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Australian Popular Political Constitutionalism

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Abstract

Analysing the Australian convention debates of the 1890s, this article will show how the text of the Australian Constitution broke with British political constitutionalism by guaranteeing 'the people' a direct role in Australian political constitutionalism. This system of Australian 'popular political constitutionalism' has since led to distinct practices and debates. First, this unique form of political constitutionalism explains the implications the High Court has drawn from Sections 7 and 24 of the Constitution. The critical question for this jurisprudence is how the Court can protect the role of the people without undermining Australian political constitutionalism. Second, this popular political constitutionalism has also shaped the evolving role of proportionally elected upper houses in representing more than a simple majority in Australian parliamentary governance. This practice raises the question of how Parliament can move beyond majoritarianism without creating too many checks on political majorities.

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Political constitutionalism relies on *political* (rather than legal) institutions, processes and structures to hold public power to account. This form of constitutionalism is central to the Australian constitutional order. For instance, the Australian Constitution does not include individual rights provisions, trusting the politics of representative and responsible government to decide the scope of those rights. This trust in parliamentary politics has been described as a strength of Australian constitutional democracy. As former High Court Justice Patrick Keane said, the 'vibrancy' of Australian democracy is grounded in the fact that important issues are 'decided by our people rather than by the courts'.[1]

This paper will examine the distinctiveness of Australian political constitutionalism. Discussions of Australian political constitutionalism have frequently been dominated by the concepts and

1. Patrick Keane, 'Keynote Address: How Things Have Changed' (Speech, Bar Association of Queensland Annual Conference, 3 March 2023) <https://www.hearsay.org.au/feature-article/>.

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debates drawn from British political constitutionalism.[2] This influence has obscured the distinctive practices and debates that have developed over time in Australian political constitutionalism. Building on recent work,[3] this article will move beyond British concepts to recover and understand these unique practices and debates.

The story of Australian distinctiveness begins in the convention debates of the 1890s, when Australian constitutional drafters broke with the British model by giving 'the people' a constitutionally guaranteed role in Australian political constitutionalism. A group of influential delegates — often representing the larger colonies of Victoria and New South Wales and led by Isaac Isaacs and George Reid — successfully inserted text into the Australian Constitution that guarantees the people a direct role in a system that otherwise trusts heavily in Parliamentary deliberation and lawmaking.[4] This popular form of political constitutionalism broke not just with American rights constitutionalism but also with the unlimited legal sovereignty of Parliament in British political constitutionalism.[5] This Australian form of political constitutionalism underpins public trust in an empowered Australian constitutional state and helps to better understand two distinct practices in Australian constitutionalism.

First, popular political constitutionalism explains one of the most contested positions that the High Court has come to play in Australian constitutionalism: Its role in enforcing implications from Sections 7 and 24 for laws that impact political speech or voting. This role should not be viewed as a turn to American-style legal constitutionalism with strong form rights review or a violation of Parliamentary sovereignty. Instead, these implications reflect the High Court's limited role in guaranteeing that 'the people' play a central role in Australian political constitutionalism. The pivotal question about the role of High Court in this context is*: How can the Australian High Court best protect the role of the people without undermining Australian political constitutionalism?*

Second, popular political constitutionalism also helps to better understand the distinctive operation of Australian parliaments. In particular, it illuminates the important role that proportionally elected upper houses of Parliament play in Australian political constitutionalism. These upper houses move beyond a majoritarian version of representative democracy by representing a broader range of Australians. They also have become the basis for a more effective form of responsible government by enabling independent oversight of the executive. This unique constitutional practice suggests the pivotal question for the role of parliament in Australian political constitutionalism: *How can Australian upper houses represent a broader range of the people without creating too many checks on political majorities?*

2. Lisa Burton Crawford and Jeffrey Goldsworthy, 'Constitutionalism' in Cheryl Saunders and Adrienne Stone (eds), *Oxford Handbook on the Australian Constitution* (Oxford University Press, 2018).
3. Yee-Fui Ng, 'Political Constitutionalism: Individual Responsibility and Collective Restraint' (2020) 48(4) *Federal Law Review* 455 (describing the distinctive nature of Australian political constitutionalism).
4. Elisa Arcioni, 'The Core of the Australian Constitutional People – 'The People' as 'the Electors'' (2016) 39(1) *University of New South Wales Law Journal* 421 (describing the special role of the people in Australian constitutionalism).
5. William Partlett, 'Remembering Australian Constituent Power' (2023) 46(3) *Melbourne Law Review* 821 (describing how the people hold constituent power in the Australian system).

This article will not provide definitive answers to these questions. Instead, its purpose is to reorient the theoretical debate so we can better understand Australian political constitutionalism. In doing so, this work builds on research from the 1980s and 1990s by scholars such as Paul Finn and Geoffrey Lindell who argued that we need to shed British concepts in order to better understand Australian constitutionalism.[6] In particular, Paul Finn described how Australian practice was turning away from the British constitutional model even before Federation.[7]

This article also joins a new wave of more recent scholarship on this topic by Yee-Fui Ng, Adrienne Stone and Ryan Goss.[8] Ng argues that Australian constitutionalism is distinct from British political constitutionalism because it is shaped not by 'internal conflict about the nature of the constitution but rather by the significant evolutionary development of fundamental institutions'.[9] Goss argues that using the British concept of parliamentary sovereignty to describe Australian constitutionalism is confusing because of the 'baggage' that comes with this British concept.[10] Finally, Stone argues that the Australian Constitution includes a 'distinctively Australian set of constitutional ideas, practices, and values'.[11]

More broadly, this article shows how theorists of political constitutionalism outside of Britain must critically evaluate the extent to which the practices of their own constitutional system fit the British model. Shedding these British concepts and assumptions can then deepen the 'reflexive' understanding of political constitutionalism by moving beyond a focus on the problems of judicial review towards a 'broader and a more deep set of constitutional questions' about the actual institutional workings of political constitutionalism in different institutional and historical contexts.[12] In Australia, for instance, this deeper understanding illuminates distinctively Australian constitutional practices that are misunderstood or underappreciated and that help to improve the functioning of Australian democracy.

To make this argument, this article will be divided into five parts. Part 1 will describe how the central concepts and ideas of political constitutionalism emerge from British constitutional practice. Part 2 will describe how these British concepts have limited our understanding of the distinctive nature of Australian political constitutionalism. Part 3 will describe the foundational moment in the creation of Australia's distinctive popular form of political constitutionalism: the convention debates that ultimately produced the Australian Constitution. Part 4 will describe the impact of this distinctive constitutional order on the role of the High Court in protecting the position of the people in Australian political constitutionalism. Part 5 will describe its impact on the unique practices of Australian parliamentary governance.

6. Paul Finn, Law and Government in Colonial Australia (Oxford University Press, 1987); Robert S Parker, 'Responsible Government in Australia' in *The Administrative Vocation: Selected Essays of R S Parker* (Hale & Iremonger, 1993) 119–38; Geoffrey Lindell, 'Responsible Government' in P D Finn (ed), *Essays on Law and Government. Volume One: Principles and Values* (Law Book Co, 1995) 75–113 ('Responsible Government').
7. Finn (n 6) 5.
8. Ng (n 3) (describing the distinctive nature of Australian political constitutionalism); Ryan Goss, 'What Do Australians Talk About When They Talk About 'Parliamentary Sovereignty'?' (2022) *Public Law* 55; Arcioni (n 5).
9. Ng (n 3) 457.
10. Goss (n 8) 75. See also, 58, 70.
11. Adrienne Stone, 'More than a Rulebook: Identity and the Australian Constitution' (High Court Public Lecture, 9 November 2022).
12. Marco Goldoni and Chris McCorkindale, 'Three Waves of Political Constitutionalism' (2019) (30)(1) *King's Law Journal* 74, 74–5.

I The British Roots of the Theory of Political Constitutionalism

Political constitutionalism is a form of constitutional government that 'uses political mechanisms to control government' and structures 'political decision-making through bicameralism, the separation of powers, and federalism'.[13] It therefore focuses on holding those who exercise political power to account primarily 'through political processes and in political institutions'.[14] For the political constitutionalist, therefore, political disagreement is not primarily resolved through litigation and by judges. Instead, this disagreement is resolved by political actors who are themselves accountable to parliament and the people through a pluralistic political process centred around elections.[15]

There have been two waves in the theory of political constitutionalism.[16] John Griffith led the 'first' wave understanding of political constitutionalism, taking a descriptive approach and describing a political constitution as something that 'lives on, changing from day to day, for the constitution is no more and no less than what happens'.[17] Later, a 'second' wave, including Jeremy Waldron, Richard Bellamy and Adam Tomkins, has sought to more explicitly cast political constitutionalism in normative terms.[18]

The central concepts and debates in this theoretical literature on political constitutionalism draw on British constitutional experience.[19] Most of the leading theorists of political constitutionalism come from Britain and developed the concept of political constitutionalism in opposition to court-centred, legal constitutionalism. John Griffith is a British legal scholar who taught at the London School of Economics for many years. Furthermore, Richard Bellamy is a British political science scholar who teaches at the University College London.[20] Adam Tomkins is a British legal scholar based that the University of Glasgow. Finally, Jeremy Waldron grew up in New Zealand's uncodified constitutional system with one fully elected house of parliament (similar to Britain) and wrote his doctorate (and started his academic career) in Britain. This shared background leads to two key British-centric commitments in the theory of political constitutionalism.[21]

First, this British background commits political constitutionalism to view judicial power through the lens of a legally sovereign parliament. Ewing argues that it is 'difficult to see how a political constitution' could operate without 'a representative and sovereign legislature as the ultimate site of political struggle'.[22] Richard Bellamy similarly argues that political constitutionalism includes five key characteristics that 'all point toward something like the doctrine of Parliamentary sovereignty — the view, in Dicey's words, that Parliament possesses "the right to make or unmake any law whatever; and, further, that no person or body is recognised . . . as having a right to override or set

13. Burton Crawford and Goldsworthy (n 2) 358.
14. Graham Gee and Gregoire C N Webber, 'What is a Political Constitution?' (2010) 30(2) *Oxford Journal of Legal Studies* 273, 273.
15. Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007).
16. Goldoni and McCorkindale (n 12).
17. John Griffith, 'The Political Constitution' (1979) 42(1) *Modern Law Review* 1, 19.
18. Gee and Webber (n 14).
19. Recently, however, some have argued that these concepts do not match up with emerging constitutional practice in Britain: Stuart Lakin, 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' (2008) 28(4) *Oxford Journal of Legal Studies* 709; Alan Greene, 'Parliamentary sovereignty and the locus of constituent power in the United Kingdom' (2020) 18(4) *International Journal of Constitutional Law* 1166.
20. See Adam Tomkins, Our Republican Constitution (Hart, 2005); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP Cambridge University Press, 2007).
21. Griffith (n 17).
22. Keith Ewing, 'The Resilience of the Political Constitution' (2013) 14(12) *German Law Journal* 2111, 2118, 2120.

aside the legislation of Parliament."'[23] Underlying this is Albert Dicey's distinction between the 'legal sovereignty' of Parliament and the 'political sovereignty' of the people.[24] With this legally sovereign parliament, the judicial invalidation of legislation is an undemocratic and illegitimate interference in the deliberations of the people's representatives.

Second, the British context commits political constitutionalism to understand parliament in terms of democratic majoritarianism and the political equality of citizens.[25] Waldron argues that a well-functioning system of political constitutionalism provides 'equal voice and equal decisional authority' to all citizens.[26] This majoritarianism is contrasted against the unequal, minority rule of unelected judges in a system of legal constitutionalism. This equality principle is also described as ensuring a better form of deliberation.[27] It does so, because '[e]lections based on one person, one vote and majority rule' are more likely to treat all citizens as having 'equal status'.[28]

II Australian Political Constitutionalism Through a British Lens

Australia's constitutional system includes a mixture of legal and political constitutionalism. Australian legal constitutionalism comes from the Constitution's written, textual commitment to the separation of judicial power and federalism. In the landmark *Boilermakers* case, for instance, the High Court argued that judicial power and independence is central to federalism because the courts bear 'the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised'.[29] The Constitution therefore clearly anticipates that the Court will play a critical role in ensuring the independence of the judiciary and policing the boundaries of power between the state and federal levels of government.

Otherwise, Australian constitutionalism is grounded on a commitment to political constitutionalism. Most notably, political constitutionalism underpins Australian representative and responsible government provided in Sections 7 and 24 by leaving 'key aspects of its content and evolution … to Parliament'.[30] Jeffrey Goldsworthy traces this to the fact that the Australian framers judged it to be 'unnecessary but also unwise…to fetter parliaments' with judicially enforceable limitations in a constitutional bill of rights.[31]

The precise nature of Australian political constitutionalism, however, remains under-theorised. A key problem is that Australian political constitutionalism is frequently understood through the theoretical categories and concepts of British political constitutionalism. Jeffrey Goldsworthy and Lisa Burton Crawford are correct when they state that 'the founders were heavily influenced by the

23. Richard Bellamy, 'Political Constitutionalism and the Human Rights Act' (2011) 9(1) *International Journal of Constitutional Law* 86, 93; John Griffith and Michael Ryle, *Parliament: Functions, Practice and Procedures* (Sweet & Maxwell, 1st ed, 1989) 244–5 (writing that Parliament is 'a constitutionally sovereign authority' and not subject in the UK to 'any constitutional limitations').
24. AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan & Co, 3rd ed, 1889).
25. Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 299 (arguing that majoritarian decision-making is the best way to treat individuals as equals); Adrienne Stone, 'Putting political constitutionalism in its place?: A reply to Cormac Mac Amhlaigh' (2016) 14(1) *International Journal of Constitutional Law* 198, 199 (arguing that 'political constitutionalists argue for the superiority of majorities').
26. Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115(6) *Yale Law Review* 1346, 1389.
27. Ibid.
28. Richard Bellamy, 'Political Constitutionalism and Populism' (2023) 50(1) *Journal of Law and Society* 17.
29. *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275–6.
30. Dan Meagher, 'What is Political Communication? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28(2) *Melbourne University Law Review* 438, 453 ('What is Political Communication?').
31. Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) 30(1) *University of Queensland Law Journal* 9, 25.

British model of political constitutionalism'.[32] But these British concepts and theories ultimately limit the ability of theorists to understand the unique practices and debates in Australian political constitutionalism that have developed over time.[33]

First, the centrality of parliamentary sovereignty to the general (British-centric) theory of political constitutionalism has obscured a clearer understanding of the constitutionally guaranteed role of the people in Australian constitutionalism and the position of the Australian High Court in protecting this role. The position of the Australian people in Australian constitutionalism and its implications for the High Court came to prominence in the early 1990s when the High Court recognised popular sovereignty as the basis for the implied freedom of political communication. This recognition was triggered by the Australia Acts and the realisation that the fundamental source of constitutional authority in Australia was now 'the people'.[34] As Chief Justice Mason wrote in an important case finding an implied right to political communication, '[T]he *Australia Act 1986* (UK) marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people'.[35]

Some have argued (mistakenly as I will later show) that this judicial recognition of Australian popular sovereignty triggered a revolutionary shift towards court-centred, legal constitutionalism and therefore a new role for the High Court in protecting individual rights. For instance, The Hon Michael Kirby argued that recognising the Australian people as the source of legitimacy for the Constitution required the Court to recognise rights that the people have reserved to themselves.[36] Leighton McDonald also declared popular sovereignty as the basis for a 'paradigm shift' in the nature of the judicial role.[37]

Many, however, rejected this reading and fell back on a British understanding of the constitutional role of the people. George Winterton argued that popular sovereignty had long been the basis of Australian constitutional legitimacy, and therefore, the Australia Acts were no basis for a revolutionary change in Australian constitutional interpretation.[38] Instead, he argued, the Australian constitution is a story of continuity with British understandings of the people. Andrew Fraser made a similar point declaring that the idea of a major shift in the judicial role in response to the discovery of popular sovereignty represented 'false hopes'.[39] More recently, Ben Saunders and Simon Kennedy surveyed the remarkable history of popular mobilisation at the time of Federation. But they argue that the Australian founders still understood the popular sovereignty of Australian people in 'the late 19th century British sense'.[40] This means that the role of the Australian people today has 'strong affinities' with the political conception of popular sovereignty.[41] Furthermore, George Duke and Carlo Dellora concluded that Australian history and High Court jurisprudence are compatible with a

32. Burton Crawford and Goldsworthy (n 2) 362.
33. Goss (n 8).
34. Geoffrey Lindell, 'Why is Australia's Constitution Binding? - The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29.
35. *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (emphasis in original).
36. Michael Kirby, 'Deakin: Popular Sovereignty and the True Foundation of the Australian Constitution' (1996) 3(2) *Deakin Law Review* 129, 142–4.
37. Leighton McDonald, 'The Denizens of Democracy: The High Court and the "Free Speech" Cases' (1994) 5 *Public Law Review* 160, 177 (a 'revolutionary change to traditional legal theory') 179.
38. George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Federal Law Review* 1.
39. Andrew Fraser, 'False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution' (1994) 16(2) *Sydney Law Review* 213.
40. Benjamin B Saunders and Simon P Kennedy, 'Popular Sovereignty, "the People" and the Australian Constitution: A Historical Reassessment' (2019) 30 *Public Law Review* 36, 57.
41. Ibid.

'weaker' conception of popular sovereignty in line with the British idea of the people's political sovereignty.[42]

The British idea of the unlimited legal sovereignty of parliament has then become a key part of the criticism for the implications the High Court has drawn from Sections 7 and 24 and which require Parliament to justify laws that limit the vote or political communication.[43] It also has led to confusion about the nature and purpose of these implications altogether. Justice McHugh described the phrase 'chosen by the people' as 'involving a value judgment', and the term 'the people' to which that phrase refers as a 'vague but emotionally powerful abstraction'.[44] This confusion and contestation has in turn led to weak and confused enforcement of these limitations on parliamentary power.[45]

But, as this paper will show in more detail in Part 3, a focus on the role of the High Court in light of the concepts of British political constitutionalism is misplaced.[46] The Australian Constitution broke with British-style political constitutionalism by guaranteeing the people a direct role in a system of political constitutionalism.[47] This distinctive combination requires the High Court to ensure that Australian parliaments do not use their lawmaking power to limit the people's direct role in Australian political constitutionalism.[48] But, in playing that role, the Court must be careful not to do so in a way that limits the centrality of parliament in Australian political constitutionalism. The central question for the High Court in this context is: *How can the Court protect the role of the people without undermining political constitutionalism?*

Second, the commitment to majoritarianism and political equality in the general (British-centric) theory of political constitutionalism has obscured the distinctive role of Australian parliaments in an *Australian* form of political constitutionalism. Most notably, it has tended to blind many to the important role that Australia's proportionally elected *upper* houses play in Australian political constitutionalism. For instance, many have criticised the Australian Senate for being undemocratic because it violates the equality principle by apportioning equal representatives to small and large states.[49] For instance, drawing on the majoritarian principles of British constitutionalism, Gough Whitlam wrote that '[t]he Senate is not a popularly elected, representative Chamber at all'.[50]

42. George Duke and Carlo Dellora, 'Constituent Power and the Commonwealth Constitution: A Preliminary Investigation' (2022) 44(2) *Sydney Law Review* 199, 227.
43. See, eg, Anne Twomey, 'Rowe v Electoral Commissioner: Evolution or Creationism?' (2012) 31(2) *University of Queensland Law Journal* 181, 185 (arguing that the Court's approach to the implication from representative democracy undermines parliamentary sovereignty); Nicholas Aroney, 'Julius Stone and the End of Sociological Jurisprudence: Articulating the Reasons for Decision in Political Communication Cases' (2008) 31(1) *University of New South Wales Law Journal* 107, 126 (arguing that implied freedom of political communication conflicts with 'the prevailing wisdom among the framers of the Constitution . . . in favour of parliamentary sovereignty').
44. *Langer v Commonwealth* (1996) 186 CLR 302, 342 (McHugh J).
45. Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27(1) *Sydney Law Review* 29.
46. Goss (n 8).
47. Partlett (n 4); Arcioni (n 5).
48. See, eg, Goldsworthy (n 31) 29 (arguing that in 'extreme' cases, the High Court should invalidate legislation).
49. John Faulkner, 'The Senate: Blessing or Bane?' (2009) 50 *Papers on Parliament* 119 <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/pop50/thesenateblessingorbane> (noting that the Labor party called for the abolition of the Senate until 1979).
50. Gough Whitlam, *On Australia's Constitution* (Widescope, 1977) 253. See also Paul Keating's comment that the Senate was 'unrepresentative swill': Joey Watson and Keri Phillips, 'Unrepresentative Swill or Vital for Democracy? Australia's Upper Houses' *ABC Radio National* (online, 10 May 2019) <https://www.abc.net.au/news/2019-05-09/is-the-senate-upper-house-still-vital-for-australian-politics/11082730>.

But since the middle of the 20th century, Australian upper houses have been elected through proportional representation in order to represent a broader range of the Australian people. These more broadly representative upper houses move beyond majoritarianism and provide a broader range of representatives the ability to both make law and hold the executive to account.[51] In a time of strong party discipline, proportionally elected upper houses that are not controlled by the party that controls the government have encouraged deliberation and become an important check on executive power. The central question in this form of parliamentarism is: *How can Australian parliaments best represent a broader range of the people without creating too many checks on popular majorities?*

The following sections will examine more closely this distinctive Australian form of popular political constitutionalism. Part 3 will describe the origins of Australian popular political constitutionalism. It will describe the foundational moment in which 'the people' were ultimately given a direct role in Australia's system of political constitutionalism. Parts 4 and 5 will then explain how this special role for the people impacts the unique practices and debates surrounding the proper role of courts and parliament in Australian popular political constitutionalism.

III The Foundation of Australian Popular Political Constitutionalism

From the beginning of the colonial period, Australian constitutional governance diverged from the British model.[52] A key defining moment in the distinctive development of Australian political constitutionalism came during the drafting of the Australian Commonwealth Constitution in the 1890s. The convention debates show clearly that the drafters broadly agreed that Australia should adopt a constitutional system of representative and responsible government grounded on political constitutionalism. But the precise role of the people in this political constitutionalism was strongly contested.[53] In the end, those wanting to constitutionally guarantee a direct role for the people in Australian political constitutionalism were successful.

There were two general sides in this debate. On one side were those who saw the need to deviate from the British model (particularly when required to by federalism) but generally wanted a representative system of political constitutionalism drawn from the British model and which avoided a direct constitutional role for the people. This group of 'anti-populists' included Samuel Griffith, Richard Baker and John Downer. They drew heavily on the concepts of political constitutionalism as understood and practiced in Britain at the time.

On the other side, however, were the advocates of a distinctive version of 'popular political constitutionalism'. These 'populists', such as Isaac Isaacs, William Trenwith and George Reid, wanted to give 'the people' a constitutionally guaranteed role in Australia's system of political constitutionalism. They often described this idea in the language of agency law, describing 'the people' — understood both nationally and in their states — as the 'principal' and parliament as the 'agent'. They frequently described this understanding as a necessary, progressive step in the development of British constitutionalism.

The anti-populists dominated the convention debates in 1891 and its eventual constitutional draft. Led by Samuel Griffith, they envisioned an Australian Constitution that combined federalism

51. Lindell, 'Responsible Government' (n 6); Geoffrey Lindell, 'Introduction' in G Lindell and R Bennett (eds), *Parliament: The Vision in Hindsight* (Federation Press, 2001) xix–xli.
52. Finn (n 6).
53. Harry Hobbs and Andrew Trotter, 'The Constitutional Conventions and Constitutional Change: Making Sense of Multiple Intentions' (2017) 38(1) *Adelaide Law Review* 49, 55: '…a battle between the principles of responsible and representative government on one side and popular democracy on the other'.

with key concepts and practices of British political constitutionalism. Most notably, the Australian people had no direct role in the constitutional system created in this draft. This document, however, faced strong opposition in the populous states like NSW and Victoria and was abandoned. When a new set of delegates — this time directly elected by the people — met in 1897 and 1898 in Adelaide, Sydney and Melbourne, the populists were far more influential. In the end, the populists were ultimately successful in securing constitutional guarantees for the people in Australia's constitutional system. These textual commitments represented a foundational moment in the creation of unique form of popular political constitutionalism that departed from British practices and concepts.

Two provisions were most significant. First, the populists were able to secure for 'the people' the direct power to approve constitutional changes through a referendum. This power — outlined in Section 128 of the Constitution — ultimately allowed the people to approve a constitutional alteration even if only one house of Parliament proposed it. Second, the populists were able to give the people a direct role in ordinary lawmaking when there was a disagreement or 'deadlock' between the two houses on a particular Bill. This power — which was ultimately described in Section 57 of the Constitution — involved a special 'double dissolution' election for both houses of parliament and a joint sitting of the parliament on the disputed legislation.

A Direct Role of the People in Constitutional Lawmaking: A Constitutional Referendum

The legal power to make constitutional law is a critical component of any constitutional system. In the British system of political constitutionalism, parliament exercises unlimited legal sovereignty and therefore is solely responsible for making both ordinary and constitutional law. In this system, the people exercise political sovereignty by voting in the representative process.

From the beginning of the drafting process, it was clear that the Australian Constitution would reject unlimited parliamentary sovereignty to make constitutional law. Because of Australian federalism, it was commonly agreed that the states would need to play a direct role in making new constitutional law. The anti-populists therefore suggested a representative process of constitutional amendment that would require an absolute majority of both houses of Parliament followed by ratification in elected state-level conventions. The populists, however, wanted to give the power to the people to amend the Constitution directly through a referendum (after proposal by Parliament). Drawing on the Swiss concept of a federal people, this referendum would require a dual majority of the national people and a majority of the people in a majority of the states.

A dual majority referendum to amend the constitution was first proposed in 1891 by James Munro, the Victorian Premier at the time, who was concerned that the 'power of numbers' and democracy would be overly compromised by state-level conventions.[54] Alfred Deakin came to Munro's support, stating that '[w]e are adopting the principle of the popular vote more and more into the present framework of representative and responsible government'.[55] John Cockburn agreed, commenting that elected conventions were introduced in the American context as a 'direct check on the popular will'.[56] A referendum would be better as it would make it easier for the people to update their constitutional document and therefore ensure 'government by the people'.[57]

There was, however, strong opposition from the anti-populists. Most notably, the leader of the 1891 convention, Samuel Griffith, invoked traditional British notions of responsible and

54. *Official Report of the National Australasian Convention Debates*, Sydney, 8 April 1891, 885 (James Munro).
55. Ibid 896 (Alfred Deakin).
56. Ibid 892 (John Cockburn).
57. Ibid 893 (John Cockburn).

representative government in response. He noted that millions of people 'are not capable of discussing matters in detail', and so they elect their representatives to govern for them.[58] This concern was echoed by Duncan Gillies, the former Premier of Victoria, who claimed at one point that you will never carry a constitution with a referendum provision drawn from the Swiss model.[59] Richard Baker characterised the idea as a dangerous one akin to the spider inviting the fly to '[c]ome into my parlour'.[60] In the end, the proposal to have a constitutional referendum was defeated soundly by 19 votes to 9.[61] The 1891 draft therefore allowed constitutional amendment only through the means of a system of state-level conventions.[62]

After a series of people's conventions and a popularly elected convention, this anti-populist approach was reversed in a 'secret' Constitutional Committee meeting chaired by Edmund Barton before the first formal convention meeting in 1897 in Adelaide. In this meeting, a series of motions were carried that increased direct 'democratic participation' in the constitutional order.[63] One gave the people the power to directly approve a constitutional alteration proposed by Parliament by acting through a referendum. That recommendation was later accepted by the full convention in Adelaide with little debate.[64]

In the final Melbourne convention, a debate emerged on what would happen if the Houses of Parliament disagreed on a potential constitutional alteration to propose to the people in a referendum. On 9 February 1898, Isaac Isaacs introduced a proposal (backed by the Victorian Legislative Assembly) that the people vote in a referendum on a proposed change even if it was proposed by only one house of parliament (and opposed by the other). He based this proposal on the importance of the people in Australian democracy. Isaacs described it as reflecting a progressive trend in the British constitution in which first Parliament became 'the master' of the executive, and since then, 'there has been a gradual but a sure shifting of power from the Parliament to the people.'[65]

Isaacs went on to argue that the idea that 'Federal Parliament is to be all-powerful' is one that 'stand[s] in the way of the development of the people'.[66] He also argued that the system of government created should create 'responsibility to the people'.[67] Alfred Deakin supported Isaacs' proposal on the basis of not making the Constitution too difficult to amend.[68] George Reid supported this approach on the basis that 'Constitution should be proposed to the people' and 'should not be blocked by the representatives' in one house.[69]

The anti-populists heavily criticised this proposal. Dobson argued that 'this proposal strikes at the very root of our system of government, wherein the people admit that they have not the experience, the intelligence, or the time to govern themselves, and, therefore, they depute representatives to do it for them'.[70] Bernhard Wise, drawing on the principles of British governance,

58. Ibid 894 (Sir Samuel Griffith).
59. Ibid 891–2 (Duncan Gillies).
60. Ibid 889 (Richard Baker).
61. Ibid 897.
62. Final Draft of the Constitution from 1891 in John Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2004) chapter VIII, 1 ('*The Australian Constitution: A Documentary History*').
63. John La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 124.
64. See ibid.
65. *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 758. (Isaac Isaacs).
66. Ibid 759 (Isaac Isaacs).
67. Ibid 722 (Isaac Isaacs).
68. Ibid 729–731 (Alfred Deakin).
69. Ibid 735 (George Reid).
70. Ibid 746 (Henry Dobson).

objected that it would be a good proposal 'if we had not responsible government'.[71] He also concluded the debate saying that it would be to lose 'the responsibility of the Ministry and the responsibility of parliament'.[72] Wise also described the proposal as making 'it possible for the people to exercise their will in a manner inconsistent with the form of government which this Constitution is designed to provide'.[73] Josiah Symon characterised the proposal as foolishly 'sweep [ing] away the necessity for taking the opinion of the Parliament at all, and to go direct to the people'.[74]

The anti-populists were ultimately successful in the short term as the proposal was defeated by a 31-14 vote.[75] Although they won this battle, they would lose the war. After the failed referendum in NSW, a Premiers' conference was held.[76] At the conference, Reid successfully inserted language allowing the people to approve a constitutional alteration even if the Houses of Parliament disagreed. In particular, the provision now allowed one House to propose a constitutional alteration to the people if an absolute majority supported that proposal twice over a sustained period. This new provision demonstrated that the people — and not Parliament — held the power to amend the Constitution. This more popular approach helped to ensure the passage of the constitution in NSW and has since shaped the development of the Australian Constitution.

B Direct Role of the People in Ordinary Lawmaking: Double Dissolution

Lawmaking is a critical part of any democratic system of constitutional government. Bicameralism requires both Houses of Parliament to agree before legislation is passed. In Britain's system of parliamentary sovereignty prior to 1911, a disagreement between the House of Commons and House of Lords meant that the legislation would fail. Although this position would change in 1911, it played a critical role in the Australian debate of the 1890s.[77]

Many of the Australian drafters rejected this pre-1911 position of British constitutionalism. Once it became clear that both houses of Australian Parliament were to be directly elected, a central question then became how to resolve disagreements between the elected houses of parliament. Bernhard Wise stated that '[n]o part of our deliberations will be followed more closely than the discussion upon this subject'.[78] The anti-populists attempted to hold as closely as possible to the British approach. But key populists argued that the people must take a direct role in resolving disagreements or deadlocks between the houses. In the conventions of 1890 and 1891, a provision allowing the people to resolve legislative deadlocks between the houses gained little traction. Richard Baker summed up the prevailing anti-populist view when he argued that '[t]he chance of deadlocks is the price we pay for our liberties'.[79]

The new convention meeting in Adelaide in 1897, however, was far more open to allowing the people to resolve deadlocks. The premier of Victoria, George Turner, discussed the issue on the third

71. Ibid 725 (Bernhard Wise).
72. Ibid 765 (Bernhard Wise).
73. Ibid.
74. Ibid 732 (Josiah Symon).
75. Ibid 765.
76. Williams (n 62) 1147.
77. Dawn Oliver, 'The Parliament Acts, the Constitution, the Rule of Law, and the Second Chamber' (2012) 33(1) *Statute Law Review* 1.
78. *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 10 March 1898, 2187 (Bernhard Wise).
79. *Official Report of the National Australasian Convention Debates*, Sydney, 1 April 1891, 545 (Francis Baker).

day of the First Session in Adelaide and proposed either a double dissolution election or a referendum to reflect the fact that '[b]oth these Houses will represent the people of the colony as their servants, and the people will be the masters'.[80]

The anti-populists continued to criticise this kind of provision. John Downer was strongly opposed to any provision for resolving a deadlock.[81] Bernard Wise questioned why a deadlock provision was needed at all, echoing British practice at the time that 'deadlock is the price we and every free country have to pay for the benefit of constitutional government'.[82] Wise then made a limited, tactical concession on appropriation bills. John Henry later agreed with Wise, cautioning against introducing mechanisms 'with which we are not acquainted'.[83] William McMillan stated that 'if we do away with deadlocks we are liable to do away with the one great thing likely to prevent the corruption of the popular branch of the Legislature'.[84] The representatives in the Senate will not be 'lunatics' and therefore should be trusted not to create a deadlock.[85] McMillan would later appeal to the British practice in which 'the only checks you have upon unwise legislation, upon the sudden passion of any particular house, is the check of an-other house under a system of bicameral government'.[86] Andrew Clark also took the conventional British position, arguing that 'The members whom the people of Australia will send to the Federal Parliament will, I hope, be reasonable men, with a high sense of the responsibility of their position, and of the magnitude of the interests committed to their charge'.[87]

The populists countered with arguments stressing the necessity of allowing the people to resolve a deadlock. Alfred Deakin said that 'Mr. Wise stated that he considered the possibility of deadlocks the price paid for the privileges of constitutional government, but to me it seems the price paid for neglecting to secure a perfect means of self-adjustment in that government'.[88] Deakin supported a deadlock provision because of the 'gravity when they do occur, and the impossibility of solving them, that renders it imperative that we should seek to devise some means by which their severity may be mitigated and a constitutional agreement arrived at'.[89] Joseph Carruthers stated that '[t]he people are generally truer exponents of the march and trend of civilisation than are politicians'.[90] John Quick worried that an upper house that is elected might feel emboldened to resist the lower house and that requires a dissolution principle:

> [H]ere, where we are creating a senate which will feel the sap of popular election in its veins, that senate will probably feel stronger than a senate or upper chamber which is elected only on a partial franchise, and, consequently, we ought to make provision for the adjustment of disputes in great emergencies.[91]

80. *Official Report of the National Australasian Convention Debates*¸ Adelaide, 24 March 1897, 41 (Sir George Turner).
81. *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 15 September 1897, 557–559 (Sir John Downer).
82. *Official Report of the National Australasian Convention Debates*¸ Adelaide, 25 March 1897, 110 (Bernhard Wise).
83. Ibid 119 (John Henry).
84. *Official Report of the National Australasian Convention Debates*, Adelaide, 29 March 1897, 220 (William McMillan).
85. Ibid 221 (William McMillan).
86. *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 15 September 1897, 548 (William McMillan).
87. *Official Report of the National Australasian Convention Debates*¸ Adelaide, 30 March 1897, 306 (Andrew Clark).
88. *Official Report of the National Australasian Convention Debates*¸ Adelaide, 30 March 1897, 293 (Alfred Deakin).
89. *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 15 September 1897, 582 (Alfred Deakin).
90. Ibid 5467 (Joseph Carruthers).
91. Ibid 552 (John Quick).

One of the leading populists, Isaac Isaacs, reminded everyone that the convention discussing deadlocks was itself elected by the people.[92] William Trenwith used principal-agent language to justify the necessity of recognising the primary role of the people in directly resolving deadlocks: 'If a dispute occurred between agents and, surely both houses are agents of the people they represent what is the common-sense course taken but to refer the dispute which the agents had been unable to settle to the principals?'[93]

After a great deal of debate and the consideration of a dizzying array of different options, a compromise was reached on a double dissolution provision followed by a joint sitting.[94] On 10 March 1898, Isaacs made one last push to replace double dissolution with a referendum provision. He had earlier argued for a referendum provision in the language of principal-agent law, stating that 'we must recognise that the people are superior to the Legislature, and that their convenience and rights must be first consulted'.[95] He went on to argue that '[t]he Houses of Parliament are merely the agents of the people' and could not see the objection to a provision empowering the people, the principal, to settle a matter when their two agents — the Houses of Parliament — 'cannot agree upon any subject'.[96] Isaacs also argued that the changing world required this innovation:

> with the growth of population, with the expansion of social and commercial and industrial necessities representative government does not always carry out the duties which it is called upon to fulfil. And that is just the juncture where we should provide some means of allowing the action of the State to proceed in a healthy fashion.[97]

Reid also used the language of principal-agent theory to make the case.

> The people say-' … "[w]e sent you into these two Houses of Parliament to legislate. When we find you, instead of carrying on legislation, quarrelling and making legislation impossible, you do not command our respect at all. You are failing in your mission, and if you cannot agree after many painful struggles between yourselves, we, your principals, we who put you there to do our work, ask you to refer your difficulty to us and allow the principals to settle what the agents cannot accomplish"'.[98]

Trenwith used similar language in the debate, asking '[c]an anything be more reasonable in such a contingency, and under such circumstances, than that the agents who have failed to agree should be called upon by their principals to stand aside and refer that matter to the principals themselves?'[99]

Wise responded by appealing to British 'theory and practice of parliamentary government, which rests upon a system of representation that is altogether incompatible with that power of direct legislation which is of the essence of the referendum'.[100] He further argued that to introduce this

92. Ibid 608 (Isaac Isaacs).
93. Ibid 606 (William Trenwith).
94. See generally J E Richardson, 'Federal Deadlocks: Origin and Operation of Section 57' (1962) 1(5) *University of Tasmania Law Review* 706.
95. *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 26 March 1897, 178 (Isaac Isaacs).
96. Ibid.
97. *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 10 March 1898, 2184 (Isaac Isaacs).
98. Ibid 2205 (George Reid).
99. Ibid 2218 (William Trenwith).
100. Ibid 2188 (Bernard Wise).

kind of provision in the legislative context would be a 'subtle poison' that would before long 'altogether destroy the vitality of Parliament'.[101] He then argued that the growing American use of referendums is a reflection of the growing corruption in the United States, whereas Australian parliaments are the 'healthy representatives of public opinion, controlled by leaders whom the people trust, and who, being in the confidence of the people, are altogether subject to the direction of the people'.[102] In particular, he argued that these representatives should be trusted because the houses of parliament will be peopled 'by men who wish to keep the Federation together, and not by men who are going to use all their ingenuity to destroy it'.[103] He disputed that 'the great body of the people' are the best 'judges' in matters of parliamentary dispute and cited the words of Bagehot that 'to do so would be to submit to the government of immoderate persons far from the scene of action, instead of to the government of moderate persons close to the scene of action'.[104]

Ultimately, the anti-populists were successful in blocking the introduction of a referendum in the place of a double dissolution provision. The agreed-upon provision required a super majority (three-fifths majority) in the joint sitting to pass the disputed legislation after the double dissolution election. But, again, a final change was made at the Premiers Conference of 29 January 1899. A major demand of NSW Premier George Reid had been that a joint sitting (following a double dissolution election) require only an absolute majority to pass the disputed legislation.[105] He was successful in inserting this absolute majority into what would become Section 57. This created a kind of de facto referendum on a legislative deadlock.

C Conclusion

The drafting history of Sections 57 and 128 of the Australian Constitution are two of the most notable examples demonstrating the direct role of the people in the new Australian Constitution. Others provisions included, for instance, the covering clauses which stated that 'the people' — and no longer 'the Australasian colonies' — 'agreed' to unite in one 'Federal Commonwealth'.[106] Moreover, Sections 7 and 24 now stated that the representatives for both Houses of Parliament were 'directly chosen by the people' rather than simply 'chosen' by the people and the Houses of Parliament as in the 1891 draft.[107]

The success of the populists in ensuring a constitutionally guaranteed role for the people in Australian political constitutionalism was driven by two main factors. First, it was underpinned by influential ideas in Australia at the time suggesting that a progressive innovation to British constitutional practice included a wider, constitutional role for the people.[108] These ideas drew on the background of Chartist popular constitutionalism in the colonial period and its impact on the development of the lower houses at the colonial level.[109] They also drew on the influence of Swiss

101. Ibid. 2188 (Bernard Wise).
102. Ibid 2191 (Bernard Wise).
103. Ibid 2192 (Bernard Wise).
104. Ibid 2195 (Bernard Wise).
105. *The Australian Constitution, A Documentary History* (n 62) 1149.
106. Ibid 293 (Covering clauses of the 1891 Draft).
107. Ibid. 298 (Section 24 of the 1891 Draft). The provision describing the Senate stated that it was 'directly chosen by the Houses of Parliament'.
108. William Partlett, Remembering Australian Constitutional Democracy (Federal Law Review forthcoming).
109. Paul Pickering, 'The Oak of English Liberty: Popular Constitutionalism in New South Wales, 1848–1856' (2001) 3(1) *Journal of Australian Colonial History* 1.

ideas of popular sovereignty, which demonstrated how a referendum should work in the federal context.

Second, it reflected pragmatic political interests. A direct constitutional role for the people was important for securing the support of the more populous states of Victoria and NSW in the referendum vote. These colonies demanded that equal state representation in the upper house (drawn from federalism) be balanced against a more direct role for the people in the constitutional system overall. This explains why these provisions were further amended at the Premiers Conference of 1899 by George Reid: they were needed to ensure that the most populous colony (NSW) would agree to federate.

Taken together, these factors helped to create a unique Australian system of popular political constitutionalism that broke with British practice and concepts and gave the people a distinctive role. The following sections (Parts 4 and 5) will explain its role in shaping the evolving and distinctive role of the High Court and parliaments in Australia.

IV The High Court: Beyond Parliamentary Sovereignty in Protecting the Role of the People

Australian popular political constitutionalism has shaped the High Court's role in Australian democracy. In particular, it shows that the implications the Court has drawn from Sections 7 and 24 are best understood neither as a violation of Parliament's legal sovereignty nor a turn to American-style form of rights-based legal constitutionalism. On the contrary, these implications are best understood as the Court's recognition of its constitutional mandate to guarantee the role of the people in Australian political constitutionalism. Seen this way, the critical question for the Court is not whether the implications from representative democracy are legitimate. Instead, the central question is: *How can the Court protect the role of the people without undermining political constitutionalism?*

A How to Understand the Implications from Sections 7 and 24

Since the early 1990s, the High Court has recognised that 'the people' are the source of constitutional legitimacy.[110] This recognition has led the High Court to draw two implications from the guarantees of representative democracy in Sections 7 and 24 of the Constitution. First, the Court has found an implication for laws that impact the free flow of political information. If a law burdens political communication, it must be 'reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'.[111] Second, the Court has found an implication for laws that impact the voting system. In this context, the Court has held that restrictions on the franchise are invalid unless they are based on a 'substantial reason'.[112]

Many have argued that these implications are illegitimate. The criticism has drawn heavily on the concepts of British political constitutionalism. Underpinning this criticism is that the Court was improperly turning away from British parliamentary sovereignty to an American form of rights-based legal constitutionalism. For instance, Jeffrey Goldsworthy characterises the implied freedom

110. *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ) ('*ACTV*').
111. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*').
112. *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174 (Gleeson CJ).

of political communication as driven by the idea that 'the United States' model of rights protection is not only more desirable, but necessary, if we are to enjoy the benefits of a genuine representative democracy'.[113] This critique has proven influential. In fact, it has triggered uncertainty and led to the weak enforcement of these limitations on parliamentary power.[114]

The implications the Court has drawn, however, should not be understood as a revolutionary turn to American style legal constitutionalism. This is particularly clear in *Lange v Australian Broadcasting Corporation* ('*Lange*') where the Court turned away from strong engagement with United States jurisprudence and instead based the implied freedom of political communication on the text, structure and history of the constitution.[115] The Court could have gone further, however, by explaining that the implication also rests on the special, direct role that 'the people' play in Australian political constitutionalism. This special role requires judicial scrutiny of laws that threaten the system of popular political constitutionalism.[116]

The success of the populists in combining a direct role for the people with political constitutionalism provides important context for interpreting the words '*directly* chosen by the people' in Sections 7 and 24. The insertion of the word 'directly' into Sections 7 and 24 in the 1897 draft was an important addition.[117] It signals that Sections 7 and 24 are part of a broader constitutional system that guarantees that the people play a direct role in the Australian constitutional system. As explored in the Part 3 of this article, the direct role for the people is secured in Sections 57 and 128. Other sections also seek to limit Parliament's ability to dilute the direct power of the people to choose their representatives. Sections 8 and 30 ban the introduction of plural voting for both houses of Parliament. Section 28 ensures that Parliament cannot extend its term for more than three years and evade electoral accountability. Finally, Section 41 requires that the franchise for both houses of Commonwealth Parliament be tied to that of the lower house in the state — the broader franchise at the time.

These provisions and their historical context help to better understand the purposes of Sections 7 and 24. The High Court stated in *Cole v Whitfield* ('*Cole*') that 'reference to … history' is used to understand 'the contemporary meaning of language used, the subject to which that language was directed *and* the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged'.[118] *Cole*, therefore, explicitly includes an orthodox technique in interpreting text: using historical context to understand the general purpose of constitutional text. Taken in their historical and textual context (Sections 8, 28, 30, 41, 57 and 128), the general purpose of Sections 7 and 24 is to mandate a 'direct' role for the people in Australian political constitutionalism.[119] This constitutional purpose clearly requires the High Court to review laws that limit political speech or the ability to vote. Thus, unlike the full legal deference given to parliament in British parliamentary sovereignty, the Australian High Court must ensure that the people play an

113. Goldsworthy, 'Constitutional Implications Revisited' (n 31) 28.
114. Stone (n 45).
115. *Lange* (n 109).
116. See, eg, George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26(1) *Federal Law Review* 1 (describing the problems of adopting a new approach to interpretation because of the recognition of popular sovereignty).
117. It is also worth noting that the 1897 drafters specifically inserted the word 'directly' into Sections 7 and 24. This was a change from the 1891 draft that had read '[t]he House of Representative shall be composed of Members chosen every three years': *The Australian Constitution: A Documentary History* (n 62) 298 (emphasis not in original).
118. (1988) 165 CLR 360, 385 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).
119. For a discussion of the concept of 'motivating mischief', see generally Anita S. Krishnakumar, 'Backdoor Purposivism' (2020) 69(6) *Duke Law Journal* 1275, 1319.

ongoing role in Australian political constitutionalism. But, in doing so, the Court must be careful not to go too far and undermine the operation of political constitutionalism through the mechanisms of representative and responsible government.

B Avoiding Concepts and Doctrines from Individual Rights Contexts

This balance between judicial protection of the people and political constitutionalism shows why attempts to place the implications from Sections 7 and 24 within American constitutional theory are problematic. For instance, Anthony Gray has argued that First Amendment jurisprudence should be employed in developing the implied freedom of political communication.[120] Others have argued that American theorists such as Alexander Meiklejohn can be used to understand the implied freedom of political communication.[121] This jurisprudence and theory are not suited to the Australian context because they emerge from a constitutional system that has an entrenched Bill of Rights and which is committed to court-centred, legal constitutionalism. They ultimately have a broader scope and will require courts to settle a number of contested questions about the scope of rights. For instance, Meiklejohn's theories ultimately are far broader than the implied freedom.[122] The implications from Sections 7 and 24, by contrast, must be understood as part of a system of political constitutionalism.

The necessary balancing act of popular political constitutionalism also shows that sporadic attempts by the Court to import concepts from rights constitutionalism (in America and elsewhere) into these implications are misguided. This includes the pre-*Lange* cases of *Theophanous v Herald & Weekly Times Limited* and *Australian Capital Television Pty Ltd v Commonwealth* which demonstrated significant enthusiasm for American theories. It also includes more recent cases.[123] For instance, in *Clubb v Edwards*, Kiefel CJ, Bell and Keane JJ refer to the importance of 'human dignity' to the constitutionally prescribed system of representative democracy.[124] In support, they cite Israeli judge, Aharon Barak, for the idea that '[h]uman dignity regards a human being as an end, not as a means to achieve the ends of others'.[125] There is no doubt that dignity is an important value in traditional individual rights discourse. But Australia's constitutionally prescribed system of popular political constitutionalism does not protect individual rights. Instead, it is intended to guarantee a *system* of popular political constitutionalism. Protecting individual dignity is not a compelling purpose for such a system.

Furthermore, the doctrinal test the majority of the Court has used to implement the implied freedom of political communication — structured proportionality — is in tension with popular political constitutionalism. This test is drawn from the European system of individual rights protection. If history shows that the purpose of Australian representative democracy is to guarantee a *system* in which the people can hold the parliament account by voting, why is a doctrinal test taken from the individual rights context being used? This problem is particularly clear in the third and final

120. Anthony Gray, 'The First Amendment to the United States Constitution and the Implied Freedom of Political Communication in the Australian Constitution' (2019) 48(3) *Common Law World Review* 142.
121. William Buss, 'Alexander Meiklejohn, American Constitutional Law, and Australia's Implied Freedom of Political Communication' (2006) 34(3) *Federal Law Review* 421.
122. See, eg, Alexander Meiklejohn, 'The First Amendment Is an Absolute' [1961] *The Supreme Court Review* 245.
123. Gerald Rosenberg and John Williams, 'Do Not Go Gently into That Good Right: The First Amendment in the High Court of Australia' [1997] *The Supreme Court Review* 439, 448–56, 458–64; *Lange* (n 109); *Theophanous v Herald & Weekly Times Limited* (1994) 182 CLR 104; *ACTV* (n 108).
124. (2019) 267 CLR 171, 196 [51] ('*Clubb*').
125. Ibid, quoting Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) 86.

'adequate in the balance' step of structured proportionality. As Brennan J stated in *Nationwide News Pty Ltd v Wills*: '[t]he balancing of the protection of other interests against the freedom to discuss governments and political matters is, under our Constitution, a matter for the Parliament to determine and for the Courts to supervise'.[126]

C Building a Distinctive Jurisprudence of the Implications from Popular Political Constitutionalism

This distinctive nature of Australian popular constitutionalism shows that the implications drawn from Sections 7 and 24 must be theorised in their own right, outside of the concepts and categories of both American and British constitutionalism. As Fredrick Schauer writes, '[t]he non-existence of a clear textual principle of free speech in the Australian Constitution, therefore, not only allows consideration of the kinds of foundational questions about free speech not permitted in many other countries, but quite possible [sic] demands it'.[127] In particular, it suggests a pivotal question for Australian democracy is to understand how the Court can balance the competing demands of protecting the people from legislative burdens on their participation while also not intruding on Australia's system of political constitutionalism.

This balancing process must respond to the fundamental rationale for judicial involvement in Australian political constitutionalism. As Gageler J stated in McCloy v New South Wales ('McCloy'), 'fidelity to the reasons for the implication' is critical to the 'nature and extent of the restriction on political communication'.[128] In Australia's system of popular political constitutionalism, the constitution guarantees a *system* of political discussion and electoral law in order for the people to play their constitutionally guaranteed role in political constitutionalism. Thus, the Court must require parliament to justify any exercise of legislative power that would, for example, undermine the ability of the people to exercise this role.

Recent cases are consistent with this rationale. In McCloy, the plaintiffs argued that a cap on donations by property developers violated the implied freedom of political communication.[129] The plurality unequivocally rejected this claim, explaining that the implied freedom is not an 'individual right'.[130] Justice Gageler went even further, arguing that the law was arguably not only valid but also *supported* by the implied freedom because it seeks to 'support and enhance equality of access to government'.[131] He reasoned that Australia's commitment to representative democracy means that a law which limits the ability of wealthy interests to gain 'unequal access to government based on money' does not burden political communication but instead improves it.[132]

Recent academic work on the implied freedom also draws implicitly on this rationale. For instance, Dan Meagher argues that the implications the Court has drawn must be understood as a minimalist form of 'judicially protected popular sovereignty'.[133] Meagher describes how popular sovereignty 'permeates' the Constitution and is particularly important in the provisions outlining representative and responsible government. In this version, the Court has a necessary but limited

126. (1992) 177 CLR 1, 50.
127. Frederick Schauer, 'Free Speech in a World of Private Power' in Tom Campbell and Wojciech Sadurski (eds), *Freedom of Communication* (1994) 1, 2.
128. *McCloy v New South Wales* (2015) 257 CLR 178, 238 [150].
129. Ibid. 199–200.
130. Ibid 202.
131. Ibid 207 [45] (French CJ, Kiefel, Bell and Keane JJ), 220–221 [93] (Gageler J).
132. Ibid 248 [183].
133. Meagher, 'What is Political Communication?' (n 30) 452.

role in protecting the 'democratic framework' that gives the people the ability to hold their representatives accountable.[134]

Finally, this rationale also suggests a better doctrinal test for the implications from Sections 7 and 24. In particular, it suggests the advantages of a 'calibrated' scrutiny test (suggested by Gageler and Gordon JJ) for determining the scope of this test.[135] In this approach, the Court would closely scrutinise laws that burden core aspects of popular political constitutionalism while giving deference to laws that do not. Those cases involving laws that warrant deference would only require 'constitutionally permissible' purposes to be valid.[136] But those cases considering laws that burden core aspects of the system of popular political constitutionalism would warrant higher scrutiny and require the impugned law to be 'narrowly tailored' to a 'compelling' purpose. This test would help to ensure that the Court is able to review laws that threaten the role of the people but hinder it from overly interfering in Australian political constitutionalism.

D Conclusion

This section has argued that the central question regarding the High Court's role in enforcing the implications of Sections 7 and 24 is not whether this kind of review is legitimate. Instead, the critical question is how the Court can balance its position as guarantor of the constitutional role of the people without overly interfering in Australia's system of political constitutionalism. This requires rejecting both the rights-based, court-centred constitutionalism of the United States as well as the British idea of the unlimited legal sovereignty of Parliament. In finding the correct balance, the Court will be exercising its power to improve Australian by safeguarding the role of the people in political constitutionalism.

V Parliament: Beyond Majoritarianism in Australian Representative and Responsible Government

> 'The organ by which the will of the people is expressed is not necessarily the house of representatives alone' – Edmund Barton, 1891.[137]

Australian popular political constitutionalism has also shaped the functioning of Australian parliaments at both the Commonwealth and state level. The distinctive role of the people has influenced Australian representative democracy with the adoption of proportional representation in many elected upper houses in Australia. It has also shaped the development of Australian responsible government with the creation of parliamentary oversight committees in upper houses that provide independent oversight of the executive government. In both cases, the key question for Australia's distinctive form of popular political constitutionalism is: How can Australian parliaments represent a broader range of the people without creating too many checks on majority rule?

134. Ibid 452–3.
135. Adrienne Stone, 'Proportionality and its Alternatives' (2020) 48(1) *Federal Law Review* 123 (describing calibrated scrutiny in the *Clubb* case and calling it a 'promising framework' for analysis).
136. *Clubb* (n 122) 232 [184] (Gageler J).
137. Elaine Thompson, 'The Senate and Representative Democracy' in Marian Sawer and Sarah Miskin (eds), *Representation and Institutional Change: 50 Years of Proportional Representation in the Senate* (Papers on Parliament No 34, December 1999).

A Distinctive Form of Representative Democracy: Proportionally Elected Upper Houses

Representative democracy is a form of democracy where the people operate through elected representatives. In the British system, political constitutionalism is based on majoritarianism.[138] Australian political constitutionalism, by contrast, has moved beyond a majoritarian conception of representative democracy towards one that seeks to broaden the representation of the people. Perhaps the most important innovation in this distinctive practice is the widespread adoption of proportional representation voting for Australia's elected upper houses.

The Commonwealth's fully elected upper house — called the Senate — was a radical democratic idea at the time of federation.[139] The Senate was elected in a non-majoritarian way, with each 'Original State' guaranteed an equal number of representatives no matter its population.[140] This feature of the Senate has been relentlessly attacked as undemocratic for giving equal representation to all states regardless of their population and therefore violating the principle of political equality.[141] In the state constitutional systems in Australia, parliamentary upper houses were not only non-majoritarian; they were often non-democratic bodies chosen by the governor or limited to propertied voters and representatives.[142]

Since Federation, the non-majoritarian nature of Australia's upper houses has evolved. Most importantly, most have become proportionally elected houses that represent a broader range of the people and which place a check on majoritarian domination in the lower house. Although proportional representation was not adopted until the mid-20th century, a proportionally elected upper house was discussed in the constitution-making conventions of the 1890s. For instance, in the 1891 Convention, Andrew Thynne of Queensland argued that 'minorities' deserved legislative protection against what he called 'the tyrannic exercise of the power of temporary majorities'.[143] In 1897, James Howe of South Australia argued that Parliament must widen its representation and argued that the Senate offered hope that 'everyone, whether they are in the majority or the minority, will know they are fairly represented'.[144] Patrick Glynn of South Australia supported proportional representation on the ground that its 'essential merit … is to widen the area of the electors' choice'.[145] Glynn introduced on behalf of South Australia a petition in defence of '[t]he Hare–Spence method' for the election 'especially of senators'.[146] The petition stated that 'while desirous of leaving undisturbed the rule of the majority', it was vital that 'the minority should not be absolutely silenced'.[147]

138. Waldron (n 25).
139. Bruce Stone, 'Bicameralism and Democracy: The Transformation of Australian State Upper Houses (2002) 37(2) *Australian Journal of Political Science* 267, 267–8.
140. *Australian Constitution*, s 7.
141. See, eg, Gough Whitlam, *On Australia's Constitution* (Widescope, 1977).
142. Justin Harding, 'Ideology or Expediency? The Abolition of the Queensland Legislative Council 1915–22' (2000) 79 *Labour History* 162.
143. *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 6 March 1891, 106 (Andrew Thynne).
144. *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 31 March 1897, 358 (James Howe).
145. *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 15 April 1897, 677–8 (Patrick Glynn).
146. *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 20 January 1898, 1–2 (Patrick Glynn).
147. Ibid 1.

These references to Hare-Spence drew on the influence of one of the most influential women at federation: Catherine Helen Spence.[148] For Spence, the 'fundamental principle of [proportional representation] is that majorities must rule, but that minorities shall be adequately represented'.[149] The minority 'can watch the majority and keep it straight'.[150] In her book *Plea for Pure Democracy*, she wrote that '[t]he minority represented, is the true sharpener of the wits of the ruling powers, the education of the people, the animator of the press'.[151] She was one of the key founders of the Proportional Representation Society, which would become instrumental in advancing proportional representation in the early decades of the twentieth century.

Momentum for proportional representation grew in the decades after federation. This is particularly true as party discipline became more influential in Australian governance. In particular, there was growing concern about the majoritarian impacts of block voting that 'produced huge majorities in turn to whichever political party built up House of Representatives majorities'.[152] Finally, in 1948, the Chifley government introduced a proportional voting system for the Senate. Since then, this constitutional practice of proportional voting has spread to upper houses of parliament in most of the Australian states (except for Queensland which abolished its upper house in 1922 and Tasmania which has proportional voting for its lower house and not its upper house).[153]

The Australian High Court has recognised the importance of the upper house in Australian representative democracy. In the *Williams v Commonwealth* case, the High Court argued that the upper house of the federal Parliament plays an important role in lawmaking.[154] French CJ argued that, although the Senate is no longer a chamber that defends the interests of the states, it still provides equal representation to the different states and therefore reflects the 'federal' nature of Australian constitutionalism.[155] Scholars have also discussed the normative value of Australia's non-majoritarian constitutional system of representative democracy. Bruce Stone refers to this new approach as a way to ensure 'the legislative process is more inclusive'.[156] Steffen Ganghof describes Australia's system of 'complex majoritarianism' as representing a distinctive and democratically advantageous form of 'semi-parliamentarism'.[157] Arend Lijphart argues that Australia's system is better at broader 'representation' and other factors of democratic quality.[158]

148. John Uhr, 'Why We Chose Proportional Representation' in Marian Sawer and Sarah Miskin (eds), 'Representation and Institutional Change: 50 Years of Proportional Representation in the Senate' (Papers on Parliament No 34, Parliamentary Library, Parliament of Australia, December 1999).
149. Catherine Helen Spence, 'Autobiography' in Helen Thomson (ed), *Catherine Helen Spence* (University of Queensland Press, 1987) 467.
150. Ibid 470–1.
151. State Library of South Australia, 'Catherine Helen Spence', *Women & Politics in South Australia* (Webpage) <https://women-and-politics.collections.slsa.sa.gov.au/spence2.htm>.
152. Uhr (n 146).
153. Bruce Stone, 'Bicameralism and Democracy: The Transformation of Australian State Upper Houses' (2002) 37(2) *Australian Journal of Political Science* 267, 276–8.
154. (2012) 248 CLR 156.
155. Ibid 205–6 (French CJ).
156. Bruce Stone, 'Bicameralism and Democracy: The Transformation of Australian State Upper Houses (2002) 37(2) *Australian Journal of Political Science* 267, 279.
157. Steffen Ganghof, Sebastian Eppner and Alexander Pörschke, 'Australian Bicameralism as Semi-Parliamentarism: Patterns of Majority Formation in 29 Democracies' (2018) 53(2) *Australian Journal of Political Science* 211, 218. See also Steffen Ganghof, *Beyond Presidentialism and Parliamentarism* (Oxford University Press, 2022).
158. Arend Lijphart, 'Australian Democracy: Modifying Majoritarianism?' (1999) 34(3) *Australian Journal of Political Science* 313, 323–4. See also Campbell Sharman, 'The Representation of Small Parties and Independents in the Senate' (1999) 34(3) *Australian Journal of Political Science* 353; Richard Mulgan, 'The Australian Senate as a "House of Review"' (1996) 31(2) *Australian Journal of Political Science* 191.

But modifying majoritarianism and adopting proportional representation is not without its dangers. In particular, it must be structured in a way that ensures that minority interests are not overly represented in the upper house and therefore overly frustrate the majority. Striking this balance requires close attention to the details of proportional representation legislation. In recent decades, for instance, some forms of proportional representation have allowed 'preference whisperers' to engage in backroom deals that lead to the election of individuals to the upper house from small parties that received a very small percentage of the first preference vote.[159] This problem recently triggered changes to the Commonwealth electoral system of proportional representation.[160] These changes preserved proportional representation voting but sought to ensure that the Senate was elected in a way that was more transparent and reflective of voter preferences.[161] This kind of change is necessary in Victoria, where the proportional representation system used in its upper house suffers from the same problem of insider deals that can undermine the power of the vote.[162]

B A Thicker Form of Responsible Government: Parliamentary Oversight

The principle of responsible government means that the government is ultimately accountable to parliament and, by extension, the people.[163] In Britain, the unelected House of Lords plays a critical role in this oversight, hosting 'select committees' that are independent of the party that controls the government. For instance, a typical committee of 12 members is 'made up of four Conservative, four Labour, two Liberal Democrat and two [c]rossbench members'.[164] In Australian popular political constitutionalism, the proportionally elected upper house of Parliament — which represents a broader conception of the people and is often not controlled by the government — has developed to provide political oversight of the executive branch. For instance, these upper houses host non-government dominated committees that oversee executive actions.[165] In many cases, crossbench members of the upper house — members that represent a smaller party or sit independently — play a key role in these committees.

Independent parliamentary committee oversight of the executive in Australian popular political constitutionalism can be traced to the early 1930s and the rise of executive regulation and the administrative state. In the early 1930s, the Senate sought to exercise review power over waterside transport regulations issued by the Scullin government. On a dozen occasions in 1930 and 1931, the government made and immediately remade regulations which the Senate disallowed.[166] In the end,

159. 'Calls for Victorian electoral reform after "preference whisperer" recorded boasting of influence', *ABC News* (Online, 17 November 2022) <https://www.abc.net.au/news/2022-11-17/calls-for-group-voting-ticket-reform-victoria/101663588>.
160. *Commonwealth Electoral Amendment Act 2016* (Cth).
161. Damon Muller, 'The New Senate Voting System and the 2016 Election' (Research Paper Series, Parliamentary Library, Parliament of Australia 25 January 2018) <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/5753272/upload_binary/5753272.pdf>.
162. Benita Kolovos, '"Preference whisperers": reforms to group voting unlikely to happen before Victorian election' *The Guardian* (Online, 23 March 2022), <https://www.theguardian.com/australia-news/2022/mar/23/preference-whisperers-reforms-to-group-voting-unlikely-to-happen-before-victorian-election>.
163. John Summers, 'Parliament and Responsible Government' in Alan Fenna, Jane Robbins and John Summers (eds), *Government Politics in Australia* (Pearson, 2014).
164. 'Lords Select Committees' *UK Parliament* (Web Page) <https://www.parliament.uk/business/lords/work-of-the-house-of-lords/lords-select-committees/>.
165. Ng (n 3) 459–60.
166. 'The Senate Committee System: Historical Perspectives' (Papers on Parliament No 54, Parliamentary Library, Parliament of Australia, December 2010).

the Senate ultimately succeeded in asserting review powers over this exercise of delegated power, creating the Standing Committee on Regulations and Ordinances in 1932.[167] This model of independent Senate committee oversight expanded in the 1960s and 1970s. This led to a system of 'legislative and general purpose standing committees, which would stand ready to inquire into matters referred by the Senate'.[168]

These committees are a critical political check on the power of the executive, particularly in an era of strong party discipline. In particular, because the party that forms government often does not control the upper house, it represents a way for a broader range of elected parliamentary representatives (both crossbenchers and members of the opposition) to scrutinise the actions of government. The High Court has recognised the importance of this role. In *Egan v Willis*, the High Court held that the New South Wales upper house had the implied power to require one of its members, who was a Minister, to produce non-privileged, state papers to the House, together with the power to counter obstruction where it occurs.[169] In support, it argued that the Parliament 'has important functions to question and criticise government on behalf of the people and that to secure accountability of government activity is the very essence of responsible government'.[170]

Australian scholars have also noted the importance of this upper house scrutiny to Australian responsible government. John Uhr describes how the Senate's Standing Committee on Regulations and Ordinances is grounded in the idea of the Senate as a 'non-party house'.[171] He also describes how responsible government has shifted to accommodate this 'more effective democracy'.[172] Geoffrey Lindell's work also highlights the importance of the use of independent parliamentary committees to carry out oversight of the executive.[173]

The Australian states have also begun to adopt this practice of independent committee oversight of the executive based in the upper house. During the COVID-19 pandemic, New South Wales' upper house created a special committee to inquire and report on the New South Wales government's response to the COVID-19 pandemic.[174] This committee of nine representatives had a non-governmental majority and chair. In fact, it comprised only three members of the government plus a crossbencher sympathetic to the government (who represented the Shooters, Fishers and Farmers Party).[175] The remaining five members (including the Chair) were members of the opposition (the Labor Party) or the Greens Party.[176]

167. Ibid.
168. Elaine Thompson, 'The Senate and Representative Democracy' in Marian Sawer and Sarah Miskin (eds), 'Representation and Institutional Change: 50 Years of Proportional Representation in the Senate' (Papers on Parliament No 34, Parliamentary Library, Parliament of Australia, December 1999).
169. (1998) 195 CLR 424.
170. Ibid 451 [42] (citations omitted).
171. 'The Senate Committee System: Historical Perspectives' (Papers on Parliament No 54, Parliamentary Library, Parliament of Australia, December 2010).
172. John Uhr, 'Parliament and the Executive' (2004) 25(1) *Adelaide Law Review* 51, 58.
173. Geoffrey Lindell, 'Responsible Government', in Paul Finn (ed), *Essays on Law and Government, Volume One: Principles and Values* (Law Book Co, 1995) 75–113.
174. New South Wales Public Accountability Committee, Parliament of New South Wales, *NSW Government's Management of the Covid-19 Pandemic* (Report, March 2022).
175. Ibid vi.
176. Ibid.

This practice, however, remains incomplete. In other states, oversight committees are not formed in the upper house but instead are 'joint' committees with members from both the upper and the lower houses.[177] These joint committees are in turn dominated by the party that forms the government. They also are often hamstrung by statutory requirements. In Victoria, for instance, joint oversight committees are required by law to inquire into all matters referred to them by the government.[178] This provision makes these committees answer to government priorities and undermines responsible government.

There are two possible ways to respond to this problem. The first is to abandon the use of joint committees for oversight purposes and to instead give state upper houses the authority and resources to create oversight committees themselves. These committees would need to have broad powers to summon witnesses and demand documents. These powers would follow the model of strong Senate oversight committees at the Commonwealth level. This solution, however, is impracticable in many state upper houses, which do not have enough members to effectively staff these critical oversight committees. Furthermore, it would not work in Queensland, which abolished its upper house in 1922, or in Tasmania which does not have a proportionally elected upper house.

Another option is to statutorily mandate that these parliamentary oversight committees have a balanced composition.[179] In Victoria, the government initially released a fit-for-purpose pandemic bill that contained no parliamentary oversight of the broad power delegated to the executive branch when a Pandemic Declaration was in effect.[180] After significant criticism, the Bill was amended to create a Pandemic Declaration Accountability and Oversight Committee ('PDAOC') that was not dominated by the government. The Act now requires '[n]ot more than half of the members of the Pandemic Declaration Accountability and Oversight Committee may be members of a political party forming the Government'.[181] It also requires the 'chairperson' of the Committee to 'not be a member of a political party forming the Government'.[182]

This practice of balanced committees has proven successful and should be expanded. The Victorian PDAOC carried out effective oversight during the pandemic. Other oversight committees should have a similar balanced composition. For instance, governmental domination of committees can undermine integrity oversight. Victorian experience is again instructive. In December 2022, the outgoing Commissioner of Victoria's Independent Broad-Based Anti-Corruption Commission ('IBAC') sent a letter to Victorian Parliament stating that Victoria's Integrity and Oversight Committee — a joint committee controlled by the party that formed the government — acted with 'a lack of fairness, partisanship, and leaking of information to the media' in its dealings with IBAC.[183]

In response, the Victorian Greens introduced a bill into Victorian Parliament that would amend the *Parliamentary Committees Act 2003* (Vic) ('*Parliamentary Committees Act*') and require all

177. See, eg, *Parliamentary Committees Act 2003* (Vic), ss 7, 14, 15, 17 (classifying the Integrity and Oversight Committee, Public Accounts and Estimates Committee, Pandemic Declaration Accountability and Oversight Committee, and Scrutiny of Acts and Regulations Committee as Joint Committees).

178. Ibid s 33(1)(b) (stating that a Joint Investigatory Committee 'must inquire' into a matter referred to it by the government).

179. This option is the only one for Queensland, which no longer has an upper house.

180. William Partlett, 'Victoria's Draft Pandemic Law is Missing One Critical Element - Stronger Oversight of the Government's Decisions', *The Conversation* (Online, 26 October 2021) <https://theconversation.com/victorias-draft-pandemic-law-is-missing-one-critical-element-stronger-oversight-of-the-governments-decisions-170623>.

181. *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021* (Vic), s 19E(5).

182. Ibid s 19F(1A).

183. Adeshola Ore, 'Dig Up Dirt on IBAC: Victorian Government Under Pressure Over Leaked Letter', *The Guardian* (Online, 9 March 2023) <https://www.theguardian.com/australia-news/2023/mar/09/dig-up-dirt-on-ibac-victorian-government-under-pressure-over-leaked-letter>.

joint investigatory committees to operate without a governmental majority.[184] The purpose of this bill is to ensure that the 'membership and chairperson of Parliament's Joint Investigatory Committees is sufficiently independent of the government and executive of the day when carrying out their functions and for other purposes'.[185] It therefore requires that '[n]ot more than half of the members of a Joint Investigatory Committee may be members of a political party forming the Government'.[186] For this bill to be effective, it also must remove the provision that joint investigative committees are required to respond to requests by the government (as they are in the current *Parliamentary Committees Act*).[187]

This kind of bill is an important model in ensuring effective joint parliamentary committee oversight of the executive. It draws on a distinctive part of Australian popular political constitutionalism that gives a broader range of the people's representatives — notably the opposition and cross-bench — the ability to oversee the actions of the executive. This kind of oversight is important: Although *in theory* members of a political party act as parliamentarians when they are on parliamentary committees, in reality they frequently follow party discipline. Given this reality, if parliament is to play a real role in oversight of the government, the composition of parliamentary oversight committees must not reflect majoritarian principles and therefore be controlled by the party that wins the majority of the vote in the lower house of Parliament.[188] Instead, they should draw on a broader range of parliamentarians to hold the government to account.

In making these reforms, however, it is important that this independent committee oversight does not go too far by allowing members of parliament on these committees to obstruct the actions of government. This would require, for instance, ensuring that these oversight committees do not get powers to block or obstruct the actions of government. Instead, they should be able to investigate and shed light on government actions. Furthermore, this committee oversight should be embedded in a culture that encourages constructive criticism, rather than the use of committees as a form of political point scoring. In reaching this balance, the culture and rules of oversight committees based in the Australian Senate are instructive. For decades, these Senate committees have successfully held the government accountability and therefore improved — rather than hindered — the government's exercise of power.

VI Conclusion

This article has argued that Australia has a distinctive form of political constitutionalism that departs from British categories and concepts in critical ways. In particular, Australia's distinctive constitutional system combines a trust in parliamentary politics and process with a direct role for 'the people'. This system helps to understand the unique role that Australian courts and Parliaments play in Australian political constitutionalism.

First, this unique Australian system of popular political constitutionalism explains the position the High Court has come to play in reviewing legislation that limits political communication or the franchise. This High Court scrutiny does not violate the legal sovereignty of Parliament or reflect a turn to a judicially centred form of rights constitutionalism. This role instead stems from the

184. *Parliamentary Committees Amendment (Preventing Government Dominated Investigatory Committees) Bill 2022* (Vic).
185. Ibid s 1.
186. Ibid s 4.
187. *Parliamentary Committees Act 2003* (Vic) s 33(1)(b) (stating that a Joint Investigatory Committee 'must inquire' into a matter referred to it by the government).
188. John Uhr, 'Parliament and the Executive' (2004) 25(1) *Adelaide Law Review* 51.

constitutional mandate in Sections 7 and 24 that the people play a direct role in Australian political constitutionalism. In enforcing these implications, the High Court must balance its protection of the role of the people with an approach that does not undermine Australian political constitutionalism. This balance points towards a calibrated scrutiny test for the implied freedom that requires differing levels of judicial scrutiny depending on the magnitude of the threat to the people's ability to hold parliament to account. More broadly, popular political constitutionalism supports a constrained version of the implications the High Court has drawn from representative democracy.

Second, this unique Australian system also helps to better understand the distinctive role of the proportionally elected upper houses of many Australian Parliaments. These upper houses are not undemocratic; they allow a form of representation that goes beyond majoritarianism. In doing so, they support a thicker version of responsible government by allowing this broader range of representatives to oversee executive actions (often through independent parliamentary committees). In implementing this form of political constitutionalism, however, the electoral details of these proportionally elected upper houses and their form of committee oversight must be designed in a way that ultimately does not go too far in obstructing effective government.

It is beyond the scope of this article to specify exactly where the balance should be found in both of these practices. Instead, its purpose is to reorient the theoretical debate to match the practical debates at the centre of Australian political constitutionalism. This kind of research can help to understand how political constitutionalism can address emerging problems in Australian constitutional governance such as growing executive centralism.[189] More broadly, this approach shows how theorists of political constitutionalism must critically evaluate (and sometimes move beyond) the categories and concepts of British constitutionalism in order to better understand and theorise the practices of its constitutional system. Political constitutionalism can come in many different forms. British concepts and categories should not hinder the ability to understand these different systems and their distinctive practices and concepts.

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189. See, eg,Victoria's Independent Broad-Based Anti-Corruption Committee, *Operation Daintree Special Report* (Report, 19 April 2023) (highlighting problems of executive centralism in Victorian governance).