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The Australian Constitution and National Identity, 2023 / Olijnyk, A., Reilly, A. (ed./s), Ch.3, pp.39-57

3

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There are several ways to consider the relationship between the Australian Constitution and national identity. One method is to focus on what substantive constitutional principles say about our national identity. For example, other chapters in this volume examine the nature of Australian federalism and the scope of the aliens power. Another method focuses on the words of the constitutional document. Not only are the words the source of substantive legal principles and institutions, but also, as Benjamin T Jones points out in Chapter 12 of this volume, words can carry 'moral power'.

But the words do not always speak for themselves. What, for example, are 'external affairs'? Who is an 'alien'? What does it mean for members of Parliament to be 'chosen by the people'? The task of interpreting these words authoritatively falls to the High Court. In this chapter, I consider whether the High Court's interpretation of the Constitution is another way of shedding light on the relationship between the Constitution and Australian national identity.

Conventional wisdom tells us the High Court uses a method known as 'legalism' to interpret the Constitution. Legalism focuses on the text of the Constitution, read in the context of the document as a whole and the circumstances in which it was written. This method largely avoids recourse to moral values or contemporary opinion.

This chapter complicates this legal orthodoxy by asking whether the High Court's interpretation of the Constitution has the potential to reflect Australia's national identity. Can the Court, by filling out the outlines drawn by the nineteenth-century framers, make the Constitution a living document that embodies the evolving identity and values of Australians?

In the US, a rich body of scholarship (which I refer to as 'popular constitutionalism') explores the relationship between the Supreme Court's interpretation of the US Constitution and the values and identity of the American people.[1] These scholars have observed that the Supreme Court's constitutional decisions generally broadly align with widely held public values of the time. Sometimes the Court's interpretation lags behind the formation of public consensus, and sometimes it leads popular opinion. But seldom has the Court's interpretation been far out of step with popular values. Can this theory apply to Australia?

This chapter begins by outlining the key features of popular constitutionalism as developed in the American literature. Section II speculates about the theory's potential application to Australian constitutional law. While I identify several obvious obstacles to the direct translation of the American theory, I argue these are not as great as they first appear. There is some potential for popular constitutionalism to apply in Australia. Section III makes good this claim by re-examining the 'right to vote' cases, *Roach v Electoral Commissioner* ('*Roach*')[2] and *Rowe v Electoral Commissioner* ('*Rowe*'),[3] from the perspective of popular constitutionalism. I conclude that, while more work is needed to identify the nature, extent and precise functioning of popular constitutionalism in Australia, there are signs that the High Court's interpretation of the Constitution sometimes reflects the evolving values and identity of the Australian people.

1 Major contributions to this scholarship include Alexander M Bickel, *The Least Dangerous Branch* (The Bobbs-Merrill Company, 1962); Neal Devins, *Shaping Constitutional Values: Elected Government, the Supreme Court, and the Abortion Debate* (Johns Hopkins, 1996); Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton University Press, 1988), doi.org/10.1515/9781400859573; Barry Friedman, *The Will of the People* (Farrar, Strauss and Giroux, 2009); Larry D Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2004).

2 (2007) 233 CLR 162 ('*Roach*').

3 (2010) 243 CLR 1 ('*Rowe*').

I. Popular constitutionalism

The American scholarship on popular constitutionalism includes descriptive and normative strands. This article focuses primarily on the descriptive strand, which identifies ways in which the American people express their views on constitutional issues. The descriptive strand of popular constitutionalism argues that these expressions of views may ultimately influence the Supreme Court's interpretation of the US Constitution.

Take, for example, one of the most controversial constitutional questions in the US: whether the Constitution impliedly guarantees a right to abortion—and, if so, in what circumstances.[4]

Since the Supreme Court's 1973 decision in *Roe v Wade*,[5] American people have expressed their views on both sides of this question. People have joined pro-life or pro-choice groups to engage in organised protests and advocacy, sometimes with an explicit constitutional dimension. For example, the annual March for Life commemorates the anniversary of *Roe v Wade* with a march from the Washington Monument to the Supreme Court.[6] People with views on the issue have voted for political candidates (at State and federal level) whose view on this issue reflects their own. Those candidates have made laws and implemented policies that push at the edge of known constitutional boundaries. This in turn has led to constitutional litigation, sometimes supported by civil society organisations with their own constitutional agenda.[7] Repeated litigation has kept abortion on the Supreme Court's agenda and has forced the Court to refine its jurisprudence, affirming the precedent of *Roe v Wade* while backing away from its application in some circumstances and ultimately overruling the decision in 2022.[8]

But the influence of the American people on the interpretation of the US Constitution does not end there. The process of appointing US Supreme Court judges is avowedly political. People can vote for a presidential

4 Abortion is the topic of an extended study from the perspective of popular constitutionalism: see Fisher (n 1).

5 410 US 113 (1973).

6 'National March for Life', *March for Life* (Web Page) <marchforlife.org/national-march-for-life/>.

7 The American Civil Liberties Union is perhaps the most well-known example of an organisation that seeks to further its objectives through constitutional litigation: see 'ACLU History' *American Civil Liberties Union* <www.aclu.org/about/aclu-history>.

8 *Dobbs v Jackson Women's Health Organization* 597 US (2022).

candidate knowing that candidate will appoint judges who lean a certain way on contentious issues. In the Senate confirmation hearings, the people's elected representatives grill the Supreme Court nominees on their approach to constitutional interpretation and even their views on specific constitutional issues. For example, since *Roe v Wade*, the nominee's position on abortion 'has played a critical part in nearly every Supreme Court appointment'.[9]

In popular constitutional theory, the American people hold levers that can shift the Supreme Court's constitutional interpretation. The quality and extent of the people's influence varies. The people's contributions can be direct and targeted (for example, a civil society organisation commencing constitutional litigation). They can be indirect and diffuse (for example, voting for a candidate who shares your constitutional view), individual or collective. Importantly, contributions to popular constitutionalism may be more or less self-conscious. The constituent who votes for a representative with pro-life views may not see themselves as engaging with constitutional issues. Yet, in combination with thousands of other like-minded voters, this constituent can push a contested constitutional position to the forefront of the political agenda and into the Supreme Court. Popular constitutional theory would describe this constituent as one of thousands contributing to the 'shared elaboration of constitutional meaning'.[10]

What is the result of these 'tugs and pulls between elected government and the Court' that 'permeate constitutional decision-making'?[11] Popular constitutionalists such as Barry Friedman argue that 'constitutional interpretation is an elaborate discussion between judges and the body politic'.[12] The Supreme Court's role in this discussion is 'highly interactive':[13] 'Courts act as go-betweens in the dialogue, synthesizing the views of society and then offering the synthesis to society for further discussion'.[14] The key descriptive insight of popular constitutionalism is 'that judicial interpretations of the [US] Constitution reflect popular will over time'.[15]

9 Devins (n 1) 104.
10 Christine Bateup, 'The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue' (2006) 71 *Brooklyn Law Review* 1109, 1118.
11 Devins (n 1) 55.
12 Barry Friedman, 'Dialogue and Judicial Review' (1993) 91(4) *Michigan Law Review* 577, 654, doi.org/10.2307/1289700.
13 Ibid 668.
14 Ibid 669.
15 Barry Friedman, 'Mediated Popular Constitutionalism' (2003) 101 *Michigan Law Review* 2596, 2599.

This leads us to the normative claims of popular constitutionalism. Popular constitutional scholars claim the continuous dialogue between the people and the Supreme Court results in 'more vibrant and durable constitutional interpretation'[16] that is neither crudely populist nor frozen in time.[17] The normative value of popular constitutionalism lies in its potential to create an 'equilibrium' between different conceptions of the public interest, which may change over time.[18] Popular constitutionalism can strike a balance 'between dynamism and finality'.[19] When popular constitutionalism works well, the contributions of each actor serve to inform the others of alternative views, shape and sharpen constitutional debates, test the limits and practicality of new constitutional principles, and accommodate different interests and views. Neal Devins argues that popular constitutional dialogue is particularly useful in relation to complex, emotionally charged and divisive social issues. Such issues 'are best resolved through political compromises that yield middle-ground solutions, rather than through an absolutist and often rigid judicial pronouncement'.[20]

Evaluation of the normative claims of popular constitutionalism is beyond the scope of this chapter.[21] However, these normative claims hint at the tantalising potential for popular constitutionalism to cut through some of the most intractable problems of constitutional interpretation. Originalist or textualist approaches risk committing polities to interpretations that no longer serve their needs. Yet more progressive interpretive theories can blur the line between constitutional principles, transient popular views and subjective preferences of those in power. Popular constitutionalism emphasises that constitutional development is both dynamic and incremental, offering a principled democratic justification for incremental change. This normative potential is another reason why it is worthwhile exploring the applicability of popular constitutional theory to Australia.

16 Devins (n 1) 162.

17 See Miguel Schor, 'Constitutional Dialogue and Judicial Supremacy' (Research Paper No 10-66, Suffolk University Law School, December 2010) 8–12, doi.org/10.2139/ssrn.1730202.

18 William N Eskridge, Jr and Philip P Frickey, 'The Supreme Court 1993 Term; Foreword: Law as Equilibrium' (1994) 108 *Harvard Law Review* 26, doi.org/10.2307/1341990.

19 Friedman (n 12) 652.

20 Devins (n 1) ch 3.

21 For some relevant critiques, see Robert Post and Reva Siegel, 'Roe Rage: Democratic Constitutionalism and Backlash' (2007) 42 *Harvard Civil Rights-Civil Liberties Law Review* 373 ('Roe Rage'); Bateup (n 10).

II. Popular constitutionalism in Australia?

Can the insights of popular constitutionalism apply in Australia? This question has been considered by only a few Australian scholars, in relation to specific problems rather than at a general level.[22]

For anyone familiar with Australian constitutional law, there are several reasons to doubt the relevance of popular constitutionalism for Australia. In this section, I identify the most obvious objections and argue these objections are not as great as they first appear.

A. Ignorance and apathy

The most obvious obstacle to popular constitutionalism applying in Australia is the widespread ignorance of the Australian Constitution. As Sarah Sorial explains in Chapter 13 of this volume, Australians have limited understanding or even awareness of the Constitution and the role of the High Court. It seems fanciful to expect Australian people to make a meaningful contribution to the development of constitutional law when they do not understand what the Constitution does.

But popular constitutionalism offers a way of contesting the claim that people who do not know about the technicalities of the Constitution cannot contribute to its interpretation. Popular constitutional theory shows that a person can contribute to constitutional interpretation without necessarily identifying their opinions as *constitutional* opinions. People do express opinions about the proper role of governments, even when they do not frame their opinions in that way. A person who votes for a candidate promising tough law-and-order policies expresses their opinion about the appropriate balance between liberty and security. If thousands of people vote for candidates with such policies over a period of decades, it may be possible to draw a conclusion that a large section of the Australian people holds a similar opinion about the proper extent of government interference in liberties.

22 Brendan Lim, *Australia's Constitution after Whitlam* (Cambridge University Press, 2017); Lael K Weis, 'Constitutional Amendment Rules and Interpretive Fidelity to Democracy' (2014) 38(1) *Melbourne University Law Review* 240; Bateup (n 10).

There is also an argument that the very apathy of Australian people reflects an acceptance of the constitutional status quo. History and experience show that if people are deeply dissatisfied with the structure of government in their country, they tend to take action. This action may range from self-education about the content of the constitution and methods of changing it, to outright revolution. The lack of interest in Australia's constitution may be a sign that, for most Australians, the constitutional arrangements work tolerably well most of the time.

This is not to deny that sections of the Australian community are systemically disadvantaged by existing constitutional arrangements. Nor is it to diminish the intense efforts of some groups within the community to bring about constitutional change. This book highlights two movements towards change: the reforms proposed in the Uluru Statement from the Heart, and the long-running republican movement. But, as we will see, even the most carefully developed cases for change have struggled to secure the community support needed for a successful referendum. While there have been outspoken critics of these reforms, the real enemy has been ignorance and apathy. For many Australians, it seems, constitutional change is not a high priority.

B. Legalism

A second reason for doubting the applicability of popular constitutional theory to Australia is the dominance of the legalist method of constitutional interpretation. Sir Owen Dixon's famous endorsement of 'strict and complete legalism'[23] continues to be cited with approval by the High Court.[24] Legalism emphasises the text of the Constitution, together with the circumstances in which the text was written and the common law and statutory history preceding writing the text.[25] Strict legalism would seem to limit the possibility of the High Court considering contemporary public opinion and values.[26]

23 Sir Owen Dixon, Speech upon Appointment as Chief Justice, reported at (1952) 85 CLR xiv.

24 For examples of approving citation by more recent courts, see Tanya Josev, *The Campaign against the Courts: A History of the Judicial Activism Debate* (Federation Press, 2017) 113 n 95.

25 The most well-known statement of this method appears in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 152 (Knox CJ, Isaacs, Rich and Starke JJ) ('*Engineers Case*').

26 Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and Aspirations in the Australian Constitution' (2016) 14(1) *International Journal of Constitutional Law* 60, 76, doi.org/10.1093/icon/mow003.

But this objection may be overstated. Legalism does not *completely* foreclose all consideration of values that are not explicit in the constitutional text. In practice (as opposed to in an abstract, caricatured form), legalism can accommodate elements of creativity and values-based reasoning. Leslie Zines pointed out, with reference to the work of the Dixon Court:

> whatever 'strict and complete legalism' referred to, it was not inconsistent with the finding of some large implications in the Constitution, with attributing broad social and economic purposes to particular provisions, or with the application of external theories and concepts in constitutional interpretation.[27]

Even if legalism does limit the influence of values and public opinion on constitutional interpretation, legalism is not the only method of constitutional interpretation used by the High Court. Legalism may be the orthodoxy, but the history of the High Court is peppered with examples of progressive, realist and functional reasoning as well as countless judgments that do not fit neatly into any single interpretive category. The truth, as Callinan J pointed out, is that 'no judge can claim to stride the high ground of exclusive interpretative orthodoxy'.[28] In short, legalism may present an impediment to applying popular constitutional theory, but not an absolute bar.

Perhaps it is unsurprising that legalism has been unable to answer all questions when applied to a constitution with so few words to work with. The language of Australia's constitution is spare and sometimes ambiguous. Such language is typical of constitutions that are designed to endure for decades and centuries.[29] The very 'spaciousness' of constitutional language invites interpretation, value judgments and change over time.[30]

Australia's legal culture poses another obstacle to popular constitutionalism. While legalist *method* makes it hard for the High Court to incorporate values and public opinion in their judgments, legalist *style* makes it difficult for everyday Australians to understand the High Court's constitutional decisions. Even when the substance of a judgment is not an example of strict and complete legalism, the form and language of the judgment will be pitched to a legal audience. Constitutional judgments are typically dry, technical and

27 Leslie Zines, 'Legalism, Realism and Judicial Rhetoric in Constitutional Law: 2002 Sir Maurice Byers Lecture' (2002) *Bar News* 13, 14.

28 *New South Wales v Commonwealth* (2006) 229 CLR 1, 301–4.

29 See Aharon Barak, *Purposive Interpretation in Law,* tr Sara Bashi (Princeton University Press, 2005) 372.

30 See Friedman (n 12) 649.

dispassionate in tone.[31] Appeals to emotion or popular sentiment are rare. The High Court's practice, since 2006, of publishing one-page, plain English, judgment summaries goes some way towards ameliorating this situation, but these summaries usually focus on the facts and outcome of each case, offering limited insight into the constitutional reasoning. Nor are these summaries necessarily pitched at a non-legal audience.

C. Judicial appointments

A further possible check on the application of constitutional theory is the relatively apolitical process of appointing judges in Australia. US Supreme Court judges are nominated by the US president and subject to Senate approval.[32] These processes create opportunities for dialogue on constitutional values between elected representatives and (future) members of the Court, and between the president and the Senate. This has made the appointments process one of the most direct drivers of popular constitutionalism in the US.[33] As Neal Devins observes, 'the [P]resident and the Senate both recognize that the best way to shape outputs (Court rulings) is to control inputs (ie, to control who sits on the Court)'.[34]

Judicial appointments in Australia are far less politicised. High Court judges are formally appointed by the Governor-General on the advice of the Executive Council.[35] In practice, the selection is made by the Attorney-General and approved by Cabinet. Beyond an obligation to 'consult' with the attorneys-general of the States,[36] there are no legislative requirements governing the process. In sharp contrast to the US, the legislature is not involved. George Williams has observed that the appointment process 'gives an unfettered power to the executive' with 'no transparency and little accountability'.[37] There is no public scrutiny of candidates before appointment. There is virtually no input from the general public.

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31 Though not always. Exceptions include Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and Heydon J in *Monis v The Queen* (2013) 249 CLR 92.

32 *United States Constitution* art II § 2(2).

33 Devins (n 1) 104; Michael J Gerhardt, 'The Federal Appointments Process as Constitutional Interpretation' in Neal Devins and Keith E Whittington (eds), *Congress and the Constitution* (Duke University Press, 2005) 110, doi.org/10.2307/j.ctv11smpx5.9.

34 Devins (n 1) 28.

35 *Australian Constitution* s 72(i).

36 *High Court of Australia Act 1979* (Cth) s 6.

37 George Williams, 'High Court Appointments: The Need for Reform' (2008) 30 *Sydney Law Review* 163. More recent calls for reform have followed the findings that Dyson Heydon sexually harassed staff members at the High Court. See Letter from Gabrielle Appleby (signed by more than 500 women in the legal profession) to Christian Porter (Attorney-General), 6 July 2020.

Despite this, appointments to Australia's High Court have, at least for the past 40 years, generally been politically uncontroversial. For the most part, judges are not seen as political actors. Few High Court judges are household names outside the legal profession. High Court judges are most commonly drawn from the ranks of serving judges and leading barristers. Even when a judge has publicly known political leanings, this is not usually seen as affecting their ability to decide cases according to law. For example, Chief Justice Robert French stood as a candidate for the Liberal Party in the 1969 federal election; yet he was appointed to the High Court by a Labor government in 2008, with no suggestion that his politics would affect his role on the Court. David Solomon has identified resistance, in Australia's 'political and legal culture', to governments appointing judges 'sympathetic to their own philosophies'.[38]

Yet the overall picture is more complex. It would be inaccurate to say that judicial appointments in Australia are completely apolitical. In the first 75 years of federation, it was reasonably common for members of the government of the day to be appointed to the High Court.[39] The last and, with hindsight, the most controversial of these was federal Attorney-General Lionel Murphy, appointed to the Court in 1975.[40] Since then, governments have eschewed appointments that may be seen as party-political. But throughout the history of federation, Australian governments have used High Court appointments:

> to affirm the direction of the Court's jurisprudence as within the bounds of majority or community opinion, by appointing a judge with a similar legal or political philosophy; or else to seek to redirect the course of the Court's decisions, by appointing a judge who is known to favour a distinctive approach to interpretation.[41]

38 David Solomon, *The Political High Court* (Allen & Unwin, 1999) 220.

39 For a description of this history and an analysis of its decline, see Douglas McDonald, 'Worlds Apart: The Appointment of Former Politicians as Judges' (2016) 41(1) *Alternative Law Journal* 17, doi.org/10.1177/1037969X1604100105.

40 For an account of the controversy, see Tony Blackshield, 'Murphy Affair' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford Reference, Online, 2007).

41 Rosalind Dixon and George Williams, 'Introduction' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 1, 11, doi.org/10.1017/CBO9781107445253.

Similarly, political scientist Paul Donegan contends 'that Australian governments have at times appointed candidates with judicial approaches and outlooks similar to their own and that this is to some extent inevitable'.[42]

There are two prominent examples of High Court appointments being used to influence the course of constitutional interpretation in Australia: Callinan and Heydon JJ. The so-called 'Mason Court' of the early to mid-1990s made a string of innovative decisions in constitutional and common law cases, employing a more progressive, less realist approach to constitutional interpretation. The Howard government, in power between 1996 and 2007, made a practice of appointing 'black letter' judges to push the Court back towards the legalist orthodoxy.[43] In 1997, Deputy Prime Minister Tim Fischer said the next High Court appointment would be a 'capital C conservative'.[44] Justice Callinan, appointed in 1998, was that person, having been publicly critical of 'judicial activism' and the Mason Court's departure from orthodox judicial method.[45] Justice Heydon, appointed in 2003, was renowned as a black letter lawyer; his speech at a *Quadrant* magazine function, provocatively entitled 'Judicial Activism and the Death of the Rule of Law',[46] is regarded as his 'job interview' for the High Court.

More recently, the Court's controversial decision in *Love v Commonwealth* ('*Love*')[47] prompted an unusual degree of scrutiny into the link between Court appointments and constitutional interpretation. Journalist Chris Merritt pointed out that three of the four majority judges were Coalition appointees. Merritt and others[48] argued the government should use its upcoming appointments to steer the Court in a more conservative, less 'activist' direction.[49]

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42 Paul Donegan, 'The Role of the Commonwealth Attorney-General in Appointing Judges to the High Court of Australia' (2003) 29 *Melbourne Journal of Politics* 40, 43.

43 See ibid; Benjamin Jellis, 'The High Court Under Howard' (Samuel Griffith Society).

44 Nikki Savva, 'Fischer Seeks a More Conservative Court', *The Age* (Melbourne), 5 March 1997, 1–2.

45 See Josev (n 24) 168–9.

46 Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 47(1) *Quadrant* 9.

47 (2020) 270 CLR 152 ('*Love*').

48 See, eg, Morgan Begg, 'Activist Judges Misrepresent Mabo to Create Privileged Class', *The Australian* (online, 12 February 2020) <www.theaustralian.com.au/commentary/activist-judges-misrepresent-mabo-to-create-privileged-class/news-story/6c9d0372378f803a16ef6c68067bc2b1>.

49 Chris Merritt, 'Judging the High Court's Justices', *The Australian* (online, 19 February 2020) <www.theaustralian.com.au/inquirer/judging-the-high-courts-justices/news-story/6c819b096c60180d761d0ca9ab38b2eb>.

To sum up, the nature of the appointment process in Australia may mean the 'political calculus'[50] that informs appointment decisions is often opaque. This avenue of communication between the Australian people and the element of the dialogue process is, therefore, more subtle and less visible in Australia than in the US; yet it is still present. Ultimately, High Court appointments may have a comparable effect on constitutional interpretation to the US, but, as explained in the next section, with a more limited range of issues on which to express different constitutional views.

D. Bill of rights

Now we come to a major difference between the US and Australian constitutions: the absence, in the Australian Constitution, of a bill of rights.

The US Bill of Rights is a major site of public debate, and the Supreme Court's interpretation of these provisions inevitably engages with the values of the community. It is easy for laypeople to hold and express opinions about the meaning of constitutional expressions such as 'due process' and 'freedom of speech'. Laypeople can, therefore, engage with and critique Supreme Court decisions interpreting those words. Robert Post and Reva Siegel point out that the Bill of Rights contains contestable, 'open-ended' provisions that express 'national ideals' about matters such as freedom and equality.[51] Judicial interpretation of these provisions, therefore, can 'provoke popular resistance because they are topics about which Americans disagree and care passionately'.[52] The Supreme Court's decisions are not just for lawyers and litigants; they reach 'a much wider audience outside the Court and beyond the particular parties to litigation'.[53]

By contrast, Australia's constitution is devoted to structural matters that seem dry and technical even to those who are interested in law and politics. The totemic cases in Australian constitutional law are about the extent of Commonwealth legislative power and the separation of judicial power—hardly matters to set the layperson's pulse racing. Even the cases about the implied freedom of political communication and the implied right to vote tend to be couched in technical, legal language, virtually impenetrable to the non-lawyer.

50 Ibid.
51 Post and Siegel, 'Roe Rage' (n 21) 378.
52 Ibid 378–9.
53 Andrew Lynch, 'Introduction—What Makes a Dissent "Great"?' in Andrew Lynch (ed), *Great Australian Dissents* (Cambridge University Press, 2016) 1, 17, doi.org/10.1017/CBO9781316665824.

But, once again, this factor should not be exaggerated. When a High Court case receives media attention, it is presented in terms that the general public can understand. And some High Court decisions *do* provoke a public reaction, especially those decisions that implicate national identity or contestable moral values. The Court's decisions on native title in *Mabo v Queensland (No 2)* ('*Mabo (No 2)*')[54] and *Wik Peoples v Queensland* ('*Wik*')[55] made a significant impression on the national psyche, with *Mabo (No 2)* earning a reference in that iconic distillation of Australian identity, *The Castle*.[56] More recently, *Love*,[57] in which the Court held Aboriginal people could not be aliens in Australia, received extensive attention in the general media. Some reporting was positive, seeing the decision as an affirmation of the connection of First Nations to Australia.[58] Others saw the decision as protecting foreign criminals and creating unwelcome race-based distinctions.[59] Another recent example is *Re Canavan* ('*Citizenship 7 Case*')[60] in which the High Court held five members of Parliament were disqualified from sitting by virtue of s 44(1) of the Constitution. The s 44 controversy sparked many discussions (beyond the legal community) about the appropriateness, in a modern multicultural society, of disqualifying dual citizens from Parliament, and the need for constitutional reform.[61]

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54 (1992) 175 CLR 1 ('*Mabo (No 2)*').

55 *Wik Peoples v Queensland* (1996) 187 CLR 1 ('*Wik*').

56 Although *Mabo (No 2)* and *Wik* were not concerned with the text of the Constitution, these cases may be considered 'small c' constitutional, in that they concern the fundamental legal framework of the Australian government.

57 *Love* (n 47).

58 See, eg, Aiesha Saunders, 'High Court Rules Indigenous Australians Cannot Be Deported', *The Sydney Morning Herald* (online, 11 February 2020) <www.smh.com.au/politics/federal/high-court-rules-indigenous-australians-cannot-be-deported-20200211-p53znd.html>; Stan Grant, 'The High Court Has Widened the Horizon on What It Is to Be Indigenous and Belong to Australia', *ABC News* (online, 15 February 2020) <www.abc.net.au/news/2020-02-15/unresolved-question-of-indigenous-sovereignty-haunts-australia/11962834>.

59 See, eg, Jennifer Oriel, 'High Court's Racist Ruling is a Low Blow to Equality and Democracy', *The Australian* (online, 6 February 2020) <www.theaustralian.com.au/commentary/high-courts-racist-ruling-is-a-low-blow-to-equality-and-democracy/news-story/2d67f520cf615f57564a14343d01577d>; John Roskam, 'Why the Aboriginal Citizenship Ruling is Alien to All Ideas of Law', *Australian Financial Review* (online, 20 February 2020) <www.afr.com/politics/federal/why-the-aboriginal-citizenship-ruling-is-alien-to-all-ideas-of-law-20200220-p542o6>.

60 (2017) 263 CLR 284 ('*Citizenship 7 Case*').

61 See, eg, Michelle Grattan, 'View from The Hill: Section 44 Remains a Constitutional Trip Wire that Should be Addressed', *The Conversation* (online, 14 April 2019) <theconversation.com/view-from-the-hill-section-44-remains-a-constitutional-trip-wire-that-should-be-addressed-115435>; Robert Angyal, 'Section 44 of the Constitution Means NOBODY is Eligible to be Elected to Parliament', *Huffington Post* (online, 16 August 2017) <www.huffingtonpost.com.au/robert-angyal/section-44-of-the-constitution-means-nobody-is-eligible-to-be-el_a_23078667/>.

The attention generated by cases such as these suggests that, despite the lack of a bill of rights, the Australian Constitution does throw up issues that touch a chord in the Australian people. For the most part, morally contestable issues of great interest to the Australian people are debated in the forum of normal, rather than constitutional, politics. When these issues have a constitutional dimension, the Australian people are quite capable of forming and expressing opinions about the desirable content of the law. As argued above, the people's silence on most constitutional issues may be evidence of widespread satisfaction with the structural aspects of the Constitution.

III. An example: Implied right to vote cases

The analysis so far suggests that there is, at least, a possibility that popular constitutionalism could be an analytical tool with some relevance to Australia. To show how this might work, I will consider how popular constitutionalism might give us some insights into the 'implied right to vote' cases: *Roach*[62] and *Rowe*.[63]

In *Roach* and *Rowe*, the High Court struck down amendments to Commonwealth electoral laws on the basis that the laws infringed a constitutional guarantee of universal adult franchise. This guarantee was derived from the words of ss 7 and 24 of the Constitution, which provide that members of the federal Parliament are to be 'chosen by the people'. In *Roach*, the law excluded from voting any person serving a sentence of imprisonment. In *Rowe*, the law abridged the 'grace period', following the issue of writs for an election, during which a person could enrol to vote or change their details on the roll.

These cases raised a classic dilemma of constitutional interpretation. At federation, universal adult franchise (as we would understand that concept today) was clearly not the norm in Australia. The voting age was 21. Women had the right to vote in South Australia and Western Australia, but not in other States. Different colonies excluded people from voting for reasons including race, receipt of charitable funds, commission of particular

62 *Roach* (n 2).
63 *Rowe* (n 3).

categories of offence, and membership of the police or armed forces.[64] The 'grace period' at issue in *Rowe* was not mentioned in the Constitution, and was not a statutory requirement until as late as 1983.[65] Therefore, the High Court's decisions in *Roach* and *Rowe* held that certain features of the electoral system were now constitutionally mandated, even though they had not been constitutional requirements when the Constitution was drafted. These decisions clearly depended on an interpretation of ss 7 and 24 that took into account social and legislative developments since 1901.

In *Roach*, a majority of the High Court[66] held invalid a 2006 amendment to the *Commonwealth Electoral Act 1918* (Cth) disqualifying all prisoners serving a sentence from voting. The Court unanimously held that the legislative provisions in place *before* the 2006 amendments—disqualifying any prisoner serving a sentence of three years or more—were valid.

The majority judgments accepted that the content of constitutional principles could change over time. Gummow, Kirby and Crennan JJ referred to the 'evolutionary' and 'dynamic rather than purely static' nature of the institutions of representative government created by the Constitution.[67] Gleeson CJ stated that 'the words of ss 7 and 24, because of changed historical circumstances including legislative history, have come to be a constitutional protection of the right to vote'.[68] The majority concluded the words 'chosen by the people' had come to mandate universal adult franchise, subject to exceptions justified by a proportionality test.

These judgments might be seen as an example of popular constitutionalism in Australia. The Court's interpretation of the words 'chosen by the people' relied on broadly held values that had evolved since federation. While it may once have been acceptable to exclude large swathes of the population from the franchise, this was no longer the case. How did the Court ascertain these values? As Hayne J (in dissent) pointed out, if constitutional meaning was to depend on 'generally accepted Australian standards', 'there is the obvious difficulty of determining what those standards are, and to what extent they

64 See Anne Twomey, 'The Federal Constitutional Right to Vote in Australia' (2000) 28(1) *Federal Law Review* 125, 144–5, doi.org/10.22145/flr.28.1.6; *Roach* (n 2) 213–5 (Hayne J).

65 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth). Until that point, the 'grace period' had been created informally by an executive practice of announcing the election several days prior to issuing the writs: see *Rowe* (n 3) 30–2 [57–61] (French CJ).

66 Gleeson CJ, Gummow, Kirby and Crennan JJ, Hayne and Heydon JJ dissenting.

67 *Roach* (n 2) 186–7 [45] (Gummow, Kirby and Crennan JJ).

68 174 [7].

are "generally accepted"'.[69] The mechanisms by which 'the people' had expressed these values were not defined with precision, but at least included the legislative developments to which Gleeson CJ referred.[70] Lael K Weis has argued that the use of legislation in this case to set a 'constitutional baseline'[71] is defensible as a relatively objective proxy for community views on moral questions.[72] Similarly, popular constitutional theory would characterise this reliance on legislation as the Court incorporating widely held community views, as expressed in legislation passed by elected representatives.

Hayne J's dissent in *Roach* is illuminating for its resistance to the elements of the majority judgments that might be described as examples of popular constitutionalism. Hayne J rejected the proposition that the Commonwealth Parliament's power to legislate for voter qualifications 'is constrained by what may, from time to time, be identified as politically accepted or acceptable limits'.[73] His Honour continued:

> Political acceptance and political acceptability find no footing in accepted doctrines of constitutional construction. The meaning of constitutional standards does not vary with the level of popular acceptance that particular applications of the power might enjoy.[74]

This passage encapsulates the resistance we might expect popular constitutional theory to encounter in Australia. It is difficult to fit a version of constitutional interpretation that incorporates the popular will within a text-based, legalist model of interpretation in which the judiciary enjoys unquestioned supremacy. But equally significantly, this was a minority view. For the majority, the constitutional concept of choice by 'the people' could, and did, change over time.

The majority judgments in *Roach* met some sharp academic criticism.[75] Critics saw the judgments as ahistorical and contrary to legalist principle. Nicholas Aroney described the majority judgments as relying, to a significant

69 Ibid 219 [158].
70 This included legislation extending the franchise to women and Indigenous people. See ibid 173 [5].
71 That is, a standard against which State action may be evaluated for compliance with constitutional requirements: Lael K Weis, *Legislative Constitutional Baselines* (2019) 41(4) *Sydney Law Review* 481, 482.
72 Ibid 510–2.
73 *Roach* (n 2) 219 [159].
74 Ibid.
75 James Allan, 'The Three "Rs" of Recent Australian Judicial Activism: Roach, Rowe and (No)'Riginalism' (2012) 36(2) *Melbourne University Law Review* 743; Nicholas Aroney, 'Towards the "Best Explanation" of the Constitution: Text, Structure, History and Principle in *Roach v Electoral Commissioner*' (2011) 30(1) *University of Queensland Law Journal* 145.

extent, on 'freestanding ethical and prudential judgments' with only 'minimal' and selective attention to the reasoning's 'fit' with 'authoritative sources of law (text, structure, and doctrine, illuminated by history)'.[76] James Allan went further, criticising both *Roach* and its successor, *Rowe*, as 'prime examples of judicial activism'[77] resting on 'the most implausible and far-fetched understanding of the meaning of the *Australian Constitution*'.[78] Allan was critical of Gleeson CJ's reliance on legislation to inform the interpretation of the Constitution, considering it 'odd' that 'past legislation can alter the Constitution's meaning'.[79]

Three years later, the High Court revisited these issues in *Rowe*. French CJ's explanation of the relationship between legislation and constitutional interpretation provides an even clearer example of how popular constitutional theory might operate in Australia. His Honour reaffirmed that the concept of 'chosen by the people' could evolve over time, and that the content of that concept depended on 'the common understanding of the time'.[80] His Honour expanded on this theme:

> The term 'common understanding', as an indication of constitutional meaning in this context, is not to be equated to judicial understanding. Durable legislative development of the franchise is a more reliable touchstone. It reflects a persistent view by the elected representatives of the people of what the term 'chosen by the people' requires.[81]

This passage eschews the criticism that, when purporting to interpret the Constitution in line with changing values, judges are really drawing on their own subjective views. In French CJ's view, legislation offers an objective way of ascertaining community values. But it is only *durable* legislative developments that can be taken into account in constitutional interpretation.

French CJ's approach in *Rowe* has been criticised for 'attribut[ing] power to the Parliament to change the meaning of the Constitution'.[82] Certainly, this approach is difficult to square with strict legalism. But popular constitutional

76 Aroney (n 75) 149.
77 Allan (n 75) 744.
78 Ibid 745.
79 Ibid 768.
80 *Rowe* (n 3) 18 [18], quoting *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1, 36 (McTiernan and Jacobs JJ) ('*McKinlay*').
81 *Rowe* (n 3) 18 [19].
82 Anne Twomey, '*Rowe v Electoral Commissioner*—Evolution or Creationism?' (2012) 31 *University of Queensland Law Journal* 181, 190.

theory provides a different way of understanding the judgment (and, indeed, the approach of Gleeson CJ in *Roach*). When Parliament enacts legislation, that legislation can be seen as expressing the community's current values. For French CJ, this expression only gains constitutional significance once it has endured for some (admittedly imprecise) time, with the community's continued acquiescence indicating that the values expressed in the legislation have remained acceptable, or at least not objectionable, to the community over time.

The manner in which *Rowe* came before the Court also has significance from the point of view of popular constitutional theory. The plaintiffs, two students affected by the removal of the 'grace period',[83] might in ordinary circumstances have lacked the resources to pursue a High Court challenge. The litigation was, in effect, initiated and run by an online-based political action group, GetUp!, which 'crowdfunded' the action through donations, as part of a broader campaign to encourage enrolment.[84] This shows the potential for individuals and organisations to contribute to constitutional interpretation by bringing a case before the Court. The people who donated their money may not have thought of themselves as expressing a constitutional viewpoint. But they may well have disagreed with the version of representative government embodied in the impugned legislation and had their own preference for a more inclusive franchise. A sufficiently large group of people felt strongly enough to donate their money so the High Court could rule on these competing constitutional visions.

From this brief analysis, we can see that the 'right to vote' cases might fit within a broader context of High Court jurisprudence articulating a distinctly Australian version of democracy. How might popular constitutionalism help us to understand cases on the implied freedom of political communication,[85] equality of voting franchise[86] and disqualification of members of Parliament under s 44 of the Constitution?[87] What would this tell us about the way the High Court has collaborated with the Australian people to mould a modern, independent Australian democracy?

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83 One of the plaintiffs was an 18-year-old who had not enrolled to vote by the time the rolls closed; the other had moved to a different electorate since enrolling to vote and had not updated his details on the roll.

84 GetUp!'s role in the 2010 election campaign generally, and *Rowe* specifically, is analysed in Ariadne Vromen and William Coleman, 'Online Movement Mobilisation and Electoral Politics: The Case of Getup!' (2011) 44 *Communication, Politics and Culture* 76.

85 See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

86 *McKinlay* (n 80); *McGinty v Western Australia* (1996) 186 CLR 140.

87 See, eg, *Sue v Hill* (1999) 199 CLR 462; *Re Canavan* (2017) 263 CLR 284.

IV. Conclusion

Despite some unpromising first impressions, I believe Australian constitutional law demonstrates some traces of an Australian version of popular constitutionalism. Popular constitutionalism will not look the same in Australia as in the US. But it may nonetheless offer new insights into Australian constitutional law. From the (admittedly selective) example of the right to vote cases, we can see how popular constitutional theory might give us a new way of reading Australian constitutional cases. Popular constitutional theory gives us an alternative to seeing these cases as either a poor example of legalism or as manifestations of judges' personal political views.

Finally, we should remember that Andrew Inglis Clark, writing in 1901, said the language of the Constitution:

> must be read and construed, not as containing a declaration of the will and intentions of men long since dead, and who cannot have anticipated the problems that would arise for solution by future generations, but as declaring the will and intentions of the present inheritors of sovereign power … who are in the immediate presence of the problems to be solved. It is they who enforce the provisions of the Constitution and make a living force of that which would otherwise be a silent and lifeless document.[88]

Regardless of your view of the normative force of this position, the potential for the Australian people to drive an interpretation of the Constitution that serves the needs and meets the standards of the present day has been present since the creation of the document.

88 Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Legal Books, 1997) 21.

This text is taken from *The Australian Constitution and National Identity*, edited by Anna Olijnyk and Alexander Reilly, published 2023 by ANU Press, The Australian National University, Canberra, Australia.

doi.org/10.22459/ACNI.2023.03