by their ethno-cultural or racial origins, or their political

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3 For an overview of the international literature, see Symposium, ‘The Evolving Concept of Citizenship in Constitutional Law’ (2010) 8 *International Journal of Constitutional Law* 6. See especially Linda Bosniak, ‘Persons and Citizens in Constitutional Thought’ (2010) 8 *International Journal of Constitutional Law* 9; Symposium, ‘Comments on Michel Rosenfeld’s *The Identity of the Constitutional Subject*’ (2012) 33 *Cardozo Law Review* 1839; Marcus Llanque, ‘On Constitutional Membership’ in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, 2010) 162. The most recent World Congress of Constitutional Law, held in Oslo in June 2014, included a workshop on Constitutional Identity: Faculty of Law, University of Oslo, *World Congress of Constitutional Law 2014* <<http://www.uio.no/wccl>>.

participation in relation to the relevant constitution.<sup>4</sup> In Australia, our history, constitutional text and case law place the Australian ‘people’ firmly within the latter grouping.<sup>5</sup>

The roles of ‘the people’ can be framed in the language of constituent power, with respect to ‘the people’ involved in a constitution’s origin,<sup>6</sup> or to ‘the people’ having ongoing constitutional power.<sup>7</sup> The idea of the constituent people was famously expressed by the Abbé Sieyès,<sup>8</sup> writing in the 18<sup>th</sup> century with respect to the French Revolution. Sieyès argued that ‘the people’, who were known as ‘the Third Estate’ and ‘the nation’,<sup>9</sup> were sovereign. They were the body who could create a constitution and therefore were the constituent power.<sup>10</sup> This idea

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- 4 See Michel Rosenfeld, ‘Constitutional Identity’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 756, 762–3. Note that these conceptions are not the only foundations for identity that arise in the literature, but are the most prominent. For a broader survey of alternative foundations, see Elaine R Thomas, ‘Who Belongs?: Competing Conceptions of Political Membership’ (2002) 5 *European Journal of Social Theory* 307, 323. See generally Seyla Benhabib, Ian Shapiro and Danilo Petranovich (eds), *Identities, Affiliations, and Allegiances* (Cambridge University Press, 2007). For discussion of the ethno-cultural or racial identity of the Australian constitutional ‘people’, see generally Elisa Arcioni, ‘Tracing the Ethno-cultural or Racial Identity of the Australian Constitutional People’ (2016) forthcoming *Oxford University Commonwealth Law Journal*.
  - 5 Although there are historical and ongoing traces of an ethno-cultural or racial identity: see *Constitution* ss 25, 51(xxvi), 127.
  - 6 See Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2003) ch 6, where he argues for a return to the value and power of constituent power in the pre-constitutional setting, rather than only in its form within the constitution once made. See generally Richard Stacey, ‘Constituent Power and Carl Schmitt’s Theory of Constitution in Kenya’s Constitution-Making Process’ (2011) 9 *International Journal of Constitutional Law* 587.
  - 7 Ulrich K Preuss, ‘Constitutional Powermaking of the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution’ in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke University Press, 1994) 143, 159, where Preuss uses the examples of France and the United States.
  - 8 It has also been connected to the older history of English constitutional theory, although there the link between ‘the people’ and the constitution was more indirect: see generally 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 the 17<sup>th</sup> century precursors to Sieyès’ work see Andreas Kalyvas, ‘Popular Sovereignty, Democracy, and the Constituent Power’ (2005) 12 *Constellations* 223, 226–7.
  - 9 Peter Campbell, ‘Introduction: Sieyès and What is the Third Estate?’ in Emmanuel Joseph Sieyès, *What is the Third Estate?* (M Blondel trans, Pall Mall Press, 1963) 3, 10–11 [trans of: Qu’est-ce que le Tiers-Etat? (first published 1789)], referring to Sieyès’ declaration that ‘[t]hese two terms [the people and the nation] must be synonymous’. This echoes Benedict Anderson’s work which defines a nation as ‘an imagined political community’, thus equating ‘the people’ with the nation: see Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, revised ed, 2006) 5–6. Anderson’s work is, in turn, influential in Rosenfeld’s account of constitutional identity: Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge, 2010) 12, 18.
  - 10 Emmanuel Joseph Sieyès, *What is the Third Estate?* (M Blondel trans, Pall Mall Press, 1963) 124–5 [trans of: Qu’est-ce que le Tiers-Etat? (first published 1789)]. For a discussion of the relationship between Sieyès’ work and that of Rousseau’s theory of the social contract, see Bronislaw Baczkowski, ‘The Social Contract of the French: Sieyès and Rousseau’ (1988) 60 (Supplement) *The Journal of Modern History* S98.

of the will of ‘the people’ as the foundation for constitutions has become an imperative of ‘modern constitutionalism’.<sup>11</sup> It reflects the 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.

In highlighting the democratic or political character of the Australian ‘people’, questions arise regarding what *kinds* of political participation are anticipated by the text of the *Constitution*.<sup>12</sup> The text creates a relationship between ‘the people’ and electors. The explicit references to ‘the people’ can be understood as references to the people acting through the vehicle of the electors. The text recognises two main types of constitutive power – the historical involvement of ‘the people’ in the making of the *Constitution*, and the ongoing powers of ‘the people’ in the structures of representative government under the *Constitution*. I note the historical form briefly, then the ongoing constitutive powers, to lead to a third type of constitutive power arising from the franchise cases of the past decade – that of collective self-definition.<sup>13</sup> The reasoning in the recent decisions of the High Court regarding ‘the people’ leads to limits on the Parliament’s ability to determine the constitutional identity of the Australian ‘people’.

‘The people’ and electors come together in the opening words of the *Commonwealth of Australia Constitution Act 1901* (Imp). The preamble commences with: ‘Whereas the people of [the colonies] ... agreed to unite in one indissoluble Federal Commonwealth’. The preambular reference and matching reference in covering clause 3 are to ‘the people’ voting in referenda in 1899–1900 to adopt the Constitution Bill – ‘the people’ acting as and through electors in the Australian colonies. The colonial peoples have been understood by the Court as the historically constitutive peoples.<sup>14</sup>

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- 11 Martin Loughlin and Neil Walker, ‘Introduction’ in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007) 1, 1. For the plethora of work addressing the concept of the constituent people see, eg, Preuss, above n 7, 143; Stacey, above n 6; Joel I Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge, 2012). There is also a growing body of scholarship critical of the concept of constituent power. See, eg, the ‘contextualisation’ of constituent power in Zoran Oklopcic, ‘Three Arenas of Struggle: A Contextual Approach to the Constituent Power of “the People”’ (2014) 3 *Global Constitutionalism* 200, 207.
  - 12 I do not engage in a critique of the effectiveness of that participation as a means of political power exercised by ‘the people’. For that kind of analysis, see Denis J Galligan and Mila Versteeg, ‘Theoretical Perspectives on the Social and Political Foundations of Constitutions’ in Denis J Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013) 3, 17–18.
  - 13 This last form of constitutive power is also seen in the theoretical work of Lindahl: see 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, 19. However, Lindahl does not connect it to the Australian constitutional context.
  - 14 Elisa Arcioni, ‘Historical Facts and Constitutional Adjudication: The Case of the Australian Constitutional Preamble’ (2015) 30 *Giornale di storia Costituzionale* [Journal of Constitutional History] 107, 112–14.

In the literature, identifying ‘the people’ as the authority for the *Constitution* because of involvement in the historical moment is often associated with discussions of sovereignty.<sup>15</sup> While such discussions can be found in the Australian literature,<sup>16</sup> they have had limited impact in the case law.<sup>17</sup> Instead, the most significant form of constitutive power of ‘the people’ seen in the text of the *Constitution* is when the people act through the electors to choose members of federal Parliament and vote in referenda.

The direct references to ‘the people’ in the text of the *Constitution* proper are to ‘the people’ acting as and through electors. Section 7 states that ‘[t]he Senate shall be composed of senators for each State, directly chosen by the people of the State’. The draft *Constitution* developed at the 1891 National Australasian Convention had provided for the senators to be chosen by the ‘Houses of Parliament of the several States’.<sup>18</sup> However, consistent with the popular process of Federation, the first draft *Constitution* of the 1897–8 Australasian Federal Convention gave that power directly to ‘the people’.<sup>19</sup> The changes between the 1891 version and the final version have been described as an increase in the democratisation, or involvement, of ‘the people’ in the *Constitution*.<sup>20</sup>

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- 15 Denis J Galligan, ‘The Sovereignty Deficit of Modern Constitutions’ (2013) 33 *Oxford Journal of Legal Studies* 703, 704.
- 16 See Robert French, ‘The Constitution and the People’ in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 60; Anthony Dillon, ‘A Turtle by Any Other Name: The Legal Basis of the Australian Constitution’ (2001) 29 *Federal Law Review* 241; Michael Wait, ‘The Slumbering Sovereign: Sir Owen Dixon’s Common Law Constitution Revisited’ (2001) 29 *Federal Law Review* 57; Michael D Kirby, ‘Deakin: Popular Sovereignty and the True Foundation of the Australian Constitution’ (1996) 3 *Deakin Law Review* 129; Andrew Fraser, ‘False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution’ (1994) 16 *Sydney Law Review* 213; G J Lindell, ‘Why is Australia’s Constitution Binding? – The Reasons in 1900 and Now, and the Effect of Independence’ (1986) 16 *Federal Law Review* 29; Paul Finn, ‘A Sovereign People, A Public Trust’ in P D Finn (ed), *Essays on Law and Government* (Law Book, 1995) vol 1, 1; George Winterton, ‘Popular Sovereignty and Constitutional Continuity’ (1998) 26 *Federal Law Review* 1; Simon Evans, ‘Why is the Constitution Binding? Authority, Obligation and the Role of the People’ (2004) 25 *Adelaide Law Review* 103; Harley G A Wright, ‘Sovereignty of the People – The New Constitutional Grundnorm?’ (1998) 26 *Federal Law Review* 165; Leslie Zines, ‘The Sovereignty of the People’ in Michael Coper and George Williams (eds), *Power, Parliament and the People* (Federation Press, 1997) 91; M J Detmold, *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (Law Book, 1985) ch 11.
- 17 While the mentions of popular sovereignty seemed to wane in the case law after *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, there has been a hint of a recent resurgence in the cases of *Unions NSW v New South Wales* (2013) 252 CLR 530, 548 [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 571 [104], 578 [135] (Keane J) and *Tajjour v New South Wales* (2014) 313 ALR 221, 271 [197] (Keane J).
- 18 See s 9 of the final draft accepted by that Convention in John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 440.
- 19 See s 9: *ibid* 502.
- 20 J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 124; Helen Irving, *To Constitute a Nation: A Cultural History of Australia’s Constitution* (Cambridge University Press, revised ed, 1999) 134–8.

Section 24 states that '[t]he House of Representatives shall be composed of members directly chosen by the people of the Commonwealth'.<sup>21</sup> Other sections of the *Constitution* make it clear that the choices in sections 7 and 24 are to be made by electors.<sup>22</sup> Those choices are made by the political core of 'the people', and are indicators of the ongoing constitutive power of 'the people'.

The *Constitution* does not explicitly identify who the federal electors should be, beyond the stipulation that the qualifications of electors of senators must be the same as that for the electors of the members of the House of Representatives.<sup>23</sup> Until the federal Parliament established a uniform federal franchise, the qualification of electors for federal elections was that which applied with respect to the 'more numerous House of Parliament' in each state,<sup>24</sup> that is, the lower house of the relevant state Parliament, from which the government of the state was formed. The *Constitution* placed no limitations on the nature of those franchises at Federation, except that electors shall vote only once in each election.<sup>25</sup>

In some states, disqualification occurred on the basis of race.<sup>26</sup> The *Constitution* did not prohibit such disqualification. However, section 25 states that, if a state disqualified all persons of a particular race from voting in their state, then, 'in reckoning the number of people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted'. The 'reckoning' of the number of 'the people' referred to in section 25 was for the purpose of determining the numbers of members of the House of Representatives to be chosen in each state. That calculation is contained in section 24(ii).<sup>27</sup>

The state-based constitutional franchise was short-lived. The *Constitution* granted power to the Commonwealth Parliament to determine a national franchise, which it exercised in 1902.<sup>28</sup> Section 30 of the *Constitution* begins: 'Until [t]he Parliament otherwise provides, the qualification of the electors ...

21 Earlier drafts of that section had referred to the 'people of the States': see s 23 of the first draft *Constitution* presented to the Adelaide session of the Australasian Federal Convention as set out in Williams, above n 18, 504.

22 See *Constitution* ss 8 ('the qualification of electors of senators'), 9–10 ('elections of senators'), 30 ('qualification of electors of members of the House of Representatives'), 31 ('elections in the States of members of the House of Representatives'), 32 ('general elections of members of the House of Representatives'). That the choice is by election was confirmed by the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557 (The Court).

23 *Constitution* s 8.

24 *Constitution* s 30. See also s 31 regarding the process of elections.

25 See *Constitution* ss 8, 30. This is known as the prohibition of plural voting: *McGinty v Western Australia* (1996) 186 CLR 140, 281–2 (Gummow J).

26 See Murray Goot, 'The Aboriginal Franchise and its Consequences' (2006) 52 *Australian Journal of Politics and History* 517, 518–26.

27 This operation of s 25 is considered in Elisa Arcioni, 'Excluding Indigenous Australians from "the People": A Reconsideration of Sections 25 and 127 of the Constitution' (2012) 40 *Federal Law Review* 287. For the position of territorians being excluded from the calculation in s 24, see also *A-G (NSW); Ex rel McKellar v Commonwealth* (1977) 139 CLR 527.

28 On 4 April 1902, the Commonwealth Franchise Bill 1902 (Cth) was introduced into Parliament to establish a uniform federal franchise. It received royal assent on 12 June 1902.

shall be ...' Section 51(xxxvi) makes clear that 'the Parliament shall, subject to this Constitution, have power to make laws ... with respect to ... matters in respect of which this Constitution makes provision until the Parliament otherwise provides'. The phrase 'subject to this Constitution' indicates that there may be limits on that power to be found within the *Constitution*.

Later in this article, I discuss the implied limitation on the power of the Parliament to determine who those electors should be. There is also one *explicit* limit to that power, in section 41, which states:

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

As addressed below, this section was inserted as a compromise in order to protect the federal vote of those groups enfranchised in some colonies but not in others at Federation.

Ongoing constituent power is usually understood as the power to change a constitution, in a manner prescribed by the constitution itself.<sup>29</sup> The idea of the ongoing constituent people in the Australian context focuses attention on the issue of what kinds of power are exercised by 'the people' within the *Constitution*. One, as noted above, is by voting as federal electors. Those electors in turn represent the broader people, including some who are excluded from the federal franchise. Another is representing 'the people' by being a member of federal Parliament. Those representatives in turn represent distinct communities within the states and even the territories. A further type of political participation occurs through the federal electors in the states and territories voting in constitutional referenda under section 128 of the *Constitution* to make changes to the *Constitution* itself. I return to that section below.

The constitutional text creates a relationship between 'the people' and 'the electors' but, as noted above, the text does not define who are amongst 'the electors'. Historically, the proportion of the population who acted as electors was smaller than is presently required by legislation and High Court jurisprudence.<sup>30</sup> The position of women over time demonstrates the changing content of 'the people' as 'electors'.

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29 Stephen M Griffin, 'Constituent Power and Constitutional Change in American Constitutionalism' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007) 49, 50. However, Ackerman argues that 'the people' can change the constitution through extra-constitutional methods or 'higher lawmaking': Bruce Ackerman, *We the People: Foundations* (The Belknap Press of Harvard University Press, 1991) 6–7.

30 For example, the voting age was originally 21 but was lowered to 18 in 1973: *Commonwealth Electoral Act 1973* (Cth) s 3, amending *Commonwealth Electoral Act 1918* (Cth) s 39. It was not until 1962 that all Aboriginal people had the right to enrol and vote at federal elections: *Commonwealth Electoral Act 1962* (Cth) s 2, repealing *Commonwealth Electoral Act 1918* (Cth) s 39(6).

### III THE CHANGING CONTENT OF ‘THE PEOPLE’

A feature of the electoral law cases from the 1970s onwards is an acknowledgment by members of the High Court that the implementation and details of the system of representative government under the *Constitution* change over time. This has implications for who gets to vote and therefore to be counted amongst the ‘people’, at least in the sense of acting as federal electors. Some Justices have acknowledged that the group of federal electors, who act on behalf of ‘the people’, does not have a fixed content. Justices McTiernan and Jacobs in *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (‘*McKinlay*’)<sup>31</sup> argued that the phrase ‘chosen by the people’ has a meaning that changes with time.<sup>32</sup> Justice McHugh took a similar approach in *Langer v Commonwealth* (‘*Langer*’)<sup>33</sup> and gave an example of changing content by stating:

In the light of the extension of the franchise during this century, for example, it would not now be possible to find that the members of the House of Representatives were ‘chosen by the people’ if women were excluded from voting or if electors had to have property qualifications before they could vote.<sup>34</sup>

#### A Women as Emerging Members of ‘the People’

‘Women’ do not appear as a category in the constitutional text. The only explicit textual indication of gender is the reference to Queen Victoria, the female sovereign at Federation.<sup>35</sup> Nevertheless, some of the text related to the federal franchise and representation in Parliament was influenced by

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31 (1975) 135 CLR 1.

32 *McKinlay* (1975) 135 CLR 1, 36–7.

33 (1996) 186 CLR 302, 342. Justice McHugh’s position in *Mulholland v Australian Electoral Commission* appears to be the same with respect to the system of government changing over time: see *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 208–9 [78]–[79]. See also at 185 [10] (Gleeson CJ), 231–2 [155] (Gummow and Hayne JJ). For earlier, similar statements, see: *Western Australia v Commonwealth* (1975) 134 CLR 201, 270 (Mason J), 273–4 (Jacobs J), *McGinty v Western Australia* (1996) 186 CLR 140, 280 (Gummow J).

34 *Langer* (1996) 186 CLR 302, 342. For a discussion of the issue of voting rights for women in the context of a defence of moderate originalism in constitutional interpretation, see Jeffrey Goldsworthy, ‘Originalism in Constitutional Interpretation’ (1997) 25 *Federal Law Review* 1, 39–47; Jeffrey Goldsworthy, ‘Interpreting the Constitution in its Second Century’ (2000) 24 *Melbourne University Law Review* 677, 698–9.

35 See *Constitution* sch, which includes the form of oath or affirmation. There are numerous references in the text of the *Constitution* to ‘the Queen’. The schedule includes a reference to allegiance to the sovereign’s ‘heirs and successors according to law’. That law has been changed to remove the preference for male heirs and replace it with absolute primogeniture: *Succession to the Crown Act 2013* (UK) c 20; *Succession to the Crown Act 2015* (Cth), the latter of which came into effect once the Australian states had all enacted referring legislation in accordance with s 51(xxxviii), the last of which being Western Australia: *Succession to the Crown Act 2015* (WA). For earlier commentary, see Anne Twomey, ‘The Australian Crowns and the Rules of Succession’ (2009) 53(6) *Quadrant* 44; Anne Twomey, ‘Changing the Rules of Succession to the Throne’ (2011) 2 *Public Law* 378; Damien Freeman, ‘The Queen and Her Dominion Successors: The Law of Succession to the Throne in Australia and the Commonwealth of Nations Pt 1’ (2001) 4(2) *Constitutional Law and Policy Review* 28; Damien Freeman, ‘The Queen and Her Dominion Successors: The Law of Succession to the Throne in Australia and the Commonwealth of Nations Pt 2’ (2001) 4(3) *Constitutional Law and Policy Review* 41.



considerations of gender.<sup>36</sup> The two most significant sections in relation to which the position of women was raised in the convention debates were sections 41 and 128. In relation to one other section, section 34, there was also mention of women in the course of its drafting.

Section 34 prescribes the interim qualifications for members of federal Parliament.<sup>37</sup> It states:

Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:

(i) He must be of the full age of twenty-one years ...

(ii) He must be a subject of the Queen ...

The limited debate regarding this section included a query as to whether use of the word ‘he’ included women.<sup>38</sup> Tasmanian delegate Neil Lewis asked whether it was possible ‘for a female elector of South Australia to be a candidate and to be elected for either the Senate or House of Representatives’.<sup>39</sup> Edmund Barton replied that the clause would have to read ‘he’. Lewis responded that, as the *Constitution* was to be within an Imperial Act, the relevant statutory interpretation legislation would apply so that ‘where the context does not imply to the contrary, “the female” will be included’.<sup>40</sup> This was consistent with the historically unexceptional use of ‘he’ to cover all persons.<sup>41</sup> Barton retorted: ‘The context does imply to the contrary!’<sup>42</sup> Lewis disagreed, saying:

I doubt it very much. Females will be able to contest every electoral district either for the Senate or House of Representatives, not only in South Australia, but right through Australia a state of affairs which is really too awful to think of [sic].<sup>43</sup>

Despite Lewis’ discomfort at the prospect of female members of federal Parliament, he did not propose any amendment to prevent such a possibility. The

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36 In addition, there is constitutional text which exists in its current form at least in part due to advocacy by women’s groups. See, eg, *Constitution* s 113 regarding intoxicating liquids. For the role of the Women’s Temperance Unions in its insertion into the draft *Constitution*, see Irving, *To Constitute a Nation*, above n 20, ch 10; Helen Irving, ‘Who are the Founding Mothers? The Role of Women in Australian Federation’ (Papers on Parliament No 25, Department of the Senate, Parliament of Australia, 1995).

37 While s 34 refers only to the qualifications for members of the House of Representatives, s 16 of the *Constitution* requires that the qualifications of senators be the same.

38 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 13 September 1897, 457–8. The section was not discussed in the Melbourne session. Discussion of the residency requirement within that section was considered in Adelaide.

39 *Ibid* 457.

40 *Ibid* 458.

41 See the statutory interpretation legislation that applied prior to and at Federation: *Interpretation Act 1850*, 13 & 14 Vict, c 21, s 4: ‘That in all Acts words importing the masculine gender shall be deemed and taken to include females’. See also Courtenay Ilbert, *The Mechanics of Law Making* (Columbia University Press, 1914) 118–19. The original version of the *Acts Interpretation Act 1901* (Cth) contained words to the same effect in s 23(a): ‘Words importing the masculine gender shall include females’. That section now reads: ‘words importing a gender include every other gender’.

42 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 13 September 1897, 458.

43 *Ibid*.

question of women's qualification under section 34 was later raised in the context of election to the first federal Parliament.<sup>44</sup>

The 'problem' of women acting as electors and, potentially, being federal parliamentarians, was ventilated to a greater degree in relation to the Convention debates regarding two other sections of the *Constitution*, whose final form was affected by the issue of federal voting rights for women. As was indicated in the debate regarding section 34, the focus of the earlier discussion in relation to sections 41 and 128 was the fact that women in South Australia at that time had the right to vote. The debates indicate that women were identified as potential future members of 'the people' in the sense that they might become federal electors, but with the conclusion that the *Constitution* should neither guarantee such membership for all women nor prevent women from taking on that role.

In 1891, under the first draft of what would become the *Constitution*, no woman in any Australian colony had the right to vote.<sup>45</sup> By the time of the final referenda to approve the draft *Constitution*, women in two colonies could take part in the decision whether the colonies should federate. Women in South Australia received the vote in 1895.<sup>46</sup> Women in Western Australia received the vote in 1899.<sup>47</sup>

In 1897, Frederick Holder, from South Australia, proposed an amendment to the draft *Constitution* such that: 'Every man and woman of the full age of twenty-one years, whose name has been registered as an elector for at least six months, shall be an elector'.<sup>48</sup> Despite Holder's advocacy of the cause, his proposal was defeated 23:12.<sup>49</sup> Opposition came from the colonies which (at the time) only enfranchised men, objecting to a provision which may have forced them into enfranchising all adults. The refusal to include such a broad franchise in the *Constitution* led to Holder's proposing the compromise that anyone who had a vote at Federation should retain that vote, leading to the adoption of section 41.

As set out above, section 41 states that Commonwealth law cannot prevent a person from voting for the Commonwealth Parliament if they have or acquire a right to vote at elections for their state Parliament. However, the meaning of

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44 Janette Bomford, 'The Lady Politician: Vida Goldstein's First Senate Campaign' in Helen Irving (ed), *A Woman's Constitution? Gender and History in the Australian Commonwealth* (Hale & Iremonger, 1996) 55, 62; Marian Simms, 'Election Days: Overview of the 1901 Election' in Marian Simms (ed), *1901: The Forgotten Election* (University of Queensland Press, 2001) 1, 11–12. See also Ann Millar, 'Feminising the Senate' in Helen Irving (ed), *A Woman's Constitution? Gender and History in the Australian Commonwealth* (Hale & Iremonger, 1996) 127, 133, where Millar notes that with the 1902 enfranchisement of all non-Indigenous women, they were thereby eligible to be chosen in later federal elections due to their status as 'electors'.

45 But note the position of women in Victoria, some of whom had a right to vote in Victorian elections between 1863–65 under the *Electoral Act 1863* (Vic). Some of my discussion in this article regarding s 41 has been published as Elisa Arcioni, 'Feminism and the Franchise' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 55.

46 *Constitution Amendment Act 1894* (SA), to which assent was given in 1895.

47 *Constitution Acts Amendment Act 1899* (WA), which consolidated a number of amendments to the constitution of that colony, including granting women the vote.

48 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, April 15 1897, 715.

49 *Ibid* 725.

section 41 was not completely clear, with at least three different interpretations being outlined even in 1901.<sup>50</sup>

The drafting of section 41 was related to the drafting of section 128. As noted above, electors not only have a role in choosing members of Parliament, they also have a vital role in accepting or rejecting proposed changes to the *Constitution* itself. Section 128 outlines how the text of the *Constitution* can be changed. The Parliament must first pass a proposed law for the *Constitution*'s alteration. That proposal must then be 'submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives'.<sup>51</sup> Until the Parliament created a uniform federal franchise, the state franchises took effect under section 128, which requires that:

until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

This passage was the compromise agreed upon, to address the fact that at the time of the relevant Convention debates, South Australia had enfranchised women, unlike the other colonies.<sup>52</sup> In debating whether the wording of section 128 captured the double majorities being sought by the delegates, the enfranchisement of women was said to 'give a very unfair advantage to South Australia' who would 'count twice'.<sup>53</sup> Barton suggested the first possible solution: 'There is only one way out of this difficulty, and that is to make the clause read thus: "... the votes of male electors only shall be counted"'.<sup>54</sup> Delegates raised the practical difficulties in achieving this.<sup>55</sup> The Convention was brought back to the 'axiom' in section 128: 'a majority of the States and a majority of the people's vote'.<sup>56</sup>

Holder once more provided the compromise: 'The best plan will be to provide that where there is adult suffrage the voting result shall be divided by

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50 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, 1901) 486.

51 'Territory' is defined as 'any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives': *Constitution* s 128. This definition was inserted by Constitutional Alteration (Referendums) 1977 (Cth).

52 Jonathan Crowe and Peta Stephenson, 'An Express Constitutional Right to Vote? The Case for Reviving Section 41' (2014) 36 *Sydney Law Review* 205, 219. Crowe and Stephenson argue that the text is best understood in this way, rather than extending to the situation whereby *any* lack of uniformity amongst state franchises would animate that paragraph.

53 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 1025 (Isaac Isaacs and Edmund Barton). It is more accurate to say that South Australia would have approximately twice as many electors than if the same population were in a different colony, given that the other colonies only enfranchised men at the time. As noted above, Western Australia would enfranchise women by the time of the referendum in that colony, but after the Convention debates had concluded.

54 *Ibid*, 22 April 1897, 1205.

55 *Ibid* 1205–6.

56 *Ibid* 1206 (Alfred Deakin).

two'.<sup>57</sup> This was described by Isaac Isaacs as 'a rough and ready way of meeting the difficulty',<sup>58</sup> one which was accepted by the Convention.<sup>59</sup>

This part of section 128 can be seen as a provision to provide the mirror-effect of section 41 – while those women enfranchised prior to Federation would gain the right to a federal vote, their inclusion amongst the constitutional electors would mean that their state's numbers of voters would be halved for the purpose of the calculations in section 128.<sup>60</sup> No referendum took place prior to the adoption of a uniform federal franchise in 1902, and thus this part of section 128 was never put into effect.<sup>61</sup>

Section 128 refers to 'electors' rather than 'people'. However, these are the same state electors as exercise the choices referred to in sections 7, 24 and, since 1977, the same territorian electors as exercise a vote under legislation enacted pursuant to section 122.<sup>62</sup> Earlier versions of section 128 during the drafting period included a reference to 'the people' with respect to the calculation required for a successful referendum.<sup>63</sup> Both before and after the removal of the phrase 'the people' from section 128 during its drafting, the delegates to the Conventions referred to choice by 'the people' to explain the complicated machinery of the referenda.<sup>64</sup> The High Court and commentators have referred to section 128 as the provision for alteration 'by the people of the Commonwealth themselves'.<sup>65</sup>

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57 Ibid 1207.

58 Ibid.

59 Ibid 1208.

60 See excerpts from the relevant debates in Patricia Grimshaw, 'A White Woman's Suffrage' in Helen Irving (ed), *A Woman's Constitution? Gender and History in the Australian Commonwealth* (Hale & Iremonger, 1996) 77, 80–1, citing *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 22 April 1897, 1204–8.

61 The first referendum held under s 128 of the Constitution was on 12 December 1906, in relation to the amendment of s 13 of the Constitution to allow for concurrent elections in both Houses of Parliament. It was carried in each state as well as nationally: see results in George Williams, Sean Brennan and Andrew Lynch, *Blackshield & Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 6<sup>th</sup> ed, 2014) 1339.

62 In 1977, s 128 was amended to include electors in territories which had been granted representation in the House of Representatives amongst the electors who could vote in constitutional referenda: *Constitutional Alteration (Referendums) 1977* (Cth). See also *Referendum (Machinery Provisions) Act 1984* (Cth) s 4(1). Previously, only electors in the states could vote in referenda.

63 Williams, above n 18, ch 25. For the amendment, see *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 22 April 1897, 1208.

64 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 12 April 1897, 454–5 (Edmund Barton), introducing the draft Constitution to the Adelaide Convention. See also: at Adelaide, 20 April 1897, 1021 (Isaac Isaacs and Alfred Deakin), 1023 (Simon Fraser). Making reference to 'the people' continued even after the removal of explicit mention of 'the people' from the section: see, eg, at: Melbourne, 9 February 1898, 717 (Isaac Isaacs).

65 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1130 (Griffiths CJ, Barton and O'Connor JJ); *Colonial Sugar Refining Co Ltd v A-G (Cth)* (1912) 15 CLR 182, 206 (Barton J): 'the consent of the people in accordance with [s 128]'; *New South Wales v Commonwealth* (2006) 229 CLR 1, 200 [468], 245 [614] (Kirby J), 299–301 [732]–[735], 319 [772], 322 [779], 353 [842] (Callinan J); Anne Twomey, 'The Federal Constitutional Right to Vote in Australia' (2000) 28 *Federal Law Review* 125, 145; French, above n 16, 60, 73; Greg Taylor, 'Citizenship Rights and the Australian Constitution' (2001) 12 *Public Law Review* 205, 222.

The removal of the phrase ‘the people’ from section 128 occurred as part of the amendment, referred to above, to counteract the ‘difficulty’ of women voting in South Australia.<sup>66</sup> The delegates understood the term ‘electors’ in section 128 to indicate that the electors were representatives of ‘the people’. The delegates discussed the difference between a majority of the population (‘the people’) and a majority of those enfranchised (‘the electors’).<sup>67</sup> The representative connection between the two has been emphasised in the jurisprudence relating to federal elections, discussed below, whereby ‘the people’ are considered as the community, represented by a smaller group – the federal electors.

The Convention debates regarding sections 34, 41 and 128 all point to the difficulty that some of the colonies faced in relation to who should be part of the political core of ‘the people’ – as federal electors and members of the federal Parliament. In the end, the constitutional text agreed upon neither required nor prevented women from exercising those constitutive roles. Instead, a truce was reached between the opposing colonial views. Women who were already part of the political people within their colonies, and then states, had the opportunity to act as part of the political people at the federal level. No colony was forced to include women amongst their own electors or agree to national inclusion. The delegates agreed to leave the matter for resolution by the federal Parliament. The Convention debates therefore indicate that women were emerging as potential members of the core of ‘the people’. Such was the position at Federation.

In 1983, in *R v Pearson; Ex parte Sipka* (‘*Sipka*’),<sup>68</sup> the Court concluded that section 41 was to have no ongoing effect for the position of women, or any other group of potential electors.<sup>69</sup> Section 41 is now a ‘dead-letter’. While the decision in *Sipka* has been criticised by scholars,<sup>70</sup> it has not been overturned or undermined in later High Court cases.<sup>71</sup> Rather than section 41 providing any

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66 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 22 April 1897, 1204–8.

67 *Ibid* 1205–7. See also: at Melbourne, 9 February 1898, 717 (Isaac Isaacs and Josiah Symon), 725 (John Downer).

68 (1983) 152 CLR 254.

69 In two earlier cases, s 41 was raised but received little attention: *Muramats v Commonwealth Electoral Officer (WA)* (1923) 32 CLR 500; *King v Jones* (1972) 128 CLR 221.

70 Twomey, ‘The Federal Constitutional Right to Vote in Australia’, above n 65, 138–41; Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (LexisNexis, 3<sup>rd</sup> ed, 2012) 15; Adrian Brooks, ‘A Paragon of Democratic Virtues? The Development of the Commonwealth Franchise’ (1993) 12 *University of Tasmania Law Review* 208, 246–8; Crowe and Stephenson, above n 52.

71 The *Sipka* interpretation of s 41 has never been challenged by a majority of the High Court: *McGinty v Western Australia* (1996) 186 CLR 140, 244 (McHugh J), 282 (Gummow J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 235 [151] (Gummow and Hayne JJ); *Roach v Electoral Commissioner* (2007) 233 CLR 162, 195 [70] (Gummow, Kirby and Crennan JJ); *Snowdon v Dondas* (1996) 188 CLR 48, 71–2 (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ). Even in the more detailed analysis of *Sipka* in *Rowe v Electoral Commissioner*, the ultimate conclusion reached in *Sipka* was not in doubt: *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 13–14 [7]–[9], 27–8 [48] (French CJ), 48 [122] (Gummow and Bell JJ), 80–1 [236]–[238] (Hayne J), 113 [350] (Crennan J). See also *Holmdahl v Australian Electoral Commission [No 2]* (2012) 277 FLR 101, 105 [11]–[12] (Gray J). A proposal to delete s 41 and insert an explicit protection of the right to vote was defeated at referendum in 1988: Constitutional Alteration (Fair Elections) 1988 (Cth). Note also the earlier proposal which would have entrenched voting rights in 1974: Constitutional Alteration (Democratic Elections) 1974 (Cth).

guarantee of inclusion of women as amongst the federal electors, their inclusion is assured by the Court's interpretation of the key sections of the *Constitution* relating to representative government – sections 7 and 24.

Sections 8 and 30 of the *Constitution* meant that the federal franchise was to be that which applied in each state until the federal Parliament enacted a uniform franchise.<sup>72</sup> The federal Parliament did so in 1902.<sup>73</sup> The majority concluded that the protection of section 41 was to apply only in the intervening period. Only those who had a right to vote in their state 'before the passing' of that federal law were covered by section 41.<sup>74</sup> Given that it was unlikely that any such person was still alive by 1983, the practical effect of section 41 was therefore spent.

The Court's interpretation of section 41 therefore has no ongoing relevance to the position of women as electors. The Court's explication of the text whose form was influenced by a concern for the protection of (eligible) women's membership of the political people tells us little about the ongoing membership of women. Instead, the reasoning directs us to look at what the Parliament has done with respect to the federal franchise, and how the *Constitution* is understood in that context. The interaction between legislation regarding elections and the constitutional requirement of choice by 'the people' is at the heart of the more recent cases, which not only establish the relationship between 'the people' and 'the electors' as a jurisprudentially powerful one, but assure the franchise rights of, amongst others, women.

#### IV 'THE PEOPLE' AS A POWERFUL CONCEPT

The High Court case law regarding the federal franchise demonstrates three elements of Australian constitutional identity arising from a consideration of the relationship between 'the people' and 'the electors'. First, the Court conceives of the electors as a subset of 'the people'. The relationship between those groups limits legislative power, with the effect that the historically precarious voting rights of groups, including women, are now protected. Second, the identification of who are the relevant 'electors' may have a normative element. Third, the

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72 Section 8 states:

The qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once.

Section 30 states:

Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once.

73 *Commonwealth Franchise Act 1902* (Cth).

74 For an early expression of this view, see R R Garran, 'Electoral Enrolment: Effect of Franchise Provisions of *Constitution* and Commonwealth Laws' in Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia: With Opinions of Solicitors-General and the Attorney-General's Department* (Australian Government Publishing Service, 1981) 695.

reasoning adopted by the Court in protecting the now broad franchise confirms that ‘the people’ are to be considered as a collective and that their will determines to a significant extent their own constitutional identity, which I call the third constitutive function of ‘the people’ – a power of collective self-definition.

### A The Electors as Representative of ‘the People’

The High Court has heard many challenges to federal electoral legislation. On each occasion, the Court has accepted that the Parliament has the power to determine the details of the electoral system, subject to constitutional limits.<sup>75</sup> With respect to the details of the franchise, it is only in recent times that there have been significant successful challenges to federal legislation. In 2007, the Court heard a challenge to the disenfranchisement of prisoners in *Roach v Electoral Commissioner* (‘*Roach*’).<sup>76</sup> In 2010, in *Rowe v Electoral Commissioner* (‘*Rowe*’),<sup>77</sup> the Court heard a challenge to the reduction in the time available to enrol to vote after the calling of a federal election. In both cases, every member of the Court accepted that the Parliament’s power was to be assessed against the constitutional phrase ‘directly chosen by the people’.<sup>78</sup> The High Court has developed the view that the electors are a subset, and representative, of ‘the people’ and the Court has relied on that relationship to invalidate federal legislation.

The requirement of choice by ‘the people’ in sections 7 and 24 is understood by the High Court as constitutional ‘bedrock’.<sup>79</sup> It is the bedrock of the system of government established by the *Constitution*. It was not until the 1970s that a series of cases led to the development of jurisprudence concerned with representative government and the relationship between ‘the electors’ and ‘the people’.<sup>80</sup>

75 *Smith v Oldham* (1912) 15 CLR 355; *Judd v McKeon* (1926) 38 CLR 380; *A-G (Cth) ex rel McKinlay* (1975) 135 CLR 1; *A-G (NSW); Ex rel McKellar v Commonwealth* (1977) 139 CLR 527; *McGinty v Western Australia* (1996) 186 CLR 140; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

76 (2007) 233 CLR 162.

77 (2010) 243 CLR 1.

78 Although they differed in their understanding of the requirements of that phrase and how the legislation in question was to be characterised: *Roach* (2007) 233 CLR 162, 173–4 [6]–[7] (Gleeson CJ), 187–8 [48]–[49] (Gummow, Kirby and Crennan JJ); *Rowe* (2010) 243 CLR 1, 12 [1] (French CJ), 48 [121] (Gummow and Bell JJ), 89 [264] (Hayne J), 97 [292]–[293] (Heydon J), 106 [325] (Crennan J), 126 [405] (Kiefel J).

79 *Rowe* (2010) 243 CLR 1, 12 [1] (French CJ), citing *Roach* (2007) 233 CLR 162, 198 [82] (Gummow, Kirby and Crennan JJ).

80 However, representative government was referred to by the High Court in earlier cases. A related notion of a right of access to government, in order to be able to participate in the activities of the federal nation, was noted in *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 108–10 (Griffiths CJ). In *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 176, Gavan Duffy J identified ‘representative government’ as having been established in Australia. In *Judd v McKeon* (1926) 38 CLR 380, the Court had to address the notion of ‘choice’ that affects the legislative power of the Commonwealth and states to prescribe a ‘method of choosing’ senators which included, in that instance, the establishment of an offence of failing to vote without a ‘valid and sufficient reason’: *Commonwealth Electoral Act 1918* (Cth) s 128A(12).

In *McKinlay*,<sup>81</sup> the Court heard a challenge to the legislation which governed the drawing of electoral boundaries for federal elections. One of the arguments made against the legislation was that it did not lead to equality of voting value, as there was inequality between the numbers of people or electors in each electoral division. The Court rejected the challenge. Justices McTiernan and Jacobs addressed the relationship between ‘the people’ and ‘the electors’, concluding that they are not necessarily synonymous. Instead, the most important principle is that of representative democracy, which is at the heart of the relationship:

To say that ‘people’ means ‘electors’ or ‘enfranchised subjects’ is erroneous because it takes account only of the enfranchised subjects regarded individually but no account of the body of subjects regarded collectively as a unity. It is an accurate description only so long as the franchise is wide enough to satisfy the description ‘popular’ but it would be nonsense to speak of a choice by a few who happened to be enfranchised (the foundation of an oligarchy) as a choice by the people (the foundation of a democracy). ...

to argue ... that ‘people’ merely means ‘electors’ is to subtract an essential feature from the constitutional requirement if thereupon it is argued that section 24 in its opening words says no more than that choosing of members shall be by direct vote of electors. The section says much more than this.<sup>82</sup>

Justices McTiernan and Jacobs indicated that there is a necessary relationship between ‘the people’ and ‘the electors’, related to representation. However, they did not explain exactly what link was required. The requirement of representation has been developed in a number of later cases.

In 1996, the High Court returned to the issue of equality of voting power in *McGinty v Western Australia* (*McGinty*),<sup>83</sup> this time focusing on the Western Australian electoral system. Argument was based on state legislation and the state’s constitution, as well as on the impact of the federal *Constitution*. Justice Gaudron’s view was consistent with that of McTiernan and Jacobs JJ, as outlined above. Justice Gaudron argued that democratic government is guaranteed by the *Constitution*. Therefore, when considering that sections 7 and 24 refer to ‘the people’ rather than ‘electors’, she concluded that ‘the expression “chosen by the people” must be seen as mandating a democratic electoral system and not as requiring a particular electoral system or that it have some particular feature’.<sup>84</sup> Ideals of representation can be seen in the reasoning of the Justices. However, those ideals were not so prescriptive as to require equality of representation in the form argued by the plaintiffs, who were seeking a principle of ‘one vote, one value’.

Later that same year, the Court decided *Langer*,<sup>85</sup> which concerned mandatory preferential voting and the prohibition of advocacy of voting contrary to that requirement.<sup>86</sup> Justice McHugh reiterated the position in *McKinlay*:

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81 (1975) 135 CLR 1.

82 Ibid 35–7.

83 (1996) 186 CLR 140.

84 Ibid 220.

85 (1996) 186 CLR 302.

86 The provisions were *Commonwealth Electoral Act 1918* (Cth) ss 240, 329A, both upheld as valid.



to read the words ‘the people’ as always being equivalent to the eligible electors would be to miss the high purpose of section 24. That purpose is to ensure representative government by insisting that the Parliament be truly chosen in a democratic election by that vague but emotionally powerful abstraction known as ‘the people’.<sup>87</sup>

Justices Toohey and Gaudron noted the distinction between ‘people’ and ‘electors’, and concluded that the phrase ‘chosen by the people’ ‘must be taken as primarily mandating a democratic electoral system’.<sup>88</sup> Justice Kirby affirmed this vein of authority in his judgment in *Mulholland v Australian Electoral Commission* (‘*Mulholland*’).<sup>89</sup> In *Mulholland*, the Court heard a challenge to the form of the Senate paper and rules which applied as a limit to which candidates and parties could appear ‘above the line’ on that ballot paper. Justice Kirby stated that ‘it is now generally accepted that the constitutional phrase ... has a high constitutional purpose’,<sup>90</sup> being ‘the constitutional idea of representative democracy’.<sup>91</sup> He highlighted the use of the word ‘people’ rather than ‘electors’, stating that the former ‘enshrines the democratic ideal to which Ch I ... gives expression’.<sup>92</sup>

The ‘high purpose’ that has been emphasised in the cases can be understood as the requirement that there be a representative link between those who are enfranchised and the broader community understood as ‘the people’. This has led to the requirement that the franchise be sufficiently broad and general in order that ‘the electors’ can be considered to be speaking for ‘the people’ when exercising their political choices as to who represents them in Parliament. There are two levels of representation enshrined in the *Constitution* – the electors representing ‘the people’ in choosing the members of Parliament and the members of Parliament in turn representing ‘the people’. This latter aspect can be seen in the reasoning of the Court with respect to the implied freedom of political communication. The implied freedom emerged from a series of cases and was expressed most clearly in the unanimous decision of *Lange v Australian Broadcasting Corporation* (‘*Lange*’),<sup>93</sup> where the Court stated that the *Constitution*, through sections including sections 7, 24 and 128, established a system of representative government. The effect of those sections is ‘to ensure that the Parliament of the Commonwealth will be representative of the people of the Commonwealth.’<sup>94</sup>

From the 1970s onwards, the Court has indicated that ‘the people’ is a broader group than ‘the electors’, and that there is a representative connection between those groups and between ‘the people’ and the Parliament. While earlier obiter comments had been made regarding the franchise, it is only in the cases of

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87 *Langer* (1996) 186 CLR 302, 342–3 (citations omitted).

88 *Ibid* 332–3.

89 (2004) 220 CLR 181.

90 *Ibid* 250 [218].

91 *Ibid* 251 [220].

92 *Ibid* 251 [222].

93 (1997) 189 CLR 520, 557. See also: at 567–8.

94 *Ibid* 558.

*Roach* and *Rowe* that the Court had to squarely address what impact the constitutional concept of ‘the people’ has on the federal franchise. On both occasions, that phrase was held to invalidate federal legislation. In those decisions, the Court gave great weight to the relationship between ‘the people’ and the ‘electors’.

Vickie Lee Roach, an Australian citizen, was convicted of a number of offences and sentenced by the County Court of Victoria to six years imprisonment. The federal electoral law in place at the time of her sentence stated: ‘A person who is serving a sentence of imprisonment for an offence against the law of ... a State ... is not entitled to vote at any Senate election or House of Representatives election’.<sup>95</sup> That section had replaced the earlier prisoner disenfranchisement regime, which applied to ‘a person who ... is serving a sentence of three years or longer for an offence against the law of ... a State’.<sup>96</sup>

Roach challenged her disqualification in the High Court by asserting that it breached sections 7 and 24 of the *Constitution*. She argued that:

a law that disqualifies qualified members of ‘the people’ from voting will be contrary to [those sections] if the disqualification is not either in furtherance of, or rationally connected and ... consistent with, representative democracy. Blanket disenfranchisement is arbitrary.<sup>97</sup>

The majority, made up of Gleeson CJ, Gummow, Kirby and Crennan JJ, agreed with Roach, invalidating the legislation and in doing so reviving the earlier legislative provision that disqualified prisoners serving a minimum sentence of three years. It was a hollow victory for Roach. She succeeded in her main argument but remained disqualified by virtue of her six-year sentence. However, her challenge encouraged the Court to explore the relationship between ‘the people’ and ‘the electors’.

The majority acknowledged that sections 8 and 30 of the *Constitution*, together with section 51(xxxvi), give the Parliament the power to make laws with respect to the franchise.<sup>98</sup> However, the Court reasoned that the power was not at large, but restricted by the requirement of sections 7 and 24 that parliamentarians be ‘directly chosen by the people’.<sup>99</sup> In reaching their conclusion, the majority affirmed the earlier position of members of the Court according to which the phrase ‘chosen by the people’ was to be considered as providing a centrepiece of representative government.<sup>100</sup> The majority concluded that the blanket ban on prisoners’ being eligible to be federal electors was too broad, excluded too many individuals from the group that should exercise the choice of ‘the people’ and

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95 *Commonwealth Electoral Act 1918* (Cth) s 93(8AA). ‘Sentence of imprisonment’ meant ‘detention on a full-time basis’: at s 4(1A)(a).

96 *Commonwealth Electoral Act 1918* (Cth) s 93(8). The second reading speech regarding the amendment noted above does not explain the change: Commonwealth, *Parliamentary Debates*, House of Representatives, 8 December 2005, 19–22 (Sharman Stone).

97 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 164 (R Merkel QC) (during argument).

98 *Ibid* 173 [6] (Gleeson CJ), 186–7 [44]–[47] (Gummow, Kirby and Crennan JJ).

99 *Ibid* 173 [6] (Gleeson CJ), 187–8 [48]–[49] (Gummow, Kirby and Crennan JJ).

100 *Ibid* 187 [48], 198–9 [83] (Gummow, Kirby and Crennan JJ).

was arbitrary. The Court adopted the idea that ‘the electors’ is a subset of ‘the people’. In this case, that subset was too narrow to satisfy the constitutional mandate, so the legislation was struck down. ‘The net of disqualification’ was ‘cast too wide’.<sup>101</sup> Three years later, the Court went further, using the mandate of choice by ‘the people’ to affect much finer details of the electoral regime.

*Rowe* was a case organised by the political activist group GetUp!. Prior to the 2010 federal election, the then government had introduced legislation which reduced the amount of time within which eligible persons could enrol to vote following the calling of an election from seven days to one day for new enrolments or three days for transfers of enrolment.<sup>102</sup> GetUp! supported the constitutional challenge to that legislation, relying on the circumstances of two individuals who were affected by the legislation, each claiming to represent a significant number of potential voters. The first was Shannen Rowe, who had recently turned 18 and had not enrolled in time to appear on the roll for the 2010 election. The second was Douglas Thompson, who had not changed his residential details in time to vote in the Division in which he resided. The Court, by majority, struck down the legislation as being inconsistent with the constitutional ‘mandate’ of choice by ‘the people’. The Court concluded that the detriment caused by the legislation outweighed any potential benefits of the early closing of the rolls; that is, too many individuals, who *could* have been within the ‘electors’ category, were prevented from being electors. As French CJ stated:

the heavy price imposed by the Amendment Act in terms of its immediate practical impact upon the fulfilment of the constitutional mandate was disproportionate to the benefits of a smoother and more efficient electoral system to which the amendments were directed.<sup>103</sup>

The electors were not sufficiently representative of ‘the people’ and thus the legislation was invalid. The outcomes of both *Roach* and *Rowe* demonstrate that the representative relationship between the electors and ‘the people’ is critical. The relationship has been used to strike down legislation. In determining who should fall within the elector category, as noted above, the Court has indicated that the answer changes over time.

## B A Normative Notion of ‘the People’

The determination of who is counted amongst ‘the people’ is also affected by an indication of a normative understanding of those ‘people’. Such normative understanding is hinted at in *Roach*. In assessing the validity of the disenfranchisement of all prisoners in that case, Gleeson CJ considered the rationale for disenfranchisement. With respect to prisoners generally, he rejected the mere fact of imprisonment as a legitimate basis for denying a person the vote.<sup>104</sup> Rather, the rationale ‘must lie in the significance of the combined fact of

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101 Ibid 202 [95] (Gummow, Kirby and Crennan JJ).

102 *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth), inserting *Commonwealth Electoral Act 1918* (Cth) ss 102(4), 102(4AA).

103 *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 39 [78].

104 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 176 [10].

offending and imprisonment, as related to the right to participate in political membership of the community'.<sup>105</sup> Chief Justice Gleeson stated that:

It is consistent with our constitutional concept of choice by the people for Parliament to treat those who have been imprisoned for serious criminal offences as having suffered a temporary suspension of their connection with the community, reflected at the physical level in incarceration, and reflected also in temporary deprivation of the right to participate by voting in the political life of the community.<sup>106</sup>

Chief Justice Gleeson recognised that acting in a way which is contrary to the norms of a society, as understood through the criminal law, means that a person is susceptible to temporary exclusion, including in relation to their political participation in that community. Individuals can be removed from the body politic, and therefore excluded from that manifestation of 'the people', if they contravene rules of behaviour that govern membership. A person may therefore be temporarily suspended from the political core of 'the people'. Chief Justice Gleeson required that a sufficiently serious level of culpability be established, understood in this case to be indicated by a minimum sentence of three years, before a person could be considered sufficiently 'bad' to warrant temporary exclusion from the political community.

The joint judgment of Gummow, Kirby and Crennan JJ featured similar socio-normative considerations. These Justices took steps towards identifying the constitutional community by referring to membership and participation in the federal body politic.<sup>107</sup> Their interpretation of the provision for disqualification in the legislation was that it served 'to protect the integrity of the electoral result from the exercise of the franchise by groups of voters sharing some characteristic considered to affect capacity to vote responsibly and independently'.<sup>108</sup>

Justices Gummow, Kirby and Crennan outlined the history of disqualifications regarding prisoners and criminal charges in colonial times and concluded that:

these grounds for disqualification manifested an understanding of what was required for participation in the public affairs of the body politic ... That understanding fixed upon considerations of fitness and probity of character which were seen to be lacking in those convicted of the categories of crimes which answered the common law description of being 'infamous'.<sup>109</sup>

Turning to the legislation in question, they acknowledged that there are constitutional limits to what the Parliament can do<sup>110</sup> and concluded that:

The legislative pursuit of an end which stigmatises offenders by imposing a civil disability during any term of imprisonment takes [the legislation] beyond what is

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105 Ibid 176 [11].

106 Ibid 179 [19].

107 Ibid 198–9 [83].

108 Ibid 183 [29].

109 Ibid 192 [62]. They also considered the constitutional history and concluded that the wording of s 44, regarding the disqualifications from being chosen or sitting as a member of federal Parliament, was also related to this concern for probity: at 194 [68].

110 Ibid 197–8 [78].

reasonably appropriate and adapted ... The net of disqualification is cast too wide.<sup>111</sup>

The Justices agreed with Gleeson CJ that a minimum sentence of three years provided an adequate ‘criterion of culpability’.<sup>112</sup> Thus, the joint judgment also reflected the notion that the community can, through its criminal laws, determine who is considered sufficiently ‘bad’ to warrant temporary exclusion from the federal electors.

### C ‘The People’ as Self-constitutive

In the cases of *Roach* and *Rowe*, a majority of the Court used the notion of choice by ‘the people’ to invalidate the electoral laws in question. In working out the meaning of that phrase, and therefore giving an indication of who ‘the people’ are, the majority started from the position that a universal adult franchise is now protected by the *Constitution*; that is, that despite no explicit direction from the constitutional text, all capable adult citizens should presumptively have, and be able to exercise, the right to vote. This was the baseline against which the Court in *Roach* determined whether it was justifiable to disenfranchise all prisoners, and against which the Court in *Rowe* determined whether the legislature could shorten the timeframe between calling the election and closing the electoral roll.

The Court has relied upon legislative indications of inclusion amongst the body politic in order to determine the constitutional requirements consistent with the mandate of choice by ‘the people’. The Court has constitutionalised legislative indications of identity.<sup>113</sup> As discussed above, ‘the people’, in the form of the electors, exercise two ongoing constitutive powers – by choosing members of federal Parliament and voting in constitutional referenda. The method of reasoning adopted by the Court confers on ‘the people’ a third constitutive power, which I call the power of self-definition.

The majority Justices, in both *Roach* and *Rowe*, used legislative indications of membership to determine who ‘the people’ are who must, constitutionally, be doing the choosing.<sup>114</sup> The pattern of membership that the Justices saw in legislation provided the meaning of the phrase ‘chosen by the people’ and identified ‘the people’ who must be able to exercise a choice through a federal vote. Those ‘people’ were therefore defined (with limitations) by the patterns found in legislation.

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111 Ibid 202 [95].

112 Ibid 204 [102].

113 See generally Elisa Arcioni, ‘Democracy and the Constitution: The People Deciding the Identity of “the People”’ in Glenn Patmore and Kim Rubenstein (eds), *Law and Democracy: Contemporary Questions* (Australian National University Press, 2014) 11.

114 *Roach* (2007) 233 CLR 162, 173–4 [5]–[6] (Gleeson CJ), 198 [80] (Gummow, Kirby and Crennan JJ); *Rowe* (2010) 243 CLR 1, 18 [18] (French CJ), 48–9 [121]–[123] (Gummow and Bell JJ), 106–7 [326], 116–17 [366] (Crennan J).

While this approach has been criticised,<sup>115</sup> it indicates that the Court is allowing ‘the people’ to determine their own constitutional identity. The reasoning of the Court can be understood as conferring on ‘the people’ the power of collective self-definition, through legislation.<sup>116</sup> The primary textual indications of ‘the people’ in the *Constitution*, sections 7 and 24, connect to the system of representative government: ‘the people’ choose the Parliament, the Parliament therefore represents ‘the people’.<sup>117</sup> The legislation made by the Parliament can therefore be understood as the will or voice of ‘the people’.<sup>118</sup> The people’s voice (legislation) is then used by the Court to determine the identity of ‘the people’ (as electors). Therefore, ‘the people’ are involved in determining their own constitutional identity. The Court, by adopting, deferring to, or reflecting, legislative choices regarding membership of the constitutional people, is reflecting the collective people’s own view of themselves. The Court is adopting the people’s view of whom ‘the people’ themselves want to be included in the constitutional community and whom they want excluded. ‘The people’ therefore exercise a third form of constitutive power – self-constitution.

This power of self-constitution is significant, albeit not unlimited. The Court has relied on a durable pattern of legislation rather than any single manifestation of the will of ‘the people’ captured by a sole piece of legislation. The power of self-constitution arises from the reasoning of the Court in *Roach* and *Rowe* but should also be placed in the broader context of the constitutional text regarding elections. In a series of cases, the Court has accepted that the Parliament has a great deal of leeway in determining the details of electoral law.<sup>119</sup> This power of the Parliament arises from the text ‘until the Parliament otherwise provides’, which can be seen throughout the Chapter of the *Constitution* that concerns the

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- 115 See concerns raised by Hayne J, with whom Heydon J agreed, in *Roach* (2007) 233 CLR 162, 219 [158], 223 [177] and in *Rowe* (2010) 243 CLR 1, 71 [203], 97 [292]. For critical commentary, see also Nicholas Aroney, ‘Towards the “Best Explanation” of the Constitution: Text, Structure, History and Principle in *Roach v Electoral Commissioner*’ (2011) 30 *University of Queensland Law Journal* 145; James Allan, ‘Australian Originalism without a Bill of Rights: Going Down the Drain with a Different Spin’ (2015) 6 *The West Australian Jurist* 1; James Allan, ‘The Three “Rs” of Recent Australian Judicial Activism: *Roach*, *Rowe* and (No)‘riginalism’ (2012) 36 *Melbourne University Law Review* 743; Anne Twomey, ‘*Rowe v Electoral Commissioner* – Evolution or Creationism?’ (2012) 31 *University of Queensland Law Journal* 181. By contrast, for a defence of the reasoning in these cases, see Patrick Emerton, ‘Political Freedoms and Entitlements in the “Australian Constitution” – An Example of Referential Intentions Yielding Unintended Legal Consequences’ (2010) 38 *Federal Law Review* 169.
- 116 See also Emerton’s analysis that suggests ‘the people’ may be understood as a ‘social and political kind constituted by the conjoint operation of ... laws’ or ‘a kind that is constituted by facts of civic engagement’: Emerton, above n 115, 196–7.
- 117 See, eg, the reference to government through representatives in *Unions NSW v New South Wales* (2013) 252 CLR 530, 548 [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
- 118 For discussion of this aspect of representation, see Denis J Galligan, ‘The People, the Constitution, and the Idea of Representation’ in Denis J Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013) 134, 144–7.
- 119 *Smith v Oldham* (1912) 15 CLR 355; *Judd v McKeon* (1926) 38 CLR 380; *McKinlay* (1975) 135 CLR 1; *A-G (NSW) v Ex rel McKellar v Commonwealth* (1977) 139 CLR 527; *McGinty* (1996) 186 CLR 140; *Mulholland* (2004) 220 CLR 181.

Parliament.<sup>120</sup> This phrase must be understood together with section 51(xxxvi), which states:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... matters in respect of which this Constitution makes provision until the Parliament otherwise provides.

Therefore, while an interim position may be established by the *Constitution*, the Parliament has the power to determine the ongoing details of how representative government is to function, subject to the *Constitution*.

The Parliament's power under section 51(xxxvi) is another indicator of the constitutive power of 'the people', where 'the people' are identified as those who choose the members of Parliament and therefore influence the electoral details made by that Parliament to which 'the people' are then subject. As we have seen, the *Constitution* sets some non-negotiable limits on the Parliament's power, including the requirement of choice by 'the people' in sections 7 and 24. However, even that limit is informed by the will of 'the people', seen in patterns of legislation. 'The people' are therefore implicated in the details set by the Parliament regarding their political participation in government, as well as in the limits imposed on successive Parliaments to ensure a minimum level of involvement of 'the people'.

## V THE PEOPLE'S POLITICAL CORE – A (FURTHER) LIMIT ON FEDERAL LEGISLATIVE POWER?

The Court has used the role of 'the people' as 'electors' under the *Constitution* in order to limit legislative power with respect to federal elections. According to the reasoning in *Roach* and *Rowe*, the federal franchise must be broad enough to satisfy the mandate of choice by 'the people'. The people enfranchised must be representative of 'the people' and restrictions on the franchise must be justified and not arbitrary. Here I suggest that the reasoning in those cases may also be used to limit legislative power beyond the confines of electoral details and into areas of legislation which impact upon other elements of the constitutional identity of 'the people'.

The identity of 'the people' under the *Constitution* is multi-faceted,<sup>121</sup> with 'the people' made up of a series of intersecting and overlapping categories of persons which together determine membership, exclusion and hierarchical positions in between. While the content of 'the people' as 'electors' is affected by legislative indications of membership through the franchise, it is not the only area

120 See *Constitution* ss 7, 10, 22, 24, 30–1, 34, 39, 46–8.

121 Elisa Arcioni and Adrienne Stone, 'Australian Constitutional Culture and the Social Role of the Constitution' (2016) forthcoming *International Journal of Constitutional Law*; Elisa Arcioni, 'Australian Constitutional Identity: Complexity and Fluidity' (Paper presented at Constitutional Identity Workshop, International Association of Constitutional Law, IXth World Congress, Oslo, June 2014) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2467407](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2467407)>.

in which legislation affects constitutional membership. Another is citizenship legislation being used by the Court to determine constitutional inclusion as ‘subjects’ and exclusion as ‘aliens’.

Unlike some constitutions, the *Constitution* makes no reference to Australian ‘citizenship’;<sup>122</sup> the drafters having deliberately excluded it from the text.<sup>123</sup> Instead, the formal category of membership identified in the text of the *Constitution* was originally, and remains, ‘subject of the Queen’,<sup>124</sup> as contrasted with the now dominant term of exclusion – ‘alien’.<sup>125</sup> Citizenship now exists under federal legislation.<sup>126</sup> Legislated citizenship has become the proxy for constitutional membership through the jurisprudential developments of the High Court of Australia.

The Court has accepted that nationality-related status – subject, alien, citizen – can be manipulated by legislation, making the status inherently susceptible to change, without any defined limits. This approach can be seen when the Court accepts that legislative incursions into common law principles regarding nationality have constitutional consequences<sup>127</sup> and when legislation is necessary to indicate a person has moved out of the ‘alien’ status and become a member of the constitutional community.<sup>128</sup> The significance of legislated citizenship can also be seen when members of the Court relied simply on the status of ‘non-citizen’, a statutory status, in order to uphold a person’s treatment under legislation as a constitutional alien.<sup>129</sup>

The underlying rationale is that it is up to the Parliament to decide membership, despite statements by the Court suggesting that the power of ultimately determining the definition of ‘alien’ rests with the Court.<sup>130</sup> The Court has exercised that role, but has deferred to the Parliament’s indications of the content through citizenship legislation.

The reasoning in *Roach* and *Rowe* demonstrates a connection between the two areas of law – the federal franchise and citizenship – that may lead to a

122 The only reference to ‘citizenship’ is to *foreign* citizenship as a basis for disqualification from being elected a member of Parliament: *Constitution* s 44(i).

123 For an overview of the relevant debates, see Kim Rubenstein, ‘Citizenship and the Constitutional Convention Debates: A Mere Legal Inference’ (1997) 25 *Federal Law Review* 295.

124 See *Constitution* ss 34, 117.

125 See *Constitution* s 51(xix). From Federation until the 1980s, the Parliament relied more on the ‘immigrant’ category to determine exclusion.

126 The current law is found in *Australian Citizenship Act 2007* (Cth). For an overview of that Act, see Sangeetha Pillai, ‘The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis’ (2014) 37 *Melbourne University Law Review* 736.

127 See *Singh v Commonwealth* (2004) 222 CLR 322, 341 [30] (Gleeson CJ), 384 [157], 391 [176]–[177], 395 [190] (Gummow, Hayne and Heydon JJ), 415–6 [255]–[257] (Kirby J).

128 *Pochi v Macphree* (1982) 151 CLR 101, 111 (Gibbs CJ), 112 (Mason J), 116 (Wilson J); *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 186 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ).

129 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 10, 25–6, 45, 64. See Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration* (Federation Press, 2011) 66–7.

130 See, eg, *Pochi v Macphree* (1982) 151 CLR 101, 85 (Gibbs CJ); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 400 [7] (Gleeson CJ), 410 [43] (Gaudron J).



restriction on the seemingly open-ended power of the Parliament regarding citizenship and alienage. In the franchise cases, the Justices assumed the baseline federal franchise to be adult citizens. This is made clearest in the reasoning of Gleeson CJ in *Roach* and French CJ in *Rowe*, but is also adopted by other members of the majorities in those cases.<sup>131</sup> The statements of the members of the Court in both cases imply that a franchise of adult citizens is necessary to achieve a direct choice by ‘the people’ in accordance with sections 7 and 24. In taking this approach, there must be a minimum content to the citizenship rules in order to not insert restrictions on citizenship which have the same effect as disenfranchisement through the electoral laws. That is, if citizenship were restricted on the basis of race, gender, mere imprisonment or religion, indicated as likely to be invalid in the franchise cases, and the franchise laws required citizenship in order to be eligible to vote, then the outcome would be the same as if the electoral law directly imposed that disqualification. Considered in this way, restrictions on discrimination on those bases with respect to citizenship rules must also be imposed in order to be consistent with the requirement of choice by ‘the people’.

This potential limitation relies on the Court confirming that legislated citizenship is the relevant constitutional discrimen in determining the franchise. This point was not directly raised in the franchise cases, and so may be open to challenge. As Heydon J in dissent noted in *Rowe*, an adult *citizen* franchise may not define the necessary breadth required by the *Constitution*. Justice Heydon questioned why sections 7 and 24 ‘speak only to citizens’ when other sections of the *Constitution* have wider effect, suggesting that some non-citizen groups are ‘in a sense part of “the Australian people”’.<sup>132</sup>

However, the reasoning in these franchise cases points to possible guides to determining legitimate restrictions on membership that do not depend on the franchise being connected to legislated citizenship. The majority demonstrated concerns about arbitrary exclusion and a need for a substantial reason for exclusion, and it adopted proportionality analysis by requiring a legitimate purpose for exclusion as well as a reasonably appropriate and adapted means of exclusion before exclusion would be valid. In *Roach*, mere imprisonment was not sufficient – the majority confirmed a minimum three-year sentence as a valid means of disenfranchisement because a conviction leading to such a sentence reflected conduct that demonstrated a rejection of the community and was sufficiently serious to justify a person’s temporary exclusion from amongst the federal electors. In *Rowe*, the restriction by only a few days on the time in which to enrol before an election was too great an intrusion on the franchise, given the lack of proof regarding any serious risk of electoral fraud caused by the limited

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131 *Roach* (2007) 233 CLR 162, 174–5 [7]–[8], 176–7 [12] (Gleeson CJ), 199 [84] (Gummow, Kirby and Crennan JJ); *Rowe* (2010) 243 CLR 1, 18–20 [18]–[22] (French CJ), 48 [121], 56–7 [151] (Gummow and Bell JJ), 111–12 [344], [347] (Crennan J); cf 93 [279] (Heydon J).

132 *Rowe* (2010) 243 CLR 1, 93 [279]. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 173 [30] (Gleeson CJ).

period in which the Australian Electoral Commission had to prepare and check the electoral rolls.

Some of the concerns relating to arbitrary exclusion and the need for proportionality could be translated across to limit the way in which the Parliament determines ascription of allegiance through citizenship legislation and therefore constitutional status.<sup>133</sup> The connection between the areas of law may in fact tend towards the limitations on the Parliament's power being *greater* with respect to citizenship than with respect to the franchise, given that membership through ascription of allegiance is necessarily prior to membership of the subset of 'the people', namely, the electors. If a person were excluded as an alien under legislation, they would be taken outside the constitutional 'people', in terms of legal categorisation and therefore become susceptible to exclusion, detention and expulsion.

If temporary disenfranchisement (dependent on prison sentence as in *Roach*, or failure to enrol as in *Rowe*) requires substantial justification, then surely permanent exclusion from the constitutional community through removal of allegiance by citizenship revocation would require even more stringent legitimation by the Parliament? If mere imprisonment is an arbitrary basis of exclusion, then the choice of convictions or conduct leading to revocation may also fail for arbitrariness if no legitimate rationale is attached to each of them. So too may the distinction between revocation being available with respect to dual nationals only, rather than application also with respect to sole Australian nationals.

However, the reasoning in *Roach* does not deny, and in one aspect reinforces, the legitimacy of legislatively excluding individuals from the constitutional 'people'. As noted above, there is a normative element to the reasoning in *Roach* that supports the capacity of Parliament to determine boundaries of inclusion and exclusion by reference to conduct which carries with it an imputed rejection of community standards. That reasoning tends to support some ability of Parliament to exclude individuals from the constitutional community, consistent with jurisprudential acceptance of the capacity of a state to determine membership of the relevant polity through legislation made under the aliens or immigration powers.<sup>134</sup> However, that general principle may still be subject to a judicial determination of the legitimacy and proportionality related to particular statutory bases of exclusion. While none of these lines of analysis foreclose citizenship revocation, they would at least require the Parliament to consider careful calibration and justification for any citizenship revocation in order to avoid constitutional challenge based on the reasoning in the franchise cases that emphasised membership of the political 'people'.

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133 See Audrey Macklin, 'Citizenship Revocation, the Privilege To Have Rights and the Production of the Alien' (2014) 40 *Queen's Law Journal* 1, 30–3 for a discussion of these same arguments in the Canadian context, by reference to *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, a case in turn referred to in Chief Justice Gleeson's judgment in *Roach*: (2007) 233 CLR 162, 177–8 [13]–[15].

134 See, eg, *Robtelmes v Brennan* (1906) 4 CLR 395, 415 (Barton J) regarding the legislative power over 'aliens' and *Ah Yin v Christie* (1907) 4 CLR 1428, 1433 (Barton J) regarding power over 'immigration'.

## VI CONCLUSION

The *Constitution* creates a relationship between ‘the people’ and ‘the electors’ that confers constitutive power on ‘the people’, acting through their representative electors. The text recognises the historical constitutive power of ‘the people’ in the constitution-making phase, as well as granting ‘the people’ through the electors the power to approve or reject changes to the text and the power to choose members of federal Parliament.

The jurisprudence in relation to federal elections confirms the connection between these two groups as a representative one. ‘The people’ is the Australian community, while the electors are a group sufficiently broad to be capable of representing ‘the people’ in order that the choice of members of the federal Parliament can be understood as a direct choice of ‘the people’. Both the constitutional text and the relevant jurisprudence highlight the constitutive character of ‘the people’ under the *Constitution*, placing the federal electors at the core of the Australian constitutional people. The core, political, ‘people’ is understood as representative of the broader group, with the contours of ‘the electors’ changing, but not narrowing, over time, and also affected by normative considerations which can determine the detail of who is eligible to vote and who can be excluded. While at Federation women were emergent, potential, members of ‘the people’ in the sense of being federal electors, their position is now assured by the High Court’s reasoning in *Roach* and *Rowe* regarding the necessary breadth of the franchise in order to satisfy the constitutional command of choice ‘by the people’. The same applies to Aboriginal people, disenfranchised under state and federal laws in the past.<sup>135</sup>

The reasoning of the Court in recent franchise cases also demonstrates that ‘the people’ are involved in their own definition. Thus, ‘the people’ exercise three different forms of ongoing constitutive power (in addition to their historical constitutive function) – choosing members of Parliament, voting in referenda and by identifying themselves through legislation which in turn affects the constitutional meaning of ‘the people’ and who are the present and future federal electors.

The significance of the relationship between ‘the people’ and the ‘electors’ is seen especially in the reasoning of *Roach* and *Rowe*, where that relationship was used to strike down federal electoral legislation that hindered the ability of the relevant people from voting in federal elections. The Court’s reasoning in turn may extend to limiting the Parliament’s seemingly unfettered power regarding citizenship, to the extent that citizenship legislation is relevant to determining constitutional identity as part of the broader group – ‘the people’.

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135 See generally Goot, above n 26.

## VII POSTSCRIPT

Since the writing of this article, amendments have been made to the Australian citizenship legislation to extend the bases of citizenship revocation.<sup>136</sup> The changes fit within the context of the long-standing power to revoke membership conferred under legislation. The first Commonwealth naturalization legislation, in 1903, provided for revocation.<sup>137</sup> Every subsequent version of that legislation has provided for revocation, the differences over time being the bases upon which revocation was available.<sup>138</sup> Unlike some legislative changes regarding citizenship that have occurred internationally, the revocation provided for in the recent legislation only applies to dual nationals and therefore avoids the prospect of statelessness.<sup>139</sup>

The government had originally proposed a Bill with broader reach than the provisions as passed. Changes to the original Bill occurred after an inquiry by the Parliamentary Joint Committee on Intelligence and Security, in which concerns were raised by constitutional experts as to the validity of the Bill.<sup>140</sup> The concerns included the operation of the separation of federal judicial power and the scope of federal legislative power. The amendments as passed incorporate a number of details which make the legislative changes more likely to withstand constitutional challenge than the original proposals, although doubts remain as to their validity and the amendments are likely to be challenged in the High Court.

In this article, I note the Court's concerns relating to arbitrariness and proportionality, with the Court requiring a legitimate *purpose* for exclusion (namely a substantial reason for exclusion) and reasonably appropriate and adapted *means* of exclusion. In the revised amendments, the Parliament reduced the range of conduct or convictions which would lead to citizenship revocation. These changes can be understood as a response to concerns that the net had been

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136 *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth).

137 See *Naturalization Act 1903* (Cth) s 11.

138 See the brief period between 1917–20 in which there was a seemingly unrestricted power of revocation, before the reintroduction of specific bases for revocation: *Naturalization Act 1917* (Cth) s 7, amending s 11 of the *Naturalization Act 1903* (Cth) to include s 11(b), the power of the Governor-General to revoke if 'satisfied that it is desirable for any reason that a certificate of naturalization should be revoked'. For the current bases of revocation, see *Australian Citizenship Act 2007* (Cth) ss 34–6 and see discussion in Pillai, above n 126, 754–8.

139 See, eg, *British Nationality Act 1981* (UK) c 61, s 40(4A) inserted by the *Immigration Act 2014* (UK) c 22, s 66(1).

140 For relevant submissions to the inquiry, see Helen Irving, Submission No 15 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 15 July 2015; Shipra Chordia, Sangeetha Pillai and George Williams, Submission No 17 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 16 July 2015; Centre for Comparative Constitutional Studies, Submission No 29 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*; Castan Centre for Human Rights Law, Submission No 30 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*; Kim Rubenstein, Submission No 35 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, 20 July 2015.

cast too wide and not all the types of conduct or convictions in the earlier Bill were sufficiently serious to indicate disloyalty such as to warrant exclusion from ‘the people’.<sup>141</sup>

The amending legislation also incorporates more detail with respect to the process by which revocation takes effect, pointing to more reasonably appropriate and adapted *means* of exclusion. For example, rather than mere conviction leading to exclusion, in section 35A the Minister must be satisfied of a range of factors before giving notice of citizenship revocation.

Nevertheless, there remains scope to challenge the amendments on the basis that the Parliament has not struck an appropriate balance in setting out the bases on which individuals can be removed from the body of ‘the people’ and the means by which they may be removed. Given the strict scrutiny applied by the majority of the Court to the impugned legislation in *Rowe* (in which a difference of only a few days in which to enrol to vote or change residence details in order to vote led to invalidity), the Court may likewise be very strict in determining the validity of legislation which strikes at the underlying membership of ‘the people’ through citizenship.

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141 For example, the earlier Bill included the charge of damaging Commonwealth property as one which would lead to exclusion: see cl 35A(3) of the original Bill, referring to *Crimes Act 1914* (Cth) s 29. That provision was removed from the amending legislation.