

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.

⁴ A comprehensive discussion of the right to vote prior to and subsequent to federation appears in A Brooks, 'A Paragon of Democratic Virtues? The Development of the Commonwealth Franchise' (1993) 12 *University of Tasmania Law Review* 208, 208-30; and A Twomey, 'The Federal Constitutional Right to Vote in Australia' (2000) 28 *Federal Law Review* 125, 144-5.

⁵ Refer for example to Barwick CJ in *King v Jones* (1972) 128 CLR 221, 230. John Quick and Robert Garran make the same point in *Commentaries on the Constitution* 1901 (Legal Books 1995) 483.

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,⁶ 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’,⁷ 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 suffrage⁸ ... 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.⁹

Gleeson CJ noted that not all people in prison were serving sentences of imprisonment – some 22 per cent were on remand.¹⁰ 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.¹¹ 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.¹² 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,¹³ he found the amending provisions here were

⁶ *Roach v Electoral Commissioner* [2007] HCA 43 (Gleeson CJ Gummow Kirby and Crennan JJ, Hayne and Heydon JJ dissenting).

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].

¹² Respectively *Sauve v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, interpreting s 3 of the *Charter of Rights and Freedoms* (Canada); *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41 (interpreting art 3 of the Protocol 1 to the *Convention for the Protection of Human Rights and Fundamental Freedoms*).

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.¹⁴

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.¹⁵ 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’.¹⁶

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,¹⁷ 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.¹⁸ They went beyond what was reasonably appropriate and adapted to the maintenance of representative government.

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.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.²⁰ As the joint reasons had noted, Hayne J observed that prior to federation there was no consistency of voting rights among the colonies.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.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.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.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.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;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.²⁷ 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.²⁸

This implies the sovereignty of the people, and that this power is exercised on their behalf by their political representatives.²⁹ Democracy literally means rule by, or government by, the people.³⁰ The precise content of representative democracy may be elusive, and it is a description applicable to a range of governmental structures.³¹ 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

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.

²⁸ J S Mill, *Considerations on Representative Government* 1861 (J M Dent, 1972) 42.

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).

³⁰ D Held, *Models of Democracy* (Policy and Stanford University Press, 1987) 2; G Maddox, *Australian Democracy in Theory and Practice* (Longman Cheshire, 2nd ed, 1991) 64.

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’.³²

I accept that there are different formulations, and that reasonable minds might differ as to which of the above best characterises the Australian democracy.³³ I accept that the *Constitution* did not provide detailed content on the particular kind of representative democracy Australia was to be, leaving it in large part up to future Parliaments.³⁴ 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.³⁵ 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,³⁶ 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.³⁷

³² For further discussion on these different models, refer to G Patmore, ‘Making Sense of Representative Democracy and the Implied Freedom of Political Communication in the High Court of Australia’ (1998) 7 *Griffith Law Review* 97; Held, above n 30; F Rosen, *Jeremy Bentham and Representative Democracy* (Clarendon Press, 1983); J Hamburger, ‘James Mill on Universal Suffrage and the Middle Class’ (1962) 24 *Journal of Politics* 167.

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.

³⁶ Cf N Aroney, ‘A Seductive Plausibility: Freedom of Speech in the Constitution’ (1995) 18(2) *University of Queensland Law Journal* 249, 268-9 noting the supposed irony in the use by an unelected judiciary of the principle of representative government as the basis of an implication of a guarantee of freedom of communication, meaning a limitation of the powers of a democratically elected Parliament.

³⁷ R Dworkin, ‘Equality, Democracy and Constitution: We the People in Court’ (1990) 28 *Alberta Law Review* 324, 337.

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.³⁹

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.⁴¹

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*,⁴² 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.⁴³ This strand of reasoning was picked up by Toohey J in *McGinty v Western Australia*,⁴⁴ who was prepared to deduce from the principle of representative democracy a broad requirement of equality in the value of votes.⁴⁵ 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*.⁴⁶ 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.⁴⁷ 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.⁴⁸ McHugh J made similar comments in *Langer v Commonwealth*.⁴⁹

⁴² *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

⁴³ *Ibid* 72.

⁴⁴ (1996) 186 CLR 140.

⁴⁵ *Ibid*, 203 (in dissent).

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.

⁴⁷ *McGinty v Western Australia* (1996) 186 CLR 140, 286-7.

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,⁵⁰ 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*,⁵¹ 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 government⁵²...undoubtedly the right of suffrage is a fundamental matter in a free and democratic society⁵³... 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.⁵⁴

Alexis De Tocqueville argued that as suffrage was progressively broadened, the strength of the democracy increased.⁵⁵ Some have said that guaranteed suffrage is mandatory for a system to be described as a democracy.⁵⁶

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*.⁵⁷ As Geoffrey Lindell has argued:

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.

⁵¹ (1964) 377 US 533, recently re-affirmed in *Bush v Gore* (2000) 531 US 98.

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.

⁵⁶ D Butler, H Penniman and A Ranney, *A Democracy at the Polls: A Comparative Study of Competitive National Elections* (American Enterprise Institute for Public Policy Research, 1981); Andre Blais, Louis Massicotte and Antoine Yoshinaka, 'universal suffrage is usually considered to be one of the most basic criteria for an election to be deemed democratic': 'Deciding Who Has the Right to Vote: A Comparative Analysis of Election Laws' (2001) 20 *Electoral Studies* 41; R Dahl, *Democracy and its Critics* (Yale University Press, 1989) 233.

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'.

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.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.⁵⁹ While the section does not guarantee a right to one-vote one-value or a system approximating it,⁶⁰ it requires more than that there be a direct vote by the people and that there be a genuine choice.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.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 *The People as Sovereign*

Clearly a related issue is the question of sovereignty,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

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).

⁶² H Gerken, ‘Understanding the Right to an Undiluted Vote’ (2001) 114 *Harvard Law Review* 1663, 1671.

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 resided 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,⁶⁴ can be made. The very democratic circumstances in which Australia's *Constitution* was drafted, involving the consent of the Australian people, have been noted.⁶⁵

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.⁶⁶

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),⁶⁷ while others believe that the Act itself transferred sovereignty to the people.⁶⁸ 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.⁶⁹

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.

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.

⁶⁶ I Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell, 1901) 21-2.

⁶⁷ G Lindell, 'Why is Australia's Constitution Binding? – The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29; Leslie Zines, 'Commentary' in Herbert Vere Evatt (ed), *The Royal Prerogative* (1987) C1, C9-10; G Winterton, *Monarchy to Republic: Australian Republican Government* (Oxford University Press, 1986) 24; *Kirmani v Captain Cook Cruises Pty Ltd (No1)* (1985) 159 CLR 351, 383 (Murphy J) and 442 (Deane J). Gummow J in *McGinty v Western Australia* (1996) 186 CLR 140 suggested that sovereignty resided in the people since 1901, given their power to amend the *Constitution* at referendum (274-5).

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.

⁶⁹ J Locke, *Two Treatises of Government 1688* (Cambridge University Press, 1988) ChVIII, para 95.

1 *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

⁷⁰ *Roach v Electoral Commissioner* (2007) HCA 43, [6] (Gleeson CJ) and [29] (Gummow Kirby and Crennan JJ).

⁷¹ Again, permitting some exceptions.

⁷² G Craven, 'Original Intent and the Australian Constitution – Coming Soon to a Court Near You?' (1990) 1 *Public Law Review* 166, 176; G Craven, 'Cracks in the Façade of Literalism – Is There an Engineer in the House?' (1993) 18 *Melbourne University Law Review* 540; Greg Craven, 'The Crisis of Constitutional Literalism in Australia' in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (1992) 1.

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.⁷⁴ 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’.⁷⁵ Gleeson CJ expressly agreed with these comments in *Roach*.⁷⁶ Toohey J in *McGinty* acknowledged that the requirements of representative democracy had changed in Australia over time,⁷⁷ 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’.⁷⁸ Gummow J to some extent agreed and Brennan CJ conceded it was at least arguable.⁷⁹ Gummow and Hayne JJ in *Mulholland v Australian Electoral Commission* agreed that representative government was not a static institution.⁸⁰ Gleeson 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.⁸¹

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.⁸² Their continuing relevance is, as has been suggested, a matter of conjecture.

Craven, ‘Original Intent and the Australian Constitution – Coming Soon to a Court Near You’, above n 72; Sir D Dawson, ‘Intention and the Constitution – Whose Intent?’ (1990) 6 *Australian Bar Review* 93; Sir O Dixon, ‘The Common Law as an Ultimate Constitutional Foundation’ (1957) 31 *Australian Law Journal* 240; S Donaghue, ‘The Clamour of Silent Constitutional Principles’ (1996) 24 *Federal Law Review* 133; G Hill, ‘Originalist v Progressivist Interpretations of the Constitution’ (2000) 11 *Public Law Review* 159; Justice Kirby, ‘Constitutional Interpretation and Original Intent: A Form of Ancestor Worship’ (2000) 24 *Melbourne University Law Review* 1; C Saunders, ‘Interpreting the Constitution’ (2004) 15 *Public Law Review* 289; M Stokes, ‘Interpretation and Change in Constitutional Law: A Reply to Jeffrey Goldsworthy’ (1996) 21 *Australian Journal of Legal Philosophy* 1.

⁷⁴ *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 171.

⁷⁵ (1975) 135 CLR 1, 36.

⁷⁶ *Ibid* [7].

⁷⁷ *McGinty v Western Australia* (1996) 186 CLR 140, 200: ‘because democracy is a dynamic phenomenon, its significance within the Constitution cannot be frozen by reference to the year 1900 or thereabouts. The *Constitution* must be construed as a living force and the Court must take account of political, social and economic developments since that time’.

⁷⁸ *Ibid* 221. Refer also to celebrated comments of O’Connor J in *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* (1908) 6 CLR 309 that ‘it must always be remembered that we are interpreting a *Constitution* broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve’ (367-8); to comments by Sir Owen Dixon that ‘it is a *Constitution* we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances (*Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 81); and by Chief Justice John Marshall that ‘we must never forget that it is a Constitution we are expounding, ... intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs’: *McCullough v Maryland* (1819) 4 Wheat 316, 407, 415.

⁷⁹ *McGinty v Western Australia* (1996) 186 CLR 140, 286-7 (Gummow J) and 166-7 (Brennan CJ). As indicated, McHugh J appeared to accept this proposition in *Langer* (1996) 186 CLR 302, 342.

⁸⁰ (2004) 220 CLR 181, 237.

⁸¹ *Roach v Electoral Commissioner* (2007) HCA 43 [7]; on the connotation/denotation distinction, see further *Sue v Hill* (1999) 199 CLR 462.

2 *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.

⁸³ [2002] 3 SCR 519.

⁸⁴ (2006) 42 EHRR 41.

⁸⁵ Refer for example to *Al-Kateb v Godwin* (2004) 219 CLR 562, especially McHugh and Kirby JJ. Refer also to David Jackson, 'Internationalisation of Rights and the Constitution' in Geoff Lindell, Cheryl Saunders and Robert French (eds), *Reflections on the Australian Constitution* (2003); K Walker, 'International Law as a Tool of Constitutional Law Interpretation' (2002) 28 *Monash University Law Review* 85; D Hovell and G Williams, 'A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa' (2005) 29 *Melbourne University Law Review* 95; and H Charlesworth, 'Dangerous Liaisons: Globalisation and Australian Public Law' (1998) 20 *Adelaide Law Review* 57.

⁸⁶ *Roach v Electoral Commissioner* (2007) HCA 43 [166] and [181] respectively.

and its laws.⁸⁷ The Canadian *Charter of Rights and Freedoms* includes a right to vote,⁸⁸ as does the New Zealand *Bill of Rights*.⁸⁹ Four different amendments to the United States *Bill of Rights* all provide for the protection of voting rights.⁹⁰

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’.⁹¹ 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’.⁹² 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’,⁹³ 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

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.

⁹³ ‘Democracy, Human Rights and Positive Law’ (1994) 16 *Sydney Law Review* 195, 199 (in the context of criticising the High Court free speech cases as unacceptable judicial activism). Refer also to J Waldron, ‘A Rights-Based Critique of Constitutional Rights’ (1993) 13 *Oxford Journal of Legal Studies* 18.

civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized'.⁹⁴

Of course, exercise of political power requires the ability and the right to vote,⁹⁵ 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*,⁹⁶ 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.⁹⁷ Similar comments appear in *Australian Capital Television*,⁹⁸ *Theophanous*,⁹⁹ and *Stephens*.¹⁰⁰ 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*,¹⁰¹ to extend the principle of separation of powers clearly

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).

⁹⁹ (1994) 182 CLR 104, 122 (Mason CJ, Toohey and Gaudron JJ).

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 continuation of the states' *Constitutions* from the date of federation, subject to the Commonwealth *Constitution*.¹⁰²

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.¹⁰³

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.¹⁰⁴ 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.¹⁰⁵

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.¹⁰⁶ However, I maintain that there is a minimum content of the

¹⁰² 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).

¹⁰³ *McGinty v Western Australia* (1996) 186 CLR 140, 210.

¹⁰⁴ *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.

¹⁰⁵ *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).

¹⁰⁶ N Aroney, 'Representative Democracy Eclipsed? The *Langer*, *Muldowney* and *McGinty* Decisions' (1996) 19 *University of Queensland Law Journal* 75, 98.

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 *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 entitlement¹¹² should apply at both levels. The High Court found in *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 *Roach*. This view is supportable by reference to the fundamental principles of representative government enshrined in the *Constitution*. It reflects a dynamic view of the provisions of the *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.

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 *Roach*. A broad reading of s 41 would be consistent with the sentiment of the majority in *Roach*.

¹¹⁰ (1983) 152 CLR 254.

¹¹¹ However, the very narrow view taken in *R v Pearson* was at odds with dicta comments by members of the High Court of Australia in *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: *Commonwealth of Australia* (1910) 108-9. Murphy J in lone dissent in *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 *R v Federal Court of Bankruptcy; Ex Parte Lowenstein* (1938) 59 CLR 556 to the effect that the *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.