THE GUARANTEED RIGHT TO VOTE IN AUSTRALIA

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I INTRODUCTION

This article will consider the extent to which there is, or should be, a constitutionally guaranteed right to vote in Australia. I will consider whether Australia’s system of representative government enshrined in our federal Constitution provides any kind of guaranteed right to vote to citizens, and if so at which elections, or whether state and federal governments have complete discretion in deciding, from time to time, who should have the right to cast a vote at federal, state and local elections. I will discuss these issues in light of the recent High Court decision in Roach v Electoral Commissioner.¹

II CONSTITUTIONAL PROVISIONS CONCERNING VOTING

I accept that as written, the Constitution provides no express guarantee of a universal franchise. The qualification of electors was clearly left for the ultimate decision of the federal Parliament.² This may have been because at the time of federation, the colonies had a number of different approaches to voting. Only South Australia and Western Australia recognised the right of women to vote; Aborigines and other racial minorities were explicitly excluded by the law of some colonies;³ those in receipt of government benefits could not vote in some colonies; and some colonies imposed a property, income or education requirement to determine who was eligible to vote.

The most immediately relevant section of the Constitution is s 41, which is cast in the following terms:

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1 [2007] HCA 43.

2 Constitution ss 8 and 30.

3 Section 25 of the Constitution acknowledged this practice and does not seek to change it. The Commonwealth in its Commonwealth Franchise Act 1902 (Cth) expressly excluded Aboriginal people from the voting process unless a state law gave them that right. In other words, it adopted the machinery of s 41 of the Constitution of equating a right to vote at state elections with a right to vote federally. This prohibition was continued in the Commonwealth Electoral Act 1918 (Cth), and to some extent in the Commonwealth Electoral Act 1961 (Cth).
No adult person who has or acquires a right to vote at elections for the more numerous Houses of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

Other sections also of relevance include s 24, requiring that the members of the House of Representatives be chosen directly by the people, and s 30, providing that until the (Commonwealth) Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each state that prescribed by the law of the state as the qualification for electors of the state Parliament. Section 24 will be discussed presently.

There seems little doubt that the reason for the inclusion of the s 41 was to protect the existing colonial franchises at the time of federation. Different colonies had different requirements. Only South Australia and Western Australia gave women the right to vote. Tasmania required voters to own a certain amount of property. Some colonies allowed plural voting; others did not. Aboriginal people were excluded from voting in most colonies; and in New South Wales anyone in receipt of state aid or aid from a charitable institution was not entitled to enrol.\(^4\) The founding fathers were concerned that the previous arrangements would not be disrupted by the creation of the new federal Parliament.\(^5\) Of course, there was a need to gain support for the new Constitution, so an attempt to minimise change to existing arrangements, where possible, was understandable.

I will consider the High Court’s recent analysis of these provisions in the context of a denial of voting rights to prisoners, before considering the broader question of universal suffrage and the extent to which it is constitutionally required in Australia.

A Roach v Electoral Commissioner

The plaintiff was an Australian citizen of indigenous descent. She was convicted in 2004 of five offences under the Crimes Act 1958 (Vic) and sentenced to a total of six years effective imprisonment. She was of sound mind and had not committed treason or treachery. This was important because under the relevant provisions of the Commonwealth Electoral Act 1918 (Cth), prior to amendments in 2006, the following were excluded from the right to vote:

(a) those who through unsound mind were incapable of understanding the nature and significance of enrolment and voting;
(b) those serving a sentence of three years or more for an offence against the law of the Commonwealth or State; and
(c) those convicted of treason or treachery.


An amendment in 2006 to (b) above extended its reach to those serving any term of full-time imprisonment. This amendment had the effect of excluding Roach from voting. She challenged the constitutionality of the amendment, and in a 4-2 verdict, the High Court partly upheld her complaint.

1 **Majority Reasoning**

Gleeson CJ noted that the founding fathers had left it to Parliament to prescribe the form of our system of representative democracy. Interestingly, he noted that ‘Australia came to have universal adult suffrage as a result of legislative action’, before these comments:

Could Parliament now legislate to remove universal suffrage? If the answer to that question is in the negative (as I believe it to be), then the reason must be in the terms of ss 7 and 24 of the Constitution, which require that the senators and members of the House of Representatives be ‘directly chosen by the people’ of the State or the Commonwealth respectively. In 1901, those words did not mandate universal suffrage… 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. Because the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people.

Gleeson CJ noted that not all people in prison were serving sentences of imprisonment – some 22 per cent were on remand. Many people were in prison for relatively short sentences – he referred to a New South Wales (NSW) report that found 65 per cent of NSW prisoners in the early years of the 21st century had been sentenced to less than six months imprisonment. Many prisoners, due to poverty, homelessness or mental difficulties, did not qualify for non-custodial orders. Though acknowledging the different statutory frameworks and different scope for judicial review, he noted decisions of the Canadian Supreme Court and the European Court of Human Rights that arbitrary denial of the right to vote was invalid. While he would have accepted as valid the legislative provision denying the right to vote to prisoners serving a term of imprisonment of at least three years, he found the amending provisions here were

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7 Other members of the majority agreed, with Gummow Kirby and Crennan JJ stating that parts of the Commonwealth Electoral Act 1918 (Cth) dealing with voting entitlements ‘represent the culmination of the movement for universal suffrage’ [29].
8 *Roach v Electoral Commissioner* [2007] HCA 43 [6].
9 Ibid [7].
10 Ibid [10].
11 Ibid [21]; the joint reasons make similar observations [91].
13 As did the joint reasons in *Roach v Electoral Commissioner* [2007] HCA 43 [102].
arbitrary, breaking the rational connection necessary to reconcile the disenfranchisement with the constitutional imperative of choice by the people.  

Gummow, Kirby and Crennan JJ noted the development of voting practices in the Australian colonies prior to federation, including a broader franchise than was the case in the United Kingdom. Exclusions in the United Kingdom for offenders convicted of treason, felony or other infamous crime tended to be adopted locally and in other British colonies. However, there were important differences in the practices of Australian colonies such that ‘universal manhood suffrage would not provide a sufficient foundation for representative government as that institution has been understood after 1900, and … as it was coming to be understood in Australia in the 1890s’. The joint reasons noted that:

Voting in elections for the Parliament lies at the very heart of the system of government for which the Constitution provides. This central concept is reflected in the detailed provisions for the election of the Parliament of the Commonwealth in what is otherwise a comparatively brief constitutional text …McGinty does not deny the existence of a constitutional bedrock when what is at stake is legislative disqualification of some citizens from exercise of the franchise.

The joint reasons explained that representative government embraced not only the bringing of concerns and grievances to the attention of legislators, but also the presence of a voice in the selection of legislators. In this way, the existence and exercise of the franchise reflected notions of citizenship and membership of the Australian federal body politic, that could not be extinguished by mere imprisonment. A prisoner retained an interest in, and duty to, their society and its governance.

The joint reasons then applied a test very similar to the second limb of the so-called Lange test, in considering whether the departure from universal suffrage was for a ‘substantial reason’, or a reason which is reasonably appropriate and adapted to serve an end which is consistent with or compatible with the maintenance of the constitutionally prescribed system of representative government. They found that the amendments were invalid, as they did not discriminate in terms of seriousness of offence, and were incompatible with past acceptable restrictions on the universal franchise. They went beyond what was reasonably appropriate and adapted to the maintenance of representative government.

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14 Ibid [24].  
15 Ibid [62].  
16 Ibid [69].  
17 Lange v Australian Broadcasting Corporation (1997) 189 CLR 520. There a joint judgment of Brennan CJ Dawson Toohey Gaudron McHugh Gummow and Kirby JJ applied a two stage test in determining whether a law infringed the constitutional requirement of freedom of communication, including: (a) whether the law effectively burdened freedom of communication about government or political matters in its terms, operation or effect; and (b) if so, whether it was reasonably appropriate and adapted to serve a legitimate end the fulfilment of which was compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and s 128 (567-8).  
18 Roach v Electoral Commissioner [2007] HCA 43 [90].
2 Minority

Starting from the same premise as the majority that the intention upon federation was that the Commonwealth Parliament itself has the power to determine the franchise, this was where it ended for the minority judges. The expression in s 24 requiring Parliament to be chosen ‘directly by the people’ was an expression of generality, not universality.\(^\text{19}\) It did not mandate universal suffrage. Denying prisoners voting rights was consistent with the s 24 requirement, and even if universal suffrage were accepted, it allowed for exceptions.\(^\text{20}\) As the joint reasons had noted, Hayne J observed that prior to federation there was no consistency of voting rights among the colonies.\(^\text{21}\)

He claimed the plaintiff here had not given precise content to the concept of ‘representative government’, and it was not sufficient to label the amendment as arbitrary. The assertion that representative government had a particular content was not based on constitutional text or history. Hayne J did not accept the doctrine as limiting Commonwealth law making power:

> The **Constitution** does not establish a form of representative democracy in which the limits to the legislative power of the Parliament with respect to the franchise are to be found in a democratic theory which exists and has its content independent of the constitutional text… To impose upon the text and structure that was adopted a priori assumptions about what is now thought to be a desirable form of government or would conform to a pleasingly symmetrical theory of government is to do no more than assert the desirability of a particular answer to the question that now arises.\(^\text{22}\)

He rejected the suggestion of the majority that the content of the expression ‘directly chosen by the people’ could or had changed over time.\(^\text{23}\) Hayne and Heydon JJ were dismissive of the use by the majority of international sources in deciding the case, given the admittedly different statutory context in which those claims had arisen.\(^\text{24}\) Heydon J rejected the assertion that the *Constitution* now required universal adult suffrage, claiming that attempts to narrow the franchise on the basis of race, age, gender, religion, educational standards or political beliefs, though highly undesirable, may not be unconstitutional.\(^\text{25}\)

Some strands of the reasoning in *Roach* will now be considered in more detail.

**B Constitutional Imperative of Representative Government**

One of the major points of distinction between members of the High Court in *Roach* was their understanding of the importance of notions of representative government implicit in the *Constitution*. This largely underpinned the joint reasons of Gummow, Kirby and Crennan JJ;\(^\text{26}\) in contrast Hayne and Heydon JJ denied the relevance of

\(^{19}\) Ibid [127].

\(^{20}\) Ibid [131].

\(^{21}\) Ibid [137].

\(^{22}\) Ibid [142].

\(^{23}\) Ibid [161].

\(^{24}\) Ibid [166] and [181] respectively.

\(^{25}\) Ibid [179].

\(^{26}\) Gleeson CJ did not base his judgment on notions of representative government.
representative government and perhaps imply their disagreement with the concept as one relevant at all to constitutional interpretation.

In a series of cases, the Mason High Court had implied a right to political free speech based on the requirement in the *Constitution* of representative government and/or representative democracy. Representative government may be defined as a process by which those who exercise legislative and executive power are directly chosen by the people. A leading advocate of representative government was Mill:

> Ideally the best form of government is that in which the sovereignty or supreme controlling power in the last resort is vested in the entire aggregate of the community; every citizen not only having a voice in the exercise of that ultimate sovereignty, but being at least occasionally called on to take an actual part in the government … the meaning of representative government is that the whole people, or some numerous portion of them, exercise through deputies periodically elected by themselves the ultimate controlling power, which in every constitution must reside somewhere. This ultimate power they must possess in all its completeness. They must be masters, whenever they please, of all the operations of government.

This implies the sovereignty of the people, and that this power is exercised on their behalf by their political representatives. Democracy literally means rule by, or government by, the people. The precise content of representative democracy may be elusive, and it is a description applicable to a range of governmental structures. Theorists have described different models of representative democracy, including:

(a) protective theory - democracy provides a way to ensure that rulers are held accountable to the people – such accountability is achieved by regular elections, a universal franchise, separation of powers, freedom of speech and the press, and freedom of association. The role of elections in this model is crucial in ensuring

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27 The proposition that the *Constitution* provides for a system of representative government is indisputable – refer for example to ss 7, 8, 24, 29 and 30; and *Attorney-General (Cth); ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1; McHugh J argued that the concept of representative government is narrower than representative democracy, and preferred the former: N Aroney, ‘Justice McHugh, Representative Government and the Elimination of Balancing’ (2006) 28 *Sydney Law Review* 505, 510. Other judges use the terms interchangeably.


29 Refer for example to *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 107, 137-8 (Mason CJ), 211 (Gaudron J), 229 (McHugh J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70 (Deane and Toohey JJ); *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 172-3. Mill describes representative government as involving when the ‘whole people, or some numerous portion of them, exercise through deputies periodically elected by themselves the ultimate controlling power’ (J S Mill, *Considerations on Representative Government* (1861) 68).


31 This remark appears, for example, in a paper written by M Gleeson, Chief Justice of the High Court of Australia, in ‘The Shape of Representative Democracy’ (2001) 27 *Monash University Law Review* 1; Stephen J in *Attorney-General (Cth); ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1, 56-7 said that the particular quality or character of the content of representative government was not fixed and precise, and was descriptive of a whole spectrum of political institutions. Refer also to *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 189-90 (Gleeson CJ), 206 (McHugh J), 237 (Gummow and Hayne JJ), 254 (Kirby J).
control by the people of the politicians, and it is of course necessary in order that the public make an informed choice, that they are exposed to political discussion;

(b) participatory theory – these theorists argue that democracy means the maximum participation of all citizens in the activity of political decision-making, as a means to develop individuals;

(c) elite theory – democracy is a means of choosing decision-makers and curbing their excesses; this model requires there be a competitive struggle for the people’s vote; democracy here is best expressed as ‘rule by politicians’.  

I accept that there are different formulations, and that reasonable minds might differ as to which of the above best characterises the Australian democracy.  

The words in s 24 ‘until the Parliament otherwise provides’ leave no other conclusion possible. However, I submit the concept of representative democracy contains a minimum content, breach of which triggers unconstitutionality.  

It is not considered to be an irony that the non-elected High Court might declare invalid laws passed by an elected Parliament on the basis that they breach minimum requirements of representative democracy, because the role of the High Court is to apply the express and implicit provisions of the Constitution. We accept the principle of judicial review in Australia. It is a mistake to equate democracy with the majoritarian rule.

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33 The author favours the first as the most accurate description of democracy in Australia.

34 This was observed by all members of the court in McGinty v Western Australia (1996) 186 CLR 140 and in Roach v Electoral Commissioner (2007) HCA 43. Mill himself recognised that there was room for a divergence of models that could be characterised as reflecting representative government: ‘while it is essential to representative government that practical supremacy in the state should reside in the representatives of the people, it is an open question what actual functions, what precise part in the machinery of government, shall be directly and personally discharged by the representative body. Great varieties in this respect are compatible with the essence of representative government, provided the functions are such as to secure to the representative body the control of everything in the last resort’; Mill above n 28, 70.

35 For example, Stephen J in Attorney-General (Cth); ex rel McKinlay v Commonwealth (1975) 135 CLR 1, 57 acknowledged the doctrine had finite limits, and that in some cases, there could be absent some quality which might be regarded as so essential to representative democracy that it was absent. Mason J expressed similar views (61). In Mulholland v Australian Electoral Commission (2004) 220 CLR 181, 189 Gleeson CJ concluded that ‘representative democracy and responsible government no doubt have an irreducible minimum content.


Of course, the doctrine was applied in the *Free Speech*[^38] cases, to determine the validity of legislative curtailments of the right to freely speak about political matters, and much of the discussion in the judgments understandably relates to that particular issue.

However, the right to freely speak about political matters is not a right in isolation. It is of course part of a broader right to participate in the political process, including the right to vote. The Court thought it was important to have the right to speak freely about political matters so that citizens could make an informed decision at election time. McHugh J explicitly made the link:

> Before (the electors) can cast an effective vote at election time, they must have access to the information, ideas and arguments which are necessary to make an informed judgment as to how they have been governed and as to what policies are in the interests of themselves, their communities and the nation.  

One of the early leading advocates of representative government, Mill, was also an advocate of (broadly)[^40] universal suffrage:

> It is a personal injustice to withhold from anyone … the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has the same interest as other people. If he is compelled to pay, if he may be compelled to fight, if he is required implicitly to obey, he should be legally entitled to be told what for, to have his consent asked and his opinion counted at its worth … There should be no pariahs in a full-grown and civilised nation, no persons disqualified .. Everyone is degraded … when other people, without consulting him, take upon themselves unlimited power to regulate his destiny.  

I agree with the adoption of such an implied right to political free speech, but believe that the doctrine of representative government is also relevant to the question of what guarantees Australian citizens have, or should have, to a right to cast a vote. Of course, the right to engage in political discussion is important. But it is of little practical effect

[^38]: See *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 107, 137-8 (Mason CJ), 211 (Gaudron J), 229 (McHugh J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70 (Deane and Toohey JJ); *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 172-3.

[^39]: *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 231. Michael Coper also made the link explicit in *Encounters with the Australian Constitution* (CCH Books, 1987). Referring to s 41, Coper notes that the section is not a full-blown guarantee of the right to vote, of universal suffrage or of equality in the value of votes, ‘as one might expect to find in a modern statement of voting rights in a representative democracy’ (335). Elsewhere, that author was in favour of the High Court making implications in the *Constitution*, at least where the implication made the political process more ‘democratic’ (accepting that this word can mean different things to different people): ‘The High Court and Free Speech: Visions of Democracy or Delusions of Grandeur?’ (1994) 16 *Sydney Law Review* 185, 193. Clearly universal suffrage or virtually universal suffrage would make the political process more ‘democratic’. Glenn Patmore also makes the link: ‘For an elector to make a good choice, it is necessary that he or she be informed by exposure to political discussion. In this sense, the operation of the protective model (of representative democracy) extends to political discussion’: ‘Making Sense of Representative Democracy and the Implied Freedom of Political Communication in the High Court of Australia’ (1998) 7 *Griffith Law Review* 97, 100.

[^40]: Mill was not in favour of granting the right to vote to those who were unable to read, write or complete simple arithmetic, and would also exclude those in receipt of government benefits.

[^41]: Mill, above n 28, 131. He was in favour of a broad franchise partly because of his concerns about politicians of low intelligence and that legislation would benefit only particular classes of the population (102).
if citizens can be capriciously denied the opportunity to exercise the right to vote by a
government. I submit that, consistently with its approach to the issue of political free
speech, the High Court must interpret the Constitution, as it did in Roach, in such a way
that citizens have some protection of their right to vote. Of course, Roach involved only
one aspect of the right to vote, namely prisoners’ voting rights. There is much more
work for the protection to do.

As the joint reasons in Roach did, some members of the High Court in Nationwide
News, acknowledged the significance of the doctrines in the Free Speech cases in
terms of broader political participation rights. Deane and Toohey JJ noted that the
general effect of the Constitution, since the adoption of full adult suffrage by all the
states, was that Commonwealth citizens not under a special disability were entitled to
share equally in voting powers. This strand of reasoning was picked up by Toohey J
in McGinty v Western Australia, who was prepared to deduce from the principle of
representative democracy a broad requirement of equality in the value of votes. Gaudron J agreed with the approach of Toohey J, adding that given the principle of
representative democracy as well as provisions such as ss 7 and 24 of the Constitution,
any attempt by the Commonwealth to deny the franchise to women or to members of a
racial minority, or to impose a property or educational qualification on voting
entitlement, would be offensive to the Constitution. Gummow J in the same case
agreed that a system which denied universal adult suffrage would fall short of the
minimum requirements of representative democracy. Brennan CJ conceded it was
arguable that denial of the right to vote along lines that historically existed in Australia
may not now be possible. McHugh J made similar comments in Langer v Commonwealth.

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42 Nationwide News Pty Ltd v Wills (1992) 177 CLR 1.
43 Ibid 72.
44 (1996) 186 CLR 140.
46 Ibid, 222 (in dissent). Gaudron J’s comments may be read together with those of Stephen and Mason JJ in Attorney-General (Cth); ex rel McKinlay v Commonwealth (1975) 135 CLR 1, 57. The reasoning of the majority differed in that while all members of the Court accepted representative government as being part of the Constitution, the majority did not think it was infringed by a voting system allowing for greater weight to be given to votes cast in some parts of the states than others. In other words, representative government did not require one vote one value or a system approximating such a model. The majority noted that the principle of representative government did not require any one system of voting. McGinty may be seen as a narrowing of the earlier cases, with the majority requiring that the implication must derive from and be limited by the text and structure of the Constitution (see especially 170 (Brennan CJ), 182 (Dawson J), 253 (McHugh J) and 285 (Gummow J), rather than an independent concept: G Williams, ‘Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform’ (1996) 20 Melbourne University Law Review 848, 853; cf Heydon J in Roach, who at para 179 claimed that a narrowing of the franchise based on race, age, gender, religion, educational standards or political opinions, though highly undesirable, may not be unconstitutional.
48 Ibid, 167; cf 183 (Dawson J).
49 (1996) 186 CLR 302, 342, and refer also to the comments of McTiernan and Jacobs JJ in Attorney-General (Cth); Ex rel McKinlay v Commonwealth (1975) 135 CLR 1, 36 (though these three judges would base the requirement on the wording of s 24 rather than any constitutional implication). Refer to G Williams, ‘Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform’ (1996) 20 Melbourne University Law Review 848, 861-2.
The American jurisprudence on voting rights also makes clear the fundamental importance of voting rights in a Constitution premised on representative government. Accepting that the express provisions of the United States Constitution operate to more directly protect the right of individuals to vote than the Australian version, I still assert that comments from eminent jurists in that country concerning representative government are apposite here. Chief Justice Warren for example in Reynolds v Sims, was adamant that:

The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government...undoubtedly the right of suffrage is a fundamental matter in a free and democratic society... as long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.

Alexis De Tocqueville argued that as suffrage was progressively broadened, the strength of the democracy increased. Some have said that guaranteed suffrage is mandatory for a system to be described as a democracy.

The suggestion thus is that, consistently with its views on representative democracy as an important constitutional principle, the High Court is right in Roach to recognise that adult citizens have a right to vote at federal elections, and that this right is entrenched by ss 7 and 24 of the Constitution. As Geoffrey Lindell has argued:

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50 Specifically, through the Equal Protection Clause (14th Amendment) - refer for example to Harper v Virginia Board of Elections (1966) 383 US 663 (striking down a poll tax); and Gray v Sanders (1963) 372 US 368 (gross disparity in voting weight attached to different parts of the State); cf validation of a literacy test for would-be voters in Lassiter v Northampton Election Board 360 US 45. Article 1, requiring that representatives be chosen by the people, is also relevant: Wesberry v Sanders (1964) 376 US 1.


52 Reynolds v Sims (1964) 377 US 533, 556.

53 Ibid 562-3.

54 Ibid 563.

55 *Democracy in America* (University of Chicago Press, 1835) Chapter IV, The Principle of the Sovereignty of the People of America: ‘there is no more invariable rule in the history of society; the further electoral rights are extended, the greater is the need for extending them; for after each concession the strength of the democracy increases, and its demands increase with its strength’. As Ronald Dworkin put it more recently, ‘We begin with a number of pre-interpretive assumptions about what good democracy is like in practice: that the right to vote is widely dispersed according to the formula one-person one-vote’: Dworkin, above n 37.


57 J Kirk, ‘Constitutional Implications from Representative Democracy’ (1995) 23 Federal Law Review 37, 60 reaches the same conclusion: ‘a persuasive argument can be made as to why universal adult suffrage is implicitly required by the Constitution as an essential condition of representative democracy’.

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representative democracy (either as an independent concept or as recognised by the words of s24 ...(may) require the right to vote to be extended to all legally capable persons so as to ensure that legislators are chosen by persons who are ‘truly representative’ of the community at any given time.\(^\text{58}\)

The existence of s 24 certainly supports the conception of Australia as being a representative democracy and allows the implication to be drawn from the text of the Constitution, as some of the more conservative judges in this area have required, rather than being ‘merely’ an independent doctrine.\(^\text{59}\) While the section does not guarantee a right to one-vote one-value or a system approximating it,\(^\text{60}\) it requires more than that there be a direct vote by the people and that there be a genuine choice.\(^\text{61}\)

The fact that the High Court by majority in McGinty rejected the suggestion of a guarantee of one-vote one-value at State elections is not considered inconsistent with such a finding that a guaranteed right to vote exists. Professor Gerken for example refers in her work to the right to vote as a ‘first generation voting right’. The American courts have proceeded from those to consider second generation voting rights such as voting equality.\(^\text{62}\) They may be considered thus as separate issues, the answer to one not necessarily affecting the answer to the other. This view also implies the fundamental nature of a right to vote.

C \hspace{1cm} The People as Sovereign

Clearly a related issue is the question of sovereignty,\(^\text{63}\) because if it is accepted that the Australian people are the sovereign entity who have ceded certain powers to the Parliament, an argument that those powers are for that reason limited, for example to

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\(^{58}\)‘Expansion or Contraction? Some Reflections About the Recent Judicial Developments on Representative Democracy’ (1998) 20 Adelaide Law Review 111, 124. George Williams would agree, given his view of a ‘universal adult franchise entrenched in the Constitution by ss 7 and 24’: Williams, above n 49, 862. Of course, what s 24 might require was specifically considered in the McKinlay and Free Speech cases. A majority in McGinty made explicit the link between representative government and the requirements of s 24.

\(^{59}\)In McGinty v Western Australia (1996) 186 CLR 140, some judges maintained that implications could only be drawn from the express terms of the Constitution: see for example 170 (Brennan CJ), 182 (Dawson J); to like effect were comments of McHugh J in Theophanous v Herald and Weekly Times Ltd (1994) 182 CLR 104, 199.

\(^{60}\)Attorney General (Cth); ex rel McKinlay v The Commonwealth (1975) 135 CLR 1 (Barwick CJ, McTiernan Gibbs Stephen Mason Jacobs JJ, Murphy J dissenting); McGinty v Western Australia (1996) 186 CLR 140 (Brennan CJ Dawson McHugh and Gummow JJ, Toohey and Gaudron JJ dissenting).

\(^{61}\)This was the limited role for s 24 conceived by Dawson J in McGinty v Western Australia (1996) 186 CLR 140, 184; see also McKinlay (1975) 135 CLR 1, 21 (Barwick CJ) and 44 (Gibbs J).


\(^{63}\)As George Winterton notes, this concept can mean either or both (a) the source from which the Constitution derives its authority; and (b) the location of the power to amend the Constitution: ‘Popular Sovereignty and Constitutional Continuity’ (1998) 26 Federal Law Review 1, 4. Refer also to H Wright, ‘Sovereignty of the People – The New Constitutional Grundnorm?’ (1998) 26 Federal Law Review 165. The sovereignty of the American people has long been recognised – refer for example to Tocqueville, above n 55. Albert Dicey would concede only that the people had political sovereignty; holding that legal sovereignty rested with Parliament: An Introduction to the Study of the Law of the Constitution (MacMillan and Co, 1885) 70.
laws that do not inhibit this sovereignty, can be made. The very democratic circumstances in which Australia’s Constitution was drafted, involving the consent of the Australian people, have been noted.

One architect of our Constitution recognised the sovereignty of the people (even in 1901) in these terms:

(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 and possessors of sovereign power, who maintain the Constitution and have the power to alter it … Every community of men is governed by present possessors of sovereignty and not the commands of men who have ceased to exist.

There is a reasonable amount of existing literature claiming that the Australian people acquired sovereignty at some time prior to the Australia Act 1986 (Cth), while others believe that the Act itself transferred sovereignty to the people. The doctrine of popular sovereignty also derives support from a Lockean view that the basis of political authority is the consent of the governed, and the idea of the social compact:

No-one can be … subjected to the political power of another without his own consent. The only way whereby anyone divests himself of his Natural Liberty, and puts on the bonds of Civil Society is by agreeing with other men to joyn (sic) and unite into a community.

I submit that recognition of the sovereignty of the Australian people is consistent with a finding that voting rights are constitutionally guaranteed, and ss 7 and 24 of the Constitution should not be read in a narrow way. It is hard to reconcile sovereignty of the people with the lack of a continuing constitutional right for the people to participate in the democratic process.

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64 Or perhaps, to laws that do not infringe fundamental human rights, though this is an issue outside the scope of this paper.
65 Note Gummow J’s reference in McGinty v Western Australia (1996) 186 CLR 140 to the work of V J Bryce in Studies in History and Jurisprudence (Oxford University Press, vol 1, 1901) 356, observing the Australian Constitution was the ‘highwater mark’ of popular government. John Hirst also noted the ‘quintessentially republican movement in our history’ whereby the Australian people voted on their new Constitution: ‘History and the Republic’ (1996) 40(9) Quadrant 38, 42.
68 For example, Mason CJ in Nationwide News Pty Ltd v Wills (1992) 177 CLR 1, 72; and McHugh J in McGinty v Western Australia (1996) 186 CLR 140, 237, 199 (Toohey J) and 274 (Gummow J) both accepted that sovereignty resided with the people. Refer also to the joint reasons of Deane and Toohey JJ in Nationwide News v Wills (1992) 177 CLR 1, 70 accepting the sovereignty of the Australian people.
The Constitution is Not Frozen

An interesting aspect of the reasoning in Roach was the starting point of all judges that, at the time of the federation, the Constitution did not require universal suffrage. How then did we get to this point? The majority claimed that universal suffrage had been introduced by legislation,70 but that at some point universal suffrage came to be required by ss 7 and 24 of the Constitution.71 Some might see a conceptual difficulty involved in using statutory developments to change (or justify changing) the meaning of words in the Constitution. I myself might have preferred to justify the requirement for universal suffrage on s 41 of the Constitution, together with the other provisions. I will refer to s 41 later in the article. However, perhaps the main point is the argument whether words in the Constitution can and should change in meaning over the years.

As the quote of Clark above testifies, at least some of the framers of the Constitution intended that it would be an organic document that would move with the society it purported to regulate. The words should not be kept in a strait jacket of what may have been intended or perceived more than one century ago, lest the document lose its relevance to contemporary society, assuming it were even possible to gauge a consensus view among the founding fathers as to what particular provisions may have been designed to achieve. While some authors go back to the ordinary rules of statutory interpretation in preferring literalism and originalism,72 it is submitted this fails to take account of the fact that the Constitution is not an ordinary Act of Parliament.

The High Court downplayed the importance of the intention of the founding fathers in interpreting the Constitution in its recent important decision in New South Wales v Commonwealth:

To pursue the identification of what is said to be the framers’ intention, much more often than not, is to pursue a mirage. It is a mirage because the inquiry assumes it is both possible and useful to attempt to work out a single collective view about what now is a disputed question of power … even if a statement about the founding fathers’ intention can find some roots in what was said in the course of the Convention Debates, care should be taken lest … the assertion assumes the answer to the very question being investigated: is the law in issue within federal legislative power? For the answer to that question is not to be found in attempting to attribute some collective subjective intention to all or any of those who participated in the Convention Debates.73

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71 Again, permitting some exceptions.
73 (2007) 231 ALR 1, 40 (Gleeson CJ Gummow Hayne Heydon and Crennan JJ). The debate over whether the Constitution should be given contemporary meaning or interpreted consistently with the intentions of the Founding Fathers (if this can be gleaned) occurred recently in Grain Pool of Western Australia v Commonwealth (2000) 202 CLR 479. This issue has been the subject of great academic debate – some references include M Bagaric, ‘Originalism – Why Some Things Should Never Change – Or At Least Not Too Quickly’ (2000) 19 University of Tasmania Law Review 173; J Goldsworthy, ‘Originalism in Constitutional Interpretation’ (1997) 25 Federal Law Review 1;
In *Theophanous* itself, Deane J emphatically rejected the suggestion that the dead hands of those who framed the *Constitution* could reach from their graves to negate or constrict the natural implications of the *Constitution* to deprive what was intended to be a living instrument of its adaptability and ability to serve future generations. Speaking of the voting provisions of s 24, McTiernan and Jacobs JJ in *McKinlay* claim that the words of the section ‘fall to be applied to different circumstances at different times’. Glieeson CJ expressly agreed with these comments in *Roach*. Toohey J in *McGinty* acknowledged that the requirements of representative democracy had changed in Australia over time, and Gaudron J in the same case agreed that s 24 had to be interpreted ‘in the light of developments in democratic standards and not by reference to circumstances as they existed at federation’. Gummow J to some extent agreed and Brennan CJ conceded it was at least arguable. Gummow and Hayne JJ in *Mulholland v Australian Electoral Commission* agreed that representative government was not a static institution. Glieeson CJ in *Roach* concluded 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.

I do not dwell here on the Convention Debates surrounding the enactment of ss 7, 24 and 41 of the *Constitution*. Others have considered this issue in some detail already. Their continuing relevance is, as has been suggested, a matter of conjecture.
Right to Vote as an Important Right

The use of international materials in the decision in Roach was interesting. The majority, though conceding the different statutory context in which the comments were made, considered Sauve v Canada (Chief Electoral Officer),83 and Hirst v United Kingdom (No 2).84 In the former case, provisions similar to those at issue in Roach were struck down as inconsistent with the Canadian Charter of Rights and Freedoms, s 3 of which guarantees a right to vote, subject to reasonable limits. The Supreme Court insisted on a rational connection between a constitutionally valid objective and the limitation in question, and minimum impairment of the guaranteed right. The majority in Roach adopted a similar approach, particularly as regards the former requirement.

In Hirst, the European Court of Human Rights held that an automatic blanket ban imposed on all convicted prisoners violated art 3 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms 1950. The United Kingdom had pursued the legitimate aim of enhancing civic responsibility and respect for the rule of law by depriving those who had breached the basic rules of society the right to vote; however the provision was arbitrary in applying to all prisoners and lacked proportionality, requiring rational connection between means and ends, and use of means no more than necessary to accomplish the objective. Strong parallels can of course be seen in the approach of the Canadian Court and the European Court of Human Rights.

Of course, the relevance of international law in interpretation of the Commonwealth Constitution is a matter of considerable debate.85 Hayne and Heydon JJ in Roach completely disclaimed the relevance of international materials in this context.86 This case may be a landmark in demonstrating a willingness of more justices of the High Court to consider international developments in constitutional interpretation.

In international circles, the right to vote is seen as a fundamental right. Article 25 of the International Covenant on Civil and Political Rights, to which Australia is a signatory, states that every citizen should have the right to vote, and that elections should be by way of universal and equal suffrage. In interpreting the European Convention on Human Rights, the European Court of Human Rights noted that the right to vote was a right not a privilege. It specifically held that any departure from the principle of universal suffrage risked undermining the democratic validity of the legislature elected

82 Brooks, above n 4, 210-12; and Twomey, above n 4, 127-30.
84 (2006) 42 EHR 41.
and its laws. The Canadian Charter of Rights and Freedoms includes a right to vote, as does the New Zealand Bill of Rights. Four different amendments to the United States Bill of Rights all provide for the protection of voting rights.

Of course, it is not submitted that Australian law should always mirror that of other countries; however, the fact that many other democratic countries provide citizens with a right to vote is said to be a relevant factor in assessing whether such a right exists, or should exist, for Australian citizens. The author applauds the reference by the majority in Roach to international materials in settling the constitutional question of voting rights.

D Right to Vote and Diceyan Theory

One must recall the reason why the founding fathers did not think it necessary to include an express Bill of Rights in the Australian Constitution. This was because of the faith they placed in the political process as an effective means by which rights are protected. Dicey claimed that the ‘will of the electors … by regular and constitutional means (shall) always in the end assert itself as the predominant influence in the country’. As Professor Harrison Moore put it ‘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’. More recently, Tom Campbell expressed the same sentiment, ‘the articulation and defence of human rights ought to be a central task of any democratic process which regards the equal right of all to participate in political decision-making as fundamental’, and refer to Chief Justice Warren of the United Supreme Court to the effect that, ‘especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic

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87 Hirst v United Kingdom (No2)(74025/01)[2004] ECHR 121; refer also to art 39 of the Charter of Fundamental Rights of the European Union.
88 Section 3 – a recent example of its interpretation is Sauve v Canada (Chief Electoral Officer) [2002] 3 SCR 519.
89 (1990) s 12(a), though subject to amendment through ordinary procedures.
90 These are Amendments Fifteen (no denial of franchise based on race), Nineteen (no denial of franchise based on gender), Twenty-Four (no denial based on failure to pay tax) and Twenty-Six (right of a person eighteen and above to vote).
91 A Vere Dicey, An Introduction to the Study of the Law of the Constitution (MacMillan, 1885) 71; Dicey referred to Parliament’s sovereignty being ‘limited on every side by the possibility of popular resistance’ (76), and that the ‘permanent wishes of the representative portion of Parliament can hardly in the long run differ from the wishes of the English people’ (81).
92 The Constitution of the Commonwealth of Australia (Charles F Maxwell, 1st ed, 1910) 329; and ‘fervid declarations of individual right, and the protection of liberty and property against the government, are conspicuously absent from the Constitution; the individual is deemed sufficiently protected by that share in the government which the constitution ensures him’ (Legal Books, 2nd edition, 1997) 78 (emphasis added); refer also to J Allan, ‘Thin Beats Fat Yet Again − Conceptions of Democracy’ (2006) 25 Law and Philosophy 533; and ‘An Unashamed Majoritarian’ (2004) 27 Dalhousie Law Journal 537.
civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized'.

Of course, exercise of political power requires the ability and the right to vote, and protection of rights by the political process can only work if, and to the extent that, the political process is properly said to reflect the will of the people. It cannot be that if voting rights can be arbitrarily denied to citizens. Even though some positivist thinkers might decry what they see as the judicial activism in the Free Speech cases, the irony is that what the cases might suggest about a guaranteed right to vote is something that positivists must, on their view of Parliamentary supremacy, welcome.

1 Implications of Roach - Representative Government at the State Level?

If s 24 confers a right to vote at the federal level for voters enrolled at the state level, what protections, if any, exist in relation to voting at the state level? Some equivalent provisions to s 24 in the Commonwealth Constitution appear in state Constitutions, though these are not entrenched.

There is some judicial support for the suggestion that an implication of representative government (including a right to vote) at the federal level should also apply at the state level. In Nationwide News v Wills, Deane and Toohey JJ claimed that there was an assumption of representative government within the states. Similar comments appear in Australian Capital Television, Theophanous, and Stephens. This comment reflected the notion that it was unrealistic to see the three levels of government within Australia as isolated from one another, and there needed to be consistency in approach. A similar argument (albeit in a different context) had appealed to some members of the High Court in Kable, to extend the principle of separation of powers clearly

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94 Reynolds v Sims (1964) 377 US 533, 562. Refer also to the Court’s statement in Yick Wo v Hopkins 118 US 356, 370 that the political franchise of voting was a fundamental political right, because it was preservative of all rights.

95 The authors of the Report of the Advisory Committee to the Constitutional Commission (1988) recommended that the right to vote in s 41 be strengthened and believed the section had continuing application (85).

96 See for example s 73(2)(c) of the Constitution Act 1889 (WA) ‘chosen directly by the people’; s 10 Constitution Act 2001 (Qld) ‘directly elected members by inhabitants of the State’; s 34 Constitution Act 1975 (Vic) ‘Assembly is to consist of members representative of and elected by electors of districts’; s 27 Constitution Act 1934 (SA) ‘elected by inhabitants of State legally qualified to vote’; and s 28 of the Tasmanian Constitution Act 1934 provides that everyone living in the State aged 18 and over and an Australian citizen is entitled to be enrolled as an elector and qualified to vote. The reference in the New South Wales Constitution 1902 is more oblique, the most relevant provision relating to compulsory voting (s 11B). It is true that these provisions are not doubly entrenched. These provisions might alternatively be taken to suggest that at federation, states were responsible governments, in the sense that they had elections, and their democratic nature was enshrined by the act of uniting in a Constitution, which included democratic federal elements.

97 Nationwide News v Wills (1992) 177 CLR 1, 75.

98 (1992) 177 CLR 106, 142 (Mason CJ), 168-9 (Deane and Toohey JJ), and 217 (Gaudron J).


100 (1994) 182 CLR 211, 232 (Mason CJ, Toohey and Gaudron JJ) and 257 (Deane), cf 235 (Brennan J).

101 Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51, where Gaudron J denied that the Constitution provided for different grades or qualities of justice, depending on whether judicial power was exercised by the State courts or the Federal courts (102). McHugh J referred to Australia’s integrated court system (113).
suggested by the Commonwealth Constitution to state courts, even though states’ Constitutions clearly did not expressly contemplate such a doctrine. Some judges in Theophanous saw it as being required by s 106 of the Commonwealth Constitution, providing for the continuance of the states’ Constitutions from the date of federation, subject to the Commonwealth Constitution.\footnote{The final words were read to mean that state legislative powers were restricted by the freedom of political communication in the Australian Constitution by Brennan CJ (155-6) and Deane J (164-7); cf McHugh J (201-2).}

It is true that Toohey J in McGinty rejects the above suggestions, but his reasoning must be borne in mind. His Honour claimed that:

> any guarantee of voting equality in Commonwealth elections will not be affected by State electoral laws permitting inequality in State elections. In this respect there is no necessary inconsistency between voting inequality at the State level and voting equality at the Commonwealth level. The conduct of State elections will not undermine Commonwealth elections.\footnote{McGinty v Western Australia (1996) 186 CLR 140, 210.}

While this may be correct in the context of the facts in McGinty, it is submitted not to be an answer to the question of inferring a guaranteed franchise at the State level. Of the judges in McGinty, Gaudron J supported this position, holding that, having regard to the system of representative democracy inherent in the Commonwealth Constitution, s 106 required states, as constituent bodies of the Constitution, be and remain essentially democratic.\footnote{Ibid 220; in that context it was not relevant because Her Honour found that the doctrine did not require practical equality in voting; however she might have applied it more directly if a state law attempted to deny voting rights to particular citizens.} The joint reasons in Roach might be read to support this view:

> In the federal system established and maintained by the Constitution, the exercise of the franchise is the means by which those living under that system of governing participate in the selection of both legislative chambers, as one of the people of the relevant State (emphasis added) and as one of the people of the Commonwealth. In this way, the existence and exercise of the franchise reflects notions of citizenship and membership of the Australian federal body politic.\footnote{Roach v Electoral Commissioner (2007) HCA 43 [83]; others might see the italicised words as stating only that the federal Senate constituency is the whole of the Senate (unless otherwise distributed).}

I have already conceded that what is taken to comprise representative democracy can and does differ, such that there is no universal set of requirements. I must concede here too that the federal Constitution provides for some inequality of voting power, in particular regarding the composition of the Senate. The point has been made that the requirements of representative democracy need to be tempered by the reality of Australia’s federal system. This might mean that some difference in voting arrangements in the states is allowed – for example that one state has abolished its Upper House; another state operates a proportional voting system. One state has abolished compulsory preferential voting. These differences may be accommodated in a federal system.\footnote{N Aroney, ‘Representative Democracy Eclipsed? The Langer, Muldowney and McGinty Decisions’ (1996) 19 University of Queensland Law Journal 75, 98.} However, I maintain that there is a minimum content of the
doctrine of representative government, such that a state law interfering with universal suffrage at the state level should be struck down as contrary to the minimum requirements of representative government that our system of government requires. This requirement exists at both the federal and state level. It seems ridiculous that, having found that universal suffrage is guaranteed by the federal Constitution, the Court would not also find it necessary at the state level. The same rationale for universal suffrage at the federal level applies to universal suffrage at the state level.

On this basis, I respectfully take particular issue with the comments by McHugh J in Theophanous that:

If a State wishes to have a system of one party government, to abolish one or both of its legislative chambers or to deny significant sections of its population the right to vote, nothing in the Constitution implies that it cannot do it. There is not a word in the Constitution that remotely suggests that a State must have a representative or democratic form of government or that any part of the population of a State has the right to vote in State elections. The Constitution contains no guarantee of a right to vote in State elections. 107

I cannot agree that if universal suffrage is now required at least federally, as a majority of the judges have now found, that the same right does not and should not apply at the state level. What high constitutional purpose is served by giving people the right to vote in some elections in Australia but not others? Surely Australia (including its states) is either a representative democracy or not? I find it very difficult to accept that a member of the High Court, charged with upholding the Constitution and fundamental constitutional principles in a social democracy such as Australia, would go along with a state legislating for a system of 'one party government', 108 or a state government that was not democratically elected. In my view the Australian public is entitled to expect that its judiciary would stand up against such draconian laws, most especially when even the simplistic (in the author's view) Diceyan principle of if-you-don't-like-it, vote-the-government-out would not work, because the people so disenfranchised would not even have the power to cast their vote.

If support were required for the proposition that the right to vote at state level and the right to vote at federal level should not be separated, one could refer to s 41 of the Constitution. The section provides that:

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

107 Theophanous v Herald and Weekly Times Ltd (1994) 182 CLR 104, 201. The author agrees only with one part of the statement – that a state could abolish at least one of its legislative chambers. This of course has happened and is not considered necessarily incompatible with representative government, particularly where the remaining chamber is democratically elected.

108 The meaning of McHugh J’s comment is not entirely clear but it might be taken to suggest that other political parties are proscribed by a state law.
The High Court did not in Roach rely on s 41 in reaching the conclusion it did,\(^{109}\) citing \textit{R v Pearson ex parte Sipka},\(^{110}\) for the proposition that the section was now ‘spent’. Certainly, that decision adopted a very narrow view of the section, rendering it obsolete.\(^{111}\) However, it may be used to evidence an intention by the founding fathers that the same rules as to voting entitlement\(^{112}\) should apply at both levels. The High Court found in \textit{Roach} that representative government required universal suffrage at the federal level. The same should apply at the state level.

### III Conclusion

I agree with the guarantee of universal suffrage found by the High Court in \textit{Roach}. This view is supportive by reference to the fundamental principles of representative government enshrined in the \textit{Constitution}. It reflects a dynamic view of the provisions of the \textit{Constitution}. It places Australia in a similar position to that of other liberal democracies. I advocate that the principle of universal suffrage is also applicable at the state level.

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\(^{109}\) The joint reasons fleetingly mention s 41, referring to it as a ‘delphic’ provision (para 70). The author believes that a broader view of s 41 should be taken, which would lead to the same result as that achieved in \textit{Roach}. A broad reading of s 41 would be consistent with the sentiment of the majority in \textit{Roach}.\(^{110}\)

\(^{110}\) (1983) 152 CLR 254.

\(^{111}\) However, the very narrow view taken in \textit{R v Pearson} was at odds with dicta comments by members of the High Court of Australia in \textit{King v Jones} (1972) 128 CLR 221, where Barwick CJ Walsh and Stephen JJ assumed without deciding that the right in s 41 was continuing: 229, 251, 267. Menzies J stated that s 41 was a permanent constitutional provision, applicable to a person post 1901 (246). Gibbs J considered the view that s 41 was confined to those on electoral rolls as at 1902 was ‘far from clearly correct’ (259). McTiernan J did not consider the issue. Professor Harrison Moore also espoused the view that the right in s 41 was not limited to those on the state electoral roll as at 1902: \textit{Commonwealth of Australia} (1910) 108-9. Murphy J in lone dissent in \textit{Pearson} maintained that s 41 had continuing effect (268). He compared the Court’s narrow view here with its narrow views as to scope of the s 80 right, and thought the comments by Dixon and Evatt JJ in \textit{R v Federal Court of Bankruptcy; Ex Parte Lowenstein} (1938) 59 CLR 556 to the effect that the \textit{Constitution} should not be mocked by an unduly narrow interpretation being given to rights provisions, were directly applicable in this context.

\(^{112}\) Though not necessarily voting systems or procedures, of course.