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Remembering Australian Constitutional Democracy

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Abstract

For many years, historical accounts of Australian Federation ignored the distinctive ideological origins of the Australian Constitution. From the mid 1980s until the 2000s, however, a generation of historians remembered how the Australian drafters built a distinctive constitutional democracy that combined trust in parliament with a direct constitutional role for a plural 'people': the people of Australia and the people of the states. Drawing on Chartist and American ideas of popular sovereignty, this system of popular political constitutionalism textually guarantees that 'the people' can 'directly' choose both houses of parliament, break deadlocks between these houses and make constitutional law. The definition of 'the people' in this distinctive form of constitutional democracy was, however, racially exclusive. In particular, First Australians were excluded from the plural people of Australia.

This intellectual history of the Australian Constitution, however, has had remarkably little impact on constitutional interpretation and discourse. This paper will begin the process of examining those implications. First, it will show how this history provides important contextual support and direction to the implied limitations on parliamentary power that stem from the constitution's guarantee of representative democracy in sections 7 and 24 of the Constitution. Second, it will demonstrate how it aids in better understanding Australia's unique constitutional system. To date, this system has remedied the racist roots of the original constitutional definition of the people largely through legislative reform. The constitutional recognition of First Australians is a critical step in acknowledging that First Australians are a distinct part of the plural Australian people. In the aftermath of the failure of the First Nations Voice to Parliament proposal, meaningful constitutional recognition for First Australians must address their structural exclusion from the plural Australian people.

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> 'Learned commentators observing the situation from a vantage point outside Australia wrote of the extremely "democratic" nature of the new Constitution, representing "the high-water mark of popular government"'.[1]

> 'The great underlying principle [of the Australian Constitution] is, that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power'.[2]

In legal circles, the *Australian Constitution* is frequently viewed as a technical rule book that creates a form of representative democracy drawn from British parliamentary sovereignty.[3] Justice Keane of the Australian High Court, for instance, described the *Constitution* as a 'small brown bird' that is 'modest' and 'in sober historical fact, a schedule to an enactment of the Imperial Parliament at Westminster'.[4] This article will argue that this understanding is underpinned by the fact that most historical accounts (even current ones) ignore the distinctive intellectual origins of the Australian Constitution.[5] This historical blind spot has allowed many Australian lawyers to (mistakenly) view the *Constitution* as a pragmatic and prosaic combination of federalism with British parliamentary sovereignty.[6]

From the mid-1980s to the 2000s, a generation of Australian intellectual and cultural historians filled this blind spot.[7] They described the significance of Chartist constitutional ideas on constitution-making in the Australian colonies that occurred during the middle of the 19th century.[8] These Chartist ideas broke with parliamentary sovereignty and instead saw 'fixed principles of fundamental law' guaranteeing a central role for 'the people' in representative democracy.[9] These ideas shaped colonial constitutions and their near universal manhood suffrage for the lower house of Parliament. They also shaped section 41 of the Australian

1. *McGinty v Western Australia* (1996) 186 CLR 140, 271 (Gummow J) (quoting James Bryce, *Studies in History and Jurisprudence* (Oxford University Press, 1901) vol 1, 536.
2. Harrison Moore, *The Constitution of the Commonwealth of Australia* (Cambridge University Press, 1902) 329 ('*Moore*').
3. Nicholas Aroney et al, *The Constitution of the Commonwealth of Australia* (Cambridge University Press, 2015) 32, 237 (describing how Australia has a modified version of parliamentary sovereignty that must accommodate federalism); Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) 30(1) *University of Queensland Law Journal* 2 (describing how the Australian framers 'continued within the British constitutional tradition') ('*Goldsworthy - Implications Revisited*').
4. Justice Patrick Keane, 'In Celebration of the Constitution' (Speech, Banco Court Brisbane, 12 June 2008).
5. Goldsworthy (n 3); Nicholas Aroney et al (n 3) 32; Leslie Zines, *The High Court and the Constitution* (Butterworths, 3rd ed, 1992) 339; Anthony Mason, 'The Australian Constitution in Retrospect and Prospect' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 7, 8.
6. See, eg, Ben Saunders and Simon Kennedy, 'Popular Sovereignty, "the People" and the Australian Constitution: A Historical Reassessment' (2019) 30(1) *Public Law Review* 36 ('the framers accepted key tenets of British constitutionalism such as the sovereignty of Parliament').
7. See, eg, Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1999) ('*Irving*'); John Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth* (Oxford University Press, 2000) ('*The Sentimental Nation*').
8. Paul Pickering, 'The Oak of English Liberty: Popular Constitutionalism in New South Wales, 1848–1856' (2001) 3(1) *Journal of Australian Colonial History* 1 (discussing how Chartism rejected parliamentary sovereignty); Paul Pickering (2001) 'A Wider Field in a New Country: Chartism in Colonial Australia' in Marian Sawer (eds), Elections Full, Free and Fair (Federation Press, 2001) 28; Terry Irving, *The Southern Tree of Liberty: The Democratic Movement in New South Wales Before 1856* (Federation Press, 2006).
9. Josh Gibson, 'The Chartists and the Constitution: Revisiting British Popular Constitutionalism' (2017) 56(1) *Journal of British Studies* 56, 81–82 (describing the Chartist view that the people had a natural right to a broad form of suffrage and to meet peaceably).

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Constitution, which explicitly guarantees that this broad lower house franchise will apply in Commonwealth elections.

A group of 'new federation historians' described the influence of Swiss and American ideas of 'the people' in shaping Australian constitution-making in the 1890s, which involved a specially elected constitutional convention that produced a constitution ratified in state referendums.[10] This process helped create a unique constitutional system of 'popular political constitutionalism' that contained a number of innovative provisions that constitutionally guaranteed a direct role for the people in Australian representative democracy.[11] These innovative provisions included a flat ban on plural voting, the requirement that the people directly choose both houses of parliament, a referendum process to amend the constitution and a provision allowing immediate elections for both houses of Parliament if they were deadlocked on legislation. Moreover, the people in this constitutional democracy were not understood simply as a national majority; they were instead a plural people, comprising 'the people of the States' (section 7 of the *Constitution*) and 'the people of the Commonwealth' (section 24 of the *Constitution*).[12]

This new intellectual and cultural history also described how the definition of the people was racially exclusionary. John Hirst described how the desire for democratic purity amongst early colonial Australians was linked with racial purity.[13] The Australian founders therefore shared a great deal with their racist contemporaries in the American progressive movement and the British labour movement.[14] This racism impacted the *Constitution*, which gave the Commonwealth vast power to make special laws for 'the people of any race'.[15] The *Constitution* also failed to recognise First Australians as part of the plural Australian people that included both 'the people of the states' and 'the people of the Commonwealth'.[16] Instead, the *Constitution* stated that First Australians 'shall not be counted' in 'in reckoning the numbers of the people of the Commonwealth'.[17] Much as the American founders proclaimed individual rights as the founding value of the United States *Constitution* while practicing slavery, the Australian drafters committed themselves constitutionally

10. Irving (n 7) (including an entire chapter on the role of 'the people' in Australian constitution-making); Hirst, *The Sentimental Nation* (n 7) (including a discussion of the central role of 'the people' in reviving and creating the Constitution); John Hirst, 'Federation and the People: A Response to Stuart Macintyre' in Department of the Senate (Cth), *The People's Conventions: Corowa (1893) and Bathurst (1896)* (Parliamentary Paper No 32, 1998) 80, 83 (describing popular sovereignty at federation as a 'living principle'). Although beyond the scope of this paper, political scientists have also highlighted distinctive aspects of Australian constitutional design. See, eg, Steffen Ganghof, 'A New Political System Model: Semi-Parliamentary Government' (2018) 57(2) *European Journal of Political Research* 261.
11. William Partlett, 'Australian Popular Political Constitutionalism' (2024) 52(2) *Federal Law Review* 156.
12. Nicholas Aroney, George Duke and Stephen Tierney, 'A theory of plural constituent power for federal systems' (2024) *Global Constitutionalism* 1.
13. Hirst, *The Sentimental Nation* (n 7) 22–3. See also John Hirst, *Looking for Australia* (Black Inc, 2010) 66–7 (associating racial purity with pure, progressive and enlightened government and describing how the Labor party was the original supporter of the white Australia policy).
14. David Southern, *The Progressive Era and Race: Reaction and Reform, 1900–1917* (Wiley, 2005); Marilyn Lake, *Progressive New World: How Settler Colonialism and Transpacific Exchange Shaped American Reform* (Harvard University Press, 2019).
15. *Australian Constitution* s 51(xxvi). This provision was intended to make it clear that the Commonwealth had broad power to enact discriminatory laws in a wide range of areas. See Sarah Pritchard, 'The "Race" Power in Section 51(xvi) of the Constitution' (2011) 15(1) *Indigenous Law Review* 44.
16. Elisa Arcioni, 'The Peoples of the States under the Australian Constitution' (2022) 45(3) *Melbourne University Law Review* 861.
17. *Australian Constitution* s 127 (now repealed).

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to a distinctive form of 'popular' representative democracy but with a racist understanding of the people.[18]

This intellectual history of Australian constitutional democracy, however, has had remarkably little effect on either constitutional interpretation in the High Court or constitutional discourse outside of the Court. This paper will begin the process of describing its impact. It will outline two key areas where this fuller history is particularly relevant. First, this history shows that sections 7 and 24 of the *Constitution* constitutionally guarantee a system in which 'the people' exercise sovereignty over Parliament through the vote.[19] This history therefore supports the implications the High Court has drawn from sections 7 and 24 and provides guidance on how they should be implemented.[20]

Second, this intellectual history also has broader consequences for public discussions about Australia's constitutional system. It shows that the Australian Constitution broke not just with the American tradition of individual rights grounded on distrust for legislative power. It also broke with the indirect *political* sovereignty of the people found in British parliamentary sovereignty.[21] The distinctive Australian system instead combined a belief in political constitutionalism with a constitutional guarantee that 'the people' could directly choose parliament, break deadlocks and make constitutional law.[22] Since Federation, this constitutionally guaranteed system of 'popular political constitutionalism' has continued to develop, including both formal constitutional amendments that increase the power of the people and legislative reforms that have increased the scope of franchise beyond white Australians.[23] Constitutional recognition for First Australians is another step in developing this unique system. After the failure of the Voice to Parliament proposal, meaningful constitutional recognition for First Australians must address their structural exclusion from the plural Australian people.

To make this argument, this paper will be divided into five parts. Part 1 will describe how historiography — the critical study of how history is written, remembered and applied — can help to expose and fill blind spots in history. Remembering the forgotten aspects of constitutional foundation can provide new historical context for better understanding constitutional law. Part 2 will explain how most of the differing historical accounts (including today) of Australian federation ignore the democratic underpinnings of Australian constitutionalism. Part 3 will describe how historians from the mid-1980s to mid-2000s filled this blind spot by remembering new historical facts showing the distinctive role of the people in Australian constitutional democracy. Part 4 will describe the significance of this fuller, intellectual history for constitutional interpretation. It provides important support and direction for the implications the Court has drawn from sections 7 and 24 of the *Constitution*. Part 5 will describe how this intellectual history also informs debates about constitutional amendment by showing the distinctiveness of Australia's constitutional system. This historical context demonstrates the importance of meaningful constitutional recognition for

18. *Irving* (n 7) 101–118.
19. *Moore* (n 2) 329.
20. Stephen Donaghue, 'The Clamour of Silent Constitutional Principles' (1996) 24(1) *Federal Law Review* 133; *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 110–11 (*'Rowe'*).
21. TRS Allan, 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' (1985) 44(1) *Cambridge Law Journal* 111, 129 (explaining how 'the people' do not exercise legal sovereignty in a system of parliamentary sovereignty).
22. See Adrienne Stone, 'More Than A Rule Book: Identity and the Australian Constitution' (Speech, High Court Public Lecture, 9 November 2022) (discussing the distinctive nature of Australian constitutionalism).
23. William Partlett, 'Australian Popular Political Constitutionalism' (2024) 52(2) *Federal Law Review* 156 (describing the role of anti-populists in opposing these kinds of changes).

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First Australians in developing Australia's distinctive constitutional system even after the failure of the First Nations Voice to Parliament proposal.

I Historiography, Blind Spots and Constitutional Law

This paper uses the methods of historiography — the critical study of how history is written and remembered — to examine how Australian constitutional democracy has been remembered.[24] Historiography critically focuses on 'the minds and the writings of those who study the past', seeking to understand the different accounts that writers of history give to a particular historical period over time.[25] At the centre of historiography is the critical study of how present-day concerns, questions or commitments drive the writing of history.

Historiography shows that *all* historical accounts have some relationship to *contemporary* context at the time they are being written.[26] As E H Carr wrote, history is 'a continuous process of interaction between the historian and his facts, an unending dialogue between the present and the past'.[27] Some historical accounts will be consciously and strategically built to suit particular contemporary agendas or commitments. In this approach, the writer of history looks to history 'produce the result intended because it is designed to do so'.[28] Others will be unconsciously shaped by less visible or unconscious commitments. These commitments often push historians to ask particular questions of history and to ignore or downplay others.

This critical insight does not mean that history is so contestable that it is unknowable or irrelevant to contemporary questions.[29] On the contrary, properly constructed historical accounts are frequently well accepted and, if used with caution, can and should inform present-day questions. But this critical insight does show that conventional accounts of the past often fall into patterns that include significant blind spots. These blind spots occur precisely because writers of history — consciously or unconsciously — ask particular questions of history, select particular historical facts or make assumptions to iron out contradictions and disharmonies in history. Finding these blind spots requires taking a critical position and identifying how contemporary commitments are driving the selection of particular historical facts. This process then allows the writers of history to broaden our historical understanding. Remembering these forgotten parts of history then provides important detail and often complexity to our understanding of history.[30]

These methodological insights can have important consequences for law. History is an important source of facts in constitutional adjudication. As Justice Owen Dixon stated, it will often be necessary for courts to 'use the general facts of history as ascertained or ascertainable from the accepted writings of serious historians'.[31] Bradley Selway describes how the facts of history can

24. Geoffrey Elton, *The Practice of History* (Sydney University Press, 1967) ('*Elton*').
25. Michael Confino, 'The New Russian Historiography and the Old: Some Considerations' (2009) 21(2) *History and Memory* 7, 7.
26. Dan Stone, 'Excommunicating the Past? Narrativism and Rational Constructivism in the Historiography of the Holocaust' (2017) 21(4) *Rethinking History* 549 (describing how 'most theorists of history and most historians accept that history is unavoidably constructivist').
27. E H Carr, *What is History?* (2d ed) (Pelican Books, 1987) 55.
28. *Elton* (n 24) 9.
29. Jo Guldi and David Armitage, *History Manifesto* (Cambridge University Press, 2014).
30. Ibid 47–8 (arguing that if the past is to be understood, it must be given 'full respect in its own right').
31. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 196.

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appear and shape the practice of the Australian High Court in various ways.[32] A classic example of the impact of history is the effect of Henry Reynolds' research on First Nations history in the High Court's landmark decision in Mabo.[33] History is central to constitutional interpretation as well, helping to understand the context and therefore purpose of constitutional provisions.[34]

History is also critical in understanding constitutional discourse outside of court. In particular, it plays a central role in helping to understand the historical period before and during constitutional foundation.[35] In Australia, the purposes and context of the constitutional text adopted in 1901 helps to understand the foundations of Australian constitutionalism itself. Moreover, by tracing its historical development from foundation to the present, we can begin to more deeply understand the distinctive features of Australia's evolving form of constitutionalism.

The process of remembering historical facts from blind spots is therefore critical in providing a new or clearer understanding of the purpose of a constitutional provision or a particular constitutional system. The following two sections will critically examine how Australian constitutional democracy has been remembered. Part 2 will examine why the distinctiveness of Australia's constitutional democracy has been a key blind spot in the conventional historical account of Australia's constitutional founding. Part 3 will then explain how a generation of historians filled this blind spot in the 1980s and 1990s, remembering a constitutional system committed to a broad but racially exclusive role for the people. Parts 4 and 5 will then outline the consequences of this fuller history for constitutional interpretation and debate.

II A Blind Spot in Understanding Australian Constitutional Democracy

> '[T]he political servants of the bourgeoisie were about to draft a constitution to protect their interests for generations to come'.[36]

Most historical accounts of Australian constitutional democracy over the years have ignored the constitution's distinctive ideological origins.[37] This ignorance is a remarkable departure from the Federation period, when the founders tied emerging Australian nationalism to the progressive ideological underpinnings of the *Constitution*.[38] The democratic experimentation of the federation period faded quickly in the public imagination as the constitution's status in Australia as embodiment of a distinctive Australian form of 'civic' nationalism receded. In its place, Australian

32. Bradley Selway, 'The Use of History and Other Facts in the Reasoning of the High Court of Australia' (2001) 20(2) *University of Tasmania Law Review* 129.
33. See Geoffrey Partington 'Henry Reynolds and the Mabo Judgment' (1996) 30 *Australia and World Affairs* 23; Anne Carter, 'The Definition and Discovery of Facts in Native Title: The Historian's Contribution' (2008) 36(3) *Federal Law Review* 299.
34. *Cole v Whitfield* (1988) 165 CLR 360 (discussing generally how history is used to interpret constitutional text in Australia) ('*Cole*'). More generally, see Ben Saunders and Simon Kennedy, 'History and Constitutional Interpretation' (2020) 40(3) *Oxford Journal of Legal Studies* 591; William Partlett, 'Historiography and Constitutional Adjudication' *(2023) 86(3) The Modern Law Review* 629 ('*Partlett*').
35. Ibid.
36. Manning Clark, *A History of Australia: The People Make Laws 1888–1915* (Melbourne University Press, 1981) vol 5, 68, 143.
37. Goldsworthy, *Implications Revisited* (n 3); *Saunders & Kennedy* (n 6). For a popular view, see 'Australian Democracy', *Museum of Australian Democracy* (Web Page) (describing the argument that Australia's representative democracy is linked with 'parliamentary sovereignty').
38. Hirst, *The Sentimental Nation* (n 7).

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national identity was replaced by the 'martial nationhood' of the bloodshed at Gallipoli in World War I.[39]

Historians of Australian federation then turned to other aspects of federation. Imperial historians viewed federation as an imperial project meant to ensure Australia's common defence.[40] Economic historians focused heavily on the financial purposes of federation. In perhaps the most influential constitutional history of the *Australian Constitution* produced prior to the 1980s, John La Nauze's *The Making of the Australian Constitution* drew heavily on his background as an economist and closely analysed the fiscal components of Australian constitution-making.[41] Robert Parker's research described how federation was driven by economic factors.[42] Other economic historians, such as Geoffrey Blainey, ignored federation altogether. Most notably, in the *Tyranny of Distance*, one of Blainey's best known and most influential books, federation is not even mentioned.[43] Blainey later admitted this deficiency, describing the democratic aspects of the *Australian Constitution* to be a 'huge, barely tapped area of research'.[44]

Labour historians took a class-based lens to federation and the constitutional order.[45] They therefore described the *Constitution* as 'just another form of self-interest' bent on advancing the interests of a privileged few.[46] For instance, Fin Crisp described federation as the creation of 'the big men of the established political and economic order, the men of property or their trusted allies' who had a mission to make the Commonwealth 'a splendid bastion of property'.[47] Manning Clark similarly described how the *Constitution* was drafted by the 'political servants of the bourgeoisie . . . to protect their interests for generations to come'.[48]

This narrative of the constitution as a self-interested enterprise has persisted into the present day.[49] Most recently, Stuart Macintyre has written that that the idea of a 'popular movement' underpinning Australian Federation involved 'a sleight of hand'.[50] Others have expressed concern about the Constitution's racist origins and the lack of entrenched individual rights protection in the *Australian Constitution*. For instance, George Williams argues that '[t]he making of the Australian constitution was neither representative nor inclusive of the Australian people generally. It was

39. Carolyn Holbrook, 'Ideas of Nationhood' in Jenny Lewis and Anne Tiernan (eds), *The Oxford Handbook of Australian Politics* (Oxford University Press, 2021) (describing how the concept of 'martial nationhood' quickly replaced the progressive, civic nationhood of the Constitution); Hirst, *The Sentimental Nation* (n 7); Kevin Blackburn, *War, Sport, and the Anzac Tradition* (Palgrave, 2016).
40. Arthur Jose, *History of Australia from the Earliest Times to the President Day* (Angus & Robertson, 11th ed, 1924).
41. John La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972). La Nauze was Dean of the Faculty of Economics and Commerce at the University of Melbourne.
42. Robert Parker, 'Australian Federation: The Influence of Economic Interests and Political Pressures' (1949) 4(13) *Historical Studies: Australia and New Zealand* 1.
43. See, eg, Geoffrey Blainey, *The Tyranny of Distance: How Distance Shaped Australian History* (Macmillan, 1968) (which contains no account of Federation).
44. Geoffrey Blainey, 'The Role of Economic Interests in Australian Federation: A Reply to RS Parker' in JJ Eastwood and FB Smith (eds), *Historical Studies, Selected Articles* (Melbourne University Press, 1964) 193.
45. The Senate and its equal representation for the less populous states has been the most target of most of this criticism. See Stuart Macintyre, 'The Fortunes of Federation' in David Headon and John Williams (eds), *Makers of Miracles: The Cast of the Federation Story* (Melbourne University Press, 2000) 13.
46. Parker (n 42).
47. LF Crisp, *Australian National Government* (Longman Chesire, 1978) 14.
48. Clark (n 36) 68, 143.
49. Geoffrey Blainey, 'The Role of Economic Interests in Australian Federation: A Reply to Professor R. S. Parker' (1950) 4(15) *Historical Studies: Australia and New Zealand* 224.
50. Stuart Macintyre, 'Some Absentees from Adelaide' (1998) 1 *New Federalist* 16.

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drafted by a small, privileged, section of society'.[51] He argues that formal constitutional change is needed for Australia's 'horse and buggy' constitution.[52] Hilary Charlesworth argues that the *Constitution's* refusal to include rights is an inherent reflection of the racism of the time.[53]

These different historical accounts of federation have uniformly ignored the ideological ferment of the federation period and its influence on the new *Constitution*. With no background historical understanding of these distinctive ideas underpinning the *Constitution*, the Australian legal community has understood it as a thin and 'prosaic document'.[54] For instance, Jeffrey Goldsworthy states the conventional view when he contrasts Australia's value-free, 'basic law' *Constitution* with the United States' 'higher law' constitution.[55] Elisa Arcioni and Adrienne Stone describe this dominant view of the *Australian Constitution* as one involving the 'modest aspirations' of the framers that helped to create 'the narrow domain of the Constitution'.[56] This thin document, the dominant understanding goes, is a 'lawyers' document' that combines American-style federalism with British parliamentary sovereignty.[57]

This conventional story also reflects the persistent influence of British constitutional concepts in the Australian legal mind. In the post-WWI period, the Constitution's status as a product of UK legislation was cited in a landmark case as the basis for a deferential form of constitutional interpretation that enabled the growth of the national government.[58] Since then, Australia's devotion to 'legalism' and political constitutionalism in the face of American-style rights constitutionalism has led to the assumption that British concepts animate Australian representative democracy.[59]

One of the most influential of these British concepts in Australian constitutional thought has been parliamentary sovereignty.[60] A group of distinguished legal academics argue that 'parliamentary sovereignty' is one of 'at least five fundamental principles which underlie the Australian constitutional system' though it has 'a qualified meaning in Australia' stemming from Australian federalism.[61] Further, in an influential book describing the Australian constitutional order, Leslie Zines argues that the Australia's 'tradition of parliamentary supremacy' comes from Australia's 'British traditional heritage'.[62] Although the High Court as a whole has been largely silent on this issue, some Justices on the High Court have also taken this position. Chief Justice Barwick argued that Australia has a system of parliamentary sovereignty because (unlike the United States) Australia did not rebel against Britain.[63] More recently, then-Chief Justice Gleeson cited Barwick's

51. George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 1999) 30.
52. George Williams, 'Our nation's rulebook is showing its age: we desperately need a review of the Constitution' *Sydney Morning Herald* (online, 29 December 2016).
53. See Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (UNSW Press, 2002).
54. Sir Anthony Mason, 'The Australian Constitution in Retrospect and Prospect' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 7, 7–9.
55. Jeffrey Goldsworthy, 'Constitutional Cultures, Democracy, and Unwritten Principles' [2012] (3) *University of Illinois Law Review* 683, 685.
56. Elisa Arcioni and Adrienne Stone, 'The small brown bird: Values and aspirations in the Australian Constitution' (2016) 14(1) *International Journal of Constitutional Law* 60, 75 (also challenging this conventional view).
57. Lisa B Crawford, The Rule of Law and the Australian Constitution (Federation Press, 2017).
58. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
59. Jeffrey D Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 1st ed, 2007) 106, 109.
60. See Goldsworthy, *Implications Revisited* (n 3).
61. Aroney et al (n 3) 32, 237 (emphasis added).
62. Zines (n 5) 339.
63. *Attorney-General (Cth) (Ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1 23–4 (arguing that there was no 'antipathy amongst the colonists to the notion of the sovereignty of Parliament in the scheme of government').

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words as a useful example of the 'historical facts' that help determine the meaning of the Constitution.[64]

III The Ideological Origins of Australian Constitutional Democracy

From the mid-1980s to the mid-2000s, however, a generation of intellectual and cultural historians worked to more fully understand the ideological origins of Australian constitutional democracy. They did this by immersing themselves in the constitutional ideas and practice of colonial and federation Australia. This historical work remembered the remarkable success of Chartist constitutional ideas in mid-19th century, colonial Australia.[65] It also remembered how the process of constitution-making in the 1890s was revitalised when the American idea of popular sovereignty led Australians to act outside of parliament through a specially elected convention and referendums.[66] This commitment to a direct role for the people in representative democracy was contested; in fact, many conservatives warned that these popular ideas were a radical departure from British practices of parliamentary sovereignty.[67] But these ideas were ultimately successful in informing the text of the *Constitution* that guaranteed a direct role for the people in Australian representative democracy.[68] This system included, however, a racist view of who comprised 'the people'.[69]

A *Drivers of This Fuller History*

This account of the distinctive nature of Australian constitutional democracy was itself the product of contemporary drivers. Perhaps the most important was a renewed search for a unique Australian civic identity grounded in the *Constitution* itself. From the mid-1980s to early 2000s, Australia underwent a significant political transformation. With the signing of the Australia Acts of 1986, Australia severed its final ties with the United Kingdom. Formal independence triggered the growth of civic nationalism linked to the *Australian Constitution* and the (ultimately unsuccessful) republic movement of the 1990s. Finally, in 2001, Australia celebrated the centenary of its *Constitution*. These events signalled an important shift in the view of the *Constitution*: it now clearly owed its legitimacy to the 'authority of the people of Australia'.[70] As part of these changes, historians studied democratic innovation during the federation and its impact on the *Constitution*.[71]

Another key driver was the turn away from economic, imperial and labour history towards cultural, transnational and intellectual history in professional history. This change turned Australian historians' attention to the distinctive constitutional *ideas* underpinning Australian constitutionalism before and during federation.[72] This included the transnational flow of constitutional ideas

64. *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 189.
65. Paul Pickering was the leading exemplar and focused particularly on the constitutional aspects of the Chartist movement in Australia: see, eg, Pickering (n 8).
66. Hirst, *The Sentimental Nation* (n 7) 127–8.
67. William Partlett, 'Australian Popular Political Constitutionalism' (2024) 52(2) *Federal Law Review* 156.
68. *Rowe* (n 20) 112 (Crennan J).
69. Irving (n 7) 1.
70. Geoffrey Lindell, 'Why is Australia's Constitution Binding? The Reason in 1900 and Now, and the Effect of Independence' (1986) 16(1) *Federal Law Review* 29.
71. See, eg, Helen Fordham, 'Curating a Nation's Past: The Role of the Public Intellectual in Australia's History Wars' (2015) 18(4) *Media/Culture Journal* 1.
72. See generally Irving (n 7).

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from Britain, Switzerland and the United States to Australia.[73] The Australian drafters then combined these ideas in a distinctive system that guarantees that 'the people' would play a central role in parliamentary democracy. The significance of these radical ideas to the *Australian Constitution* shows the extent to which it broke with not just United States concepts of rights-based democracy but also British ideas of parliamentary sovereignty in which 'the people' only exercise a limited form of political sovereignty.

B *The People's Constitutionally Guaranteed Role in Australian Representative Democracy*

This intellectual and cultural history remembered the distinctive constitutional ideas and practice of the colonial and federation period.[74] Irving describes how the decades before Federation were characterised by 'social experiment' in ensuring a more egalitarian and popular form of representative democracy powered by the working class.[75] This also included expanding the franchise to women.

These historians described the remarkable success of Chartist constitutional ideas in colonial Australia (in contrast with their failure in Britain).[76] For instance, Paul Pickering described how Chartist constitutional ideology had successfully embedded itself in the Australian colonies by the 1850s and was grounded on 'a popular interpretation of Britain's constitutional history'.[77] This Chartist constitutionalism rejected emerging conceptions of parliamentary sovereignty and instead argued that there were fundamental principles that placed limits 'beyond which no parliament could reach'.[78] These principles — such as broad suffrage laws and the right for the people to peaceably assemble — ensured a form of 'popular constitutionalism' that guaranteed a central role for the people in parliamentary democracy.[79]

These Chartist ideas shaped the nascent constitutional orders of the colonies in the middle of the 19th century, leading to the introduction of (almost) universal manhood suffrage in the lower houses of many Australian colonial parliaments.[80] This expansion of the franchise was particularly strong in South Australia, where both women and First Australians earned the right to vote by the late 19th century.[81] It is important not to overstate the influence of these ideas: the colonial constitutional orders retained upper houses that were either unelected or chosen by a very narrow group of propertied men. But these reforms were significant and were noticed outside of Australia. United States President Teddy Roosevelt declared Australia to be a 'splendid object lesson' in representative democracy.[82] These colonial constitutions served as a critical background for the

73. See Pierre-Yves Saunier, *Transnational History* (Palgrave Macmillan, 2013).
74. Irving (n 7); Hirst, *The Sentimental Nation* (n 7); see John Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) ('*The Australian Constitution*'). See also John Bannon and John Williams (eds), *The New Federalist: The Journal of Australian Federal History* (1998–2001).
75. Irving (n 7) 43.
76. Gibson (n 9) 70; see John Moloney, 'Eureka and the Prerogative of the People' (Speech, Senate Occasional Lecture Series, 23 April 2004).
77. Pickering (n 8) 27. See also Paul Pickering, 'A Wider Field in a New Country: Chartism in Colonial Australia', in Marian Sawer (ed), *Elections Full, Free and Fair* (The Federation Press, 2001), 28–44.
78. Gibson (n 9) 89.
79. Ibid.
80. Irving (n 7) 43.
81. Ibid.
82. Clare Wright, '"A Splendid Object Lesson": A Transnational Perspective on the Birth of the Australian Nation' (2014) 26(4) *Journal of Women's History* 12.

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federation movement in the 1890s; they were frequently mentioned as examples in the drafting discussions. Moreover, section 41 of the Constitution guaranteed that the broad franchise that had developed for these lower houses would apply to Commonwealth elections.

A group of 'new federation historians' then specifically focused on the distinctive role of 'the people' in Australian constitution-making in the 1890s.[83] They described how the initial constitutional draft of 1891 was produced by a process with little role for the people. The draft drew heavily on British parliamentary sovereignty and gave the people no guaranteed role in Australian representative democracy.[84] Furthermore, it included an appointed upper house and allowed ministers to sit outside parliament. It was, however, abandoned.[85]

They then described how the federation movement was revived when a series of bottom-up federation conventions proposed to turn to 'the people' and 'not politicians'.[86] A new process was devised in which the people would directly elect representatives to a new constitution-making convention. Hirst explains how this role for the people outside of parliament drew on American constitutional ideas that found their way to Australia through James Bryce's influential book *The American Commonwealth*.[87] This book contained an entire appendix that described the ways that the people could act through conventions outside of the legislature.[88] Moreover, Irving describes how the concept of the 'people' acting outside of parliament helped ensure that '[t]he people had become the legitimizing force behind federation'.[89] For instance, women's groups such as the Women's Christian Temperance Union played an important role in restarting the federation process and petitioning the elected drafted convention.[90]

The new federation history then explained how this popular process injected distinctive democratic ideas into the constitutional drafting process. The Victorian Premier (George Turner) at the first meeting of this elected convention set the tone by advocating a number of voting guarantees that ensured that 'the people' played a central role in Australian representative democracy.[91] These ideas were not uncontested; they drew criticism from delegates who wanted a system of democratic governance closer to the British model.[92]

But ultimately these ideas found their way into the text of the *Constitution*. They were successful not just for ideological reasons; they were also practically important. A strong constitutional commitment to the people was crucial to the successful ratification of a constitutional system with an upper house that gave the smaller states equal representation.[93] The 'yes' vote in Victoria and NSW

83. John Waugh, 'New Federation History' (2000) 24(3) *Melbourne University Law Review* 1028.
84. Williams, *The Australian Constitution* (n 74) 155–6. Available in full at 435–60.
85. Hirst, *The Sentimental Nation* (n 7) 105–23.
86. Ibid 124.
87. Hirst, *The Sentimental Nation* (n 7) 127–128 (describing how the Australians were familiar with the American practice of using specially elected conventions because of Bryce's work); see also Stephen Gageler, 'James Bryce and the Australian Constitution' (2015) 43(2) *Federal Law Review* 177 (describing the centrality of Bryce's The American Commonwealth to the Australian constitutional drafters).
88. James Bryce, *The American Commonwealth* (Liberty Fund 1995) 606–609.
89. Irving (n 7) 152.
90. See Helen Irving, *Who are the Founding Mothers? The Role of Women in Australian Federation* (Papers on Parliament No 25, June 1995).
91. John De Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 118.
92. William Partlett, 'Australian Popular Political Constitutionalism' (2024) 52(2) *Federal Law Review* 156 (describing the role of anti-populists in opposing these kinds of changes).
93. Hirst, *The Sentimental Nation* (n 7) 178–83.

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ultimately succeeded by stressing how the *Constitution* created the 'most democratic' federation in existence.[94] For instance, Alfred Deakin's justification of the draft was grounded in its democratic exceptionalism: 'you will look in vain for [a constitution] as broad in its popular base, as liberal in its working principles, as generous in its aim'.[95] Moreover, George Reid, the Premier of NSW, strengthened the role of the people in the draft constitution at a secret Premiers' conference to ensure that the constitutional draft was successful in a second referendum in NSW.

The text of the *Australian Constitution* therefore reflected a distinctive combination of Chartist and American understandings of popular democracy. It included a number of systemic and structural provisions to guarantee a direct role for the people.[96] First, the preamble described 'the people' (and no longer 'the Australasian colonies') as creating the *Constitution*.[97] Second, it introduced a number of guarantees of popular control over parliament. Chapter I required the upper house of Parliament (the Senate) to be 'directly chosen' by the 'people of the State(s)' (section 7) and the lower house of Parliament (the House of Representative) to be 'directly chosen' by 'the people of the Commonwealth' (section 24). These provisions broke with the 1891 draft by providing the people with a constitutional guarantee of a 'direct' choice of their representatives in both the lower and upper house of Parliament.[98]

Sections 7 and 24 also showed the plural nature of 'the people' in Australia: they acted not just as a national entity but also as the people of the states. This plural conception of the people was reflected in section 128 which gave 'the people' (and not parliament) the constituent power to make constitutional law — but only when a majority of the national people *and* the majority of people in a majority of states agreed.[99] This referendum process was widely assumed to be one that would allow the people to frequently amend the *Constitution*,[100] leading one commentator to worry that it would allow the 'habit of tinkering' with the *Constitution*.[101] This gave the Australian people (and not parliament) the *legal* sovereignty to alter their constitutional order through a referendum.[102]

This plural understanding of the people — particularly when reflected in an upper house (Senate) that gave equal representation to all states — was criticised for rejecting a purely majoritarian form of democratic politics. This criticism was particularly strident from Australia's emerging labour movement, which wanted fewer checks and balances on broad-based electoral majorities.[103] The rejection of majoritarianism, however, was defended as democratic by its supporters on the basis that it was more inclusive. For instance, Andrew Thynne in the 1891 Convention argued that 'minorities' deserved legislative protection against what he called 'the tyrannic exercise of the

94. In Victoria, the liberal Age newspaper which could have blocked federation was only persuaded to support the Constitution because of its democratic nature: Ibid 179–80.
95. Ibid 182–3.
96. See Elisa Arcioni, 'The Core of the Australian Constitutional People: "The People" as "The Electors"' (2016) 39(1) *University of New South Wales Law Journal* 421.
97. *Australian Constitution,* preamble. Nauze describes how this change triggered comment in Britain that '[t]he wording of this preamble is likely to give rise to some observation in the Imperial Parliament': Nauze (n 41) 186.
98. John Williams, *The Australian Constitution: A Documentary History* (Melbourne, Melbourne University Press 2005) 298.
99. Ibid, s 128.
100. JA Isaacs and JE Mackey, Melbourne Age (Monday, 10 July 1899). The authors speculate that s 128 could be used to overcome deadlocks between the lower and upper houses.
101. Moore (n 2) 332.
102. William Partlett, 'Remembering Australian Constituent Power' (2023) 46(3) *Melbourne Law Review* 821.
103. Brian O'Callaghan, 'A Watchful Attitude Towards Federation: Tocsin's Approach to the Draft Constitution Bill 1897-1900' (1977) 11(2) *Melbourne University Law Review* 16.

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power of temporary majorities'.[104] This desire to ensure minority representation triggered serious discussions of proportional representation voting rules for the Senate in the drafting conventions.

The *Constitution* also included key guarantees about the makeup of the plural Australian people. Sections 8 and 30 banned plural voting and section 24 required the House of Representatives (the more representative body) to be twice the number of senators. Section 41 also required that the franchise for both houses to be tied to that of the most progressive franchise, the lower house at the state level which had been transformed under Chartist ideology in previous decades. Section 28 also drew on a Chartist call for short parliaments by entrenching a requirement that the House of Representatives be elected every 3 years or less.

Finally, the *Constitution* included additional systemic mechanisms for 'the people' to ultimately resolve legislative deadlocks between the houses of parliament.[105] A critical new section gave the people the ability to break legislative deadlocks in a double dissolution election followed by a joint sitting of both houses.[106] George Reid described this provision in the convention debates using agency law terminology, explaining that the provision allowed the people as 'principal' to finally settle 'what the agents cannot accomplish'.[107] Another delegate, William Trenwith, used similar language, arguing that when 'the agents' — that is, the houses of parliament — are unable to agree, they are 'called upon by their principals to stand aside and refer that matter to the principals'.[108]

This innovative constitutional system and its distinctive role for 'the people', however, was racially exclusive.[109] Helen Irving describes how Australians sought to purify their democratic exceptionalism from any contamination 'that would come from coloured people in numbers'.[110] Democratic innovation did not extend to non-white Australians. Furthermore, the push for universal manhood suffrage in NSW, Victoria, Tasmania and South Australia meant that First Nations men technically had the franchise.[111] But this right to vote was extremely difficult to exercise, particularly as Australia's growing nationalism was linked with race.[112] Patricia Grimshaw describes federation as a problematic 'turning point' in consolidating 'white policies towards Aborigines that all but extinguished a promised path to citizenship'.[113]

The text of the *Constitution* reflected the racist nature of the people in federation-era Australia. Although the *Constitution* recognised 'the people of the States' as part of the plural Australian people, it did not recognise First Australians. Instead, section 127 excluded First Australians from

104. *Australasian* Convention Debates, Sydney, 6 Friday March 1891, 106 (Andrew Thynne).
105. Moore (n 2) 328. Moore compares the Australian Constitution with the United States Constitution and stresses how the people 'play a direct part' in 'every function of government'.
106. *Australian Constitution* s 57.
107. *Official Record of the Debates of the Australasian Federal Convention,* Melbourne, Thursday 10 March 1898, 2205 (George Reid).
108. *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, Thursday 10 March 1898, 2218 (William Trenwith).
109. John Hirst, *Australia's Democracy: A Short History* (Allen & Unwin, NSW, 2002) 112–13.
110. Irving (n 7) 118.
111. Pat Stretton and Christine Finnimore, 'Black Fellow Citizens: Aborigines and the Commonwealth Franchise' (1993) 25(101) *Australian Historical Studies* 522 ('*Stretton and Finnimore*'); Ann Curthoys and Jessie Mitchell, *Taking Liberty: Indigenous Rights and Settler Self Government in Colonial Australia, 1830-1890* (Cambridge University Press, 2018) (describing the central role of expediency in giving First Nations Australians the rights of white Australians in the colonial period).
112. Murray Goot, 'The Aboriginal Franchise and Its Consequences' (2006) 52(4) *Australian Journal of Politics and History* 517.
113. Patricia Grimshaw, 'Federation as a Turning Point in Australian History' (2002) 33 (118) *Australian Historical Studies* 25, 26.

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'the people', stating that they were not to be counted 'in reckoning the numbers of the people of the Commonwealth'. This exclusion accompanied decades of legal discrimination, starting with the Commonwealth Franchise Act that barred First Australians from voting.[114] More broadly, section 51(xxvi) gave the Commonwealth Parliament the power to make 'special' laws for 'the people of any race' (except for First Australians). Edmund Barton commented that this power was intended to ensure that the Commonwealth would 'have the power to regulate the affairs of the people of coloured or inferior races who are in the Commonwealth'.[115] Finally, section 25 stated that if particular 'races' were excluded from voting, they were not to be counted in the general 'reckoning' of the number of people.

The consequences of this fuller history of simultaneous democratic innovation and racial exclusion in Australian constitutional democracy have not been fully realised in Australian constitutional law or discourse. The following sections will explain these important consequences. First, this fuller history shows that the general purpose of sections 7 and 24 of the Constitution is to guarantee that 'the people' can control parliament through the vote. This constitutionally guaranteed form of popular political constitutionalism provides a new way of justifying the limitations the Court has placed on parliament on the basis of representative democracy (part 4). Second, it helps to understand the distinctiveness of Australia's constitutional system and demonstrates why constitutional recognition for First Australians is an important step in further developing this system (part 5).

IV The Intellectual History of Australian Constitutional Democracy and Constitutional Interpretation

This intellectual history is significant for constitutional interpretation. Most notably, it provides important support for the implications the High Court has drawn from the constitutional guarantee of representative democracy in sections 7 and 24 of the *Constitution*. In a series of landmark cases, the High Court has argued that this guarantee necessarily contains implications that limit parliament's ability to burden the electoral franchise or political communication.[116] These have generated criticism, with newly appointed Justice Steward recently writing that it is 'arguable' that the implied freedom of political communication 'does not exist'.[117] In support, he argued that it is not sufficiently supported by the 'text, structure and context of the constitution'.[118] Moreover, the High Court has struggled to define the precise nature of the *Constitution's* guarantee of representative democracy.[119] Justice Gageler has described representative democracy as 'a very large constitutional idea' that defies easy categorisation.[120] Justice McHugh described the phrase 'chosen by the people' as 'involving a value judgment' and the term 'the people' to which that phrase refers as a

114. Chesterman and Galligan, *Citizens without Rights* (Cambridge University Press 2009) 7–9. The states and territories also were critical in passing laws that discriminated against First Australians.
115. *Official Record of the Debates of the Australasian Federal Convention,* Melbourne, 27 January 1898, 228–9 (Edmund Barton).
116. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*'); *Roach v Electoral Commissioner* (2007) 233 CLR 162 ('*Roach*').
117. *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 249.
118. Ibid.
119. Adrienne Stone, 'Limits of Text and Structure Revisited' (2005) 28(3) *University of New South Wales Law Journal* 1 ('*Limits of Text and Structure Revisited*').
120. *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 89 (Gageler J).

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'vague but emotionally powerful abstraction'.[121] Adrienne Stone has argued that this ongoing interpretive disagreement and uncertainty has in turn led to weak enforcement of these implied limitations on parliamentary power.[122]

This section will describe how this intellectual history of Australian constitutional democracy both supports these implications and helps determine their scope. This history shows that sections 7 and 24 of the Constitution guarantee a system where 'the people' can directly choose their representatives and therefore hold parliament to account. These provisions therefore create a key constitutional limitation on parliamentary power. This constitutionally guaranteed form of popular political constitutionalism requires a limited but important role for courts in reviewing laws that threaten the popular accountability and representativeness of parliament.

A *The Implications from Representative Government*

In a series of cases, the High Court has held that sections 7 and 24 contain important implications that limit parliament's power to pass laws that impact the franchise or political speech. These limitations on parliament have faced persistent 'interpretive disagreement'.[123] This criticism is frequently underpinned by a key argument: these implications are not necessary to Australian representative democracy because they conflict with Australia's commitment to parliamentary sovereignty. The implications, the argument concludes, are inappropriate and should be abandoned.

First, the Court has held that the constitutional guarantee of representative democracy requires Parliament to justify legislative burdens on political communication.[124] This implication has proven highly controversial. For instance, Justice Heydon has argued that the implied freedom of political communication 'is a noble and idealistic enterprise which has failed, is failing and will go on failing'.[125] Nicholas Aroney has written that the implied freedom of political communication conflicts with 'the prevailing wisdom among the framers of the Constitution . . . in favour of parliamentary sovereignty'.[126]

Second, the Court has held that the constitutional guarantee of representative democracy requires Parliament to have a 'substantial reason' if it passes a law that burdens or limits the electoral franchise.[127] The Court has argued that 'chosen by the people' changes over time as Parliament expands the democratic franchise through legislation. The Court's use of an evolving 'legislative baseline' to determine constitutionality has proven controversial.[128] For instance, Justice Hayne criticised the Court for linking the 'ambit of constitutional power' to what is 'politically accepted' in legislation.[129] Anne Twomey has argued that this approach is 'radical' and 'not justified by the text

121. *Langer v Commonwealth* (1996) 186 CLR 302, 342.
122. Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27(1) *Sydney Law Review* 29.
123. Ibid.
124. *Lange* (n 116).
125. *Monis v The Queen* (2013) 249 CLR 92, 251.
126. Nicholas Aroney, 'Julius Stone and the End of Sociological Jurisprudence: Articulating the Reasons for Decision in Political Communication Cases' (2008) 31(1) *UNSW Law Journal* 107, 126.
127. *Roach* (n 116).
128. Lael K Weis, 'Legislative Constitutional Baselines' (2019) 41(4) *Sydney Law Review* 481. *Rowe* (n 20) 18 (French CJ) ('is now informed by the universal adult-citizen franchise which is prescribed by Commonwealth law').
129. *Roach* (n 116) 219 (Hayne J).

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or structure of the Constitution'.[130] In particular, she argues that it undermines 'the principle of parliamentary sovereignty' by allowing parliament to bind future parliaments.[131]

B *History, Cole v Whitfield and Sections 7 and 24*

If Australia had adopted a federal version of British parliamentary sovereignty at federation, these are persuasive critiques of the implications the Court has drawn from representative democracy. An Australian form of parliamentary sovereignty would be fully 'opposed to judges having power to protect them from legislation' outside of the textual limitations largely stemming from federalism.[132] With this understanding of Australian representative democracy, therefore, the Court has gone astray and neither implication is appropriate.

But read in light of the intellectual history of Australian representative democracy described in part 3 above, it becomes clear why the text and structure of sections 7 and 24 necessarily require the implications the Court has drawn. *Cole v Whitfield* tells us how we use history to understand the meaning of constitutional text and structure.[133] In that case, a unanimous High Court described the role of history in understanding the meaning of constitutional text and structure. The Court stated that 'reference to history' is used to understand 'the contemporary meaning of language used, the subject to which that language was directed *and* the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged'.[134]

The *Cole* formulation therefore explicitly includes an orthodox technique in interpreting legal text: using historical context to understand the general purpose or mischief to which the text is directed. In a leading case describing this technique, the High Court has explained that the modern purposive approach to textual interpretation uses history prior to adoption of the text in its 'widest sense' to understand 'the mischief' which the text was 'intended to remedy'.[135] *Cole* signals adherence to this approach by describing constitutional interpretation in light of the 'nature and objectives *of the movement* towards federation' from which the Constitution emerged.

By directing the interpreter to understand constitutional text and structure in light of the nature and objectives of the 'movement' towards federation, *Cole* requires a wide understanding of the historical context prior to constitutional adoption. This includes an understanding of the *direction* of pre-adoption history and how the text fits into this broader constitutional movement.[136] Thus, in the *Cole* case itself, the Court seeks to understand the broader purposes to which the words 'absolutely free' in section 92 are directed by looking to the broader sweep of colonial and federation-era history. The Court describes how this history shows that section 92 was part of a general free trade movement. At the time, this was focused on forbidding particular burdens on inter-colonial trade such as customs duties.[137] It then, however, abstracts from this to a general purpose of blocking any 'discriminatory burdens of a protectionist kind', including those not understood at the time of

130. Anne Twomey, 'Rowe v Electoral Commissioner: Evolution or Creationism?' (2012) 31(2) *University of Queensland Law Journal* 185.
131. Ibid 181.
132. Goldsworthy, *Implications Revisited* (n 3) 25.
133. (1988) 165 CLR 360.
134. Ibid 385 (emphasis added).
135. *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.
136. Stephen Gageler, 'Beyond the text: A vision of the structure and function of the Constitution' (Winter 2009) *Bar News* 30, 32 (describing how the High Court in Cole used the history to 'identify the mischief to which Section 92 was directed').
137. *Cole* (n 34) 372.

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constitutional adoption.[138] This was made clear in the *Betfair* case, when the Court invalidated a Western Australian law that banned internet-based betting exchanges.[139]

The guarantee of representative democracy in sections 7 and 24 must be interpreted in the same manner. The intellectual history shows that sections 7 and 24 were part of a movement towards federation that sought to constitutionally guarantee a direct role for the people in Australian representative democracy. This history shows how sections 7 and 24 are part of a wider constitutional system that includes sections 8, 28, 30, 41 and 128. These other provisions reveal the general constitutional purpose of 'directly chosen by the people' is to mandate a constitutional system where the people can hold parliament accountable.

Read in line with *Cole*, therefore, sections 7 and 24 protect against laws that undermine the ability of the people to use the vote to exercise political control over parliament. Justice McHugh explains that sections 7 and 24 require a 'process' that enables the people to cast an 'effective vote at election time'.[140] This explains why the implications the Court has drawn are necessary: they ensure that the people continue to play a central role in Australian popular political constitutionalism. This implication clearly requires a limited but important role for courts. As Justice Toohey describes it, the 'essence' of the constitutional guarantee of representative democracy remains 'unchanged' but the method of 'giving expression to the concept varies over time' as different challenges emerge.[141] Thus, for instance, as the democratic franchise and the definition of the people expands, courts must scrutinise laws that reduce the size of that franchise. Furthermore, as new legislative threats emerge to the system of political communication which undermine the ability of the people to choose their representatives, the courts must require parliament to justify these laws.

C *The Implied Freedom of Political Communication*

The intellectual history of Australian constitutional democracy has played little to no role in either justifying or shaping the implied freedom of political communication. In *Australian Capital Television Pty Ltd v Commonwealth* ('*ACTV*'), for instance, the Court cited authorities such as the American Solicitor General, Archibald Cox, as the basis for the implication.[142] In *Lange v Australian Broadcasting Corporation*, the Court retreated from 'political principles or theories' extraneous to the Constitution and instead argued that the text and structure of the constitution alone justify this implication.[143]

The intellectual history provides critical context for understanding why the text and structure of the Australian Constitution necessitate this implication. Initially, it refutes the argument that the implied freedom of political communication is illegitimate because Australian representative democracy reflects British parliamentary sovereignty.[144] Instead, this new intellectual history demonstrates that the sections 7 and 24 were part of a constitutional movement that constitutionally guaranteed 'the people' a role in Australian representative democracy. This constitutionally guaranteed form of popular political constitutionalism breaks with the absolute judicial deference in parliamentary sovereignty and instead requires courts to also play a role in scrutinising legislation

138. Ibid 392.
139. *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418.
140. *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 231 (McHugh J) ('*ACTV*').
141. *McGinty v Western Australia* (1996) 186 CLR 140, 201 (Toohey J).
142. (1992) 177 CLR 106, 139, citing Archibald Cox, *The Court and the Constitution* (Houghton Mifflin Co, 1987); *Lange* (n 116) 559.
143. Ibid 566-7.
144. Goldsworthy, *Implications Revisited* (n 3) 25.

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that impairs the free flow of political communication necessary for the people to hold their representatives accountable through the vote.[145]

This purposive approach to the interpretation of sections 7 and 24 also explains why the freedom of political communication is guaranteed despite the rejection of a bill of rights at federation. It shows that Australia's movement towards federation had a unique conception of representative democracy and political constitutionalism that rejected individual rights in favour of a constitutional guarantee that the people can hold parliament to account through the vote. This special constitutional role for the people in the Australian legal system was obscured for many years by Australia's ambiguous colonial relationship with the United Kingdom. After the Australia Acts of 1986, however, it was clear that Australia was a fully independent nation.[146] This shaped the High Court's recognition of the role of the Australian people in the constitutional order and therefore the implied freedom. For instance, in an important early case recognising this implication, Chief Justice Mason argued that the *Australia Act 1986* (UK) marked the end of the 'legal sovereignty' of Imperial Parliament and that 'ultimate sovereignty' now resided in the Australian people.[147]

This history also helps support the Court's doctrinal position that the freedom of political communication does not protect a 'personal right akin to that created by the First Amendment' but instead curtails the power of the legislature to limit political speech.[148] The Court describes how the freedom protects the flow of information to people about 'the functioning of government' and the 'policies of political parties and candidates for election'.[149] Lael Weis describes the implication as an attempt to protect a 'structural feature of the constitutional system' by scrutinising laws that threaten a 'system of government that is constitutive of popular sovereignty'.[150] This suggests that American categories and understandings of the freedom of speech are not relevant to Australian jurisprudence. Instead, the High Court should be scrutinising laws for their attempts to undermine the systemic ability of 'the people' to hold 'the body politic' accountable through voting.[151]

This intellectual history also responds to the challenge put by Adrienne Stone to better describe the 'kind of public debate' that should be protected under the implied freedom of political communication.[152] By showing the constitutional value that the drafters placed on the systemic ability of the people to hold parliament to account, this history shows that courts must scrutinise laws that threaten Australia's system of popular political constitutionalism.[153] This understanding of the role of the courts in upholding Australia's guarantee of representative democracy is described in Justice Gageler's extra-curial writing. He has explained that the 'underlying purpose of the constitution' is to enlarge the powers of self-government of the people.[154] This form of

145. *ACTV* (n 140) 135. See also Donaghue (n 20) 156–8.
146. *Sue v Hill* (1999) 199 CLR 462, 490 (Gleeson CJ, Gummow, Hayne JJ) (arguing that the UK has been a 'foreign power' to Australia since at least the *Australia Act 1986* (Cth)).
147. *ACTV* (n 140) 138.
148. *McCloy v New South Wales* (2015) 257 CLR 178, 283 (Gordon J) ('*McCloy*').
149. *Lange* (n 116) 560; see also Dan Meagher, 'What Is "Political" Communication? The Rationale of the Implied Freedom of Political Communication' (2004) 28(2) *Melbourne University Law Review* 438 (describing how the purpose of the implied freedom of political communication is 'to secure and provide for the meaningful exercise of the sovereignty of the people through the effective operation of our system of constitutional government, which is promoted by a broad-ranging and informed political discourse').
150. Lael Weis, 'McCloy Symposium: Lael Weis on Why Political Communication Isn't an Individual Right in Australia', *Opinions on High* (Blog Post, 19 October 2015).
151. Ibid 47 [120] (Gummow and Bell JJ).
152. Stone, *Limits of Text and Structure Revisited* (n 119) 851.
153. *ACTV* (n 140) 135. See also Donaghue (n 20) 156–8.
154. Gageler (n 136) 37.

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representative democracy, he explains, requires judicial 'vigilance' when popular accountability is inherently weak or endangered.[155] This is clearest where the government burdens the right to vote itself. But this vigilance is also required when law endangers 'a process of communication by which that political accountability is maintained'.[156] In these cases of vigilance, the Court must ensure that the law is reasonably adapted and appropriate to achieve a compelling end. If it is not, it is committing 'a fraud on the power' and the Court must invalidate it.[157]

Two High Court cases are consistent with the enforcement of this systemic constitutional guarantee. In the *McCloy* case, the plaintiff advanced an American-style individual liberty claim under the implied freedom of political communication to invalidate a cap on donations by property developers. The Court unequivocally rejected this claim, explaining that the implied freedom is not an 'individual right'.[158] Justice Gageler explains that Australia's commitment to representative democracy means that a law which limits the ability of wealthy interests to gain 'unequal access to government based on money' does not burden political communication but actually improves it by allowing 'meaningful participation' for non-wealthy voices in the electoral process.[159] Moreover, French CJ, Kiefel, Bell and Keane JJ stress that the law helps to ensure the '[e]quality of opportunity to participate in the exercise of political sovereignty' which they argue 'is an aspect of the representative democracy guaranteed by our Constitution'.[160]

In the *Brown* case, the High Court struck down a Tasmanian anti-protest law because it burdened political speech in a way that was greater than reasonably necessary. The Court reasoned that the Act had broad effects on the system of political communication, largely by 'extending the areas of its operation, creating further consequences for non-compliance with directions including special offences and heavy penalties' and, 'more importantly' that deterrent is 'achieved by the uncertainty which surrounds the areas within which the Act applies'.[161] These measures are likely to go far beyond any legitimate purpose and instead 'deter protest[s] of all kinds', thus depriving the people of access to political communication that can help them hold parliament to account through the vote.[162]

Other judgments, however, are not consistent with this approach. For instance, in *Clubb v Edwards*, Justices Kiefel, Bell and Keane refer to the importance of 'dignity' and 'privacy' to the constitutionally prescribed system of representative democracy.[163] In support, they cite Israeli judge, Aharon Barak, for the idea that '[h]uman dignity regards a human being as an end, not as a means to achieve the ends of others'.[164] There is no doubt that privacy and dignity are important values in traditional individual rights discourse. But Australia's constitutionally prescribed system of popular political constitutionalism does not protect individual rights. Instead, it is intended to guarantee a *system* that allows the people to hold parliament to account. Protecting individual dignity or privacy (or autonomy for that matter) are not important or compelling purposes of such a system.

155. Ibid.
156. Ibid 38.
157. Ibid.
158. *McCloy* (n 148) 202.
159. Ibid 248.
160. Ibid 207.
161. *Brown v Tasmania* (2017) 261 CLR 328, 372.
162. Ibid 373 [145], 374 [152]; see orders at 375.
163. (2019) 267 CLR 171, 196 (Kiefel CJ, Bell and Keane JJ) ('*Clubb*').
164. Ibid.

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Finally, the doctrinal test the Court has adapted to understand the implied freedom — structured proportionality — is in tension with this fuller history. If history shows that the purpose of Australian representative democracy is to guarantee a *system* in which the people can hold the parliament account by voting, why is a doctrinal test taken from the individual rights context being used? In particular, the third and final 'adequate in the balance' step of structured proportionality is problematic in a system of political constitutionalism such as Australia. As Justice Brennan stated in *Nationwide News Pty Ltd v Wills*, the balancing of key interests is better left to Parliament.[165]

Although a comprehensive discussion of the correct test is beyond the scope of this paper, the fuller history suggests that a version of the 'calibrated' scrutiny test (suggested by Justices Gageler and Gordon) is more appropriate.[166] In this approach, the Court would closely scrutinise laws that burden core aspects of popular political constitutionalism while giving deference to laws that do not. Those cases involving laws that warrant deference would only require 'constitutionally permissible' purposes to be valid.[167] But those cases considering laws that burden core aspects of the system of popular political constitutionalism would warrant higher scrutiny and require the impugned law to be 'narrowly tailored' to a 'compelling' purpose.

Two recent cases provide examples of how this calibrated scrutiny test could operate. In *Ruddick v Commonwealth*, the plaintiff challenged 2021 amendments that compelled deregistration of a party that chose a name which duplicates the name of an earlier registered political party.[168] In a 4-3 judgment, the Court upheld the amendments. Calibrated scrutiny supports this outcome. In this case, the impugned law should be subject to searching scrutiny because it impacts the ability of political parties to communicate with voters on the ballot paper — clearly a central aspect of Australian popular political constitutionalism. But it passes this stricter scrutiny because the law has a compelling purpose that is at the core of popular political constitutionalism: reducing voter confusion and therefore improving the ability of the people to make a clear and informed choice about their representatives. Furthermore, the law is narrowly tailored to this compelling purpose: there do not appear to be obvious other ways to avoid voter confusion, and therefore the law improves the clarity and quality of electoral choice and communication on government or political matters.

In *Murphy v Electoral Commissioner*, the plaintiffs argued that the long-standing practice of closing the electoral rolls 7 days after the issue of the writ was invalid because the Electoral Commission now possessed the technological and administrative capacity to process new enrolments closer to polling day.[169] The impugned provisions had been in place for many years and therefore do not place a significant burden on popular political constitutionalism. As Justices French and Bell argued, this was 'not a case about a law reducing the extent of the realisation of the constitutional mandate'.[170] Instead, it was a case arguing that 'the law did not go far enough in the provision of opportunities for enrolment'.[171] Given this, the impugned law only requires a constitutionally permissible purpose. In this case, this is easily found as the cut-off period is important to the 'the orderly and efficient conduct of elections'.[172]

165. (1992) 177 CLR 1, 50.
166. Adrienne Stone, 'Proportionality and its Alternatives' (2020) 48(1) *Federal Law Review* 123 (describing calibrated scrutiny in the *Clubb* case and calling it a 'promising framework' for analysis).
167. *Clubb* (n 163) 232 [184] (Gageler J).
168. (2022) 96 ALJR 367.
169. (2016) 261 CLR 28.
170. Ibid 53 [39] (French CJ and Bell J).
171. Ibid.
172. Ibid 54 [41].

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D *The Voting System Cases*

This fuller historical account has had more impact on cases where the Court scrutinises laws that burden or reduce the ability of the people to vote. In *McGinty*, Justice Gummow argued that the Court must scrutinise laws burdening the ability of the people to vote because '[t]he architects of the Australian federation shared an expectation that the federal Parliament would embrace what were then advanced ideas of political representation'.[173] This fact, he argued, showed that sections 7 and 24 create a constitutional requirement 'of ultimate control by the people, exercised by representatives who are elected periodically'.[174]

This history reappeared more strongly in the *Roach* case, in which the Court invalidated a law that broadly disenfranchised prisoners no matter the severity of the crime or the length of the sentence. Justices Gummow, Kirby and Crennan invalidated the law in part on Australia's progressive and broad colonial franchise (for its time).[175] They argued that Australia's distinctive system of *representative government* with which the framers were 'most familiar as colonial politicians' helps to understand the purpose of the Constitution's guarantee in sections 7 and 24 that representatives be 'directly chosen by the people'.[176]

The most explicit use of this fuller history is in *Rowe v Electoral Commissioner*, a case where the High Court struck down a law shortening the period during which voters could enrol to vote after an election writ was issued.[177] In her judgment, Justice Crennan made use of the intellectual history of colonial Australian representative democracy. Justice Crennan had written a Master's thesis at the University of Melbourne on the influence of Chartism in colonial Victoria.[178] Her judgment draws on this work by describing the 'British radicalism' that took hold in the Australian colonies and the strong push for manhood suffrage.[179] She then links these ideas with constitutional provisions aimed at blocking oligarchical mechanisms (plural voting or undemocratic upper houses) that would halt or reverse 'the tide of democracy'.[180]

In describing this political history, Justice Crennan explicitly relies on the new wave of intellectual history highlighting Australia's distinctive form of representative democracy. She relies on the work of John Hirst's *The Strange Birth of Colonial Democracy: New South Wales 1848-1884*, one of the early books examining the distinctive nature of Australian democracy.[181] She also cites Peter Cochrane's book *Colonial Ambition: Foundations of Australian Democracy*, which remembers the democratic ideas of colonial Australia.[182] Finally, she cites John Molony's *Eureka and the Prerogative of the People* which describes the role of Chartism in the democratic exceptionalism of colonial-era Australia.[183]

She describes how this historical background provides important context for understanding sections 7 and 24. These provisions, she argues, were directly targeted at blocking attempts to re-establish what she calls 'oligarchic' governance. This includes section 7 which guaranteed that the

173. *McGinty* (n 141) 271.
174. Ibid 285.
175. *Roach* (n 116) 192.
176. Ibid 188.
177. *Rowe* (n 20).
178. Susan Crennan, '"Transplanted Chartist Spirit": Achieving Manhood Suffrage in Victoria: The Turning Point of 1854' (History Honours Theses, 2002).
179. *Rowe* (n 20) 110–11.
180. Ibid 112.
181. John Hirst, *The Strange Birth of Colonial Democracy: New South Wales 1848-1884* (Allen and Unwin, 1988).
182. Peter Cochrane, *Colonial Ambition: Foundations of Australian Democracy* (Melbourne University Press, 2006).
183. John Molony, *Eureka and the Prerogative of the People* (Melbourne University Press, 2001).

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commonwealth upper house (the Senate) would not be an undemocratic body (as it was in many states). It also includes a ban on plural voting in sections 8 and 30, another technique that was used in the colonies (and Britain) to limit democratic governance.[184] Finally, she describes how section 41 tied Commonwealth electoral rolls to the lower house of parliament in each state, the key institution at the centre of the colonial movement towards democracy.[185]

Justice Crennan argues that this structural context makes it clear that sections 7 and 24 were part of a broader movement to 'mandate a franchise which will result in a democratic representative government'.[186] She then concludes that this constitutional purpose will naturally require the Court to scrutinise laws that burden the vote and therefore threaten the developing concept of representative democracy.[187] This history then supports the doctrinal requirement that Parliament have a 'substantial reason' if it limits the ability of people to vote enshrined in past legislation.[188]

Justices Gummow and Bell explicitly adopt Justice Crennan's historical argument. In addition, they also independently refer to the 'striking' development of representative democracy in the Australian colonies and the 'deep significance' of the 'progressive instincts' of the time in understanding the purpose of sections 7 and 24 of the Australian Constitution.[189] This history shows that '"progressive instincts" would animate members of legislative chambers' when they legislated for a franchise that would ensure representatives 'chosen by the people'.[190] In fact, they go on to argue that this new history shows that the Constitution was framed on the idea that 'the body politic would embrace the popular will and bind it to the processes of legislative and executive decision making'.[191]

This use of the fuller intellectual history can and should be used more widely by both claimants and the Court in the voting context. For instance, they could expressly cite *Cole v Whitfield* and its interpretive method as supporting this implication. In so doing, they would explain how this history provides important context for why Parliament must justify any law that undermines the representative nature of parliament by reducing or burdening the ability of 'the people' to hold parliament to account. The Court should also make broader use of this history in justifying why it must strike down laws that 'impermissibly distort the voting system in a way that would compromise the representative nature of a future Parliament'.[192]

This history of the distinctive role of the people also helps explain and justify the Court's use of prior electoral legislation as a baseline to determine constitutional validity and shows why it is not 'radical' or problematic. Each new law defining the franchise allows 'the people' (acting through their parliamentary representatives) to exercise 'the power of collective self-definition' in determining the scope of 'the people' and therefore a representative parliament.[193] If a new law itself burdens or limits this self-definition process or legislative baseline of 'the people', it

184. *Rowe* (n 20) 113–14.
185. Ibid.
186. Ibid 117.
187. Ibid.
188. Ibid 121.
189. Ibid 46–7.
190. Ibid 47.
191. Ibid.
192. *Palmer v Australian Electoral Commission* (2019) 269 CLR 196, 214 [53] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ) ('*Palmer*').
193. Elisa Arcioni, 'The Core of the Australian Constitutional People – "The People" as "the Electors"' (2016) 39(1) *UNSW Law Journal* 421, 442.

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poses a threat to the ability of 'the people' to hold parliament to account and must be justified in court.[194]

This approach is also consistent with political constitutionalism because it means the Court does not itself need to independently determine what a popularly representative parliament is; instead, it simply has to look to pre-existing electoral legislation to determine that question. The Court is therefore not overstepping the bounds of its legitimate authority. Instead, the Court is allowing Parliament to determine who 'the people' are through legislation. As Weis explains, it 'allocates the primary institutional responsibility for defining the incidents of representative democracy' (in this case, who are the people) to Parliament.[195] 'Legislative baselines' in this context are therefore a deferential tool in protecting 'the people' from laws that dilute their power to use the vote to hold parliament to account.

Finally, as with the implied freedom, this fuller history suggests that a test of calibrated scrutiny — and not proportionality reasoning — is best suited to judging the constitutionality of laws in the voting context. In this approach, the greater the threat to the system of popular political constitutionalism, the greater scrutiny that should be applied. The outcome in the recent *Palmer* case would be consistent within this calibrated scrutiny approach.[196] In the case, the plaintiff argued that the Electoral Commission's practice of publishing the indicative two-candidate preferred count *after* polls closed in the relevant Division but *before* the polls closed in all parts of the nation violated sections 7 and 24. The facts showed that there was little evidence that this practice impacted voter choices. Under the calibrated approach, therefore, this practice would be subject to significant deference and only require a constitutionally permissible rationale. In this case, the Electoral Commission adopted the practice to ensure that the public would know 'the result of the count as it becomes available'.[197] This rationale is constitutionally permissible and therefore the challenge must fail.

The calibrated scrutiny test also makes it clear why a voter identification law should face searching judicial scrutiny.[198] This kind of 'voter ID' law would introduce a new requirement for voting that would make it difficult for some to vote, particularly those without a fixed residence.[199] It would therefore threaten the system of popular political constitutionalism by making it difficult for some Australians to vote. In order to avoid invalidation, therefore, the Commonwealth would need to argue that this identification requirement is narrowly tailored to a compelling purpose.

V Intellectual History and Australia's Constitutional System

The fuller history also helps to better understand Australia's distinctive constitutional system and practice. To date, the conventional historical account of Australian constitutional democracy as a fusion of federalism and British parliamentary sovereignty has shaped public discourse about constitutional reform. For instance, Australia's supposed adherence to parliamentary sovereignty

194. Lael K Weis, 'Legislative Constitutional Baselines' (2019) 41(4) *Sydney Law Review* 481.
195. Ibid 513.
196. *Palmer* (n 192).
197. Ibid 209 [29].
198. See, eg, *Electoral Legislation Amendment (Voter Integrity) Bill 2021*. Explanatory Memorandum, Electoral Legislation Amendment (Voter Integrity) Bill 2021.
199. Editorial, Government Must Spell Out Benefits of Voter ID Law, *Sydney Morning Herald* (31 October 2021).

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has played a powerful role in discussions and proposals about how best to protect individual rights.

The centrality of parliamentary sovereignty in Australian constitutionalism, however, has recently been questioned. Ryan Goss has asked whether Australians should understand themselves as having a constitutional system of parliamentary sovereignty when Australia's constitutional texts (both state and federal) place clear limitations on parliamentary power. He concludes that '[t]o describe Australian legislative power by drawing an analogy with British parliamentary sovereignty risks giving an imprecise and misleading sense of the nature of Australian legislative power'.[200] This claim echoes others that argue more broadly that the continued use of parliamentary sovereignty today obscures more than it shows.[201]

The intellectual history provides additional support for Goss's critique. As stated above, the constitutionally guaranteed role of the plural people in Australian democracy is a significant break with British parliamentary sovereignty and its limited, indirect role for the people.[202] This has important implications for understanding Australia's constitutional system. It shows that this system is better understood in its own right as one anchored in a unique combination of political constitutionalism with a system where 'the people' have a constitutionally guaranteed role.[203] This system gives the people *constitutionally guaranteed* mechanisms for directly exercising their sovereignty, rather than the indirect *political* mechanisms of popular sovereignty in the British tradition of parliamentary sovereignty. Finally, it is a democratic system that rejects a majoritarian and unitary conception of the people. Instead, it recognises the plural nature of the Australian people.

In addition, this history also demonstrates that Australia's distinctive constitutional system was originally built for a white Australia. This racial exclusion extended to all non-white Australians but was particularly pronounced for First Australians whose status as a 'people' that predated federation was completely ignored. Since federation, structural constitutional and legislative changes have helped to overcome this racism by expanding the definition of the people. Despite the failure of the First Nations Voice to Parliament in a referendum, constitutional recognition for First Australians is a critical next step in overcoming this history of exclusion.

A *The Standard Account of Australia's Constitutional System and Constitutional Discourse*

The orthodox view that Australia has a federal version of parliamentary sovereignty has long played a prominent role in Australian constitutional discourse. It has been particularly influential in opposing a constitutional bill of rights and advocating for a statutory bill of rights that will protect rights but also ensure respect for 'parliamentary sovereignty'. For instance, the design of Victoria's statutory bill of rights (called the *Charter of Human Rights and Responsibilities Act 2006* (Vic)) was

200. Ryan Goss, 'What Australians Are Talking about When They Are Talking about "Parliamentary Sovereignty"' [2022] (1) *Public Law* 55.

201. Martin Loughlin and Stephen Tierney, 'The Shibboleth of Sovereignty' (2018) 81(6) *Modern Law Review* 989.

202. *Australian Constitution* s 128; *McGinty* (n 141) [22] (McHugh J) '[s]ince the passing of the Australia Act (UK) in 1986 . . . the political and legal sovereignty of Australia now resides in the people of Australia'.

203. Kristen Rundle has recently argued that rather than telling a 'derogation story' about the extent to which a particular practice fails or modifies a dominant theory, we should instead work to understand the actual nature of that practice. Kristen Rundle, 'Outsourcing and Neoliberal Constitutionalism', in Phillip Toner and Mike Raferty (eds), *Captured: How Neoliberalism Transformed the Australian State* (University of Sydney Press, 2024).

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shaped by a 'desire to retain parliamentary sovereignty'.[204] In Queensland, the explanatory notes for its Human Rights Act also sought to ensure that the Parliament would 'remain sovereign'.[205]

Most recently, this common view of sovereignty in Australia's constitutional system emerged in the 2023 referendum debate about a First Nations Voice to Parliament. This Voice proposal emerged in 2017, after a series of regional dialogues convened around Australia culminated in the Uluru Statement from the Heart. This Statement requested 'structural' solutions to the ongoing failure of Australian constitutional democracy to incorporate the views of First Australians. Amongst these was the 'establishment of a First Nations Voice enshrined in the Constitution'. Although its exact powers and makeup were to be legislated in the event of a successful referendum result, this Voice to Parliament was constitutionally described as giving First Australians the ability to make 'representations [to parliament and the executive] on matters relating to Aboriginal and Torres Strait Islander Peoples'.[206]

Both sides of the debate about a First Nations Voice to Parliament strained to place this proposed institution in the orthodox view of Australia's constitutional system. Those in favour of the proposal situated the Voice to Parliament in the context of parliamentary sovereignty. For instance, the Law Council of Australia has argued that a Voice to Parliament is 'consistent with parliamentary sovereignty'.[207] Those in opposition to a Voice institution described it as a threat to Australian parliamentary sovereignty. Then-Prime Minister Malcolm Turnbull argued that it proposed a 'radical change to our constitution's representative institutions'.[208] Others argued that it poses a 'unprecedented threat' to Australia's representative institutions.[209] Finally, a common argument in the referendum debate was that a Voice to Parliament would 'permanently divide' Australia and therefore threaten its unity.[210]

B *Australia's Distinctive Constitutional System*

The fuller history of Australian constitutional democracy challenges a key assumption underpinning this debate. Most importantly, it shows that, from the very beginning, the Australian Constitution broke with British-style parliamentary sovereignty. The Australian Constitution was instead a key moment in the formation of a distinctive Australian system which guarantees that the plural people — currently understood as both the people of the nation and the people of the states — have a direct role in choosing their representatives, breaking legislative deadlocks and making constitutional law.

204. Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian Charter of Rights and Responsibilities: Drawing the Line between Judicial Interpretation and Judicial Law-Making' (2007) 33(1) *Monash University Law Review* 9, 10–11; see also Dan Meagher, 'Taking Parliamentary Sovereignty Seriously within a Bill of Rights Framework' (2005) 10(2) *Deakin Law Review* 686.
205. Explanatory Note, Human Rights Bill 2018.
206. Prime Minister Anthony Albanese, 'Address to Garma Festival' (30 July 2022).
207. Law Council of Australia, 'Constitutionally Enshrined Voice to Parliament a Must' (Media Release, 29 June 2018); see also Murray Gleeson, 'Recognition in Keeping with the Constitution: A Worthwhile Project' (2019) *Uphold and Recognise*; Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, 'Final Report' (29 November 2018) ch 3; Megan Davis, 'The Voice to Parliament: Our Plea to Be Heard', *ABC News* (online, 11 July 2019).
208. Calla Wahlquist, 'Indigenous Voice Proposal "Not Desirable", Says Turnbull' *The Guardian* (online, 26 October 2017); Turnbull has since changed his view, see Malcom Turnbull, 'I Will be Voting Yes to Establish an Indigenous Voice to Parliament' *The Guardian* (online, 15 August 2022).
209. Morgan Begg, 'Voice to Parliament Carries the Same Risks It Did Two Years Ago' Institute for Public Affairs (11 July 2019).
210. Australian Electoral Commission, *Your Official Yes/No Referendum Pamphlet* 9.

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This system is visible both before and after federation. Prior to federation and influenced by Chartist ideology, colonial-era Australians developed a number of innovations that expanded the role of the people. These included the secret ballot, the elimination of property requirements (for many lower houses) and (in South Australia) giving women the right to vote (in 1894). As described in part 3 above, the Commonwealth Constitution entrenched this system by constitutionalising many of these mechanisms as well as introducing a referendum and double dissolution provision. Although these mechanisms might seem natural to us now, they were radical for their time. Furthermore, they were *structural* guarantees of popular involvement in politics, rather than rights guarantees secured through litigation.

Since then, this distinctive constitutional system has continued to evolve.[211] Four of the eight successful constitutional amendments to the Australian Constitution have involved giving the people more structural power in Australian constitutional democracy.[212] For instance, in 1977, s 15 of the *Constitution* was amended to ensure that if a casual vacancy occurs in the Senate, the state parliament must choose a replacement who is from the same political party as the previous 'senator chosen by the people of a State'.[213] The underlying purpose was to guarantee that the choice of 'the people of a state' not be frustrated by the representatives in state parliament appointing a replacement from another political party. Another constitutional amendment (from 1977) amended s 128 of the *Constitution* to give the people who lived in the territories the ability to vote in constitutional referendums.[214] The chief goal was to ensure that a broader range of 'the people' would participate in the referendum process.

This system of popular political constitutionalism has also evolved at the sub-constitutional level. For instance, the electoral franchise has expanded over time to give a broader section of the people the power to control parliament through the vote. This includes the inclusion of non-white Australians in the definition of the people by expanding the franchise. Moreover, voting was made compulsory in most elections in a system overseen by a powerful Australian Electoral Commission to avoid problems of voter apathy and unrepresentative parliaments. Finally, proportional representative voting for the Senate was introduced in 1948. This drew in part on a longer tradition of argument dating back to federation that recognises the value of giving representation to groups that might be silenced in a more majoritarian system.[215] For instance, Patrick Glynn introduced a petition at the Melbourne session of the Constitutional Convention that proportional representation in the Senate was vital to ensure that 'the minority should not be absolutely silenced'.[216]

These innovations now seem uncontroversial. But, in many cases, they were radical for their time. For instance, compulsory voting was highly controversial when it was first introduced and required large-scale state intervention.[217] These innovations are also distinctive. Very few countries

211. Lisa Hill, 'Australia's Electoral Innovations' in Jenny M Lewis and Anne Tiernan (eds) *The Oxford Handbook of Australian Politics* (Oxford University Press, 2021).
212. These include the referendum on Senate elections (Section 13, 1906); counting First Nations people in population counts (Section 127, 1967); Senate casual vacancies (Section 15, 1977); and territories' right to vote in referendums (Section 128, 1977).
213. Constitution Alteration (Senate Casual Vacancies) 1977, Parliament of Australia, *Bills Digest* (Digest No 83 of 1977).
214. Constitution Alteration (Referendums) 1977, Parliament of Australia, *Bills Digest* (Digest No 81 of 1977).
215. John Uhr, 'Why We Chose Proportional Representation', Papers on Parliament.
216. *Official Record of the Debates of the Australasian Federal Convention (Third Session)*, Melbourne 20 January 1898 2 (Patrick Glynn).
217. Judith Brett, *From Secret Ballot to Democracy Sausage: How Australia Got Compulsory Voting* (Text Publishing, 2020) ('*Brett*').

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in the world have compulsory voting and some that do are abandoning this practice.[218] Moreover, the cultural importance placed on voting in Australia is distinctive amongst democracies.[219]

C Implications for Constitutional Reform and First Australian Constitutional Recognition

This fuller historical account therefore shows that Australia's distinctive constitution system involves structural mechanisms that guarantee the ability of a plural people to participate in Australia's parliamentary centred form of political constitutionalism. This system does not guarantee the role of the people through *individual* rights protection. It therefore stands in tension with an American-style constitutional bill of rights. Instead, the constitution provides for a *systemic* guarantee that the plural people be able to participate in Australian representative and responsible government.

Constitutional recognition for First Australians is an important step in more fully realising this system because it remedies the exclusion of First Australians from the plural Australian people. As described above, Australia has long had a plural idea of 'the people' in which the Constitution recognises not just the national people of the Commonwealth but also the people of the states. This form of democracy therefore goes beyond simple majoritarianism towards a more inclusive form of democracy that recognises a plural conception of shared sovereignty. As Dylan Lino argues, federalism recognises a degree of autonomy for the people of the states while still maintaining an overarching state exercising shared rule.[220] This inclusiveness in turn helps to ensure greater trust in Australian democracy.

At federation, this plural concept of the people recognised that the people of the Commonwealth *and* the people of the states were distinct political communities that should have a guaranteed role in holding parliament to account. But it did not accord First Australians — a distinct people that also predated settlement — any structural ability to participate in this new constitutional system. Instead, despite the provisions in chapter 1 of the Constitution seeking to protect a broad democratic franchise, section 127 of the Constitution explicitly stated that First Australians were not to be counted 'in reckoning the numbers of the people of the Commonwealth'. In 1902, the *Franchise Act* (Cth) gave women the right to vote and stand for Parliament. It, however, explicitly excluded 'aboriginal native[s] of Australia, Africa, Asia, or the Islands of the Pacific except New Zealand … unless able to vote under Section 41'.[221]

It would take another 60 years for the Parliament to include First Australians in the legislative definition of the people that participated in Australian representative democracy.[222] Five years later, the constitutional reform process of 1967 took another partial step in remedying the racial exclusion in Australia's commitment to representative democracy. This reform improved the position of First Australians by deleting section 127 and giving the Commonwealth power to make special laws regarding First Australians under the race power provision. In 1983, Commonwealth law finally made enrolling to vote at federal elections compulsory for First Australians.[223]

218. 'Compulsory Voting' *International Institute for Democracy and Electoral Assistance* (describing how many countries have abandoned compulsory voting in recent years such as Chile, Austria, Fiji and Cyprus).
219. *Brett* (n 217).
220. Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018) 228 ('*Lino Constitutional Recognition*').
221. *Stretton and Finnimore* (n 110) 521–35.
222. See *Commonwealth Electoral Act* 1962 (*Cth*) giving First Nations Australians the right to enrol and vote but not making enrolment compulsory.
223. Dylan Lino, 'The Indigenous Franchise and Assimilation' (2017) 48 *Australian Historical Studies* 363, 367.

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These reforms, however, still do not remedy the *constitutional* exclusion of First Australians, a people that had a long and close relationship with the land for centuries predating Australian colonialism. Constitutional recognition must remedy this constitutional exclusion. The plural nature of the Australian people can allow First Australians to exercise sovereignty as a people but in a way that is broadly compatible within the Australian settler-nation state. A First Nations Voice to Parliament was aimed directly at this structural exclusion. It constitutionally guaranteed that First Australians can directly participate in policy-making that directly impacts them. As Megan Davis argued, this inclusion 'mak[es] space for the first peoples to play an active role in the nation'.[224] Although this proposal was rejected by the Australian people at referendum, it is important not to abandon the project of First Nations constitutional recognition.

In the wake of the failure of the Voice to Parliament proposal, meaningful constitutional recognition must take real steps towards realising the promise of the special role of the plural Australian people in the Australian constitutional order. Although the precise details of this recognition are beyond the scope of this paper, this recognition must be more than symbolic and work to overcome the 'multiple ethical lapses of the settled state' by repairing a central flaw in the definition of the Australian people.[225]

This constitutional reform will also help to strengthen the trust of First Australians in Australian democracy. The failure to recognise First Australians in the Constitution has led to decades of paternalistic policy-making that has excluded them from shaping policies that impact their everyday life. This exclusion has had serious adverse consequences.[226] Amongst these include the fact that First Australians face disproportionately high levels of incarceration and are far more likely to live in poverty than other Australians.[227] It also includes the fact that the health and life expectancy of First Australians lag well behind the average for non-First Australians.[228] Meaningful constitutional recognition can help to close the gap between First Australians and the general Australian population and therefore help to secure greater trust in government.

VI Conclusion

The fuller, intellectual history of colonial and federation-era Australia that emerged in the mid-1980s fills an important blind spot in our understanding of Australian constitutional democracy. It shows that the Australian constitutional drafters not only rejected American-style constitutional commitments to individual liberty grounded on a mistrust of public power. They also rejected British constitutionalism's commitment to placing legal sovereignty in the hands of parliamentary representatives. The fuller history instead shows how the founders created a unique constitutional system committed to political constitutionalism but that also provided the plural Australian people with constitutional guarantees that they could 'directly' choose both houses of parliament, break deadlocks between these houses and make constitutional law. This distinctive popular political constitutionalism, however, was racially exclusionary.

224. Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 12.
225. Ibid 13.
226. Leonie Cox, 'Fear, Trust and Aborigines: The Historical Experience of State Institutions and Current Encounters in the Health System' (2007) 9(2) *Aboriginal Health and History* 70.
227. Emma Hodge, '8 Facts about Poverty amongst Aboriginal Australians', *The Borgen Project* (Blog Post, 20 October 2019).
228. Australian Institute of Health and Welfare, 'Indigenous Life Expectancy and Deaths' (Report, 23 July 2020).

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This paper has begun the process of uncovering the consequences of remembering this intellectual history of Australian constitutional democracy. First, this remembered intellectual history provides critical support and direction to the High Court's existing caselaw on the necessary implications from sections 7 and 24 that limit parliamentary power. Second, this intellectual history helps to better understand the distinctiveness of Australia's constitutional system and why meaningful constitutional recognition for First Australians must be more than symbolic and remedy their structural exclusion from the plural Australian people. Taken together, this remembered history also helps to move towards a better understanding of Australia's unique constitutional identity: a system of constitutional democracy that trusts in parliament *but* that is also constitutionally accountable to a plural Australian people. Future work is needed to further explore other aspects of this distinctive Australian form of 'popular political constitutionalism'.

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