

THE PEOPLE AND THE CONSTITUTION

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It is a great honour to have been asked to give this year's Lucinda Lecture. It would be churlish of me, as a Queenslander, to observe that at the time that the great work was done on the ship after which this lecture is named, she was owned and crewed by Queenslanders. It would be churlish, but we Queenslanders acknowledge no equals when it comes to our capacity for churlishness.

However, quite apart from being churlish, it would be wrong on this occasion to make special claims for the contributions of particular colonies because the work which was done on the *Lucinda* was done by individuals who made themselves the first Australians. By their efforts, they ensured that we, too, would have that privilege. Their work stands as an enduring reminder that, just as those individuals from their separate colonies combined their talents to forge a nation, so today's Australians can work together to make a more just nation with confidence that their efforts will not be in vain.

I THE PEOPLE IN POLITICS

It was only in the latter half of the 18th century that the idea of the people as a source of sovereign authority emerged as a central element of political discourse in the west. And once it emerged it almost immediately became the focus of fierce polemic.

Edmund Burke, in his reaction to the French Revolution, spoke of the aristocracy and higher clergy, and those who deferred to them, as the only true 'people' of France. Only they, he thought, were capable of reconstituting the French state from its convulsions, and of returning it to civilisation.¹

So far as Burke was concerned, the dissolution of the intergenerational bonds of tradition, religion and prescription meant that those in France who supported the Revolution, that is to say the majority of the population, including many of the lower clergy, were a mere 'multitude' or a 'mob'.² Conversely, from the perspective of those Burke described as a mob, the aristocracy and the Church hierarchy, the mutually dependent representatives of property and religion were, axiomatically, 'enemies of the people'.

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1 Edmund Burke, 'Remarks on the Policy of the Allies' in Paul Langford, L G Mitchell and William B Todd (eds), *The Writings and Speeches of Edmund Burke* (Oxford University Press, 1990) vol 8, 452, 457–8, cited in Richard Bourke, *Empire and Revolution: The Political Life of Edmund Burke* (Princeton University Press, 2015) 865.

2 Edmund Burke, *Reflections on the Revolution in France*, J C D Clark (ed), (Stanford University Press, 2002) 227–9 [100]–[102], 261–2 [143]–[145]; Edmund Burke, 'Reflections on the Revolution in France 1790' in Langford, Mitchell and Todd (eds), above n 1, vol 8, 53, 125–30.

Herodotus, writing at the very beginning of Western thought about politics, saw the common language, religion and customs of the Greeks as setting them apart from the barbarians, the latter term deriving from the Greek word *'barbarophonoi'*, that is people who say 'baa-baa', because those people who did not have the good fortune to speak Greek sounded, in Greek ears, like sheep.

But although the markers of a common culture were sufficient to identify the Hellenes as an ethnic group separate and distinct from their neighbours in the Mediterranean, they were not enough to make it sensible to speak of them as a people in any politically meaningful sense. They identified themselves as Greeks in negative terms, that is to say, as what they were not, rather than as a community committed to each other across city boundaries. In the discourse about political matters, which the Greeks invented, it made sense only to speak of the Athenians or the Spartans or the Thebans.

It was the Roman lawyer, Cicero, who in his *De Re Publica*, uses the literary device of the Dream of Scipio to give the authority of Publius Cornelius Scipio Africanus, the greatest of the Roman Republic's citizen soldiers, to the proposition that the *'populus'*, the people, served by a true republic is not any assemblage of individuals, but an assemblage associated in a particular common interest. And that common interest is in the doing of justice to each other.

Of course, when speaking of Marcus Tullius Cicero as a 'lawyer', I do so advisedly. That modest description does a disservice to a man who single-handedly converted the concrete language of the always practical Romans into a vehicle for abstract thought. Although he was no friend of ordinary people, to whom he referred as *'plebs sordida'* (the Great Unwashed), he seems to have invented the word *'humanitas'*, the noblest of abstract nouns. He wrote and spoke his own language so brilliantly that for more than fifteen hundred years after his death, every educated European tried to write like him.

For Cicero, a true republic is a state which serves the *'res populi'*, the thing of the people, that is the common good, by securing the practice of justice between them: a notion that the French citizens of 1789 would come to call *'fraternité'*.

The people, as a source of political authority, appear in European discourse about politics only after the passing of the Middle Ages. Before that time, save for some glimmerings in the work of John Duns Scotus and Marsiglio of Padua, the people were not even a relevant subject of political thought, which was taken up (as in the Magna Carta) with kings and their obligations to the barons and to the Church. The focus of attention was fixed upon the authority of monarchs as God's anointed, and the interests of the armed aristocracy, temporal and spiritual, who dominated political and economic life.

In the 16th and 17th centuries, as the medieval conception of Christendom began to break down, English speakers sought to recapture Cicero's idea of the *'res populi'*, the common good and doing justice in the community, in the word 'Commonwealth'. In Henry IV, Part 1, Shakespeare uses that term; and each of the American states, Massachusetts, Virginia and Pennsylvania called, and continues to call, itself a Commonwealth.

Sometimes, political thinking about the identity of a people was attended by serious misjudgement or overreach. James VI of Scotland, upon being crowned King James I of England, sought to establish the Union of his two kingdoms. Parliamentary acceptance of the Union would await more than a century after James in 1604 caused to be minted a new £1 coin on which he was identified as King of what he called ‘Great Britain’. On the reverse of this coin was a Latin translation of *Ezekiel 37:22*: ‘*Faciam eos in gentem unam*’ — I will make them into one people.

James commanded all his ‘subjects to repute, hold and esteem both the two realms as presently united, and as one realm and kingdom, and the subjects of both the realms as one people, brethren and members of one body’. The basis for this proclamation was James’ rather optimistic view that God had already ‘united these two kingdoms both in language, religion and similitude of manners’.³

James clearly needed to get out more and actually meet some of his subjects — on both sides of the Tweed. He seems to have been oblivious of the deep-rooted and long-standing Scottish desire for independence from England, as well as the equally deep-seated English distrust of the Scots expressed in Shakespeare’s collective description in *Henry V* (1.2.170) of the good folk who live north of the Tweed as the ‘weasel Scot’.⁴

Subsequently, the concept of ‘the people’ came to have an enduring place in the theory and practice of politics. In both Australia and the United States, the concept of the people has also been employed as a bridge between the political and the legal, between political and legal sovereignty.

Ironically, the concept has been more influential in the development of the jurisprudence of our *Constitution* in Australia than in the constitutional jurisprudence of the United States. I speak of ‘irony’ because, in the *United States Constitution*, the concept of ‘the People’ was given a central place that it was not accorded in our *Constitution*. One might, therefore, have expected the concept to affect, strongly and pervasively, the interpretation of the *United States Constitution* by American judges. But that expectation would be disappointed. On the other hand, with much less textual material to work with, Australian judges have found the concept of ‘the people’ a fertile source of constitutional doctrine. I do not suggest that the work of our judges in this regard has been uncontroversial; simply that the phenomenon cannot be denied.

I will go on later to suggest that this difference in American and Australian constitutional case law reflects the different historical foundations of our two countries, and the different founding myths created by those experiences. For good or ill, these differences have proved to be powerful influences in shaping

3 Bruce Galloway, *The Union of England and Scotland 1603–1608* (John Donald, 1986); David M Bergeron, ‘King James’s Civic Pageant and Parliamentary Speech in March 1604’ (2002) 34 *Albion* 213; Jenny Wormald, ‘The Creation of Britain: Multiple Kingdoms or Core and Colonies’ (1992) 2 *Transactions of the Royal Historical Society* 175.

4 James Shapiro, *1606: William Shakespeare and the Year of Lear* (Faber & Faber, 2015) 44.

the judges' understanding of their respective nations, more influential in some respects than the words on the page of our constitutional documents.

II THE UNITED STATES CONSTITUTION: WE THE PEOPLE

In the very first words of the *United States Constitution*, 'We the People', that people announced to the world their determination to constitute a government for themselves.

As Marshall CJ said in *McCulloch v Maryland*:

The government of the Union ... is ... a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised on them, and for their benefit.⁵

The People, as the very source of the *Constitution* itself, are expressly referred to in art 1, s 2 and in the First, Second, Fourth, Ninth and Tenth Amendments. The deployment of the concept explicitly rejects all possibility of a superior authority on earth, including the authority of the existing colonies, or States as they now became: the new government to be constituted was not the creature of those colonies; rather, the States as such, were the creatures of the *Constitution*, and the *Constitution* was the creation of the People. The People, who are constituting a new government for themselves, recognise each other as members of a distinct community, a community which is both logically and historically anterior to the government to be established by and for that community.

All this owed a lot to Alexander Hamilton and James Madison, two of the three authors of *The Federalist Papers*, but it also owed much to some of the lesser known of the Founders of the United States. For example, it was John Jay, of New York, the third contributor to *The Federalist Papers*, who had the brilliant insight that by expressly locating sovereignty in 'the people' one could avoid the difficult issue of whether sovereignty resided in the States or in the new federal government.⁶

In addition, it is perhaps not unreasonable to assume that Jay, as a well-educated American of his time, was well aware of Cicero's view that it was the commitment to justice towards each other which characterised a people.

Another of the lesser-known of the American Founders was Gouverneur Morris. He was charged by the Constitutional Convention with actually drafting the *Constitution*. He took the preamble of the original draft, which had been: 'We the people [with a small "p"] of the states of New Hampshire, Massachusetts, Rhode Island [etc] ...' and changed it to: 'We the People [with a capital "P"] of the United

5 17 US (4 Wheat) 316, 404–5 (1819).

6 Joseph J Ellis, *The Quartet: Orchestrating the Second American Revolution, 1783–1789* (Alfred A Knopf, 2015) 113.

States'. This has rightly been described as 'probably the most consequential editorial act in American history'.⁷

As a matter of practical politics, the idea of 'the people' had a powerful practical appeal for those who had recently been victorious in a long and costly war against a common foe. The colonists had successfully combined in war to win their independence from the most powerful empire in the world. Moreover, they had experience of 200 years of clearing a wilderness and building towns, and of holding town hall meetings to decide how their common enterprises should best be conducted. And, most importantly, they all spoke a common language and shared the cultural insights generated by the experience of and reflection upon the English civil wars of the 17th century.

All that having been said, there is a serious question as to the historical accuracy of the assertion by those who propounded the *United States Constitution* that all those who had previously been residents of 13 colonies under the British Crown were a truly unified social unit accurately described as 'the People'.⁸ It is not going too far to say, with Cicero's notion of a people in mind, that it would be difficult to imagine aggregations of people less unified in their commitment to common ideas of justice than the hardy individuals of the Puritan states of New England and the slave-owning aristocracies of the South.

Before the Convention which agreed to propose the *Constitution* for adoption by the people, George Washington had written: 'We are either a United people or we are not. If the former, let us, in all matters of general concern act as a nation ... If we are not, let us no longer act a farce by pretending to it.'⁹ This was wishful thinking of the same order as James I of England. It was a view that James Madison did not share. Madison saw the division between the states by reason of 'their having or not having slaves' as fundamental.¹⁰ And within 80-odd years, he would, tragically, be proved right.

Focusing for the moment though, upon 'the People' as a concept used as a legal rather than political concept, I suggest that the values of unity and social solidarity strongly implied in the concept of the people, and which the citizens of revolutionary France called '*fraternité*', have not flourished in the constitutional jurisprudence of the United States as one might have expected given the central place occupied by 'the People' in the *United States Constitution*.

7 Ibid 151.

8 Some such questions were raised by Barwick CJ in *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 22–3.

9 Quoted in Ellis, above n 6, 109.

10 Max Farrand (ed), *The Records of the Federal Convention of 1787* (Yale University Press, 1937) vol 1, 486.

III *BROWN v BOARD OF EDUCATION*

The institution of racial segregation prevailed in the Southern States long after the Civil War had ended slavery. By the end of the decade after World War II, it was abundantly apparent that the political branches of government were simply not able or willing to effect the removal of segregation which basic decency, not to mention the result of the Civil War, required.

Standing in the way of a judicial inroad upon segregation was the 1896 decision of the US Supreme Court in *Plessy v Ferguson* (*'Plessy'*),¹¹ which held that a State statute requiring railway companies to provide separate accommodation for white and coloured persons, and making a passenger who insisted upon occupying a coach or compartment other than the one set aside for his race liable to a fine or imprisonment, did not violate the 14th Amendment of the *Constitution* passed after the Civil War. By the 14th Amendment, all persons born or naturalised in the United States, and subject to the jurisdiction thereof, are made citizens of the United States and of the State wherein they reside; further, the States are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws.

The majority of the justices in *Plessy* had said:

A statute which implies merely a legal distinction between the white and colored races — a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color — has no tendency to destroy the legal equality of the two races ... Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power ...¹²

This reasoning is focused entirely on equality with no notion of the irreducible unity implied by the *Constitution's* derivation from 'the People'. The problem with the idea of 'separate but equal' is that the *Constitution* postulates that the People are not divided. That is not a result of the 14th Amendment, but of the original instrument itself. And as to who are the People, once slavery had been abolished, there was no constitutional basis for laws which segregated African Americans from their fellow citizens.

When the issue of segregation came before the Supreme Court again in 1953 in *Brown v Board of Education of Topeka* (*'Brown'*),¹³ the Court decided to overrule

11 163 US 537 (1896).

12 Ibid 543–4.

13 347 US 483 (1954).

Plessy's 'separate but equal' doctrine. It did so by reference to evidence which showed that the separate schools available to black schoolchildren were not, as a matter of fact, adjudged to be equal to those made available to white children.¹⁴

Brown was, of course, a ground-breaking decision. It was and remains controversial in a number of respects. The one aspect of the reasoning on which I wish to comment is that the decision was based on a view that what was separate was not, on the facts of the case, equal. There was a simpler and broader answer that does not depend on judicial impressions about what the facts of each particular case might mean in terms of equality: segregation of the people by state or federal law is simply antithetical to the first premise of the *United States Constitution*.

This answer had been hinted at in the dissenting judgment of Harlan J in *Plessy* in which his Honour memorably wrote: 'I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved.'¹⁵ Harlan J buttressed his opinion with references to the 14th Amendment and notions about the 'personal liberty enjoyed by every one within the United States';¹⁶ but his Honour's reasoning was inspired by an appreciation that it is beyond the organs of government established by the people in their *Constitution* to erect divisions between that people.

The desegregation decision in *Brown* might have rested more satisfactorily on this basis than on the judges' impressionistic view of the facts of each particular case. Whatever impression a judge might form of the evidence in a particular case, it should surely be irrelevant to say that separate is equal: 'separate', even if equal, is simply inconsistent with the fundamental unity of the People from which the *Constitution* proceeds.

A student of America's founding would have found support for that thesis in an interesting source. When the government of Lord North procured the Imperial Parliament to pass the *Prohibitory Act* in December 1775,¹⁷ its effect was to blockade American trade. The *Prohibitory Act* was followed by the *Treason Act 1777*¹⁸ and the *Letters of Marque Act 1777*,¹⁹ which allowed American colonial vessels to be seized as prize by British ships and suspended habeas corpus in the colonies.

Edmund Burke saw these laws as effecting a rupture between the British people on the two sides of the Atlantic and as justifying disobedience and rebellion by the Americans, albeit in order to restore the proper order, not to replace it altogether.²⁰ Burke said that laws which discriminated against the trans-Atlantic British community exhibited a particular vice: 'Other laws may injure the community, this tends to dissolve it.' Burke described the *Prohibitory Act* as 'a

14 Ibid 491–3.

15 163 US 537, 554–5 (1896).

16 Ibid 555–6.

17 16 Geo 3, c 5.

18 17 Geo 3, c 9.

19 17 Geo 3, c 7.

20 Bourke, above n 1, 8, 502–4.

solemn publick act made for separating the Colonies from the British Empire, a complete abdication of [the Parliament's] authority'. But in *Brown*, this line of argument, and the support given to it by the greatest British friend of the American Revolution, was lost to view.

Had that not been so, the contortions of the later US jurisprudence relating to affirmative action might have been avoided. Laws which strengthen the bonds of fraternity between the People, according to their judgments in their legislatures, should not be vulnerable to attack based on impressionistic judgments about the practical requirements of equality in any particular case.

Perhaps an even more powerful illustration of the absence of the people from the mindset of the US judiciary is the recent expansion by the US Supreme Court of the scope of the Second Amendment. In 2008 in *District of Columbia v Heller*²¹ and in 2010 in *McDonald v City of Chicago*,²² the majority of the Supreme Court struck down gun control laws in the District of Columbia and the states on the basis that they infringed the Second Amendment which says: 'A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed'.

The majority view proceeded on the footing that this provision confers a constitutional right upon an individual to possess firearms. This view was contrary to that taken in 1939 in *United States v Miller* which emphasised that the right to bear arms was related to their use for general security by a militia.²³ It is distinctly odd that the Second Amendment expressly contemplates that the militia may be well-regulated — for example, the militia may be ordered to stack their arms by their officers acting within the chain of command — yet individuals may not be required to give up their arms. There is also the stunning reading out of the express recognition in the Second Amendment itself that it is the right of the people which is not to be infringed rather than a right in every individual.

This reading out is baffling, even if one subscribes to the originalist approach to constitutional interpretation adopted by the majority of the Court in those cases. In this regard, we can be entirely confident that the framers of the *United States Constitution*, slave-owners and free-soilers alike, did not intend that the right to keep and bear arms would be guaranteed to any one of the millions of black people in the US at the time who might happen to win his or her freedom.

This indifference to the concept of the people, and its implications, stands in marked contrast to the Australian jurisprudence. Here, with much less textual encouragement, our jurisprudence has warmly embraced the idea of the people as a source of constitutional law.

21 554 US 570 (2008).

22 561 US 742 (2010).

23 307 US 174 (1939).

IV THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA AND 'THE PEOPLE'

So far as the *Australian Constitution* is concerned, the sober reality is that our *Constitution* began its legal life as a section of an Act of the Imperial Parliament at Westminster, the *Commonwealth of Australia Constitution Act 1900* (Imp). In 1935, Sir Owen Dixon wrote:

The framers of our own Federal *Commonwealth Constitution* (who were for the most part lawyers) found the American instrument of government an incomparable model. They could not escape from its fascination. Its contemplation damped the smouldering fires of their originality. But, although they copied it in many respects with great fidelity, in one respect the *Constitution* of our Commonwealth was bound to depart altogether from its prototype. It is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions.²⁴

In this Imperial Act, the Australian people, as such, do not get a mention. The Act recites that:

the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established.²⁵

And s 5 of the Imperial Act makes the *Constitution* binding on the 'people of every State and of every part of the Commonwealth'. And this people rate only a small 'p'.

Unlike the *United States Constitution*, our *Constitution* does not postulate the anterior existence of 'the People' who have resolved among themselves to institute it. One might suggest that, in this, it accurately acknowledged that there was not, as a matter of historical fact, an Australian people at the time of Federation. It might also have reflected a reluctance to assert an Australian national identity separate from the British identity of all of the other subjects of Queen Victoria within the British Empire.

Sections 7 and 24 of the *Constitution*, along with s 128, are the foundation for the judge-made law which has struck down laws made by the parliaments of the states and the Commonwealth. Section 24 provides that the House of Representatives shall be composed of 'members directly chosen by the people of the Commonwealth'. Section 7 provides that the Senate shall be composed of senators for each state, 'directly chosen by the people of the State'. Once again, the people rate only a small 'p'.

24 Sir Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 597. See also *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351, 458.

25 *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12.

Section 128, which provides for the amendment of the *Constitution* by referendum, does not even refer to the people; rather, it refers to ‘the electors qualified to vote for the election of members of the House of Representatives’.

From this sparse textual basis has grown, not without controversy, a body of case law which protects against legislative or executive action by a State or the Commonwealth, that ‘freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors’.²⁶ This is the implied freedom recognised in decisions such as *Lange v Australian Broadcasting Corporation*. The protection thus afforded has been characterised as necessary to ensure that political sovereignty in this country is exercised by the people of the Commonwealth.²⁷

The constitutionally protected interest is that of the people of the Commonwealth, not of any individual. This can be seen in relation to what is inaccurately described as the right to free speech.²⁸ Under our *Constitution*, the ‘right to free speech’ is an incident of the constitutional protection afforded to the people of the Commonwealth. That protection does not guarantee an individual’s right to free speech, a right to ‘construct a particular communication’,²⁹ or a right in an individual to accumulate and exercise political influence free of legislative regulation.³⁰ That is because the implied freedom of communication serves, not individual rights, but rather the collective interest in the ‘[e]quality of opportunity to participate in the exercise of political sovereignty [which] is an aspect of the representative democracy guaranteed by our *Constitution*’.³¹

How the people of the Commonwealth and states should go about making their choice of Members of the House of Representatives and Senate respecting this was left to the Parliament to determine; but the seemingly modest provisions of ss 7 and 24 have been held by our judges to establish that the people of the Commonwealth are the sovereign power within the Commonwealth because of their enfranchisement by the *Constitution*. In *Roach v Electoral Commissioner* (*‘Roach’*), Gummow, Kirby and Crennan JJ observed that: ‘the existence and exercise of the franchise reflects notions of citizenship and membership of the Australian federal body politic’.³²

In *Rowe v Electoral Commissioner* (*‘Rowe’*), Gummow and Bell JJ held that the expression ‘chosen by the people’ in ss 7 and 24 signified ‘the share of individual citizens in political power by the means of a democratic franchise’.³³

26 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.

27 *Unions NSW v New South Wales* (2013) 252 CLR 530, 583–4 [158].

28 *Ibid* 571–2 [109]–[112].

29 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 451 [381].

30 *McCloy v New South Wales* (2015) 257 CLR 178, 207 [45]. See also *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1, 72; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136; *Unions NSW v New South Wales* (2013) 252 CLR 530, 578 [135]–[136].

31 *McCloy v New South Wales* (2015) 257 CLR 178, 207 [45].

32 (2007) 233 CLR 162, 199 [83].

33 (2010) 243 CLR 1, 48 [121]. Crennan J made a similar observation: at 112 [347].

This collectivist and egalitarian view is not a recent invention. As long ago as 1902, Professor Harrison Moore said of our *Constitution*: ‘The great underlying principle 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.’³⁴

Notwithstanding its exiguous textual foundations, the idea of the shared legal sovereignty of the people of the Commonwealth has proved to be a particularly hardy specimen. In *Roach*, the High Court considered whether a law which disqualified all persons serving a term of imprisonment from voting was constitutionally valid.³⁵ A majority held that the Commonwealth Parliament could not exclude all citizens serving a term of imprisonment from the franchise. It was said that citizenship and membership of the Australian federal body politic are ‘not extinguished by the mere fact of imprisonment. Prisoners who are citizens and members of the Australian community remain so. Their interest in, and duty to, their society and its governance survives incarceration’.³⁶

Notice the reference to civic duty in this passage, rather than individual right.

In *Roach*, Gleeson CJ referred, with evident approval, to the observation by Professor Tribe that ‘in deciding who may and who may not vote in its elections, a community takes a crucial step in defining its identity’.³⁷ The question whether only electors qualified to exercise the franchise are ‘the people of the Commonwealth’ has been attended with some controversy. Murphy J thought that this was so,³⁸ Gummow J disagreed,³⁹ and French CJ in *Rowe* thought that the view of Gummow J was correct, but that the ideas were ‘converg[ing]’.⁴⁰ With great respect to those of a different view, I think that Gummow J was right. If there were no better reason, I would cite a grandfather’s unwillingness to accept that my infant grandchildren are not people of the Commonwealth, just as were Australian women before full federal adult suffrage, at least those who did not live in the enlightened States of South Australia and Western Australia. But as it happens, there is a better reason: ss 8 and 30 of the *Constitution* expressly contemplate that not all of the people of the Commonwealth may be qualified as electors.

I would suggest that, at the least, the political unity necessarily implicit in the idea of the people denies the power of any organ of government to divide or segregate the people in terms of religion, race, gender or social condition, so far as their political sovereignty is concerned. And given the centrality of political sovereignty, the concept may also serve as a brake on introducing divisions of this kind in any aspect of public life. As *Plessy* and *Brown* illustrate, to allow

34 W Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1st ed, 1902) 329.

35 (2007) 233 CLR 162, 174 [7], 182 [23], 198–9 [81]–[84].

36 *Ibid* 199 [84].

37 *Ibid* 177 [13], citing Laurence H Tribe, *American Constitutional Law* (Foundation Press, 2nd ed, 1988) 1084.

38 *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 68–9.

39 *McGinty v Western Australia* (1996) 186 CLR 140, 279.

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

the organs of government to divide the people is likely, as a practical matter, to poison all aspects of civic life. If the organs of the state can treat one segment of the people less generously than another segment, in terms of rights of property, security and religious liberty, the latter group can be expected to support the maintenance of the balance in the organs of government which serves their sectional advantage. Apartheid in South Africa and segregation in the south of the United States are obvious examples of this phenomenon.

In this regard, there are two provisions originally contained in our *Constitution* which were distinctly out of place in an inclusive understanding of the people as a unifying constitutional principle. Each was the antithesis of the Ciceronian ideal of the commitment of a people to doing justice to each other. Section 127 provided that: 'In reckoning the numbers of the people of the Commonwealth, or of a State or other parts of the Commonwealth, aboriginal natives shall not be counted.'

This provision was removed by the 1967 Referendum in one of the existential acts by which the Australian people made their commitment to a more just community.

The other provision of exclusionary effect, remarkably perhaps, still remains. It is s 25 which states relevantly that:

if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

Happily, that provision has now no practical operation. But it is, to say the least, at odds with the unity inherent in the idea of the people that it expressly contemplates even the possibility of dividing the people of the Commonwealth by denying to some of them their equal participation in all aspects of citizenship.

V MYTHS OF NATIONHOOD

How then are we to understand the absence of 'the People' as an influence on the judicial thinking which produced the United States decisions to which I have referred? And what was it that has moved Australian judges to their expansive treatment of the exiguous references to the people in our *Constitution*?

The resonance of any constitutional provision must depend, at least to some extent, on the time, circumstances and experience of the audience. A nation's historical experience, and the shared cultural understanding and sense of history, the founding myths, to which it gives rise, affect the outlook and the mindset of the citizens who share those understandings; it affects their children, and it affects their judges.

In the case of the United States, there was, first of all, the great contradiction between slave states and free states that Washington tried to wish away. Madison's more sober view was shown to be correct in the great disillusionment which led to

the Civil War. That cataclysm proved more conclusively than any legal argument could that the making of a people committed to doing justice amongst its members cannot be achieved by the stroke of a pen, even a pen wielded as elegantly as that of Gouverneur Morris.

Secondly, Americans share a founding myth centred upon a highly individualistic view of what makes America great. For many Americans, the vision of a man and his musket carving his own happiness out of the state of nature where opposition, natural or human, is something to be overcome by force proved to be compelling. It is, after all, a shared vision that inspired three generations of Wild West movies in which noble individuals destroy their enemies utterly, sometimes more in sorrow than in anger, but always with an efficiency that obviates the moral discomfort of further debate or compromise.

VI THE AUSTRALIAN EXPERIENCE

The historical facts of the Australian founding, and the national myths they generated, were entirely different from those of the United States.

Here, there was never even a possibility of imagining ourselves as ‘a People’ without government. While the Pilgrim Fathers fleeing religious persecution by government is a powerful strain in the foundational myth of the United States, we began, ignominiously, but undeniably, as a project of government, and of the British government at that. And the imperial government underwrote our survival in a dangerous world until 1942. As Alfred Deakin famously said: ‘But for the British Navy there would be no Australia’.⁴¹

Our economy was not built by titans of industry like Rockefeller, Carnegie and JP Morgan, whose rags to riches success stories captured the imagination of the public, even as their highly developed acquisitive instincts, allowed to operate unchecked for so long, dominated the US economy in the late 19th and early 20th centuries.

In Australia, only collective action by governments could have built the railways and the roads that made us an economic community. And of critical importance, we did not wrest our nationhood by force of arms from the bloody hands of a tyrannous government, but received it as the free gift of the Imperial Parliament at Westminster.⁴²

Subsequently, our idea of ourselves as the people of the Commonwealth was crystallised by great events in the life of the nation which involved action as a community. Our own idea of nationhood was forged in our collective responses to the challenges of a dangerous world abroad and economic crises at home. The events of Gallipoli and the Western Front, the Great Depression, Tobruk and

41 Arthur W Jose, ‘The Royal Australian Navy 1914–1918’ in C E W Bean (ed), *Official History of Australia in the War of 1914–18* (Angus & Robertson, 1921–1942, 4th ed, 1937) vol 9, xxvii.

42 *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 22–4.

Kokoda and the 1967 Referendum have been crucial to the national myth that commits us to each other. Sir Victor Windeyer, who had been a very distinguished soldier in World War II before he became a very distinguished justice of the High Court, in a judgment written in 1971, said of the Commonwealth of Australia:

It became a nation. Its nationhood was in the course of time to be consolidated in war, by economic and commercial integration, by the unifying influence of federal law, by the decline of dependence upon British naval and military power and by a recognition and acceptance of external interests and obligations.⁴³

Speaking of the *Engineers' Case*,⁴⁴ the most important of all constitutional cases, Windeyer said: 'in 1920 the *Constitution* was read in a new light, a light reflected from events that had, over twenty years, led to a growing realization that Australians were now one people and Australia one country'.⁴⁵

The *Engineers' Case*, with its endorsement of an expansive view of the central power of the Commonwealth over that of the States, is itself powerful evidence that government did not loom in the consciousness of our nation's founders as a monster lurking in the shadows as an ever present threat to liberty. Our founders, heeding the wisdom of John Quincy Adams, did not go in search of monsters to destroy.

The model of government which dominated the thinking of those whose work is celebrated in the title of this series of lectures was that of a sovereign legislature and a responsible executive government.⁴⁶ Those who framed our *Constitution* deliberately chose parliamentary democracy and responsible government rather than a thoroughgoing separation of powers and limitations upon parliamentary sovereignty in favour of individual rights. The tutelary spirit of our *Constitution* was not Montesquieu or Blackstone or John Locke, but Albert Venn Dicey who saw Parliament as sovereign.

As Sir Owen Dixon said of the framers' unwillingness 'to place fetters upon legislative action': 'The history of their country had not taught them the need of provisions directed to the control of the legislature itself'.⁴⁷

And as the ties of Empire became even looser and more tenuous, the felt need to locate Australian sovereignty, a matter which became urgent after the passage of the Australia Acts in 1986, was answered for us by the availability of ss 7 and 24. In *Australian Capital Television Pty Ltd v Commonwealth*, Mason CJ said that the Australia Acts 'marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people'.⁴⁸

Today, it is a disappointment to some that our *Constitution* does not express a ringing declaration of commitment to a vision of the shared values of the Australian

43 *Victoria v Commonwealth* (1971) 122 CLR 353, 396.

44 (1920) 28 CLR 129.

45 *Victoria v Commonwealth* (1971) 122 CLR 353, 396.

46 *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 24.

47 Sir Owen Dixon, *Jesting Pilate* (The Law Book Company, 1965) 102.

48 (1992) 177 CLR 106, 138 (citations omitted).

people.⁴⁹ But the circumstance that our *Constitution* allows our decent people to be what they decide to make of themselves is not a reason for disappointment. In the long sweep of history, human affairs being as they are, today's call to arms in a noble cause can become tomorrow's national embarrassment. Anyone who reads our history knows that if there had been a ringing commitment of the Australian people to any shared value at the time of Federation, it would have been to the White Australia Policy; which was then universally regarded as the necessary bulwark of the prosperity of working people in Australia and of the experiments in democracy which were then occurring here.⁵⁰

One might be emboldened to suggest that, over time, we have grown closer to the Ciceronian ideal of a people defined by a commitment to justice than our American cousins. For them, their *Constitution's* express references to 'the People' resonate only faintly. For us, the almost incidental textual references have become the 'constitutional bedrock'⁵¹ of an existentialist experiment that does not seek to tie the hands of future generations too tightly. In particular, the values of fraternity have not been decisively checked by a single minded, one might even say blinkered, view of the claims of individual liberty. And so, in comparison with our American cousins, we have had some notable successes as a people committed to doing justice to each other.

We have enjoyed a broadly based system of social welfare for more than half a century. We have enjoyed an effective system of universal health care for nearly 40 years. We are indisputably a more civil society. We have not been obliged to tolerate the slaughter, at more or less regular intervals, of heroes and innocents at the hands of troubled souls exercising their judicially guaranteed right of access to a gun. These things were achieved peaceably by our people in their parliamentary assemblies. And the achieving itself made our people stronger, because these things were achieved by our people without the need for them to rely on the judiciary to resolve major political conflicts because the political branches of government were too feeble or fractured to do so.

Our *Constitution*, while providing the means for future generations to make what they can of themselves, did not seek to make them prisoners of the visions of the past. That would have pleased Thomas Jefferson who wrote from Paris to James Madison less than two months after the fall of the Bastille: 'no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation'.⁵²

Our *Constitution* made us free to make of ourselves as a people what we will. We have had some success; but we face great challenges, the most urgent of which is the proper recognition of Indigenous Australians and their place within

49 Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and Aspirations in the Australian Constitution' (2016) 14 *International Journal of Constitutional Law* 60, 79.

50 See J P Bulkeley, *The British Empire: A Short History* (Clarendon Press, 2nd ed, 1926) 108.

51 *Roach* (2007) 233 CLR 162, 198 [82].

52 Letter from Thomas Jefferson to James Madison, 6 September 1789 in James Morton Smith (ed), *The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison 1776–1826* (W W Norton, 1995) vol 1, 634.

our people. The other side of the existentialist coin that is our constitutional inheritance is that we must recognise that when we fail to do justice to each other today, the fault is not in our stars or our ancestors but in ourselves.